CAMBRIDGE

Cambridge Legal Studies

STAGE 6 YEAR 12

SIXTH EDITION



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ISBN 978-1-009-49803-6

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CAMBRIDGE
UNIVERSITY PRESS & ASSESSMENT

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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First Edition © Daryl Le Cornu, Ann Miller, Sarah Robinson, Tim Kelly and Kevin Steed 2006
Second Edition © Paul Milgate, Daryl Le Cornu, Ann Miller, Sarah Robinson, Tim Kelly and Kevin Steed 2010
Second Edition Contributions by Travis McGregor and L. Elaine Miller
Third Edition © Paul Milgate, Daryl Le Cornu, Sarah Hawke, Ann Miller, Tim Kelly, Kevin Steed and Phil Webster 2013
Fourth Edition © Paul Milgate, Daryl Le Cornu, Alisha Murphy, Ann Miller, Tim Kelly, Kevin Steed, Phil Webster and Sarah Hawke 2016
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First published 2006
Second Edition 2010
Third Edition 2013
Fourth Edition 2016
Fifth Edition 2020
Sixth Edition 2024
20 19 18 17 16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

Cover designed by Jennifer Jones
Text designed by Shaun Jury
Typeset by Integra Software Services Pvt. Ltd.
Printed in Singapore by Markono Print Media Pte Ltd

A catalogue record for this book is available from the National Library of Australia at www.nla.gov.au

ISBN 978-1-009-49803-6

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Contents

How to use this resource viii
About the authors x
Introduction xi
Glossary of key words xii

PART 1 – CRIME **1**

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 8
1.4 Causation 9
1.5 Categories of crime 9
1.6 Summary and indictable offences 22
1.7 Parties to a crime 23
1.8 Factors affecting criminal behaviour 24
1.9 Crime prevention: Situational and social 26
Chapter summary 29
Multiple-choice questions 29
Short-answer questions 29

Chapter 2 – The criminal investigation process **30**
2.1 Police powers 32
2.2 Reporting crime 34
2.3 Investigating crime 35
2.4 Arrest, detention and charge 44
2.5 Court attendance notice, bail or remand 46
Chapter summary 49
Multiple-choice questions 49
Short-answer question 49

Chapter 3 – The criminal trial process **50**
3.1 Court jurisdiction: Criminal courts 52
3.2 The adversary system 58
3.3 Legal personnel in a criminal trial 59
3.4 Pleas and charge negotiation 62
3.5 Legal representation and Legal Aid NSW 63
3.6 Burden and standard of proof 64
3.7 Use of evidence, including witnesses 65
3.8 Defences to criminal charges 66
3.9 The role of juries, including verdicts 72
Chapter summary 75
Multiple-choice questions 75
Short-answer questions 75













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Chapter 4 – Sentencing and punishment 76
4.1 Sentencing and punishment 78
4.2 Statutory and judicial guidelines 79
4.3 The purposes of punishment 81
4.4 Factors affecting a sentencing decision 84
4.5 The role of the victim in sentencing 87
4.6 Appeals 88
4.7 Types of penalties 90
4.8 Alternative methods of sentencing 98
4.9 Post-sentencing considerations 99
Chapter summary 105
Multiple-choice questions 105
Short-answer question 105

Chapter 5 – Young offenders 106
5.1 Young offenders and the law 108
5.2 Age of criminal responsibility 110
5.3 The rights of children and young people when questioned or arrested 114
5.4 Children's Court: Procedures and operation 122
5.5 Penalties for children 124
5.6 Alternatives to court 128
5.7 The effectiveness of the criminal justice system when dealing with young offenders 131
Chapter summary 137
Multiple-choice questions 137
Extended-response question 137

Chapter 6 – International crime 138
6.1 Categories of international crime 140
6.2 Dealing with international crime 147
6.3 The effectiveness of measures dealing with international crime 157
Chapter summary 161
Multiple-choice questions 161
Short-answer question 161

Themes and challenges for Part I – Crime 162

PART II – HUMAN RIGHTS 165

Chapter 7 – The nature and development of human rights 166
7.1 The definition of human rights 168
7.2 Developing recognition of human rights 170
7.3 Formal statements of human rights 183
Chapter summary 188
Multiple-choice questions 188
Short-answer questions 189

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Chapter 8 – Promoting and enforcing human rights 190
8.1 International community: State sovereignty 192
8.2 Role of the United Nations 194
8.3 Roles of other international bodies 199
8.4 Human rights in Australian domestic law 205
8.5 The role of the *Australian Constitution* 207
8.6 Other human rights roles in Australia 209
Chapter summary 218
Multiple-choice questions 218
Short-answer questions 219

Chapter 9 – Contemporary human rights issues 220

Issue 1: Human trafficking and slavery 222
9.1 Contemporary slavery 223
9.2 Defining the issue 225
9.3 Extent of the issue 226
9.4 Responses to the issue 229

Issue 2: Child soldiers 236
9.5 Defining the issue 237
9.6 Extent of the issue 239
9.7 Responses to the issue 242

Issue 3: Exploitation of workers 249
9.8 Defining the issue 250
9.9 Extent of the issue 251
9.10 Responses to the issue 255
Issue 1 summary 259
Issue 1 short-answer questions 259
Issue 2 summary 259
Issue 2 short-answer questions 259
Issue 3 summary 260
Issue 3 short-answer questions 260

Themes and challenges for Part II – Human rights 261

PART III – OPTIONS 263

Chapter 10 – Option 1: Consumers 264
10.1 The nature of consumer law 266
10.2 Contracts 268
10.3 Consumer protection 279
10.4 Consumer redress and remedies 289
10.5 Contemporary issue: Credit 299
10.6 Contemporary issue: Product certification 302
10.7 Contemporary issue: Marketing innovations 307
10.8 Contemporary issue: Technology 309
Chapter summary 313
Short-answer questions 313
Extended-response questions 313

Themes and challenges for Chapter 10 – Option 1: Consumers 314

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Chapter 11 – Option 2: Global environmental protection 316
11.1 The nature of global environmental protection 319
11.2 Responses to global environmental protection 331
11.3 Contemporary issue: The law's role in relation to global environmental threats 356
11.4 Contemporary issue: The demand for resources and global environmental protection 359
11.5 Contemporary issue: Australia's responses to international initiatives 362
11.6 Contemporary issue: Barriers to achieving an international response to global environmental protection 365
Chapter summary 370
Short-answer questions 370
Extended-response questions 371

Themes and challenges for Chapter 11 – Option 2: Global environmental protection 372

Chapter 12 – Option 3: Family 374
12.1 The nature of family law 377
12.2 Responses to problems in family relationships 389
12.3 Contemporary issue: Recognition of same-sex relationships 401
12.4 Contemporary issue: The changing nature of parental responsibility 404
12.5 Contemporary issue: Surrogacy and birth technologies 407
12.6 Contemporary issue: Care and protection of children 412
Chapter summary 417
Short-answer questions 417
Extended-response questions 418

Themes and challenges for Chapter 12 – Option 3: Family 418

Chapter 13 – Option 4: Indigenous peoples (DIGITAL-ONLY CHAPTER)
13.1 Nature of the law and indigenous peoples
13.2 Responses to indigenous peoples
13.3 Contemporary issue: Loss of cultural rights including language
13.4 Contemporary issue: Land rights
13.5 Contemporary issue: Legal rights to natural resources
13.6 Contemporary issue: Intellectual property rights
Chapter summary
Short-answer questions
Extended-response questions

Themes and challenges for Chapter 13 – Option 4: Indigenous peoples

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Chapter 14 – Option 5: Shelter **422**
14.1 The nature of shelter 425
14.2 Legal protection and remedies associated with securing shelter 432
14.3 Purchasing shelter 432
14.4 Leasing 443
14.5 Securing other types of shelter 448
14.6 Dispute resolution mechanisms 452
14.7 Contemporary issue: Affordability 455
14.8 Contemporary issue: Discrimination 460
14.9 Contemporary issue: Homelessness 461
14.10 Contemporary issue: Social housing and community housing 463
Chapter summary 466
Short-answer questions 467
Extended-response questions 467

Themes and challenges for Chapter 14 – Option 5: Shelter **467**

Chapter 15 – Option 6: Workplace (DIGITAL-ONLY CHAPTER)
15.1 The nature of workplace law
15.2 Regulation of the workplace
15.3 Contemporary issue: Discrimination
15.4 Contemporary issue: Safety
15.5 Contemporary issue: Termination of employment
15.6 Contemporary issue: Leave
Chapter summary
Short-answer questions
Extended-response questions

Themes and challenges for Chapter 15 – Option 6: Workplace

Chapter 16 – Option 7: World order **470**
16.1 The nature of world order 472
16.2 Responses to world order 479
16.3 Contemporary issue: The Responsibility to Protect principle 497
16.4 Contemporary issue: Regional and global situations that threaten peace and security – the invasion of Ukraine 500
16.5 Contemporary issue: The success of global cooperation in achieving world order – the campaign for the elimination of nuclear weapons 509
16.6 Contemporary issue: Rules regarding the conduct of hostilities – international humanitarian law 516
Chapter summary 522
Short-answer questions 522
Extended-response questions 522

Themes and challenges for Chapter 16 – Option 7: World order **523**

Answers to multiple-choice questions *525*
Glossary *526*
Index *540*
Acknowledgements *553*

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How to use this resource

Part and chapter openers

Each chapter of *Cambridge Legal Studies Year 12 Sixth Edition* begins with an opener that contains chapter objectives, assessment for learning guidance, relevant law and a legal oddity. In addition, Part openers outline the principal focus and themes and challenges of the Part.

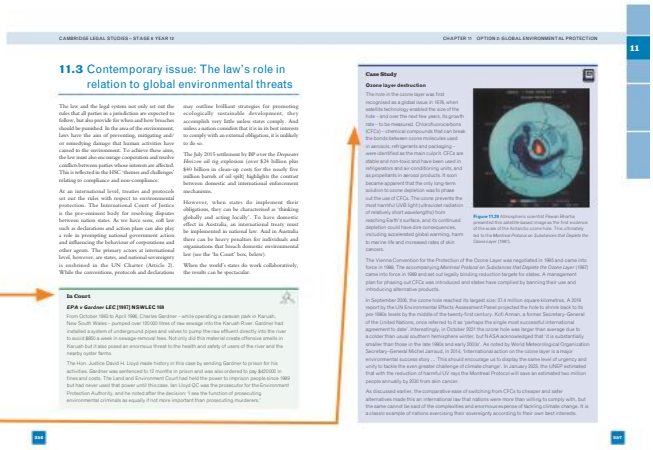


In Court

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.

Case Studies

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



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

Legal links connect you with internet resources and activities that will help you extend your knowledge and stay up to date with changes in the legal system.



Media articles

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

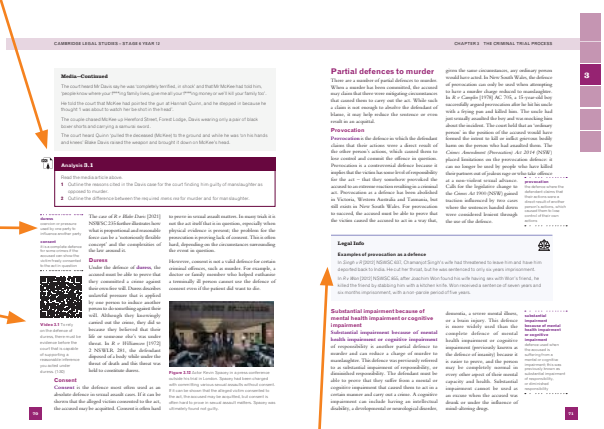
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Analysis activities
Analysis activities support you in engaging with media articles, court cases, videos and online resources.

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

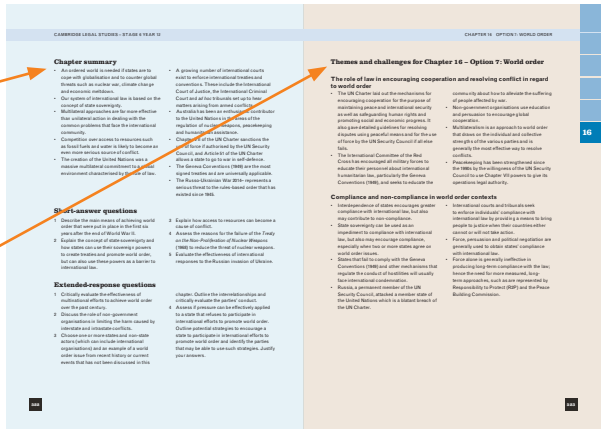
Video and audio
QR codes in the print book enable you to access video and audio items that enrich the learning experience.

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



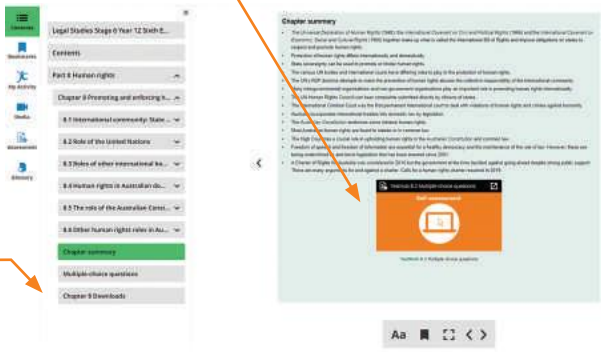
End-of-chapter sections
At the end of each chapter you will find a chapter summary and a set of questions to help you consolidate your learning from the chapter.

Themes and challenges
Option chapters, as well as the final chapters for Part I and Part II, have a summary of how the themes and challenges have been addressed.



Interactive textbook
The interactive textbook includes the full text of the print edition, including video and audio items, and digital-only chapters. There are also 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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Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies Year 12 Sixth Edition*.

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.

Recent student action on climate change and increasingly the polarised state of politics and policy making in Australia highlights a society undergoing rapid change socially and economically with the gig economy.

Cambridge Legal Studies Year 12 Sixth Edition is a comprehensive resource that builds on the knowledge and skills introduced in the Year 11 course, thoroughly covering all key content areas of the Year 12 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 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

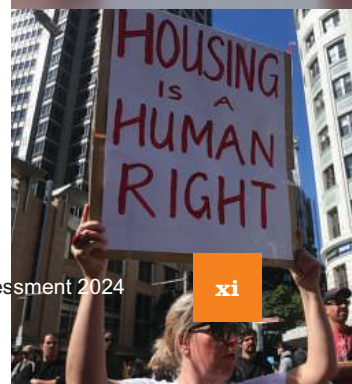












The authors and publisher wish to thank the following for reviewing the manuscript and providing feedback: Goorlil Consulting, Renata Hecimovic.

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Glossary of key words

Syllabus outcomes, objectives, performance bands and examination questions have key words that state what you 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 you and your teacher 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 or 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

Using a range of contemporary examples, you will investigate criminal law, processes and institutions, and the tension between community interests and individual rights and freedoms.

Themes and challenges

The themes and challenges covered in Part I include:

- the role of discretion in the criminal justice system
- issues of compliance and non-compliance in regard to criminal law
- the extent to which law reflects ethical and moral standards
- the role of law reform in the criminal justice system
- the extent to which the law balances the rights of victims, offenders and society
- the effectiveness of legal and non-legal measures in achieving justice.

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**	2
Chapter 2	**The criminal investigation process**	30
Chapter 3	**The criminal trial process**	50
Chapter 4	**Sentencing and punishment**	76
Chapter 5	**Young offenders**	106
Chapter 6	**International crime**	138

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Chapter 1
The nature of crime

Chapter objectives

In this chapter, you 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Customs Act 1901 (Cth)
Crimes Act 1914 (Cth)
Copyright Act 1968 (Cth)
Drug Misuse and Trafficking Act 1985 (NSW)
Summary Offences Act 1988 (NSW)
Criminal Code Act 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)
Crimes Amendment (Intimate Images) Act 2017 (NSW)
Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW)
Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW)

SIGNIFICANT CASES

R v Whybrow (1951) 35 CAR 141
Boughey v The Queen (1986) 161 CLR 10
R v AEM (Snr); R v KEM; R v MM [2002] NSWCCA 58
R v Thomas Sam; R v Manju Sam (No 18) [2009] NSWSC 1003
Burns v The Queen (2012) 246 CLR 334
R v Campbell [2014] NSWCCA 102
Swan v The Queen (2020) 269 CLR 663

Legal oddity

Law reflects the values, customs and traditions of different countries. This is particularly exemplified in the differing gun control laws of the United States and Australia. The Second Amendment to the US Constitution 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'. This law, born in the cauldron of the American War of Independence, has resulted in gun laws that are more permissive than those of nearly any other country in the world. Depending on what state they live in, US citizens can own a semi-automatic rifle, carry a concealed weapon and, in certain circumstances, own an automatic weapon. These laws contrast greatly with Australia, where after the Port Arthur massacre of 1996, gun control laws were dramatically tightened, with all high-powered weapons now banned or heavily restricted, and licensing greatly expanded. The homicide rate in the United States is much higher than in Australia.

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1.1 The meaning of crime

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

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.

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'.

Marantelli, SE & Tikotin, C, 1985, *The Australian legal dictionary*, Edward Arnold Australia, Caulfield East, Victoria.

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 may cause 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 often results in variations across societies in types of crimes and punishments. 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 or the consumption of alcohol, are deemed crimes in other 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 Prosecutions), 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 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.

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Figure 1.1 New laws need to be introduced to handle the rise of computer-based crimes such as cyberattacks. In 2017, a cyberattack affected computer networks across the globe.

More recently, with a greater understanding of the link between coercive control and escalation into domestic violence offences, the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) was introduced. Under this Act, coercive control in current and former intimate partner relationships has become a criminal offence.

Digital harassment and the non-consensual distribution of images has become problematic for many Australians, leading to the introduction of the *Crimes Amendment (Intimate Images) Act 2017* (NSW).

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 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 the rights of the community and the rights of individuals in the criminal justice system. Ensuring the balance between these competing interests is vital in maintaining public confidence in the criminal law and the institutions that implement them.

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.
- 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 defendant is brought before the courts by an individual who is affected (the plaintiff).
- 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 reasonable 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 (on the balance of probabilities).
- 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.

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

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

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

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

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Broadly speaking, the distinction between criminal and civil law depends on the legal proceedings that may follow from the act. If the act is a crime, then the offender faces investigation by the police and prosecution by the state. 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.



Figure 1.2 Sofia Sam being taken to the Supreme Court on 8 March 2017. She was accused, and later found guilty, of murdering her husband in 2017.

Review 1.1

1. Define the term 'crime'.
2. Explain why activities are crimes in some communities but not in communities in other countries.
3. Identify the similarities and differences between criminal and civil law.

1.2 Elements of crime

Video 1.1 *Actus reus* and *mens rea* (01:30)

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

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

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.

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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 wilfully, 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 '1.3 Strict liability offences' on page 8), 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.



Figure 1.3 Police responding to the Lindt Cafe, Martin Place siege. A lone gunman held hostages inside the cafe over 15 and 16 December 2014. The three components of *mens rea* are intention, recklessness and criminal negligence – which are all elements associated with this crime.

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. 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.
- **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 on page 8.

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 when they should have and so allows the avoidable danger to occur

In 2019, 18-year-old Christopher Cassaniti died at the scene of a workplace scaffolding collapse. In 2022, NSW District Court Judge Andrew Scotting found the company Synergy Scaffolding Services had put workers in 'significant peril' and the reason the scaffolding collapsed was due to a 'culmination of events', such as building ties being removed. He fined the company $2 million, after a 10 per cent reduction for the guilty plea. Cassaniti's parents said the fine was 'laughable', as this amount would not be a deterrent for a big company.

In October 2023, the NSW government announced it would be introducing industrial manslaughter laws in 2024. This is something Cassaniti's parents had called for to bring NSW in line with other states.

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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 and having broken skin oozing fluid.

The court found that eczema was medically treatable, yet because treatment was denied the child had unnecessarily suffered and died from the condition. 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 a sentence of imprisonment of five years and four months.

1.3 Strict liability offences

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

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 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 a 'honest and reasonable mistake'.

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 the *actus reus* and *mens rea* of the crime.
3. Outline two main differences between strict liability offences and other offences. Give examples of some strict liability offences.

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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 alleged criminal act)

In Court



***Swan v The Queen* (2020) 269 CLR 663**

In this case, the High Court extended the law of causation in homicide cases. The court found that in order for someone to be held legally responsible for a homicide, it must be proven beyond a reasonable doubt that the person's actions were 'a substantial or significant cause of the death'. The victim Mr Kormilets died eight months after his attack and after a fall in a nursing home due to medical complications he suffered as a result of the attack on him in his home. The accused could not have foreseen the fall in the nursing home, but the court ruled that the chain of causation had not been broken and found the accused guilty of homicide.

1.5 Categories of crime

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

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, drug-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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Legal Links

A range of recorded criminal incidents in New South Wales can be accessed on the website of the NSW Bureau of Crime Statistics and Research.



Figure 1.4 Australian Federal Police display more than one tonne of MDMA (ecstasy) tablets seized from the waterfront in 2005 in Melbourne, Australia. Crimes related to drug offences include **trafficking**, possession and use.

Research 1.1

Find the *Crimes Act 1900* (NSW) on the internet and look at the categories of offences listed under the Act. Identify how many of the categories and offences listed in Table 1.1 you can 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.

trafficking dealing or trading in something illegal, particularly drugs

homicide the unlawful killing of another person

murder the deliberate killing of a person

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 occasioning (causing) death.

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 doing of an act with the foresight of the probability of death arising from that act.
- 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



Figure 1.5 A police officer inspects a body at the crime scene following a stabbing incident in Melbourne in 2018. A knife-wielding attacker killed one person and injured two others. In the criminal justice system, homicide is defined as the unlawful killing of another person.

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and capacity to know better, and that the act constituted a 'reckless indifference to human life'. Boughey was convicted of the murder. See also *R v Campbell* [2014] NSWCCA 102.

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 as the impact of these crimes for victims, their families and the community is devastating. This may make it seem that murder occurs more often than other violent crimes, but in reality the opposite is true. In 2022, the murder rate in New South Wales was three people per 100 000 population. By contrast, the rate of domestic and family violence was 650. According to the Australian Institute of Criminology, most murder victims are killed by a family member or friend, and up to 41 per cent of all homicides are related to domestic violence.

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.

For example, in *Burns v The Queen* (2012) 246 CLR 334, the accused, Burns, was a participant in a methadone program conducted by a Sydney clinic. Burns had made a business of selling some of her methadone to friends and acquaintances. On one occasion, she sold methadone to a person who died after taking the drug. The deceased person's body was discovered in a toilet block behind Burns's unit. The deceased had died as a result of using a prescription drug combined with the methadone provided by the accused. Burns was tried and convicted of manslaughter.

There are three main types of manslaughter:

- **Voluntary manslaughter** occurs when a person kills with intent, but there are mitigating circumstances (such as the defence of **provocation**), which reduces 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. It is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm. In circumstances that involve a great falling short of the standard of care that a reasonable person would have exercised, and that involved such a high risk that death or grievous bodily harm would follow, then the doing of the act would merit criminal punishment.
- **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.

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

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

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

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

involuntary manslaughter
the killing of a person where the death occurred because the accused acted in a reckless or negligent way without intending 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. Some mothers 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.

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Dangerous driving occasioning 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 person. 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 two recently closed homicide cases. Draw up a table and identify:

- the case name and court reference
- the charges brought against the defendant and the relevant facts of the case
- the *actus reus* and *mens rea* for each case.

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**).

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.

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

common assault
an assault where there is no actual physical harm to the person assaulted; it includes threatening to cause physical harm to another person

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

Sexual offences

Sexual assault

Sexual assault refers to sexual contact or behaviour that occurs without explicit consent of the victim. Rape is a type of sexual assault involving sexual intercourse or other forms of sexual penetration carried out against a person without their consent. The definition of sexual assault includes where consent is not present or has been withdrawn such as in 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 is reportedly one of the most under-reported crimes.

Lack of consent is central to the crime of sexual assault and is defined in detail in the *Crimes Act 1900* (NSW). It states that a person is not consenting where:

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

Further reforms to consent laws were introduced by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW). In addition to the times when a person cannot legally give consent, the new laws now require parties to give and obtain consent at the 'time of the act'.

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

Aggravated sexual assault

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 of age 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.

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Indecent assault

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

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

Aggravated sexual assault in company

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 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.

Analysis 1.1

Use the QR code to watch Video 1.2.

1. Describe how aggravated sexual assault in company is different from sexual assault.
2. What is the non-parole period and the maximum penalty for this offence?
3. What three things must the prosecution prove for a person to be convicted of this crime?
4. Outline what factors can lead to a longer non-parole period.

Video 1.2 Aggravated sexual assault in company (03:33)



Figure 1.6 The rate of sexual assault victims continues to trend up in Australia. The victimisation rate for female victims (206 victims per 100 000 females) was more than five times that of male victims (39 victims per 100 000 males). Source: Australian Bureau of Statistics

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In Court



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

In New South Wales, the catalyst for the introduction of the law of 'sexual assault in company' was the case of *R v AEM.*

The facts of the case of *R v AEM* are: three 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 were verbally threatened 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 men's crimes. Following the case, the NSW Parliament moved quickly to introduce new laws and tougher penalties, creating a new offence of 'aggravated sexual assault in company' in section 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.

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

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

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 section 80.1 of the *Criminal Code Act 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 King or Queen. 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.

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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 section 80.2 of the *Criminal Code Act 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 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.

A review of the law of sedition was undertaken by the Australian Law Reform Commission (ALRC). Among the ALRC's recommendations was the suggestion 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).



Research 1.3

The ALRC report *Fighting Words: A Review of Sedition Laws in Australia* contains a history of sedition laws and various recommendations about reforming Australia's laws.

Read the report on the internet and complete the following tasks.

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

Economic offences

'Economic offences' include 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 these three main categories:

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

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

Crimes against property

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

Larceny

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.

Robbery

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 a higher sentence.

Break and enter

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.

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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 that workplace

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

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

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**.

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.





Figure 1.7 Titus Day (left) was jailed for two-and-a-half years for embezzling funds from Guy Sebastian (right). Day was Sebastian's agent.

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).

Table 1.2 Recorded criminal incidents for major offences, all NSW, five years to June 2023

Offence	5 years ago	4 years ago	3 years ago	2 years ago	Current	Two-year trend	Five-year trend
Break and enter dwelling	25552	23058	19257	17346	19076	+10.0%	–7.0%
Break and enter non-dwelling	10028	9015	7098	7020	8026	+14.3%	–5.4%
Steal from dwelling	38118	33518	28737	26363	28140	+6.7%	–7.3%
Steal from retail store	26131	23707	20535	17273	25478	+47.5%	Stable

Source: NSW Bureau of Crime Statistics and Research

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Research 1.4

Search newspapers or go online to find two articles about white-collar crime. Make sure the articles are current and discuss 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.

Media

Former Tesla Motors Australia director sentenced for insider trading

Australian Securities and Investments Commission media release

21 March 2023

On 17 March 2023, former Tesla Motors Australia Pty Ltd (Tesla Australia) director Kurt Schlosser, of Sydney, New South Wales, was sentenced in the Sydney District Court following his guilty pleas to two insider trading offences.

Mr Schlosser was sentenced to two years and six months imprisonment, to be released immediately upon entering into a recognizance, on the condition that he be of good behaviour for two years and six months.

In his role as country director of Tesla Australia, Mr Schlosser was informed of a confidential, in-principle agreement to be entered into by Tesla Inc in the United States of America. The agreement related to the supply of lithium to Tesla Inc by Piedmont Lithium Ltd, a company listed on the Australian Securities Exchange (ASX).

Mr Schlosser then purchased 86478 shares in Piedmont Lithium Ltd in two transactions and also communicated that inside information to a friend in circumstances where it was likely that person would also acquire Piedmont Lithium Ltd shares. Mr Schlosser, shortly after the announcement was made public, sold the shares for a realised profit of $28883.53.

An order was also made by consent for Mr Schlosser to forfeit the profit of $28883.53 to the Commonwealth.

ASIC Deputy Chair Sarah Court said, 'ASIC is committed to acting against conduct that damages the integrity of Australia's financial markets. Insider trading undermines investor confidence and gives individuals an unfair advantage. This criminal outcome demonstrates the serious consequences for trading when in possession of inside information.'

As a result of his conviction, Mr Schlosser is also automatically disqualified from managing corporations for five years.

The matter was prosecuted by the Commonwealth Director of Public Prosecutions after a referral from ASIC.

Background

On 15 November 2022, Mr Schlosser pleaded guilty to two insider trading offences relating to shares in Piedmont Lithium Ltd, contrary to s1043A of the *Corporations Act* (22-319MR).

A breach of s1043A of the *Corporations Act* carries a maximum penalty of 15 years' imprisonment.

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fraud
deceitful or dishonest conduct carried out for personal gain

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 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.

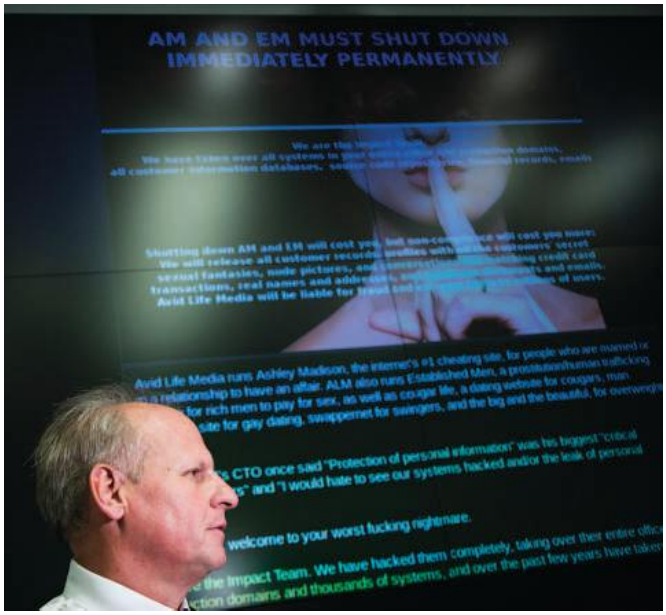


Figure 1.8 Superintendent Bryce Evans speaks to the media about the Toronto police investigation into the Ashley Madison hack.

Fraud

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

Fraudulent crimes are becoming increasingly relevant with advances in technology, especially relating to internet use and electronic facilities such as automated 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 to open bank accounts to deposit fraudulently gained funds. Identity crime is one of the fastest-growing areas of crime in Australia. During 2015–2016, approximately 9 per cent of respondents to surveys by the Australian Institute of Criminology had suffered misuse of their personal information in the preceding 12 months, with 5 per cent having financial losses. The Attorney-General's Department estimated that identity crime cost Australia approximately $3.1 billion in 2021. Identity crime, as with many other forms of computer crime, is here to stay. Increased spending on better security, enforcement and education is required to reduce the incidence of these types of crimes.

Legal Links

The Australian Government has established a website 'Scamwatch' with information about current fraudulent scams.

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.

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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 or caffeine. Illegal drugs are drugs that have been prohibited by law because law-makers have deemed them unsafe for general use; they include, for example, 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
- **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) who were executed in Indonesia in 2015.

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, which controls the demerit system through which offenders lose points from their driver's licences if they are caught committing certain traffic offences.

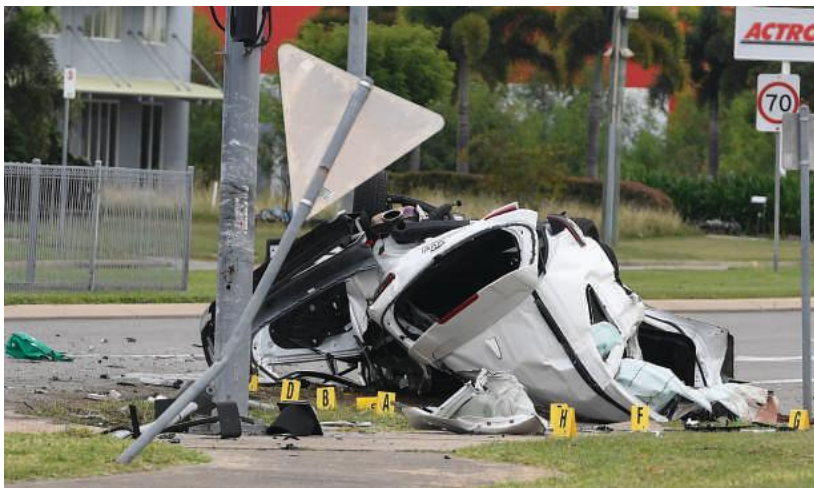


Figure 1.9 Four teenagers died in a single-vehicle crash in Townsville in 2020. Negligent driving causing death or serious bodily harm carries harsh penalties.

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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.

affray
using or threatening to use violence on another person 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

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

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 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.



Figure 1.10 Police arrest Deanna 'Violet' Coco at an Extinction Rebellion protest in 2019. Coco is a well-known activist who has been charged with public nuisance offences in both New South Wales and Victoria following protests on the Sydney Harbour Bridge and Melbourne's West Gate Bridge.

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.

The use of police discretion in public order offences often results in higher incidences of discrimination, with First Nations people 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: **attempt** and **conspiracy**.

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Attempt

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 *Crimes Act 1900* (NSW) 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. 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. However, the accused may have a lawful reason for the conduct in question or have had no real intention of completing the apparent crime.

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 of 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. List what types of crime these offences include. Identify the *actus reus* and *mens rea* for these crimes.
2 A number of driving offences and regulatory offences are strict liability offences. Discuss why these crimes do not require the proof of *mens rea*. Assess the advantages and disadvantages for society of such offences being strict liability offences.
3 Attempts and conspiracies often carry penalties as high as if the crime were 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

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

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

Summary offences

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.



Figure 1.11 Summary offences are considered less serious offences and are heard and sentenced in a Local Court before a magistrate, such as the Central Local Court House in Sydney.

Indictable 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, they will be heard 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, where a jury might be more inclined to acquit, although this would not be guaranteed.

The main differences between summary and indictable offences are outlined in Table 1.3.

Table 1.3 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
Judgment and punishment determined by a magistrate	Judgment determined by a jury; punishment determined by the judge
Charge usually laid by a police prosecutor 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

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Review 1.4

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

- **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 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 1.12 The principal in the first degree is the person who actually commits the criminal act, while a principal in the second degree is someone who was present, and assisted or encouraged the principal offender.

Review 1.5

1 Describe the four possible parties to a crime.
2 Explain why the criminal law distinguishes between the different parties to a crime.

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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 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.

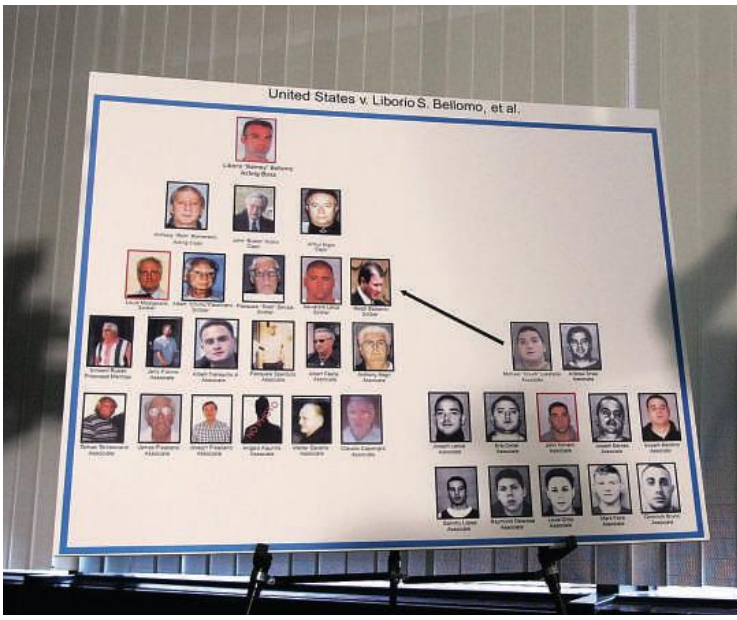


Figure 1.13 Social factors influencing a person's attitude towards crime may include their family and personal relationships. In 2006, in New York, over 30 members of the Genovese organised crime family were indicted for various crimes such as murder, money laundering, racketeering and cocaine distribution.

This 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 receives 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 Australian Institute of Criminology show that one-third of male and one-half of female offenders receive a welfare or government payment as their main source of income. Lower levels of education and lack of skills are often closely related to

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economic factors, with such people often long-term 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. Economic factors, such as the high cost of living in 2023, usually leads to an increase in property theft. As petrol prices climbed between July and September 2023, there was a 20 per cent increase in petrol theft, which cost the industry $6.5 million a month.

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 recent climate change protests in Sydney in 2022. A man was charged with a number of offences after suspending himself from a crane at Port Botany. He was charged with endangering a person on a railway, remaining in a waterside restricted zone when not authorised, refusing to comply with direction, encouraging the carrying on of an operation for the commission of crime and risking the safety of another by climbing a building/structure.



Figure 1.14 A demonstrator is arrested during a 2022 protest calling for a radical cut to Australia's carbon emissions.

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.

Genetic theories

Genetic theories surrounding criminal behaviour have long been a topic of interest for scientists and criminologists. For example, in the early nineteenth 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 previously 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, property offences for profit, offences against the person for revenge, and white-collar crimes such as embezzlement or insider trading for profit. 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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Research 1.5

The Australian Institute of Criminology (AIC) is a research and knowledge centre on crime that publishes various crime-related statistics. Access online the latest edition of the AIC's publication *Australian crime: Facts and figures*. View the 'offender profiles' for the most recent year available and complete the following tasks.

1. Outline if most offenders in Australia are male or female and how old most of the offenders are.
2. Describe the main areas of income (non-criminal and criminal income) recorded by offenders.
3. Identify what percentage of offenders have been arrested in the past 12 months.
4. List the main types of crimes committed.



Figure 1.15 Bernard Madoff (C) at New York Federal Court in 2009. He was found guilty of running a US$50 billion Ponzi scheme through his investment company. White-collar crimes tend to be driven by greed and self-interest.

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 is likely to 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 may 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 considers the influence of physical environments upon crime.
- Focused (situational) approaches 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 'hotspots' 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 cameras are another important method of crime prevention and have been installed in many retail shops 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 they are at risk of being impeded

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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 unwearable. 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 for whom the school setting is not appropriate. 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 safe and positive life choices. There are also initiatives to support young Indigenous people who may be at risk of offending; for example, the Koori Youth Justice Program has Koori employees to support these young people by providing advocacy, support that is culturally sensitive, and suitable role models.

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 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.

Video 1.3 RISEUP is a program for at-risk youth. (02:42)



Figure 1.16 People march in Melbourne on the International Day for the Elimination of Violence Against Women.

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Media



The National Plan to End Violence against Women and Children 2022–2032

Australian Department of Social Services website

On 17 October 2022, the Australian, state and territory governments released the National Plan to End Violence against Women and Children 2022–2032 (National Plan).

The National Plan is the overarching national policy framework that will guide actions towards ending violence against women and children over the next 10 years.

It highlights how all parts of society, including governments, businesses and workplaces, media, schools and educational institutions, the family, domestic and sexual violence sector, communities and all individuals, must work together to achieve the shared vision of ending gender-based violence in one generation.

The National Plan outlines what needs to happen to achieve the vision of ending violence in one generation, across four domains:

1. **Prevention** – working to change the underlying social drivers of violence by addressing the attitudes and systems that drive violence against women and children to stop it before it starts.
2. **Early intervention** – identifying and supporting individuals who are at high risk of experiencing or perpetrating violence and prevent it from reoccurring.
3. **Response** – providing services and supports to address existing violence and support victim-survivors experiencing violence, such as crisis support and police intervention, and a trauma-informed justice system that will hold people who use violence to account.
4. **Recovery and healing** – helping to reduce the risk of re-traumatisation and supporting victim-survivors to be safe and healthy to be able to recover from trauma and the physical, mental, emotional, and economic impacts of violence.



Research 1.6

Use the internet to research RISEUP, the National Plan to End Violence Against Women and Children or another crime-prevention program, and assess which elements of the program would be described as situational crime prevention and which would be social crime 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 examples of how this is achieved.

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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, 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.



Multiple-choice questions

1 Which of the following offences relates to selling alcohol to a minor?
- **a** A public order offence.
- **b** A strict liability offence.
- **c** An offence against the person.
- **d** An offence against the sovereign.

2 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.

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 What type of offence might writing a book calling for the violent overthrow of the government be prosecuted as?
- **a** A crime against humanity.
- **b** A crime against a person.
- **c** A crime against property.
- **d** A crime against the sovereign.

5 Which of the following best describes involuntary manslaughter?
- **a** A person causing the death of another person 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.

Short-answer questions

1 Assess the extent to which the criminal law reflects the moral and ethical standards of the community.

2 Evaluate the extent to which criminal penalties are a reflection of public morality.

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Chapter 2
The criminal investigation process

Chapter objectives

In this chapter, you 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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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)
Crimes (Serious Crime Prevention Orders) Act 2016 (NSW)
Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016 (NSW)

SIGNIFICANT CASES

R v Rondo [2001] NSWCCA 540

Legal oddity

A citizen's arrest is when someone who is not a 'duly sworn police officer' detains another person. Under section 100 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), a person can make a citizen's arrest if another person has just committed, or is in the act of committing, an indictable offence. In December 2022, a driver in the Gold Coast noticed a van being driven erratically, and when he saw that the two teenage boys inside were wearing gloves and COVID-19 masks, he realised the van was probably stolen. He later saw the van stopped by the road, so he got out of his car and ran towards it. With the help of a nearby couple, he was able to pin down the boys and hold them until the police arrived.

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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.

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

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

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

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 judgments. 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 then present the **evidence** for judgment 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 to carry out their role against the rights of ordinary citizens.

In New South Wales, crimes will be investigated by the NSW Police Force (state) or the Australian Federal Police (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:

- arrest and interrogate
- 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
- recommend whether or not bail should be granted.

The special powers that are afforded to the police are provided by the government to protect the community on behalf of all citizens. However, such powers can conflict with the rights of individuals or at times be misused. For example, searching an individual's property against their wishes may be deemed necessary if there is a reasonable belief that



Figure 2.1 Police officers in the United Kingdom can carry out a search and seizure in an effort to combat potential knife-crime. This is the power to search a person and/or their possessions and to seize and detain items that are discovered.

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a crime has been committed. 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 used by police are done so in accordance with the law and not abused.

The NSW Police Force also follows a specific code of behaviour, which is outlined in its Standards of Professional Conduct. The code of behaviour sets out the values police officers are expected to uphold in the line of duty. 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. A reason this is important is because if biases influence police behaviours, oppressed groups may be given attention by police that results in over-representations of these groups in arrests, convictions and unfair police treatment.

Where a suspect believes their rights have been abused, there are complaints procedures available. It should be noted that while the code of practice is legislated, it is reliant upon the self-regulation of police practices internally. This can be problematic if there are systemic issues. Two further checks on the use of police powers is the Police Integrity Commission and the NSW Ombudsman.



Figure 2.2 Police officers patrol the Sydney Opera House during lockdown restrictions in 2021. The NSW Police Force must follow a specific code of behaviour and are expected to treat all members of the community in a fair and ethical manner.

Increased police powers

In 2016, the NSW Government passed new laws that further restrict the rights of citizens. The government argued that these laws were necessary to combat an increasingly complex situation in an environment of heightened risks to public safety.

Serious Crime Prevention Orders

The *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) allows the police to apply for court orders that restrict the activity of a suspect, based on allegations of their involvement in criminal activity.

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

These orders can also be used as a post-conviction control. According to Vicky Sentas and Michael Grewcock, Senior Law Lecturers at the University of New South Wales:

> The court has an open-ended power to impose whatever prohibitions, restrictions or requirements it thinks will prevent, restrict or disrupt the person. For example, orders can ban the suspect from types of locations, restrict their movements and subject them to ongoing curfews for up to five years.
>
> A breach of the order carries a maximum penalty of five years' imprisonment.

Sentas, V & Grewcock, M, 2018, 'Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety', *International Journal for Crime, Justice and Social Democracy*, vol. 7, no. 3, pp. 75, 80.

These types of orders are determined on the balance of probabilities and can be applied without any evidence that the suspect has committed a crime, and in a wide range of circumstances. It is argued that Serious Crime Prevention Orders are the most extensive form of supervisory order now available and are substantially more expansive than existing control order schemes. Some groups, such as First Nations peoples, can be particularly impacted by these orders.

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Investigative detention

The *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW) extends police powers to allow the detention of a terror suspect as young as 14 years old (previously 16 years old) for investigation to prevent terrorist acts. Powers under this Act also permit questioning of the suspect in dangerous conditions for periods of 16 hours or more at a time; this further extends limits for interrogation outlined prior.

Review 2.1

1 Outline the powers police officers have to conduct an investigation.
2 Discuss the circumstances in which a police officer may search a person (see page 32). Assess if the search powers are necessary or too broad. Explain your answer.

2.2 Reporting crime

Video 2.1 Crime Stoppers enables people to make anonymous reports of criminal activity. (01:33)

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.

Some crimes are more widely reported than others; for example, property offences such as car theft. 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. A 2024 Australian Institute of Health and Welfare (AIHW) report estimated that over 90 per cent of sexual assaults in Australia are not reported to the police. The AIHW said that over 30 per cent of those who did not report gave one or more of the following reasons: feeling they could deal with it themselves, not regarding it as a serious offence, and/or feeling ashamed or embarrassed. In addition, 13 per cent indicated fear of the legal process as one of the reasons for not reporting. This may indicate an 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 still the case, even though legislation that allows victims in sexual assault matters to give evidence by closed-circuit television cameras, rather than being in the room face-to-face with the accused, has recently been passed.

Review 2.2

1 Describe the role of the police in society.
2 Discuss why there must be a balance between the extent of police powers and citizens' rights.
3 Explain why some crimes are under-reported.

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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 **forensic** investigators 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.

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.

It is important that the evidence gathered is sufficiently relevant to the case, and it is the best possible evidence available to secure a conviction 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, which 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. Precautions are 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.

charge
formal accusation of a person of committing a criminal offence

forensic
related to scientific methods of solving crimes, involving examining the objects or substances that are involved in the crime

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)

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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.

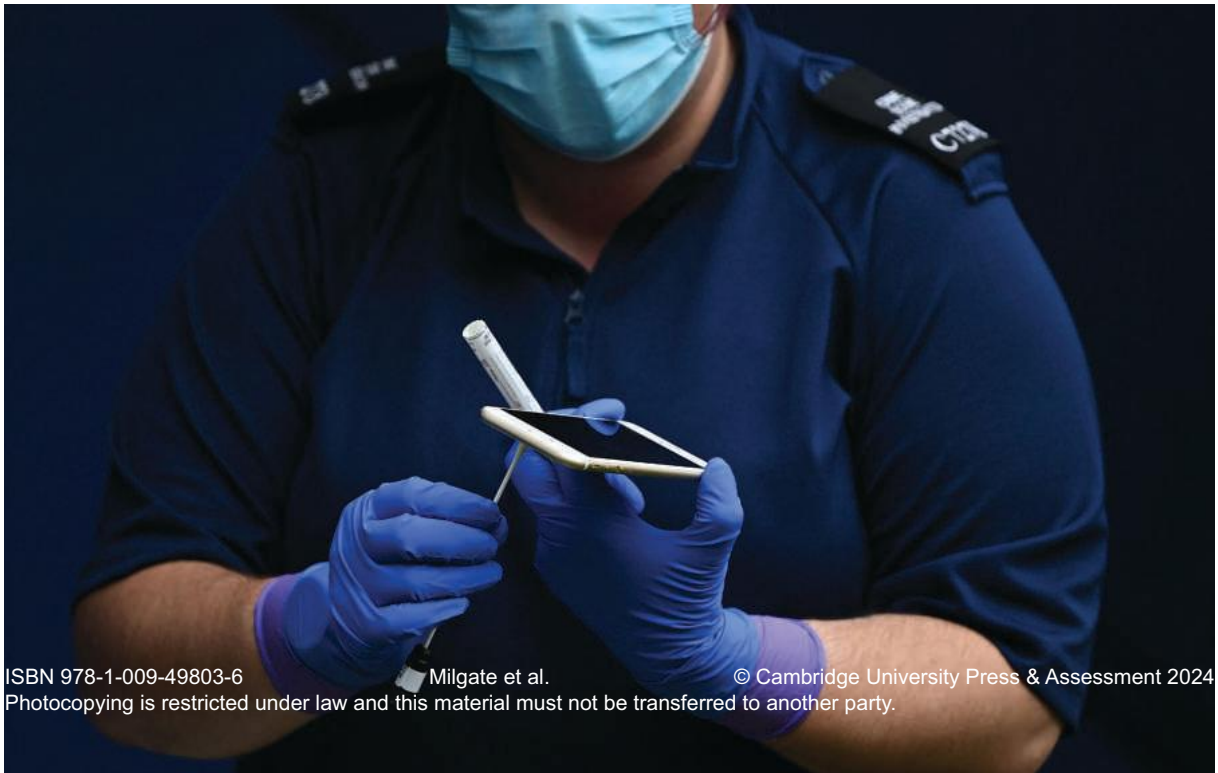
For example, scientific and technological advances have now made the processing and cross-checking of criminal databases easier and more effective for day-to-day policing. State-of-the-art fingerprint and DNA databases make it easy for police to share information across states and internationally. Police 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 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

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 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.

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 are still concerns over the reliability of DNA testing and the time it takes for tests to be completed, which at times delays criminal trials in NSW. The turnaround for more serious offences such as murder, manslaughter, rape and sexual assault is much quicker as these matters can be prioritised. DNA samples are seen as an effective crime prevention strategy, but testing can be flawed, as seen in the following media article.

Figure 2.3 A police officer with blue protective gloves holding a swab for forensic evidence tracing at the scene. DNA evidence has been used to gain difficult convictions in both current and 'cold' (unresolved) cases.



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Note: Some students may find the following media article confronting.

Media



'Bondi Beast' breakthrough: DNA links eastern suburbs rape terror to Sydney grandfather

Sylvia Jeffreys

The Sydney Morning Herald

20 November 2022

Police have achieved an astonishing breakthrough in the hunt for one of Sydney's most prolific sex offenders, known for years as 'The Bondi Beast', bringing a decades-long cold case to a close.

Detectives from State Crime Command's sex crime squad have spent years analysing 31 incidents of actual or attempted sexual assault that occurred across Sydney's eastern suburbs between 1985 and 2001.

Detective Superintendent Jayne Doherty, commander of the sex crime squad, said that by using advanced technology investigators had closed in on one man whose DNA is a perfect match to 12 semen samples provided by victims.

'We were given a link to a broad number of people who were possible contributors,' Doherty told *The Sydney Morning Herald* and *60 Minutes*.

'And then through the dedicated hard work over the last six years of the sex crimes squad we were able to then bring that link down to a single person and identify the contributor of that DNA. No two people share the same DNA, and that's why we've been able to come back to this one person.'

Thirty-seven years after the first chilling attack, Doherty revealed that the DNA matches pointed to a 66-year-old La Perouse grandfather, Keith Simms.

But in a frustrating twist for investigators and victims, Simms died in February this year – seven months before police narrowed their gaze.

Simms' distraught family have told police they had no idea he may have been leading a double life, and have described him as a loving and devoted husband and father.

Detective Acting Inspector Shelley Johns from Strike Force Doreen broke the news to Simms' wife and said the revelation was a devastating blow to the family.

'His family had no idea and really were beyond shocked when we had to tell them,' Johns said. 'There are so many questions that are unanswered. And a lot of them have come from the victims themselves.'

The case file

For 16 years, women in Sydney's eastern suburbs lived in fear of a sex attacker dubbed 'The Centennial Park Rapist', 'The Tracksuit Rapist' and 'The Bondi Beast', and for decades police were hunting several men.

The opportunistic offender targeted women exercising in public places including Centennial Park and the picturesque Bondi to Coogee coastal track. On other occasions, women were violated by a predator as they slept in their homes.

The victims ranged in age from 13 to 55 and did not fit a consistent profile. However, Johns said there were striking similarities across all 31 incidents.

(Continued)

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Media—Continued

'There were many similarities. There were the offences that were committed in people's homes in the middle of the night. And in nearly all cases where a house was broken into, it was in the same circumstances.

'And then on the other hand, there were the women who were out and about doing their normal daily activities; jogging, walking, exercising, and all of a sudden have been grabbed by this man from behind, dragged into some bushes or a secluded area and sexually assaulted.'

The brazen nature of the crimes and the level of offending across several suburbs including Randwick, Coogee, Tamarama and Pagewood had sickened even the most hardened police officers.

'I've not seen any investigations with the number of offences and type of offending committed as in this investigation,' Johns said. 'This is a woman's worst nightmare: to wake up in the middle of night and someone standing over the top of you with a knife, in a balaclava.'

The investigation

The first major breakthrough in this case arrived in 2005 – 20 years after the first attack – when sex crime squad detectives discovered a scene-to-scene DNA link between five assaults that occurred around the year 2000, including one at Randwick Cemetery.

This development was the catalyst for the formation of Strike Force Doreen – a dedicated team of detectives who began reviewing evidence including thousands of documents, victim statements and crime scene photographs.

A review under the Cold Case Justice Project identified a further seven cases linked by DNA, taking the total to 12.

But the case went cold again until 2016 when a random search of the police DNA database uncovered a familial match to the samples provided by victims. By this stage, the investigation had expanded to 31 attacks; 12 were connected by DNA and 19 by modus operandi.

Detective Sergeant Dan Walker from the police DNA management unit said this was the moment the investigation accelerated.

'It was our first real starting point from a forensic viewpoint,' Walker said in an interview. 'And then eventually in 2019 we got another match, but this was a different form of match; it was a Y-DNA match.'

YSTR or Y-DNA matching homes in on the paternal line of a family tree, making it more precise than earlier technologies. NSW Police started utilising Y-DNA matching in 2019 and in this case it served up a new focus for detectives: a sprawling family tree featuring 324 individuals.

'This is definitely the largest family tree we have done but absolutely necessary to follow those generations back to get to that common ancestor where the Y-DNA meets,' Walker said.

Detectives then applied old-fashioned detective work in a process of elimination, focusing on the age and location of the relevant family members, which ultimately led them to Keith Simms on September 3 this year.

Police then obtained a DNA sample of Simms through a warrant but have not disclosed how the sample was collected.

'Our science services tested that and that profile from that sample matched the crime scenes,' Walker said. 'It's a statistical ratio of one in 100 billion. So, it only belongs to him.'

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The victims

In early October, 69-year-old Jennifer – who did not want to disclose her surname – received the news she'd waited more than half her life to hear. Detectives from Strike Force Doreen informed her they had received a direct DNA match to the sample she provided in the hours after being raped in her Randwick unit in 1987.

'I burst into tears,' she said. 'It was just so emotional. It's not a case of forgive and forget. Because I'll never forget. And I'll probably never forgive him for changing my life and everyone else's. What gave him the right?'

Jennifer was 33 and working as a community liaison nurse when a stranger entered her staff accommodation at the Prince of Wales Hospital via a balcony door in the early hours of the morning and violently assaulted her. The balaclava-clad man held a knife to her throat and told Jennifer he was there to rape her.

'I was just so frightened … I felt that it wasn't happening, it was a nightmare.'

The despicable act left an indelible mark on Jennifer, who has undergone years of trauma counselling to help deal with debilitating flashbacks.

Detectives from Strike Force Doreen had the delicate task of contacting victims – some of whom live overseas and haven't spoken to police in decades – to pass on the news of their DNA breakthrough.

'We sat down as a team and figured out how we were going to do it, and what we were going to say,' Johns said.

'There was a lot of emotion involved. They were hard, but very rewarding phone calls to make. A lot of people felt really relieved, and it really added to the closure of him being identified, but also the fact that he could never do anything like this to them or anybody again.'

Detective Senior Constable Joshua Reeks praised the enormous courage of victims such as Jennifer who came forward to police at a time of unspeakable trauma to provide the DNA samples that would prove key to solving the heinous crimes.

'These attacks are some of the worst things people will ever go through,' Reeks said. 'And to go through that, and then find the courage to call the police, go through the process of being medically examined and providing statements, which is difficult.

'But it was immensely brave that they took control of what happened and have led us to where we are today.'

The mountain of evidence gathered by the determined investigators who refused to give up will never enter a courtroom. But as far as the sex crime squad is concerned, it's 'case closed'.

While many survivors are reluctant to report a traumatising attack, investigators believe more victims will come forward after the successful findings of such a high-profile case. Doherty has sought to reassure all victims of sexual violence that her team will never stop searching for answers.

'We need, as a community, to support victims, not judge them,' she said.

'Come forward to police. We will believe you. We will investigate. We won't force you to go to court. We will walk beside you on the journey that you are prepared to take with us.'

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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, 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.

Recently, the power of search and seizure came under greater scrutiny after complaints were made by a number of young women who were strip searched at music festivals in 2018 and 2019. The Law Enforcement Conduct Commission investigated these complaints and found in 2022 that the reason used by some officers that a suspicion that someone is concealing drugs in the body cavities is not enough to justify a strip search and that ambiguity around strip searches needed further clarification.



Figure 2.4 Police officers using sniffer dogs at music festivals continues to be controversial given the low success rate and the question about the extent to which the practice is an infringement of civil liberties.

A 2006 report by the NSW Ombudsman found the use of sniffer dogs to be an 'ineffective tool for detecting drug dealers'. The use of sniffer dogs at musical festivals in 2022 and 2023 continues to be controversial given the low success rate and the question about the extent to which the practice is an infringement of civil liberties.

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.

Documents obtained by the Redfern Legal Centre through Freedom of Information in August 2022 found that more than 4400 strip searches were carried out between July 2020 and June 2022 and at least 100 of these were against children. It is suggesting that police have not taken seriously the recommendations from the Law Enforcement Conduct Commission to overhaul polices around the use of strip searches and that police themselves still do not fully understand their own strip-search powers.

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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 in the next section.

In Court



***R v Rondo* [2001] NSWCCA 540**

In this NSW Court of Criminal Appeal case, Mr Rondo had been driving a car when he was pulled over by police who questioned him about damage to the rear panels. The officers saw Rondo put something in the car's glove box, and felt that this gave them a reasonable suspicion, and so searched the car.

They found money and cannabis in the car, which led to Rondo being charged. Subsequently, Rondo's house was searched, with police finding 215 grams of cannabis and 59 cannabis plants. At trial, Rondo was found guilty of supplying a prohibited drug and cultivation of a prohibited plant.

Justice Smart outlined the meaning of 'reasonable suspicion':



1. A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear ... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
2. Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
3. What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information, the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question, regard must be had to the source of the information and its content, as seen in the light of the whole of the surrounding circumstances.

The conviction was overturned on appeal.

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.

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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 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 video record the search in order to use it later in court and to guard against claims of improper procedures or the planting of evidence.



Figure 2.5 Police search for evidence at a block of flats in Sydney in 2017 after counter-terrorism raids were held across the city.

***Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW)**
Schedule 1, Form 11

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* (NSW) 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 6 am and 9 pm)

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

[* 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* (NSW). These include the following powers:

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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 do anything that it is reasonably necessary to do for the purpose of preventing the loss or destruction of, or damage to, anything 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.

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.]

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.

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Review 2.3

1 Describe some of the technology available to police officers when they are investigating crimes.
2 Outline some of the issues with the use of DNA evidence.
3 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; that is, 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 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 may 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.

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. (See also information under Investigative detention on, page 34). Police can only detain a suspect for six 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 six 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 six 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

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- 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 identification parade (used when a witness who allegedly saw the suspect is asked to identify them from among a group of different people)
- 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.

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 gaps in the information in their evidence. However, many suspects voluntarily answer questions.



Figure 2.6 A man is placed under arrest by tactical police outside the NSW Parliament House on Macquarie Street in Sydney. Usually, as soon as the police have a suspect in custody, the suspect is questioned.

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 may be informal, where the officer writes notes by hand, or formal, where video and audio recordings are made for the police records. A copy of these recordings should also be provided to 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.

Release or charge

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

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 the following section, 2.5 Court attendance notice, bail or remand). 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 preventative detention.

Review 2.4

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

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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

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

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

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

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

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

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 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.

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) (repealed), 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.

In 2013, the new *Bail Act 2013* (NSW) was introduced. The 2013 Act amended the 1978 Act as follows:

- Bail will now be refused if the accused person is deemed to be an 'unacceptable risk'.
- In determining whether or not to grant bail, decision-makers must now consider the views of victims, and must consider new risk factors, such as whether the accused has criminal associations or a history of non-compliance with court orders.

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- A previous bail decision cannot be reviewed purely on the basis of the new *Bail Act 2013* (NSW) – this is not, by itself, a 'change of circumstances'.

Amendments in 2022 to section 22B of the *Bail Act 2013* make it harder to argue to get bail, particularly for people who plead guilty, or are eventually found to be guilty, and are likely to be imprisoned for the offence. This will be because these people will be required to establish a special or exceptional circumstance in order to be granted bail pending their sentencing.

It is further argued that introducing a 'higher standard' for bail may contradict the 'Early Appropriate Guilty Plea' program introduced in NSW in early 2018. The program aims to encourage defendants to enter guilty pleas at an early stage, which would relieve pressure on the Court and criminal justice system, and in return, the defendant would receive a discounted sentence. If these latest amendments to the Bail Act do undermine the early plea program, it may further exacerbate pressure on the remand in NSW prisons of those who are yet to be found guilty of an offence or sentenced.

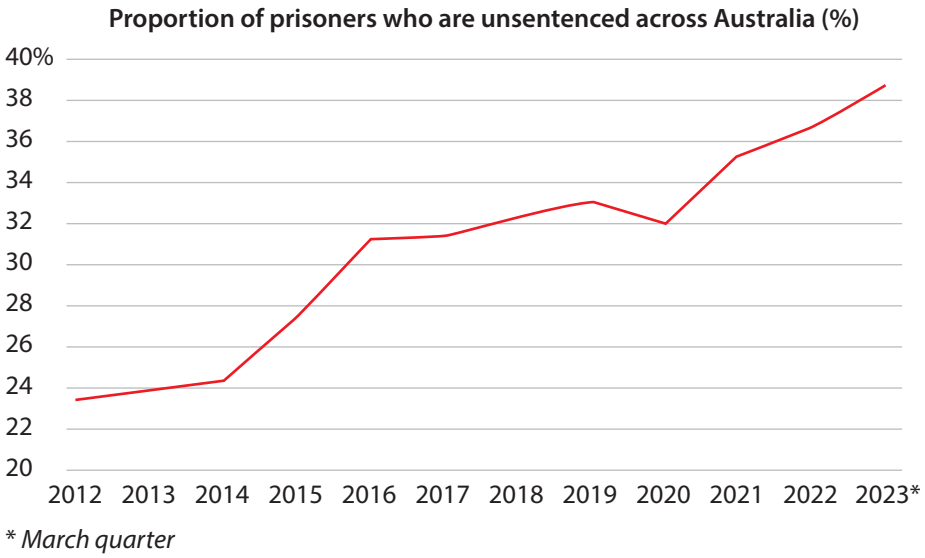


Figure 2.7 Proportion of prisoners who are unsentenced across Australia (%) 2012–2023. Source: ABS

Research 2.1

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 complete the following tasks.

1 List if bail was granted in the case.
2 Describe any conditions set on granting bail.
3 Discuss if there was an amount of money required for bail and, if so, how much.
4 Assess whether the decision on bail was fair in the circumstances.

Review 2.5

1 Describe the different forms bail can take.
2 Outline the changes in the *Bail Act 2013* (NSW) and what effect it will have for people accused of a crime.

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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 previously listed 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 2.6

1. Explain what a court attendance notice is and describe what happens if someone ignores one.
2. Describe the purpose of bail in relation to balancing the rights of the community and the rights of the individual.
3. Explain how remand is different from imprisonment.



Figure 2.8 Remand is usually sought for people who have committed particularly violent crimes, dangerous criminals, repeat offenders or those thought to be a flight risk.

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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 six hours without charge; this 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.
- Video and audio recordings are made of interviews in relation to serious offences.
- A person charged with an offence is either released on bail or held on remand until the trial.

Multiple-choice questions

1 A court attendance notice is best described as:
- **a** a legal document that 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 would be considered evidence?
- **a** A newspaper report.
- **b** A support person's advice.
- **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 not a reason that might be given for holding someone 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** Six hours.
- **b** Eight hours.
- **c** 12 hours.
- **d** Indefinitely.

Short-answer question

There is a constant tension between the interests of the community and individuals' rights and freedoms. Outline how the law attempts to balance the competing rights of individuals and the community within the criminal justice system.

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Chapter 3
The criminal trial process

Chapter objectives

In this chapter, you 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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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)
Protection of the Environment Operations Act 1997 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Jury Amendment (Verdicts) Act 2006 (NSW)
Local Court Act 2007 (NSW)
Coroners Act 2009 (NSW)
Crimes Amendment (Provocation) Act 2014 (NSW)
Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW)
Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)

SIGNIFICANT CASES

R v Williamson [1972] 2 NSWLR 281
R v Camplin [1978] AC 705
Zecevic v Director of Public Prosecutions Vic (1987) 162 CLR 645
Dietrich v The Queen (1992) 177 CLR 292
Commonwealth of Australia v Griffiths & Anor [2007] 70 NSWLR 268
Wood v The Queen [2012] NSWCCA 21
Singh v R [2012] NSWSC 637
R v Won [2012] NSWSC 855
Environment Protection Authority v Dib Hanna Abdallah Hanna [2018] NSWLEC 80
R v Blake Davis [2021] NSWSC 235
Hastwell v Parmegiani [2023] NSWSC 1016

Legal oddity

In 2023, the Bottle-O Beechboro in Western Australia captured closed-circuit television footage of the moment a man attempting to steal a 12-pack of drinks was confounded by a set of sliding doors that did not open. The footage shows the man walking towards the counter with his drinks, and then suddenly running towards the doors. When the doors didn't open, the man walked back and forth to try to trigger the mechanism, and then tried to open them with his hands. When this failed, he walked back to the counter and left his drinks with the staff member. The shop shared the footage on its Facebook page, asking if anyone could identify the man.

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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 needs to take place in an appropriate court. There are many courts that have jurisdiction to hear criminal offences. Determining which court hears a particular matter depends 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.

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

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

The case will then be heard at the appropriate place in the **court hierarchy**. The term '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.

In Australia, each state and territory has its own court hierarchy; 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.

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 the court's **appellate jurisdiction**.

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 court. For example, the Local Court of New South Wales has no appellate jurisdiction. The arrows in Figure 3.1 show the courts that can hear appeals from each of the lower courts.

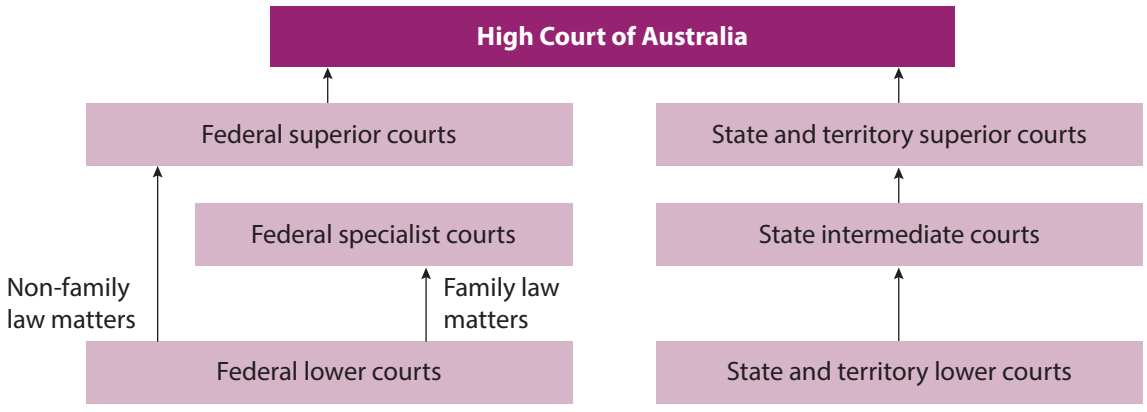


Figure 3.1 The Australian court hierarchy including state, territory and federal courts

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Review 3.1

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

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 Coroners 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 by the lower courts in the 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.



Figure 3.2 People stand outside the entrance to the Downing Centre Local and District Court building in Sydney. The Local Court is the first point of call for most criminal matters in New South Wales.

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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, magistrates are appointed by the Governor

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

The Local Court has jurisdiction to deal with summary offences and conducts **committal proceedings** to determine whether or not there is sufficient evidence (*prima facie*) for indictable offences to be heard in the higher district and supreme courts. It can also hear indictable offences that are triable summarily, such as assault which can be heard in the Local Court or the District Court.

There is no jury in the Local Court. Local Court matters are tried before 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.

In criminal matters, the Local Court will hear minor criminal matters, bail hearings and committal proceedings for serious offences. In a committal proceeding, a magistrate will hear the prosecution's evidence and determine whether it is sufficient to support a conviction by a jury. If satisfied that there is a case to answer and *prima facie* (a Latin term meaning 'establishing the facts') has been established, the accused will be ordered to stand trial in a higher court; if not, the accused is discharged. Amendments introduced to committal proceedings have shifted the role of the magistrate away from solely assessing the sufficiency of the prosecution's evidence. Now, magistrates are proactive in facilitating effective negotiations between the parties earlier in the court process. The primary aim of this facilitation is to bring about an early plea, which ultimately saves time and resources. This legislation arose from the NSW Law Reform Commission report titled *Encouraging Appropriate Early Guilty Pleas*.

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.

Coroners Court

The Coroners 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 Coroners 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 Coroners 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.

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.

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Figure 3.3 The Coroners 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.

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 criminal proceedings will be brought against that person.

Coronial inquests can result in changes to the law or the introduction of new rules or regulations governing a practice within the community. The 40 kilometres per hour signs on school buses were introduced after recommendations from a coronial inquest into the death of a school student.

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 complete the following tasks.

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

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 Youth Koori Court is an initiative of the Children's Court to divert young First Nations people between the ages of 10 and 17 from prison, with proceedings carried out in an informal setting designed to support and rehabilitate them.

The Children's Court and issues relating to young offenders are considered in more detail in Chapter 5.

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. The District Court was 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

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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 $1.25 million (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 stealing
- 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 Act 2001* (Cth).

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.

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.



Figure 3.4 Justice Peter McClellan delivers a verdict at the Court of Criminal Appeal. This is the highest court for criminal matters in New South Wales.

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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.

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. 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. For example, in the case *Environment Protection Authority v Dib Hanna Abdallah Hanna* [2018] NSWLEC 80, Hanna became the first person in NSW to be convicted of being a 'repeat waste offender' under s 144AB(2) of the *Protection of the Environment Operations Act 1997* (NSW). On several occasions Hanna collected building waste, including asbestos material, and dumped it at the properties of people who responded to his advertisement for 'free clean topsoil'. He was sentenced to three years imprisonment, with a two year and three month non-parole period.

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 was established under section 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 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.

The High Court represents an important check on government power as it has the authority to strike down any laws that are unconstitutional.

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Legal Links

The NSW Government's Communities and 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.

The ACT Government provides information on that territory's courts and tribunals.

The Commonwealth Attorney-General's website has information about the federal legal system and courts.

Review 3.2

1 Outline the types of cases that can be heard in the District Court.
2 Explain the types of cases that can be heard in the Supreme Court and in the Court of Criminal Appeal.
3 Explain why criminal matters heard in the High Court are considered to be law-making cases.

3.2 The adversary system

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

The criminal justice system in Australia is based on an **adversary system** of law. The adversary system (also known as the adversarial 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. In criminal law the adversary system pits the prosecution representing the state against the accused. 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 (for example, in coronial inquests and royal commissions).

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 both parties are able to present their side according to the rules of evidence and procedure. The jury represents judgment by one's peers (other members of the community) and is considered an impartial observer. 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 may not be in a position to request or allow this. The adversary 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 by the jury 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. 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 also involve a number of legal personnel (outlined in Figure 3.5).

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 of the court in which the crime will be heard.

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.

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.

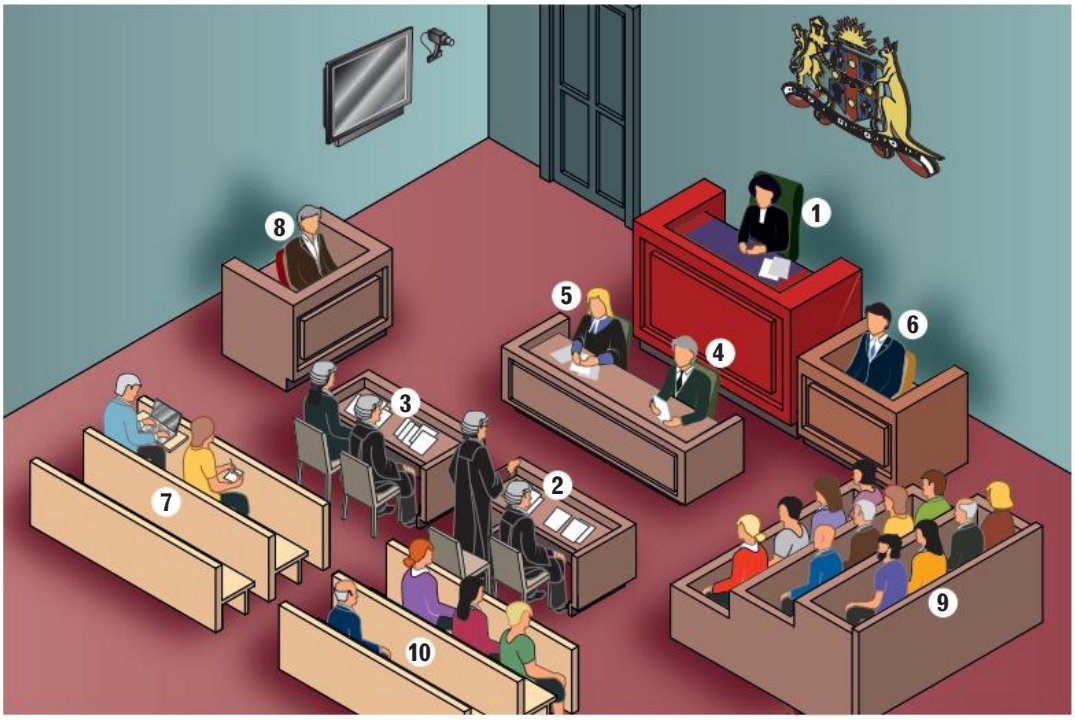


Figure 3.5 Court cases involve a number of key participants, including: 1 judge or magistrate; 2 prosecutor (for example, police prosecutor or Director of Public Prosecutions); 3 accused's barrister or solicitor; 4 judge's associate; 5 court reporter; 6 accused; 7 media; 8 witness; 9 jury; and 10 public gallery.

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Magistrates oversee proceedings and make a determination on the basis of the evidence presented. Once a magistrate has found an accused person guilty, they will also pass sentence. Magistrates also conduct committal proceedings for indictable offences 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 with the intention of obtaining 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 prosecutes summary offences

public prosecutor a legal practitioner employed by the Director of Public Prosecutions; usually prosecutes 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.



Figure 3.6 Government prosecutors arrive at the Magistrates Court in Brisbane. In criminal trials, the state or 'Crown' is represented by a prosecutor who brings the action against the accused.

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 the next section).

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 NSW 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 present evidence, 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. It reviews cases proposed by the police to determine if there is enough evidence to succeed. 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
- whether it is in the public interest to do so.

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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. A solicitor will usually prepare a brief for a barrister to present in court. It will overview the case and outline the key facts, legal issues and relevant law such as legislation and precedents. Solicitors 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. 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.



Figure 3.7 Barristers enter the Supreme Court of New South Wales. 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.

Review 3.3

1. Explain the difference between the adversary system and the inquisitorial system of law.
2. Outline the strengths and weaknesses of the adversary system of trial in criminal matters.
3. Identify areas of criminal law where an inquisitorial style of inquiry is used. Explain why this style is used.
4. Explain the role of the prosecution in a criminal trial.
5. Outline the similarities and differences in the roles of a magistrate and a judge.
6. Describe the types of cases heard by a magistrate and by a judge.
7. Explain why some indictable offences might be heard by a judge alone without a jury.
8. Compare the roles of public prosecutors and public defenders.

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3.4 Pleas and charge negotiation

plea
a formal statement of guilt or innocence by the accused

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

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.

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.

Incentive for an offender to give an early guilty plea is provided for under the *Crimes (Sentencing Procedure) Act 1999* (NSW), where caps are placed on the discount available to offenders. This Act was recently amended by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), which offered the following incentives:

- a 25 per cent reduction on an imprisonment sentence where the guilty plea is entered in the Local Court before committal
- a 10 per cent reduction on an imprisonment sentence for a plea received not less than 14 days before the first day of the trial
- a five per cent reduction on an imprisonment sentence thereafter.

If the accused pleads not guilty, the case will be defended in court. The dates of the trial will be set. The accused will be granted bail or remanded in custody until that date.

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 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.

Some of the arguments for and against plea and 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 the 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.

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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. This right is limited to serious indictable cases where the accused will most likely be denied justice if they appear without legal representation. 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 representation in an indictable criminal matter is high. The quality of legal services can vary depending on the experience and expertise of the lawyer who is representing a defendant. This usually comes down to the amount defendants are able to pay for legal representation. 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 NSW 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.

The threshold to access legal aid is out of the reach of many people. Legal Aid NSW is usually accessed by marginalised and disadvantaged groups in society such as people with a disability, women, First Nations peoples and those who are financially disadvantaged through unemployment or are low-income earners.

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.



Figure 3.8 Legal Aid NSW aims to protect people's rights in the legal system by ensuring they are appropriately represented in legal matters

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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 Government, the NSW Government 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.

Review 3.4

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

Research 3.3

Visit the Legal Aid NSW website. Read the information on the website and complete the following tasks.

1. Identify how many clients were represented by Legal Aid NSW in the last financial year.
2. Identify the percentage of Legal Aid NSW expenditure that was spent on criminal law. Assess how this compares with other areas of law.
3. Identify how many calls were made to the Legal Aid Youth Hotline.
4. Use the internet to research if there are to be any future funding cuts to Legal Aid NSW.

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.

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

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

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.

Generally, the DPP 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 the jury of the case beyond any reasonable doubt.

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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 testified 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.



Figure 3.9 Real evidence such as weapons used in crimes are important pieces of evidence in establishing guilt or innocence.

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 in court by either. 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 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.

Recent developments in police responses to domestic violence incidences, where victims have consented to video recording (documentary) interviews at the time of the incident, have seen an increase in the conviction rate in 2023.

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, or someone who assessed the defendant, such as a psychiatrist). Their job is to give testimony based

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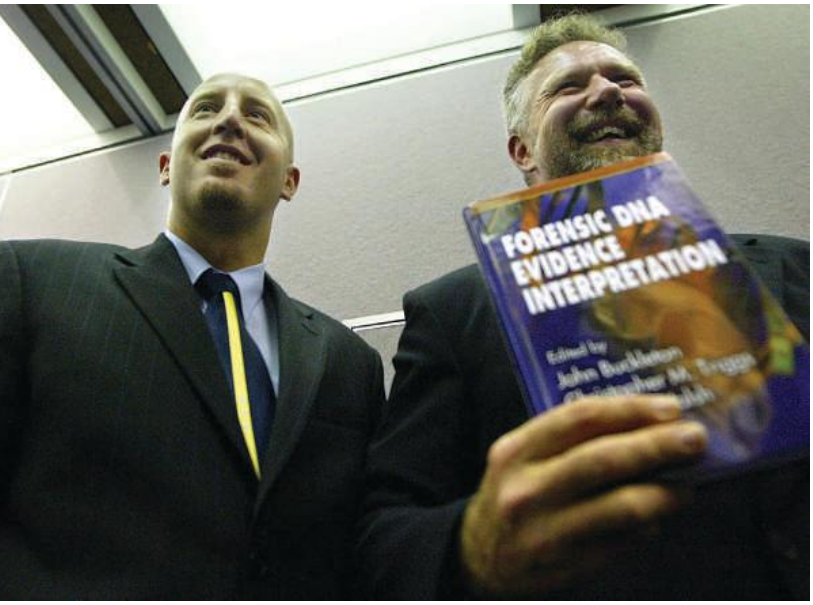


Figure 3.10 DNA expert Simon Walsh (left) and renowned New Zealand forensic scientist John Buckleton (right) at the official launch of their book, *Forensic DNA Evidence Interpretation*. In a trial, expert witnesses provide testimony based on their expert or specialised knowledge and give an opinion or interpretation of the evidence.

on their expert or specialised knowledge and give an opinion or interpretation of the evidence. If a witness is deemed to be an expert, they will be able to give an opinion based on questions put to them. The evidence of an expert witness can often be valuable in that it provides insight into the case that other witnesses cannot.

However, this is not always the case. A court case that highlights the fallibility of expert witnesses is *Wood v The Queen* [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 the expert testimony accepted by the court was flawed and that there was reasonable doubt about his scientific proof relating to Ms Byrne's death. In circumstances such as these, the NSW Supreme Court (*Hastwell v Parmegiani* [2023] NSWSC 1016) reaffirms the immunity of expert witnesses from being sued in a civil proceeding. The High Court of Australia (the 'HCA') has historically held that witness immunity is necessary to ensure that witnesses can give evidence in court without fear or favour (*Commonwealth of Australia v Griffiths & Anor* [2007] 70 NSWLR 268 at [43]).

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 requirements of a guilty mind to be proven for the offence. Some defences challenge the extent to which the *actus reus* (guilty act) is present. 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.

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

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

Mental health impairment or cognitive impairment

Mental health impairment or cognitive impairment (previously known as the defence of mental illness or insanity) is a defence that is only available where the accused can prove that they were in fact mentally or cognitively impaired 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. This defence 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 health impairment or cognitive impairment succeeds, the accused may be found to be 'not criminally responsible'.

mental health impairment or cognitive impairment
mental or cognitive impairment at the time of the act, meaning the accused cannot have formed the *mens rea* at the time of the offence; previously known as the defence of mental illness or insanity

Legal Info



The M'Naghten test



Figure 3.11 In 1843, Scottish woodturner Daniel M'Naghten killed English civil servant Edward Drummond while suffering from paranoid delusions. His trial was a landmark in that it established a legal definition of criminal insanity, known as the M'Naghten rule.

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. Concerns include 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. New South Wales has taken steps to address this with the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), which does not use the term 'insanity', and provides definitions for 'mental health impairment' and 'cognitive impairment'.

Involuntary behaviour or automatism

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.

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

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Mistake

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.

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

Self-defence or necessity

Self-defence or necessity is sometimes called an 'all or nothing' defence in that the accused admits to committing the act. 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 *Zecevic v Director of Public Prosecutions Vic* (1987) 162 CLR 645, it was held that the defendant must have reasonable grounds to believe their life was threatened and they must use 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.

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

Media



Actor gets five years for killing rapper with sword

Candace Sutton

News.com.au

16 March 2021

Aspiring actor Blake Davis has been sentenced for killing rapper Jett McKee with a samurai sword on a Sydney street after a botched drug robbery.

Justice Natalie Adams in the NSW Supreme Court said with backdating, Davis's sentence would expire in February 2026.

But she imposed a non-parole period of two years and nine months, which with time served will mean he will be eligible for release from prison as early as August 2023.

'I am satisfied beyond reasonable doubt that Mr Davis intended to kill Mr McKee at the relevant time,' she said.

'All the eyewitnesses described one clean, intentional blow.

'I am satisfied … Mr Davis wielded an extremely dangerous sword, causing a significant injury from which (Jett McKee) could not have recovered.'

However she found he had significant existing mental health problems and would suffer in custody.

Davis, 31, who has appeared in Housos and Fat Pizza, was found guilty last December of the manslaughter of McKee near his home at Forest Lodge, Sydney on August 10, 2018.

Davis and his girlfriend and co-offender Hannah Quinn were originally charged with McKee's murder, but the murder charge was dismissed against Quinn who was found guilty of being an accessory to manslaughter.

Sentencing Davis on Tuesday, Justice Adams said striking the fatal blow 'was not a reasonable response in the circumstances' and he had been 'acting excessively'.

Justice Adams said that despite Davis's contention he was doing so to defend his girlfriend Hannah Quinn as McKee pointed a gun at her, she found that 'Mr McKee did not pose any immediate threat to Ms Quinn.

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'Mr Davis … somehow misread the situation as to the threat Mr McKee posed to Ms Quinn.'

She did say, however, that the 'degree of excessiveness' of Davis's response was 'moderate'.

'I am satisfied he felt scared and confused … but that does not adequately explain his actions of hiding evidence, taking things and fleeing.

'I am satisfied McKee pointed the pistol inside the premises. I am not satisfied McKee was pointing a gun at Quinn at the time of the fatal blow.'

Regarding Davis's evidence that he could not remember striking the fatal blow to McKee, except in flashbacks, that he had said he did in a conversation with his co-offender, Hannah Quinn.

She cited a conversation recorded secretly by police listening devices in which Davis told Quinn: 'I tell everyone I don't remember it, but I can remember it.'

She described the victim as 'a user of ice and a severe gambling addict' who had 'consumed a toxic to lethal dose of ice and attempted a violent home invasion' on the day he died.

Justice Adams said that after losing $30000 at Star Casino he and his friend had 'decided an option to get money fast was to rob drug dealers … because they would not go to the police after being robbed.

'They robbed another dealer and got $10000 and some drugs. Regrettably, Mr McKee gambled his half of this away.'

She said Blake Davis had at the time of the killing been on workers' compensation from The Actors Centre for 'workplace bullying, posttraumatic stress disorder, anxiety and depression'.

She said he deserved a 25 per cent discount for offering to plead guilty to manslaughter prior to the trial on the murder charge.

Justice Adams acknowledged that Davis had a fear of custody because he had been put upon by other inmates during a brief period behind bars after his arrest.

Justice Adams said: 'I'm left with no doubt the lives of the Davis family and the McKee family have been shattered forever'.

Quinn, a former trainee preschool teacher and barista, was cleared of murder during their trial when Justice Adams ordered the jury to find her not guilty on the charge.

The jury found Davis guilty of manslaughter and Quinn, 26, was found guilty of accessory after the fact of manslaughter.

In 2018, Quinn and Davis were selling cannabis from their Forest Lodge flat to customers including a friend of Jett McKee's, who was a protected witness, their trial heard.

The man, given the name Frank O'Connor, had gone to the couple's flat and had seen Davis remove cash he described as 'cannabis money' from a drawer near the front door.

Around 12:30 on the day he died, McKee planned to rob the couple as he was a gambling addict who needed to pay debts.

Wearing a black balaclava and carrying a blank-firing pistol, McKee entered the flat, pointed the gun at Davis and demanded money, the trial heard.

'Give me all your f***ing money or I'll kill you', Davis said McKee told him, at which point he had put his hands up and yelled, 'There's no money here'.



Figure 3.12 Blake Davis and girlfriend Hannah Quinn

(Continued)

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Media—Continued

The court heard Mr Davis say he was 'completely terrified, in shock' and that Mr McKee had told him, 'people know where your f***ing family lives, give me all your f***ing money or we'll kill your family too'.

He told the court that McKee had pointed the gun at Hannah Quinn, and he stepped in because he thought 'I was about to watch her be shot in the head'.

The couple chased McKee up Hereford Street, Forest Lodge, Davis wearing only a pair of black boxer shorts and carrying a samurai sword.

The court heard Quinn 'pulled the deceased (McKee) to the ground and while he was 'on his hands and knees' Blake Davis raised the weapon and brought it down on McKee's head.

Analysis 3.1

Read the media article on the previous pages.

1 Outline the reasons cited in the Davis case for the court finding him guilty of manslaughter as opposed to murder.
2 Outline the difference between the required *mens rea* for murder and for manslaughter.

The case of *R v Blake Davis* [2021] NSWSC 235 further illustrates how what is proportional and reasonable force can be a 'notoriously flexible concept' and the complexities of the law around it.

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

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

Duress

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.

Video 3.1 To rely on the defence of duress, there must be evidence before the court that is capable of supporting a reasonable inference you acted under duress. (1:30)

Consent

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.

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.



Figure 3.13 Actor Kevin Spacey in a press conference outside his trial in London. Spacey had been charged with committing various sexual assaults without consent. If it can be shown that the alleged victim consented to the act, the accused may be acquitted, but consent is often hard to prove in sexual assault matters. Spacey was ultimately found not guilty.

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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

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. The *Crimes Amendment (Provocation) Act 2014* (NSW) placed limitations on the provocation defence: it can no longer be used by people who have killed their partners out of jealous rage or who take offence at a non-violent sexual advance. Calls for the legislative change to the *Crimes Act 1900* (NSW) gained traction influenced by two cases where the sentences handed down were considered lenient through the use of the defence.

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

Legal Info



Examples of provocation as a defence

In *Singh v R* [2012] NSWSC 637, Chamanjot Singh's wife had threatened to leave him and have him deported to India. He cut her throat, but he was sentenced to only six years' imprisonment.

In *R v Won* [2012] NSWSC 855, after Joachim Won found his wife having sex with Won's friend, he killed the friend by stabbing him with a kitchen knife. Won received a sentence of seven years and six months' imprisonment, with a non-parole period of five years.

Substantial impairment because of mental health impairment or cognitive impairment

Substantial impairment because of mental health impairment or cognitive impairment of responsibility is another partial defence to murder and can reduce a charge of murder to manslaughter. This defence was previously referred to as substantial impairment of responsibility, or diminished responsibility. The defendant must be able to prove that they suffer from a mental or cognitive impairment that caused them to act in a certain manner and carry out a crime. A cognitive impairment can include having an intellectual disability, a developmental or neurological disorder, dementia, a severe mental illness or a brain injury. This defence is more widely used than the complete defence of mental health impairment or cognitive impairment (previously known as the defence of insanity) 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 cannot be used as an excuse when the accused was drunk or under the influence of mind-altering drugs.

substantial impairment because of mental health impairment or cognitive impairment
defence used when the accused is suffering from a mental or cognitive impairment; this was previously known as substantial impairment of responsibility, or diminished responsibility

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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).

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

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.

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, sole traders/contractors and enrolled students. 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), people with a disability, 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.

One criticism of the jury system is that too many people are able to avoid jury duty as a result of the exemptions available and at times calls on a smaller cross-section of the community for the accused to be judged by.

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 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).

A **challenge for cause** is a challenge 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.

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 judgment

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Figure 3.14 Actress Rebel Wilson speaks to the media after a six-person jury returned unanimous verdicts in her favour after she sued Bauer Media for defamation. Juries are a central part of the adversary system of criminal law.

based solely on the evidence presented. 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.

In 2006, the NSW Parliament amended the *Jury Act 1977* (NSW) with the *Jury Amendment (Verdicts) Act 2006* (NSW) to allow majority verdicts in cases where reasonable time for deliberation has passed and the court is satisfied that a unanimous verdict will not be reached. Under section 55F of the *Jury Amendment (Verdicts) Act 2006* (NSW), a 'majority verdict' is defined as:

- a verdict agreed to by 11 jurors where the jury consists of 12 persons, or
- a verdict agreed to by 10 jurors where the jury consists of 11 persons.

At the time the amendment was passed, it was suggested the changes were more political than practical as the extent of hung juries was not as great as had been suggested (the extent of hung juries was the stated reason for the amendment). The available evidence suggests that hung juries occur in less than five per cent of criminal trials, according to the results of an Australian Research Council funded study of sexual assault trials in 2022. Recent high-profile examples include the Hayne and the de Belin sexual assault trials, which highlighted the implications of hung juries in terms of delaying justice, additional costs and the impact on the complainants and witnesses.

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The Act does not apply to Commonwealth offences, as unanimous verdicts for those offences are protected under section 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.

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'. This study continues to inform the efficacy of juries in understanding directions and instructions given to them during 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 per cent of the jurors believed that it meant 'sure that the person is guilty', 22.9 per cent believed it meant 'almost sure', 11.6 per cent 'very likely' and 10.1 per cent '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 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, but '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 per cent. In 2017, this further increased to over 85 per cent of offenders.



Review 3.6

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

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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 Coroners Court decides whether a person's death is suspicious and whether 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 Director of Public Prosecutions prosecutes cases on behalf of the NSW 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 jurors where the jury consists of 12 persons, or 10 on an jury of 11 persons.

Multiple-choice questions

1 Which of the following is the Coroners Court?
- **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** legal practitioner.
- **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** charge negotiation.
- **b** diminished responsibility.
- **c** double jeopardy.
- **d** a 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.

Short-answer questions

1 Evaluate the implications of plea bargaining in terms of justice for the accused, the victim, the community and the efficiency of the court system.

2 Assess the ability of the adversary system as a vehicle for achieving justice for individuals and the community.

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Chapter 4
Sentencing and punishment

Chapter objectives

In this chapter, you 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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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)
Terrorism (High Risk Offenders) Act 2017 (NSW)
Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW)
Crimes (High Risk Offenders) Amendment Act 2017 (NSW)
Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020 (Cth)
Crimes (Administration of Sentences) Amendment (No Body, No Parole) Act 2022 (NSW)

SIGNIFICANT CASES

Kable v Director of Public Prosecutions NSW (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 The Queen [2009] NSWCCA 244
R v Tuala [2015] NSWCCA 8
Hughes v The Queen [2015] NSWCCA 330

Legal oddity

In 2019, the City of Darwin Council passed a rule that if a dog is barking for longer than three minutes at night, or six minutes during the daytime, neighbours can call the council to investigate and apply penalties to the owner.

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

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.

The sentence is the sanction imposed by the state in relation to the offender's criminal conduct. As such, the sentencing of an offender is one of the most crucial steps in the criminal process. It involves a judgment 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. 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.



Figure 4.1 A man reacts as he listens to the sentence being delivered for Cardinal George Pell who was found guilty of historic child sex crimes in 2019. During the sentencing hearing, the judge hears and considers arguments and evidence about the relevant law and decides what the most appropriate sentence ought to be.

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4.2 Statutory and judicial guidelines

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, section 19A of the *Crimes Act 1900* (NSW) describes the maximum penalty for murder as life imprisonment, and section 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.

The *Crimes (Sentencing Procedure) Act 1999* (NSW) 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.

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 judgments 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 1999* (NSW) also allows for the New South Wales Attorney-General to apply to the court for a **guideline judgment** on sentencing for particular offences – such judgments are issued by judges after hearing arguments from both the Director of Public Prosecutions and the Senior Public Defender. Guideline judgments will be used in determining future sentences. Judicial guidelines are set by the NSW Court of Criminal Appeal to assist judges when applying discretion. Sentencing is considered a complex process as magistrates and judges have to consider a number of competing factors in determining an appropriate sentence given the facts and circumstances surrounding the offence.

maximum penalty
set by parliament; 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

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

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

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, in 2014, former New South Wales Premier Barry O'Farrell introduced the eight-year minimum sentence for convicted one-punch offenders.

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Figure 4.2 A mandatory sentence is an automatic sentence set by parliament that must be imposed by the judicial officer for particular offences or repeat offences. In 2014, former New South Wales Premier Barry O'Farrell introduced an eight-year minimum sentence for convicted one-punch offenders.

A mandatory life sentence is also in place for the murder of a police officer in section 19B of the *Crimes Act 1900* (NSW).

At Commonwealth level, mandatory sentences were introduced for Child Sex Offences under the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth).

The NSW 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.

non-parole period
a period of imprisonment during which parole cannot be granted

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. The Northern Territory has now abolished its mandatory sentencing laws, after they were found to cause a significant and unmanageable rise in imprisonments, with little deterrent effect and with First Nations offenders over-represented. Mandatory sentencing is usually influenced by the politics of the day and as such has little impact on reducing rates of offending.

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 the purpose of these guidelines in sentencing.
3. Compare and contrast the positive and negative aspects of mandatory sentencing.

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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 themself 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)**
Extract from 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 in the following text.

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 punishment against an individual offender aiming to deter them from committing crime in the future

general deterrence 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 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.

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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 believed that it is only through education and social programs that we can really deter people from committing crimes. He also suggested that there is little evidence that harsher penalties have a deterrent effect on potential offenders. As a general rule, well-educated, healthy people with a comfortable standard of living are not the ones filling up our jails. Mr Cowdery suggested that programs such as circle sentencing, MERIT and drug courts are far more appropriate ways of deterring people from reoffending. However, as deterrence remains an objective of sentencing, judges must consider it their decisions.

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 section 3A purposes listed on the previous page, 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 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 is appropriate for 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.

Amendments to the law due to societal trends or patterns of behaviour as in the *R v AEM* case can influence the severity of a sentence as was the case with a spate of 'gang rape' incidences that sparked the 'aggravated sexual assault in company' amendments to the law and subsequent harsher sentencing regime.

Retribution is among the many factors considered in sentencing determinations.

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Rehabilitation

Rehabilitation is considered 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 and behaviour 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.

Several of the purposes listed in section 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. 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.

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

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, 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 and protecting the community.

One of the implications 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

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



Figure 4.3 An inmate feeds peanuts to a cockatoo at John Morony Correctional Complex Wildlife Centre in Sydney as part of a rehabilitation program.



Figure 4.4 Incapacitation, such as licence cancellation, involves making the offender incapable of committing further offences.

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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 – most people would agree that people who have committed serious violent crimes require imprisonment, for instance, and that serial drink-drivers should have their licences cancelled.



Review 4.2

1. Outline the purposes of sentencing in New South Wales.
2. Research an alternative to traditional means of sentencing and describe its effectiveness and role in the criminal process.
3. Explain to what extent deterrence reduces the likelihood of crimes being committed in the future.
4. Explain the role of retribution in the legal system.
5. Discuss the purpose of rehabilitation and its role in the criminal justice system.
6. 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 previously, 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 factors that affect 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 1999* (NSW) lists the aggravating and mitigating factors that are to be taken into account. These are extremely important considerations 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.

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Figure 4.5 Violence, particularly gratuitous violence, is considered an aggravating factor that would make the offence more serious or severe.

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 was committed in company or involved some type of organised crime
- **victim** – if the victim was vulnerable (for example, old, young or a person with a disability) 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.

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.

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

remorse deep regret or sorrow for one's wrongdoing

Analysis 4.1

Look at the *Crimes (Sentencing Procedure) Act 1999* (NSW) at http://cambridge.edu.au/redirect/10304. Read section 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.

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In Court



***McCartney v The Queen* [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 stated that general deterrence was one of the purposes of the sentence, saying 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 offender's relatively young age, that he had no criminal history and was considered unlikely to reoffend. He was in steady employment as a carpenter in a supervisory position and had strong character references from his friends and employer. 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 vehicle 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 his consideration of the sentencing factors. The panel of three judges stated that the sentence already fell within the lowest range of available sentences for the offence, which carries a maximum of 14 years' imprisonment. The appeal judges determined that the sentence should not be altered.

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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 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 section 28 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 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. Both these cases reviewed the use of a victim impact statement in sentencing with practical implications for both the victim and the offender. A *Law Society Journal* article discusses the review of victim impact statements in *Tuala*.

> [Justice Simpson] concluded that ... where no objection is taken to the VIS [victim impact statement], no question is raised about the weight it should be given and/or no attempt is made to limit the use the Crown can make of it, '... the case for its acceptance as evidence of substantial harm [is] strengthened' (at [78]). In other words: if a VIS is admitted without comment, it can be more readily used against the offender. Moreover, there will be little difficulty with its use where it mostly confirms other evidence, or attests to harm of the kind that might be expected.
>
> On the other hand, if the facts set out in the VIS are in contest, the victim's credibility is in issue, the harm goes well beyond what you would normally expect, or the VIS is the only evidence of the harm, a court will need to be cautious.
>
> The practical consequence is that both parties will need to carefully consider what use a VIS is going to be put to at the time it is proffered.
>
> Spohr T 2015, 'Criminal law: March 2015', *Law Society Journal Online*, 1 March.

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 are provided through the lens of the victim. Supporters argue that they provide an important opportunity for victims to express themselves in the criminal process. Moreover, 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.

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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

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

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**.

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; for example, in the evidence admitted or in the instructions of the judge to the jury. 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, or by the prosecution against the leniency of the sentence. Sentence appeals might be made alone or in conjunction with an appeal against conviction.



Figure 4.6 Convicted Australian drug smuggler Scott Rush (left) listens to his lawyer from inside a holding cell in Indonesia. In 2011, Rush appealed his death sentence and had it reduced to life imprisonment.

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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 4.1

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 complete the following tasks. Sources might include media articles and transcripts of the most recent cases.

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 Skaf received.
3. Outline the process of the appeals in this matter. Identify when the sentences were appealed and to where.
4. In detail, outline one of the appeals and the reasoning behind the appeal. Discuss 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 previously, 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 learned a lesson and will not reoffend.

caution
a formal warning without charge issued by police for less serious offences

criminal infringement notice
a notice issued by the police outside of court alleging a criminal infringement and requiring payment of a fine

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 NSW 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.

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; for example, when applying for certain jobs, seeking certain entitlements or applying for travel visas.

Normally, a conviction will be recorded and an appropriate sentence imposed. For less serious offences, particularly where they involve

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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.

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 section 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) – at the time of publishing, the value is $110. In 2024, under Australian federal law a penalty unit for an individual was $313.

A reform to the on-the-spot fines system in New South Wales is called a Work and Development Order. This 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. Work and Development Orders are only available to people who have a mental illness or an intellectual disability, or who suffer from acute economic hardship, such as homelessness.



Figure 4.7 For minor offences, such a parking infringement, a fine will usually be issued. These are often referred to as 'on-the-spot fines'.

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.

When the state believes that a person has acquired assets through the **proceeds of crime**, it will confiscate these unless that person can prove how those assets were acquired. This is called **forfeiture** of assets and is provided for under the *Criminal Assets Recovery Act 1990* (NSW). In 2010, the NSW Government reversed the onus of proof onto the person suspected of acquiring the assets through the proceeds of crime.

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 in New South Wales, the value of one penalty unit is $110

proceeds of crime
assets (money or property) obtained by an offender through their criminal activities

forfeiture
the loss of rights to property or assets as a penalty for wrongdoing

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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.

The NSW Crime Commission, working with the NSW Police Raptor Squad in 2023, has been able to seize significant assets of alleged criminal activity after the NSW Government strengthened forfeiture laws. These laws now put the onus back on individuals to explain how assets have been acquired.

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 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.

Conditional Release Order (CRO)
an order requiring an offender to accept compulsory restrictions for up to two years, during which time the offender undertakes to regularly report to and obey directions from their community corrections officer

Conditional Release Order

A court may decide to issue an offender with a **Conditional Release Order (CRO)**, either by itself or in conjunction with another penalty, for up to two years. If the offender breaches the CRO, 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.

A CRO can be a significant restriction on an offender's life and freedom. CROs are usually used in cases such as driving while disqualified, first-time drink driving or low-level drug possession, where lesser penalties are not considered sufficient or effective, but imprisonment is considered too severe. They act as a warning to less serious offenders, diverting



Figure 4.8 Chris Dawson (centre) arriving at court in Sydney 2020 after being charged with the murder of his wife Lynette Dawson in 1982.

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them from the criminal justice system and freeing up resources to deal with a more serious offenders who impose more of a threat to the community. CROs replace Non-Conviction Bonds.

Community Correction Order

Community service orders have been replaced by **Community Correction Orders (CCO)**. A CCO is a penalty that can be imposed by the court for a period of up to three years instead of a period of detention or imprisonment. They replace two previous penalties: Community Service Orders and Good Behaviour Bonds.

CCOs usually apply to theft, common assault, property damage and drug possession where a fine or a bond is insufficient, but imprisonment is considered unwarranted. They are a flexible sentence allowing the court to take into account the nature of the offender and the offence. Compulsory supervised work in the community, supervision by Community Corrections Officers and curfews are imposed so that offenders are held accountable.

CCOs 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. CCOs 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 severity of imprisonment that can be imposed in New South Wales.

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 to be 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.

Community Correction Order (CCO)
a penalty that can be imposed by the court involving compulsory supervised work in the community, supervision by community corrections officers and curfews

parole
release of a prisoner before the expiry of an imprisonment term, temporarily or permanently, on the promise of good behaviour

A sentence will be imposed for each offence of which the offender is convicted. 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).

Use of imprisonment still raises many issues in regard to the objectives of punishment and impacts on offenders and costs to the community. Since the 1980s, the imprisonment rate in Australia has tripled from 66 per 100 000 of the adult population in 1985 to 202 per 100 000 in 2023. Australia now has one of the highest incarceration rates in the Organisation of Economic Co-operation and Development. Furthermore, the already disproportionate number of First Nations people who are incarcerated has doubled in the past 30 years – from 14.4 per cent of all prisoners in 1991 to 33 per cent of all prisoners in 2023.

As at December 2023, the overall number of people in NSW adult prisons was 12 091. Although this is considerably below the February 2020

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peak of 13 974, it had grown by 38 per cent over the last decade. First Nations children were still significantly over-represented in NSW youth detention, with 122 First Nations young people in custody, an increase of 28.4 per cent in the previous 12 months.

As well as the cost to taxpayers in the billions of dollars, it further entrenches disadvantage, given that most people in prison come from a background of unemployment, social disadvantage, family breakdown, homelessness, intellectual disability, and poor physical and mental health. Rates of recidivism remain high, but many non-violent offenders seem unable to effectively explore the range of diversion options that already exist.

The following media article discusses some of the implications of imprisonment and the concern of adult reoffending rates.

Media

Jailing is failing and NSW is a world-beating failure

Bob Debus and Greg Smith

The Sydney Morning Herald

10 December 2021

NSW has a prison problem. At a time when there is clear demand for more funding on our hospitals, disability and mental health services, schools and infrastructure, the state is more than halfway through a $3.8 billion splurge on expanding prison capacity – more beds, more cells, more people in prison as a result of a long-term dependence on incarceration as the mainstay response of the criminal justice system.

This state boasts the biggest population of prisoners in the country and a higher imprisonment rate than any country in western Europe. It is a by-product of a lengthy political addiction to law-and-order auctions where the major parties seek to outbid each other in the 'tough on crime' stakes.

The NSW prison population has grown by 38 per cent in the past decade.

The result? Almost half of the adults released from prison in NSW are convicted of another offence within 12 months. For young people, more than 60 per cent will be back behind bars in a year.

These are very expensive failures – more than $1.1 billion is spent on prisons in NSW, and billions more on justice and policing. The rising recidivism rate in NSW show us locking up doesn't work, and our rehabilitation efforts are not effective. Jailing is failing.

As former Labor and Liberal attorneys-general of this state, we have seen first-hand how our current system is failing too many people – not just those who are put behind bars only to be given an 'education' in worse criminal behaviour, but also victims of crime who expect that our justice system will reduce reoffending, not make it more likely.

A report released today by the Justice Reform Initiative – of which we are proud patrons – shows that NSW is well behind the rest of the developed world when it comes to running a criminal justice system that works.

In the United States, both Republican and Democrat state governments are acting on the evidence that shows mass incarceration doesn't make communities safer nor prevent repeat offending. Reforms in Texas since 2007 have seen the state close four prisons, saving an estimated $US3 billion and reducing reoffending rates.

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Yet in NSW, the prison population has grown by 38 per cent over the past decade. There is a pressing issue with the numbers we are imprisoning on remand: more than three in 10 people in NSW prisons are unsentenced, an increase of 10 per cent over the past decade. NSW keeps 15 per cent of people on remand in prison for longer than a year, more than any other state or territory.

There are people who are a serious threat to society, who commit terrible crimes and show no remorse or compassion for their victims. These people are rightly imprisoned. But who are we locking up with them? Our prisons are overflowing with too many who are locked up for minor offences and too many who need mental health, disability and support services in the community. Too many people leave prison homeless, jobless, and institutionalised, and more likely than not to reoffend and return to prison.

Aside from the human and social costs, the Productivity Commission has calculated the 40 per cent rise in incarceration rates nationally over the past 20 years has cost taxpayers about $13.5 billion.

There were more than 40 000 people in prison in Australia at the end of June 2020, but many more flowed through prisons over the year. At $330 per prisoner per day, the overall cost to taxpayers was about $5.2bn last year alone.

The real 'tough on crime' approach is to do what works, not what's easy. It's about being smart, looking impartially at the evidence and taking pragmatic steps that will actually deliver results for a more effective criminal justice system.

There is no single 'fix' to reduce prison numbers; rather, there is a range of evidence-based policies and programs that will drive prison numbers down and increase community safety.

Raising the age of criminal responsibility is one clear example: internationally and nationally the evidence is that 14 is the minimum age, developmentally and neurologically, at which children could or should be held criminally responsible. And yet in NSW and other states and territories, we make children criminally liable at 10. Only the ACT has so far committed to raising that to 14, while other jurisdictions indicate they may overrule the expert advice and opt for a politically 'safer' option of 12 years old.

We also know that reintegration programs that address the drivers of incarceration are cheaper than building more prisons and far more effective in reducing reoffending and helping our community become a safer place.

The Justice Reform Initiative is a broad alliance includes former judges, prosecutors and police who have witnessed how the overuse of jail sentences leads to worse outcomes for our society, not better. We come from all sides of politics and want an unbiased, evidence-based examination of the role that imprisonment plays in our justice system because our reliance on locking people up is not working.

Analysis 4.2



Read the media article above.

1 Outline the trend of the prison population in New South Wales compared to the rest of the Western world.
2 Discuss some of the reasons for this trend over the last decade.
3 How effective is prison in achieving rehabilitation as a purpose of punishment? Explain some of the suggested solutions of strategies to improve the effectiveness of prison as a source of punishment.

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Intensive Correction Order

Intensive Correction Order (ICO) an alternative to a custodial sentence where an offender has restricted movement and must attend a rehabilitation program

diversionary program an alternative to the traditional court system that focuses on the rehabilitation of offenders

On 1 October 2010, periodic detention (where offenders to serve a period of time each week or month in prison, rather than the full period of a sentence) was replaced by the **Intensive Correction Order (ICO)**. This was brought about by an amendment to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW). A further amendment, the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW), strengthened ICOs to improve community safety and support victims as well as aiming to reduce reoffending by increasing supervision by trained Community Correction Officers.

An offender who has been sentenced to a maximum term of two years is eligible for an ICO. They are not available for offenders guilty of murder, manslaughter, sexual assault, any sexual offence against a child, discharge of a firearm, terrorism offences or organised crime. 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
- electronic monitoring 24 hours a day, seven days a week
- 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.

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 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, nine years after the Drug Court's establishment, which assessed its effectiveness. 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.

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Figure 4.9 An ex-drug addict in his room at Orana Haven, a rehabilitation centre in New South Wales for First Nations people. A diversionary program focuses on the rehabilitation of offenders.

Participants who completed the program were:

- 37 per cent less likely to be reconvicted for any offence
- 65 per cent less likely to be reconvicted for an offence against the person
- 57 per cent less likely to be reconvicted for a drug offence.

A second report in 2014 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.

The most recent report, in 2020, found that those who had completed the program took 22 per cent longer to reoffend for an offence against the person compared to those sentenced to traditional penalties, and were 17 per cent less likely to reoffend for any offence. This suggests that the program's effectiveness has reduced, and the report proposed several possible reasons for this (for example, a shift in the drug market from heroin to methamphetamine, which has no proven pharmacotherapy) and made some recommendations for further evaluation.

Research 4.2

The website of the New South Wales Crime Prevention Division outlines the major diversionary programs currently used in New South Wales. Visit the website and select two diversionary programs to report on.

1. Outline the types of offences and offenders targeted by the diversionary programs.
2. Describe the methods used by the programs to assist offenders.
3. With reference to traditional penalties, evaluate whether the programs are effective in achieving justice.

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4.8 Alternative methods of sentencing

circle sentencing a form of sentencing for some adult First Nations 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

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

Circle sentencing is an alternative court for sentencing adult First Nations people. It was introduced in New South Wales on a trial basis at Nowra in February 2002, and now operates in a range of Local Courts including Bourke, Lismore, Walgett and Mount Druitt.

The Circle Courts are designed for repeat offenders and those who have committed more serious crimes. Circle sentencing is based on First Nations customary law and more traditional First Nations 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 First Nations 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 First Nations 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. The NSW Bureau of Crime Statistics and Research reported that, when compared to First Nations offenders sentenced in the traditional way, those who participated in circle sentencing:

- are 9.3 percentage points less likely to receive a prison sentence
- are 3.9 percentage points less likely to reoffend within 12 months
- take 55 days longer to reoffend if and when they do.



Figure 4.10 The city of Nowra in New South Wales introduced circle sentencing in 2002. Circle sentencing is an alternative court for sentencing adult First Nations peoples based on customary law and more traditional First Nations forms of dispute resolution.

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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 per cent 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 4.4

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.

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 41 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.

correctional centre commonly known as a prison, an institution where offenders are held in custody for the period of their imprisonment

Maximum security centres include the Goulburn Correctional Centre for men and the Silverwater Women's Correctional Centre. These facilities hold offenders who committed the most serious crimes and whose escape would be highly dangerous to the public.

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Figure 4.11 Parklea Correctional Centre in Sydney is both a maximum and a minimum security prison for males.

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 by placing them in protective custody for certain periods of time.

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.

The case of *Hughes v The Queen* [2015] NSWCCA 330 – Robert Hughes' case – was highly publicised as Hughes had previously starred in the TV series *Hey Dad!*, and was sentenced to 10 years and 9 months' imprisonment for multiple sex offences against minors. As a result, he was placed in protective custody, but in spite of this, in Goulburn Jail inmates were able to throw boiling water and human excreta at him.

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 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. Additional conditions, such as receiving specified counselling or other treatment, may apply.

Under legislation introduced in New South Wales in 2022, the *Crimes (Administration of Sentences) Amendment (No Body, No Parole) Act 2022* (NSW), if an offender convicted of murder or manslaughter fails to tell investigators the location of their victim's remains, the State Parole Authority can refuse parole. Such laws offer prisoners an incentive to give up information about the location of their victims' remains. Similar laws had previously been introduced in the Northern Territory, Queensland, South Australia, Victoria and Western Australia.

As well, if the parolee's behaviour raises serious concerns about community safety, even if there has been no breach of their parole conditions, the parole

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Figure 4.12 An offender convicted of murder or manslaughter who does not tell investigators the location of their victim's remains can have parole refused.

can be revoked (that is, cancelled). Supervised home detention in the last six months of the non-parole period provides a structured transition between prison and parole for suitable candidates. However, domestic violence offenders are not eligible for this condition.

Evidence shows supervision is the best method of reducing reoffending and Community Corrections Officers have been given greater authority to better manage an offender's behaviour by directly responding to less serious breaches of parole.

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.

Media



Parole supervision works to reduce reoffending

Release date: 10 February 2022

A new study by the Bureau of Crime Statistics and Research (BOCSAR) has found that NSW prisoners who receive parole supervision after their release reoffend less than similar prisoners who are released unconditionally.

The study followed over 50 000 prisoners released from custody between January 2010 and March 2019.

BOCSAR found that, compared with equivalent unsupervised prisoners, prisoners released to supervised parole were:

- 10.0 percentage points less likely to be convicted within a year (a decrease of 17.5%)
- 5.0 percentage points less likely to be imprisoned within a year (a decrease of 18.2%).

Parole was particularly effective in reducing serious reoffending among high-risk prisoners and Aboriginal prisoners.

Importantly, lower than expected reoffending rates were still observed 24 months after release from prison.

Adult reoffending is a significant criminal justice issue and reducing reoffending among people released from prison is a NSW Premier's Priority.

'Each year in NSW about 8 000 people are released from prison. Nearly half will record a new conviction within a year and a quarter will receive a new prison sentence,' said Jackie Fitzgerald, Executive Director of the Bureau of Crime Statistics and Research. 'This study suggests that community supervision can help to break the cycle of reoffending among this high-risk group'.

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Review 4.5

1 Identify the duty of the state to offenders in custody. Discuss how an offender under threat of violence can be protected.
2 Describe how an offender can achieve parole and the importance of parole in the criminal justice system.

Preventive and continued detention

preventative detention keeping a person in custody, even though they have not committed any offence, to prevent some future harm that they may commit

continued detention ongoing detention of a person who has already served the full sentence for their offence

Preventative detention is possibly the harshest form of sentence. It is also the most controversial. Preventative 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.

There are two types of preventative detention: post-sentence preventative detention, which occurs when a person has already been sentenced and has served that sentence; and preventative detention without charge, which can occur at any time. All types of preventative detention orders are highly contentious as they act to remove a person's basic legal rights without due process.

The most severe type of preventative 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 Director of Public Prosecutions NSW* (1996) 189 CLR 51. However, most Australian jurisdictions have legislation enabling general powers of preventative 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.

Continued detention, on the other hand, is where serious offenders who have served their full sentence continue to be detained. New South Wales has a post-sentencing scheme under the *Crimes (High Risk Offenders) Act 2006* (NSW) that allows for the ongoing detention of high-risk offenders who are serving a sentence for a serious sexual or violence-related offence. The Attorney-General can apply to the Supreme Court for a Continuing Detention Order (CDO) for the offender if satisfied 'to a high degree of probability' that the offender is most likely to reoffend if released.

The allowable purposes of the continued detention are:

- to secure the protection and safety of the community
- to facilitate rehabilitation.

Through the *Crimes (High Risk Offenders) Amendment Act 2017* (NSW), changes have been made to strengthen CDOs to better protect the community from high-risk sex and violent offenders who pose an unacceptable risk to the community at the end of their sentence. The amendments to the Act include:

- the threshold for making a CDO has been strengthened so an offender's risk to the community is considered, instead of whether they can be adequately supervised
- a greater number of offenders are now eligible for a CDO or an Extended Supervision Order (ESO), and an offender's criminal history is considered more holistically (their past history is considered as well as the future risk of the offender committing violent or sexual crimes).

The Act provides a stronger voice for registered victims and greater flexibility in how they provide information to the Supreme Court. This is also

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balanced with a stronger emphasis on reforming offenders while they are in prison.

Moves to extend a prisoner's detention period can be decided by state and territory supreme courts, with a three-year maximum for CDOs.

The *Terrorism (High Risk Offenders) Act 2017* (NSW) introduced a scheme of post-sentence supervision and detention for New South Wales high-risk offenders posing an unacceptable risk of committing serious terrorism offences so as to ensure the safety and protection of the community.

It allows the state to apply for ESOs or Continuing Supervision Orders as well as allowing for interim supervision orders if it appears that the offender's supervision or custody will expire before proceedings are determined.

ESOs were further strengthened for high-risk offenders under amending legislation passed in 2017.

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 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:

- when the person is sentenced for the offence, or
- 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 youth 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.

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



Figure 4.13 Veteran Australian artist and entertainer Rolf Harris was convicted and jailed for indecent assault on two girls under the age of 16.

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long after the period of the sentence that 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.

Deportation

Deportation is the forcible removal from Australia and requires a specific deportation order made under section 206 of 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 sections 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.

In 2017 in New South Wales, 430 visas were cancelled on character grounds, with hundreds more in other states and territories. This number continues to grow as a result of the crackdown by the Australian Government.

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 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. In October 2023, an alleged human trafficking boss Binjun Xie was found and deported amid a major shake-up of border security.

Case Study



Gus Kuster

Gus Kuster was part of a botched deportation operation in August 2019. The 40-year-old was born in Papua New Guinea (PNG) to an Australian father and a Papuan mother. The family moved to Australia when Kuster was three years old. As an adult in Australia, he was charged with a number of drug, driving, weapons and domestic violence offences and was imprisoned.

It was decided that Kuster was to be sent back to PNG on character grounds and was told he was to be given $250 and two weeks' accommodation to start a new life in Port Moresby. He was reported as saying, 'I don't know how that was going to pan out, knowing that I haven't been there at all since I was the age of three'.

However, when Kuster arrived in Port Moresby, he was told that he could not enter the country as the PNG Government had not been provided with paperwork confirming his citizenship. He was sent back to the immigration detention in Brisbane.

'The Australian Government is saying I'm not Australian, and the [Papua] New Guinea Government is saying that I'm not allowed there because I've lived all my life in Australia,' Kuster said. 'Doesn't "permanent resident" mean you're permanent?'

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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 Intensive Correction Orders 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.

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 Community Correction Order be suitable for?
- **a** Manslaughter.
- **b** Murder.
- **c** Driving while disqualified.
- **d** Armed robbery.

5 Imprisonment has been shown to:
- **a** reduce recidivism.
- **b** reduce reoffending.
- **c** increase reoffending.
- **d** increase rehabilitation.

Short-answer question

Evaluate the purpose and effectiveness of possible penalties a judge could consider before sentencing an offender.

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Chapter 5
Young offenders

Chapter objectives

In this chapter, you will:

- discuss a range of issues surrounding the age of criminal responsibility
- explain why the criminal justice system treats young offenders differently from adult offenders
- assess how effectively the criminal justice system deals with young offenders.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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Relevant law

IMPORTANT LEGISLATION

Bail Act 1978 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children (Detention Centres) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
Summary Offences Act 1988 (NSW)
Young Offenders Act 1997 (NSW)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Bail Act 2013 (NSW)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

United Nations Convention on the Rights of the Child (1989)

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

What's in a baby name? In some countries like Denmark, New Zealand and Sweden, naming a baby is a serious matter that is legislated. If Danish parents don't choose one of the 7000 government-approved names for their bundle of joy, they're required to get the church to approve their baby's name. New Zealand and Sweden have lists of banned baby names that are updated each year. For example, the names 'V8' and 'Superman' aren't allowed but 'Violence' and 'Google' are acceptable.

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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 **youth justice**.

youth 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, New South Wales Youth Justice, in its annual report, *Young People in Custody Health Survey*, suggested 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, a total of 4536 young people aged 10 and over were under youth justice supervision on an average day in 2021–2022, and 8982 young people were supervised at some time during the year. Over 90 per cent of these were aged 14 and over.

On an average day, the rate of those aged 10–17 under youth justice supervision was 13 per 10 000.

The rates are higher for First Nations young people than for non-Indigenous young people. On an average day in 2021–2022, the rate of First Nations young people aged 10–17 under youth justice supervision was 121 per 10 000 (down from 162 in 2017–2018), while for non-Indigenous young people it was 6.5 per 10 000 (down from 9.6 in 2017–2018).

There are two recognised approaches that can be taken by the law with regard to young offenders and youth justice. These are:

- the welfare model
- 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.

To some extent, the youth 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 youth justice system that maximise an offender's chance at rehabilitation, but elements of the 'get tough' approach have also influenced current laws.

Both approaches have had significant effects on young people who commit offences, and when viewed by gender these effects are particularly significant for male offenders, as the offending rate in 2021–2022 was more than twice the female youth offender rate. The offending rate for young offenders is also significantly higher than that of adult offenders.



Review 5.1

1. Compare the youth offending rate by age and gender, as shown in Figure 5.1.
2. Explore some possible reasons for the difference in the rates.
3. Does Figure 5.2 provide any further evidence for raising the age of criminal liability from 10 years? Explain.

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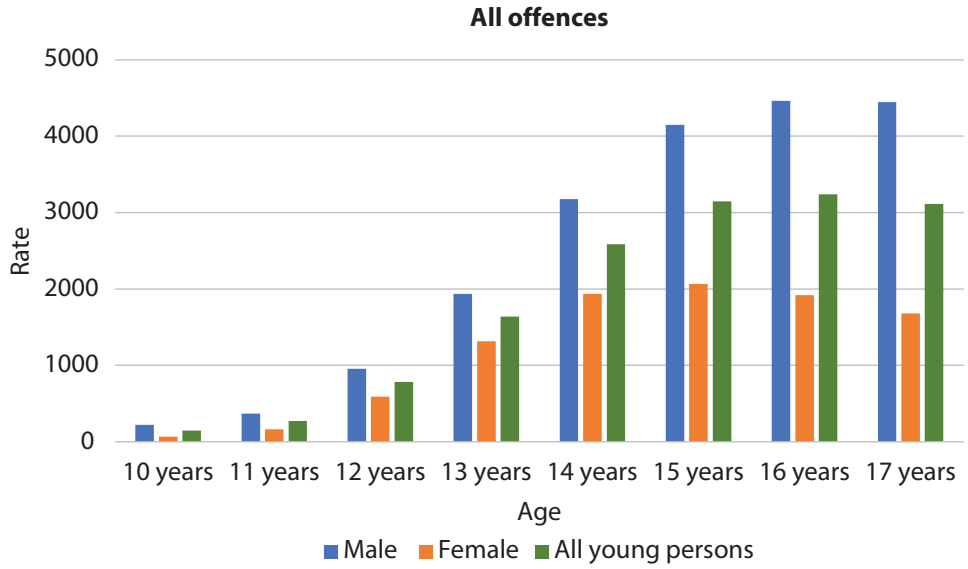


Figure 5.1 Offending rate by age and sex, 2022–2023 (rate per 100 000 persons for the sex and age group of interest)
Source: ABS, *Recorded Crime – Offenders, 2022–2023*, Table 22, Youth offenders, Sex and principal offence by age, 2022–2023

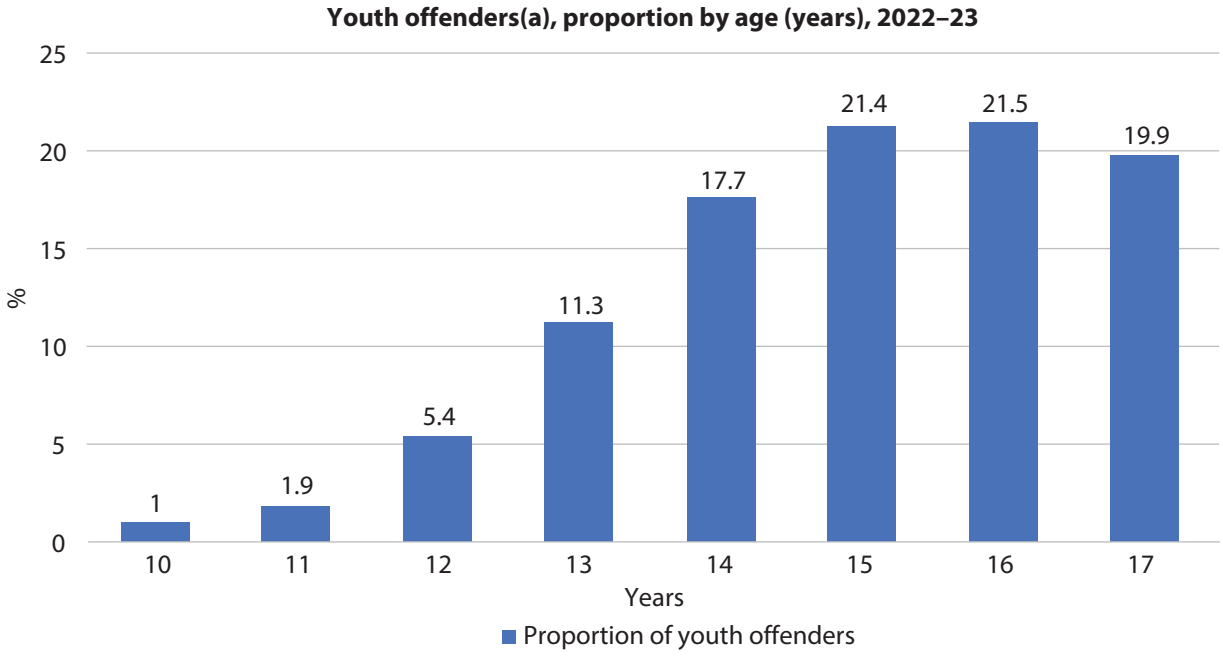


Figure 5.2 Among youth offenders in 2022–2023, the largest group of offenders were aged 16 years (21.5% or 10 304 offenders).
Source: https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release

Research 5.1

Visit the website of Crime Statistics Australia and investigate some of the emerging trends in the crimes committed by young offenders.

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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, about 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.

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

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'.

By the end of the nineteenth 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, lack of information 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 twentieth 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* (1989). 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 the 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'.

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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. Previously, in some states the age of criminal responsibility was as low as seven years.

Proving that an offender under the age of 10 understood their act to be wrong and hence they had intent 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 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 that 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.

doli incapax
a Latin term meaning 'incapable of wrong' (that is, of criminal intent); the presumption that children under a certain age cannot be held legally responsible for their actions and so cannot be guilty of an offence

conclusive presumption
a legal presumption in favour of one party that is final and cannot be rebutted by the other party

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 from parents and teachers, or behaviour of and statements by the child.



Figure 5.3 The rebuttable presumption recognises that children between 10 and 13 years of age might have the mental capacity to understand the seriousness of their act.

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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, 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*. Judge Studdert, who heard the case, affirmed that the presumption of *doli incapax* applied in New South Wales, and that it was for the jury 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.

The evidence presented included evidence from a child psychiatrist who determined that LMW probably could understand the difference between right and wrong. Three teachers presented evidence 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 up Corey and dropped him into the river, and afterwards. However, this evidence was from two six-year-old witnesses.

On various appeals about the available evidence from the defence and the DPP, Judge Studdert 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.

This case promotes further discussion on the age of criminal liability of which there were calls to lift the age from 10 to 14 in NSW again in 2023.

As in the case of *R v LMW* [1999] NSWSC 1343 (see the 'In Court' box above), 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, vol. 10, no. 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

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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.

There have been advocates arguing that the age of *doli incapax* should be raised above the age of 10. In 2021, Australia was criticised by 31 member states of the United Nations for not increasing the age, though some of the states and territories are making changes:

- Northern Territory in August 2023 it raised the minimum age of criminal responsibiity to 12; a two-year review will take place before considering raising it to 14.
- Tasmania plans to raise the minimum age of detention to 14 (with exceptions for the most serious offences).
- Australian Capital Territory in November 2023 raised the minimum age of criminal responsibility to 12; in July 2025 it will be raised to 14.
- New South Wales currently has no moves to raise the age.

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 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 on the previous page), 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.



Figure 5.4 Once a person turns 14 years, the presumption of *doli incapax* no longer applies.

Table 5.1 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 and older	Full adult criminal responsibility, with case to be heard in adult courts.

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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 years old 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. Discuss why young people are treated differently from adults in the criminal justice system. Provide examples in your answer.

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, jointly with the Human Rights and Equal Opportunity Commission, the Australian Law Reform Commission conducted an important inquiry into young people and the law. The report was titled *Seen and Heard: Young People and the Legal Process*, and it 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 youth 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* (1989). In 2020, the Australian Capital Territory became the first jurisdiction in Australia to lift the age to 14. However, national standards have not yet been implemented in 2023 as there are a range of differences across states and territories, particularly in jurisdictions such as the Northern Territory that have a more punitive approach to young offending.

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, such as:

- 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 or railway property.

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, then 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.



Figure 5.5 Police must ensure there is a responsible adult present any time a person under 18 years old is questioned.

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 section 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.

right to silence
the right of a person to refuse to answer any question put to them by the police

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 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.

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In the majority of cases the police cannot search you unless they have reasonable suspicion that you have something illegal on your person. 'Reasonable suspicion' is difficult to define and in a contested case it is up to the court to decide. Recent incidences of strip searches at music festivals around Australia in 2018 and 2019 against young people have raised a number of concerns regarding the 'reasonable suspicion' that young people have illicit drugs on their person. A reasonable suspicion is less than a belief but more than just a possibility.

The Law Enforcement Conduct Commission investigated the complaints of five young women who were searched at music festivals and outside the Star Casino in Sydney in 2021. It recommended at least one of the complainants receive an apology, with sustained findings against two police officers who carried out the search. The Commission acknowledged that many of the people who experienced such strip searches found it humiliating and degrading. It stated that not all police at such festivals were experienced at exercising search powers at festivals and it recommended training be provided for proper exercise of such powers. NSW Police will continue to follow their usual procedures.

Documents obtained by the Redfern Legal Centre through Freedom of Information in August 2022 found that police have not taken seriously the recommendations from the Law Enforcement Conduct Commission to overhaul polices around the use of strip searches and that police themselves still do not fully understand their own strip-search powers.

Review 5.3

1. Explain if or when a young person has to give their name and address to police officers.
2. Define the right to silence and discuss the extent to which the protections afforded to children and young people are adequate.
3. Assess why a young person might need a responsible adult present when being asked questions by the police.

Legal Links

People under the age of 18 are entitled to free legal advice from Legal Aid NSW. This can be accessed over the phone on the 'Help over the Phone' service on 1300 888 529. This service is staffed by qualified lawyers experienced in youth matters and is accessible to young people seven days a week. Further information is available on the Legal Aid NSW website.

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 should be adhered to, relating to people who are on bail conditions.

Police must tell a person that they are under arrest, why they are under arrest 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.

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Media



NSW police strip-searched more than 100 children as young as 13 in two-year period

Michael McGowan

The Guardian

21 August 2022

The New South Wales police have been accused of misunderstanding their own strip-search powers after data showed officers continued to use the controversial practice on thousands of people, including children as young as 13, during the height of Covid.

Data reveals police in NSW carried out more than 4,400 strip-searches between July 2020 and May 2022, which includes a Delta-wave lockdown that lasted more than 100 days.

Released to the Redfern Legal Centre under freedom of information laws, the figures show more than 100 children were among those searched, including a 13-year-old.

It comes despite promises by police to overhaul policies around the use of strip-search powers after the release of a damning report by the law enforcement watchdog in 2021.

The report – which recommended parliament consider changes to legislation to clarify police powers after finding many common practices including forcing people to squat or move their genitals are not legal – has never received a formal response by the state government.

But experts are concerned the data – and a response given to the Guardian by the NSW police for this story – suggest the controversial power is being misused.

In NSW, police are only permitted to conduct field strip-searches if the urgency and seriousness of the situation requires it.

In the case of minors, a parent or guardian must be present, unless the search must be done immediately for the safety of the person or to prevent evidence being destroyed.

But in response to questions from the Guardian, NSW Police said that strip-searches were one of the 'various proactive strategies' used in its 'ongoing commitment to reducing crime and the fear of crime in the community'.

A spokesperson claimed powers 'such as searches and move-on directions have been proven to significantly drive down crime', including knife possession and armed robbery, despite data consistently showing the vast majority of strip-searches are done on the basis of suspected drug possession.

The data obtained by the RLC also showed nothing illegal was found in about 60% of searches conducted during the period.

While the spokesperson said an officer 'must have the state of mind required' under the legislation governing search powers, Dr Vicki Sentas, a lecturer at the University of NSW, said the response showed officers 'misunderstand the legal purpose of strip-searches'.

'Strip searches should never be used as proactive crime prevention to deter future offending,' said Sentas, who in 2019 co-authored a report which found that the use of drug dogs was helping to fuel massive increases in strip-searches.

'Strip searches are meant to be a last resort only to be used in serious and urgent circumstances, like an emergency. It's not surprising looking at the volume of strip-searches during the pandemic that NSW police see strip-searches as a proactive policing tool.'

(Continued)

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Media—Continued

The use of strip-search powers in NSW has been intensely scrutinised by legal groups, oversight bodies and academics in recent years. The new figures come as a class-action lawsuit against the state was launched last month alleging the unlawful use of strip-searches at music festivals.

Sam Lee, the RLC's police powers solicitor, said while the overall number of searches was lower than previous years, it was still higher than expected given the data was collected during a period which covered Covid lockdowns and when music festivals were largely in hiatus.

'I was astounded by the high number of searches with very few people on the street,' Lee said.

'It's a clear indication the policy changes are not putting any brakes on this practice.'

The data also showed Indigenous Australians, particularly children, continue to be disproportionately targeted by police.

Overall, Indigenous Australians made up 10% of those subject to the searches, despite comprising only 3.4% of the state's population.

Indigenous people made up 18% of all children searched, but in some areas they were dramatically over-represented. In Dubbo, in the state's central-west, more than 50% of people strip-searched were Indigenous.



Analysis 5.1

Read the media article on pages 117–18.

1 Outline the extent of strip searches on children and young people in New South Wales in 2022.
2 Why is it suggested that this power is being applied illegally?
3 Explain the impact of this practice on First Nations children.

Support person and legal advice

The Australian Law Reform Commission'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.

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

Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), people under the age of 18 are defined as 'vulnerable people' and are given special protection when arrested and detained for questioning. The Act 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.

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

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Figure 5.6 A young woman is arrested by police during an Extinction Rebellion protest in the central business district of Sydney in 2019. Any person who is arrested must receive a caution; that is, the police must warn the person that they do 'not have to say or do anything but that anything the person does say or do may be used in evidence'.

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 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

Unlike adults, people under 18 years of age in New South Wales can only 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 previously mentioned, 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.

Similarly, police cannot take a DNA sample of any suspect under 18 years old unless they have a Children's 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.

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Legal Info

Suspect Targeting Management Plan

The NSW Police Suspect Targeting Management Plan (STMP) seeks to prevent future offending by targeting repeat offenders and people police believe are likely to commit crimes in the future. The STMP is a police intelligence tool that uses risk assessment to identify suspects and a policing program that guides police interaction with individuals who are subject to the program. STMP is also used for targeting of young people. A report from the Law Enforcement Conduct Commission (LECC) 2023 has made some concerning findings in regard to this practice. It found that during the period under review, the STMP was:

> 'unreasonable, unjust, oppressive or improperly discriminatory in its effect on children and young people'.

Law Enforcement Conduct Commission (LECC), 2023, *An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people – Operation Tepito Final Report*, October.

It also found that First Nations young people were consistently over-represented as STMP targets.

There has been no formal finding by the LECC, as the STMP ceased being used against young people from October 2023, and against adults from December 2023. There are concerns, however, that there is no clear indication as to what it might be replaced with, or the extent which the police might provide additional training for its members in the light of the report.



Figure 5.7 NSW Police Suspect Targeting Management Plan has been criticised for disproportionate use against young people and First Nations people.

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 First Nations youth. The *United Nations Convention on the Rights of the Child* (1989) obliges 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.

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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 youth 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 as further evidenced by the use of STMPs in New South Wales. Improving policies or finding alternatives – including community-oriented or problem-oriented strategies, adjustments to procedures for the apprehension of youth offenders, interrogation and evidence-gathering guidelines, and police discretion regarding referrals to youth 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 this 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.



Figure 5.8 It could be argued that police in New South Wales and other jurisdictions should be given additional specialist training in youth policing.

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.

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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).
5 Identify the rights of young offenders when questioned and arrested. Discuss how they differ from the rights of adults.

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 of:

- 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 Family and 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 (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 section 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 on the following page.

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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 section 6 of the *Children (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 must answer any questions that the child asks about the process or decision.
- Available penalties and sentencing procedures differ from those of ordinary courts.

Children's Court statistics

The NSW Commission for Children and Young People is an independent organisation that reports to the NSW 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 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. One of the findings from the Commission's report *A Picture of New South Wales Children* was that on an average day 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
- First Nations children were approximately 26 times more likely to be there than non-Indigenous 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 one per cent. Further, the number of criminal cases finalised in Children's Courts nationally has continued to trend down.

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.

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Figure 5.9 The Children's Court Clinic is an arm of the Children's Court. Its main function is to make clinical assessments of children and submit reports to the court.

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 Youth Justice, but more recently they are done through the clinic. The clinic will be asked to complete an assessment where there are 'specific psychological, psychosocial or mental health issues present in the child's situation that the court needs to consider prior to passing sentence'. The assessment report 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.

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 the most common profile of an offender.
4. Describe the role of the Children's Court Clinic.

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* (1989), which acknowledges that children and young people have the best chance of any offenders of being rehabilitated and reintegrated into society. As previously mentioned, factors under section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) are to be considered in children's proceedings. Additional section 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.

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.

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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 (Criminal Proceedings) Act 1987* (NSW) lists the penalties that can be applied to children. These are outlined in Table 5.2.

Table 5.2 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 conference	The child can be released subject to the child complying with a **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 Youth 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 **Youth Justice centre**; the maximum time a child can be sentenced to a control order is two years.

Youth 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 Youth Justice centre.

Youth Justice centres are managed by Youth Justice, which is a part of the Department of Communities and Justice. 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 Youth Justice centres and the effects of this incarceration are mostly negative and detrimental to rehabilitation. Amendments to section 22A of the *Bail Act 1978* (NSW) enacted in 2007 also account for the increasing number of youth on remand in New South Wales, most for relatively short stays.

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 Youth Justice centre

Youth Justice centre
a detention centre housing young offenders subject to control orders

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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.

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 innocence for 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.

Since then, the number of youth on remand has been increasing. Between 2016–2017 and 2020–2021 there was an 11 per cent rise in the number of remand admissions, from 2917 to 3242 (with a peak in 2019–2020 of 3297). In 2022, of the young people in detention on an average night in the June quarter, almost four in five (78%) were unsentenced; that is, they were awaiting the outcome of their court matter or sentencing. As youth 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 have been to court, this amendment's provisions have added to the negative experience many young people have with the criminal justice system. 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 that are more resource efficient are discussed later. First Nations youth continue to be significantly over-represented. The average daily number of youth (10–17 years) in custody in New South Wales fell by 26.4 per cent between 2018–2019 (265) and 2022–2023 (195). However, the percentage of these who were First Nations young people rose from 47.9 per cent in 2018–2019 (127) to 53.3 per cent in 2022–2023 (104).

Sentencing considerations for young offenders

Although the *Children (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.



Figure 5.10 Grave adult behaviour is 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 Higher School Certificate. The court reversed the original sentence and replaced it with a 12-month probation order.

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.

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

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 sticky tape 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.
4. Analyse the main purposes of youth sentencing and explain how they differ from those of adult sentencing.

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5.6 Alternatives to court

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

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.

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.

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 a graffiti offence. 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 1997* (NSW) 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.

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Figure 5.11 NSW data showing 10-year trends in police proceedings against young people by method of legal proceeding
Source: https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx

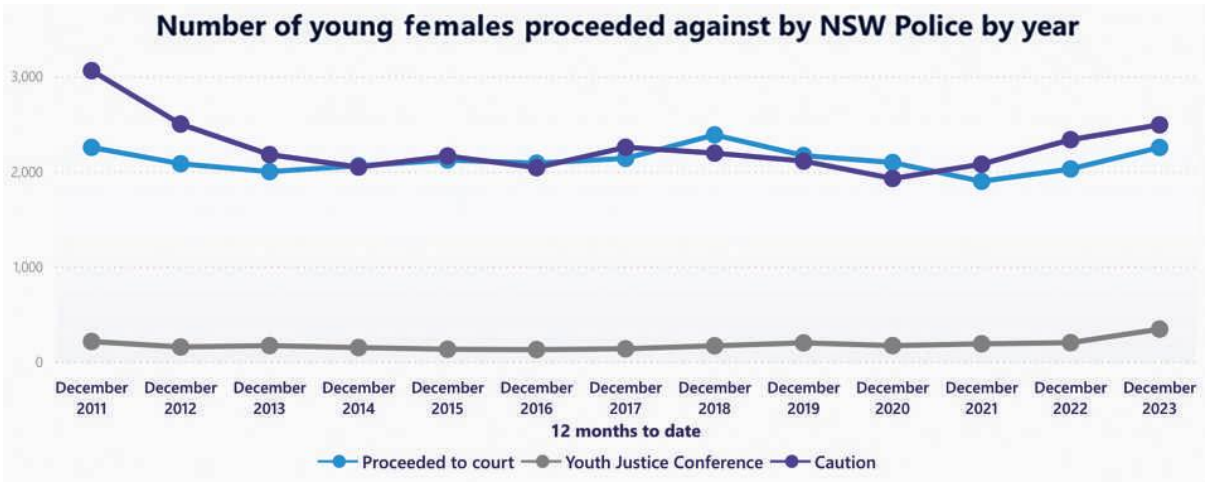


Figure 5.12 Filtered version of the data in Figure 5.11, showing female statistics only
Source: https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx

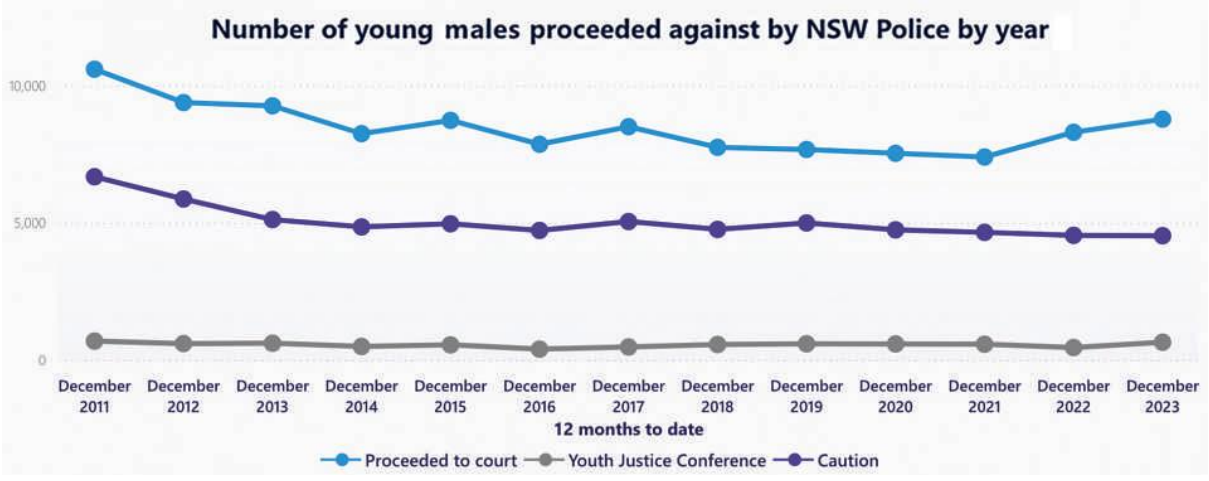


Figure 5.13 Filtered version of the data in Figure 5.11, showing male statistics only
Source: https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Young-people.aspx

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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. Conferences hold the offender accountable, but they also 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 1997* (NSW) has been well received by commentators. It embraces the welfare model of youth justice and encourages offender rehabilitation over traditional means of dealing with crime. It uses diversionary measures to find solutions to youth 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 Young Offenders Act (1997) on the Likelihood of a Custodial Order* found that the risk of receiving a custodial order dropped significantly: for First Nations young offenders it fell by 17.5 per cent, and for non-Indigenous young offenders by 16.3 per cent.

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. 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 wide-ranging and more serious offences, are lower. As mentioned later on page 132, conferencing also needs to be supported by well-resourced rehabilitative programs.

Legal Info



Youth offenders

The *Young Offenders Act 1997* (NSW) specifies a limit of three police cautions per individual. No such limits are prescribed for youth justice conferences, although over time it has been shown to be unusual for youth to receive more than three youth justice conferences.

Overall, as the number of contacts (cautions, conferences or court appearances) increases, the likelihood of being dealt with via a caution decreases.

The likelihood of a court appearance also increases.

Although the results suggest that the hierarchy of sanctions established by the *Young Offenders Act 1997* (NSW) is being adhered to, the bureau noted that youth offenders are far more likely to be given a caution or referred to court than they are to be referred to a conference.

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Research 5.2

Research NSW Police with respect to youth justice conferencing and complete the following tasks. (See the website at http://cambridge.edu.au/redirect/10305.)

1 Explain the difference between the following diversionary processes: '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 offending 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 (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.

> These 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.

Weatherburn D, Vignaendra S & McGrath A, 2009, *The specific deterrent effect of custodial penalties on juvenile reoffending*, Technical and background paper series no. 33, Australian Institute of Criminology, Canberra.

The idea that imprisonment can have long-lasting negative effects on young people is further supported by 'Life Without Barriers' (NGO):

> Most trauma-informed experts agree that children who interact with the criminal justice system are generally more vulnerable to begin with. Aboriginal and Torres Strait Islander children are vastly over-criminalised in Australia and face dispossession, intergenerational trauma, racism, discrimination, lack of opportunity and segregation. When they enter the juvenile system, they are no longer seen as the children they are; they are seen as offenders. A label that is hard to shake.

Life Without Barriers website, 2022, 'Locking Up Kids: Australia's failure to protect children in detention', 15 November.

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Figure 5.14 Children who have been neglected or mistreated 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.

This has not happened in New South Wales. As previously mentioned, a trend has been the increasing numbers of young people in Youth Justice centres, which has predominantly come about because of amendments to the *Bail Act* (2013). 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.

The average cost of detaining a young person in a Youth Justice centre is approximately $170 000 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.

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 *Young Offenders Act 1997* (NSW) 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 per cent 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.

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However, conferencing needs 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* (NSW) 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.



Figure 5.15 A youth justice conference allows the offender to take some responsibility for their actions and provides them with appropriate support services to help them to overcome their difficulties. Despite questions about its effectiveness, youth justice conferencing remains an important alternative to incarceration.

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) in 2011 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:

- 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, 'the attempt to combine the so-called justice and welfare models of youth 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'.
- 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.

On 18 December 2023, The Law Society of NSW acknowledged the need for better education for young people in order to combat weapon-related offending. This submission was in response to the NSW Sentencing Council's issues paper 'Weapons-related offences: sentencing young offenders', and requested a range of initiatives and programs to be implemented. It included increasing family support programs and wraparound, multi-agency services; improving access to and availability of mental health support services specially targeted for adolescents, particularly in regional areas where such services may be lacking; establishing carefully considered school-based initiatives and

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public safety campaigns to promote community wellbeing and crime prevention; and reviewing any existing initiatives and programs for their effectiveness.

Many of these problems could be reduced by a police force dedicated to and trained in the principles of youth justice and diversion. This is the case in the Northern Territory and New Zealand: 84 per cent 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 five per cent of 'life course' offenders (those who offend through their lives) commit approximately 50 per cent of all youth 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.

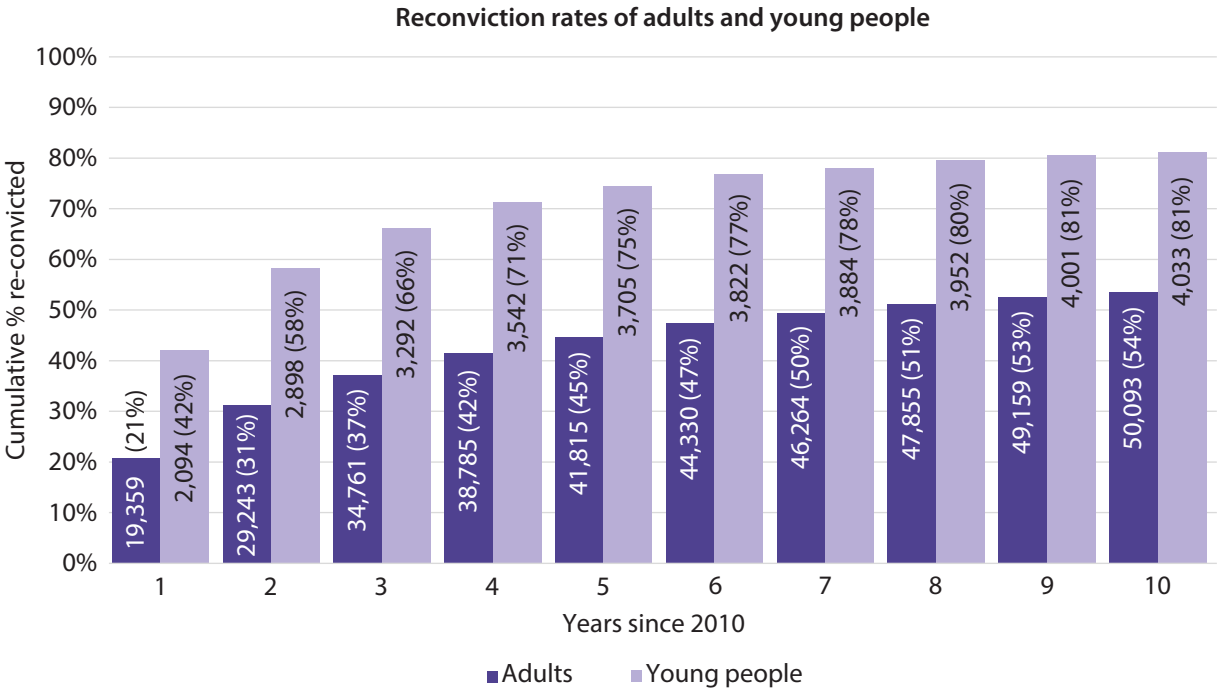


Figure 5.16 The cumulative percentage of adults and young people convicted in 2010 who were reconvicted over the 10 years to 2020. Proportionately more young people reoffend. This suggests that rehabilitation of young offenders needs to be reinforced.
Source: https://www.bocsar.nsw.gov.au/Publications/BB/2022-Report-Long-term-reoffending-rates-in-NSW-BB162.pdf

Review 5.7

1. Identify the impact that changes to the *Bail Act* (2013) 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. Discuss 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.
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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Media



Save the Children report shines light on child rights violations in Australia's youth justice system

WA, QLD and NT revealed as jurisdictions most frequently violating the rights of children under youth justice supervision.

Save the Children

19 April 2023

Widespread child rights abuses in Australia's youth justice system are today detailed in a new Save the Children report, which calls for an urgent nationwide overhaul to ensure better outcomes both for children and the community.

The report reveals every Australian state and territory jurisdiction has a long way to go to uphold the rights of children across the areas of policing, bail and remand, diversion, court processes, sentencing practices, and detention.

Western Australia, Queensland and the Northern Territory were the worst offenders when it comes to violating the rights of children in youth justice facilities. In all three jurisdictions, the use of adult facilities to detain children, as well as the use of excessive force and restraint, were identified as significant breaches of children's rights.

Western Australia is detaining boys in the maximum-security adult Casuarina prison and last year was revealed to be using a dangerous restraint technique on children, which was replaced with an alternative method following criticism.

In February, Queensland introduced legislation to criminalise breach of bail for children, along with other punitive measures, despite acknowledging the legislation was inconsistent with the state's Human Rights Act (2019).

Shane*, who just turned 18, has been in and out of the youth justice system in Queensland since he was 13 years old. He describes mixed experiences with the authorities.

'Last time I was in contact with police was in a watch house and they treated me like I wasn't even there. I was in the watch house for nine days,' he said.

'Sometimes [the police] can be alright, other times they just treat us like scum, like we're adults not juveniles.'

Save the Children Australia CEO Mat Tinkler said Australia's youth justice system was failing to adequately support vulnerable children in contact with the law and keep communities safe.

'Australia's youth justice system is responsible for repeated, egregious breaches of children's rights, often resulting in direct harm to many children,' he said.

'We are a nation that prides ourselves on giving everyone an opportunity to succeed, and yet authorities are setting children and young people up to fail.

'We know what works and what doesn't. State and Territory governments must invest in strengthening and expanding early intervention and diversion programs.'

Australia has made a significant shift towards prioritising incarceration well above diversion and rehabilitation, including the use of isolation, separation, and lockdown in youth detention facilities. This is despite the evidence showing prevention and early intervention are the methods that most reduce crime.

(Continued)

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Media—Continued

A child rights approach would ensure youth justice policies and practices align with Australia's international human rights obligations, and provide long-term improvements for children, young people, and communities.

'The global evidence base shows that a rights-based approach to youth justice will lead to better outcomes for children, the community and governments,' Mr Tinkler said.

'The punitive and "tough on crime" approaches of Australian governments are the opposite of this: they punish children for being victims of underlying causes like poverty and inequality; poor access to education and family support; and lead to children cycling back into the system again and again.

'By adopting a child rights approach to youth justice, governments can improve how the youth justice system operates, leading to better outcomes for children and making communities safer.

'This involves governments being prepared to invest in prevention and early intervention programs that are proven to reduce crime and set young people up with the skills and connections to reach their potential.'

Save the Children is advocating for reforms including the introduction of national youth justice standards, that all jurisdictions raise the age of criminal responsibility to at least 14, independent oversight of youth detention facilities, and legislated human rights protections.

The new report provides a roadmap away from child rights violations in our current justice system towards a future system that respects child rights, reduces offending and re-offending, and keeps the community safer.

Shane* is currently being supported by 54 reasons, which delivers Save the Children's services in Australia. He said this support has helped him to see the potential in his life, and he is now determined to learn from his mistakes.

'I've been in and out of here [detention] my whole life. It's time to wake up. I'm 18 now and I don't want to be in and out my whole life,' he said.

'In detention, you lose time away from your family, you can never get that back. That is all just lost time.

'I don't know where I'd be if I didn't have [my support worker] and 54 reasons helping me.

'There should be more help and services because what's locking kids up really doing? I think there should be more services instead of locking them up.'

Figure 5.17 The notorious Don Dale Prison, Northern Territory



Analysis 5.2

Read the media article on pages 135–6.

1. Outline the extent to which children and young people are having their rights violated in youth justice facilities.
2. Explain what is meant by a 'child rights' approach to this issue.
3. Describe what Save the Children is advocating for reforms to the justice system in regards to young offenders.

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Chapter summary

- There are two main approaches to young offenders in the criminal justice system: the welfare model (aimed at rehabilitation) and the justice model (aimed at punishment).
- 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 Youth 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.
- 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.

Multiple-choice questions

1 Which of the following refers to *doli incapax*?
- **a** The age at which children can appear in court.
- **b** The incapacity to have criminal intent.
- **c** Mitigating factors when sentencing.
- **d** The incapacity to make decisions about the future in court proceedings.

2 Which of the following is correct for a person under 14 years of age 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** a 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 is the most severe penalty a young offender can receive?
- **a** Community service order.
- **b** Fine.
- **c** Control order.
- **d** Bond.

Extended-response question

Brad and Lachlan, both aged 13, rob a 24/7 convenience store. They use fake guns, and during the robbery, they push over the store attendant who hits his head and is seriously injured. Both are found guilty of a number of offences and are sentenced to a juvenile detention centre for a period of two years. At the time of sentencing, it was revealed that both boys had come from dysfunctional homes where there had been no limits placed on their behaviour for a number of years.

With reference to the above scenario and your own knowledge, assess the effectiveness of the criminal justice system when dealing with young offenders.

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Chapter 6
International crime

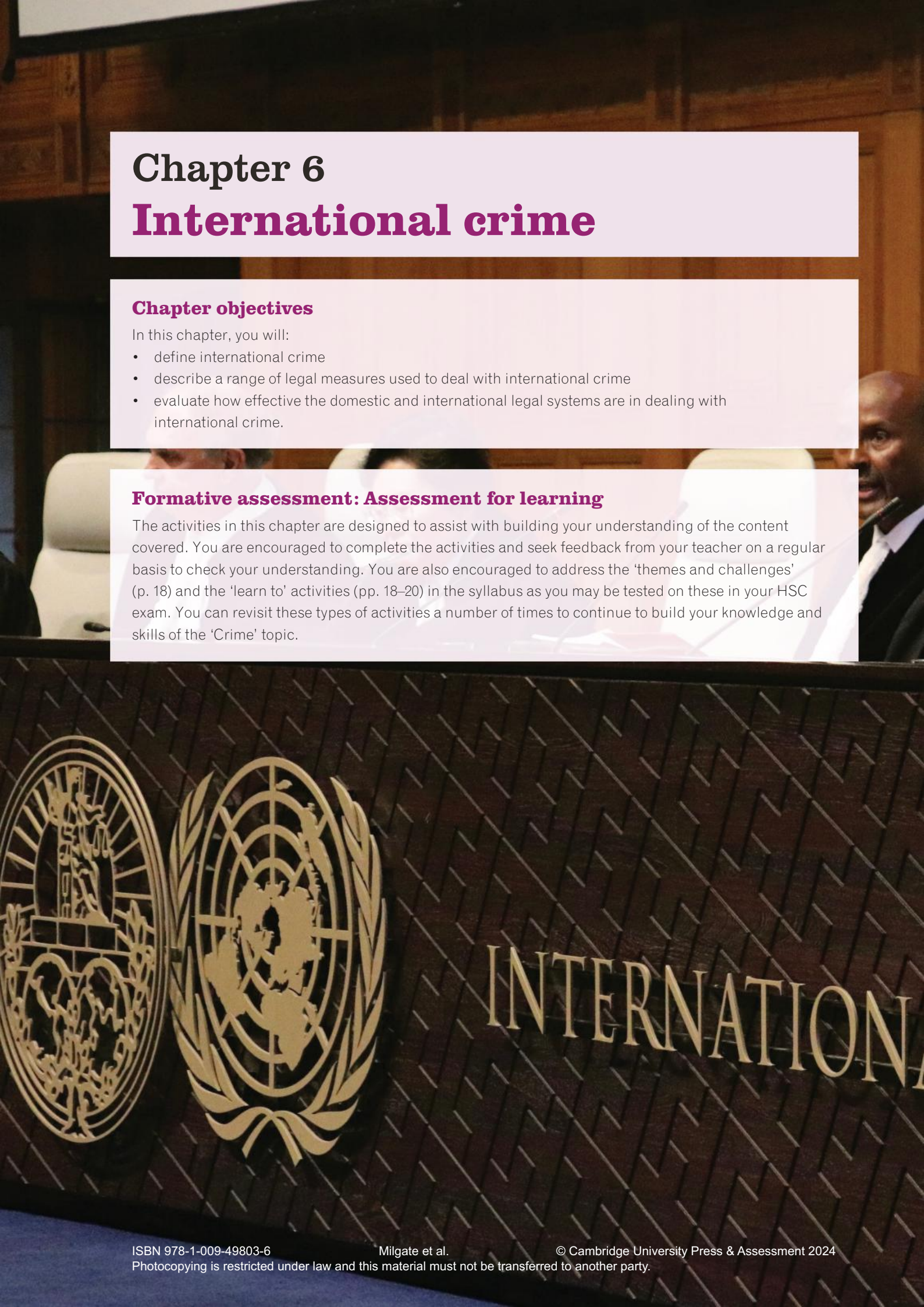
Chapter objectives

In this chapter, you will:

- define international crime
- describe a range of legal measures used to deal with international crime
- evaluate how effective the domestic and international legal systems are in dealing with international crime.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 18) and the 'learn to' activities (pp. 18–20) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.



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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)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Convention on the Prevention and Punishment of the Crime of Genocide (1948)
Geneva Conventions (1949)
Rome Statute of the International Criminal Court (1998)
United Nations Convention against Transnational Organized Crime (2000)

Legal oddity

In 2012, a Taliban commander wanted for organising attacks on Afghan and US troops was arrested after giving himself up and demanding the $100 reward for his arrest. Officials had placed 'wanted' posters in the districts where the Taliban commander was active. NATO officials and Afghan troops were at a loss to understand why he attempted to claim a reward for his own capture. Until then, the tactic of using 'wanted' posters for insurgents had not yielded many positive results.

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6.1 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. They will also be liable to any applicable judgment 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 federal *Criminal Code Act 1995* (Cth) (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.

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

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.

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. 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**; for example, genocide or crimes against humanity.

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In more recent years, with globalisation, plus increased international travel and advances in technology, previously local crimes now cross national borders or involve international actors. 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.

'**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 the states themselves were even formed. However, until only recently most of these crimes have not been considered outside the context of domestic law.

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 Malian Muslim militant Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud attends his trial for demolishing shrines, rape, torture and sex slavery at the International Criminal Court in The Hague in 2019. Crimes against the international community are a collection of offences that are recognised by the international community as being of universal concern.

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.

transnational crimes crime that occurs across international borders, either in origin or effect

international crime a broad term covering any crime that is punishable by a state but has international origin or consequences, or a crime recognised by the international community as punishable

genocide the deliberate extermination of a national, ethnic, racial or religious group

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

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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

International Criminal Court (ICC) an independent international court established by the Rome Statute to prosecute and try international crimes of the most serious nature; the ICC started operating in July 2002

Rome Statute the *Rome Statute of the International Criminal Court* (1998); the international treaty that established the International Criminal Court

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.

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.

Genocide

Article 6 of the *Rome Statute of the International Court* (1998) ('**Rome Statute**') gives the **International Criminal Court (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.

Under the Rome Statute, genocide includes the following actions towards the group:

- killing or causing serious physical or mental harm to members
- deliberately creating conditions designed to destroy the group entirely or in part
- preventing births within the group
- forcibly taking children away from the 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 treaties established by the United Nations – the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948). The US President Joe Biden in March 2022 labelled the actions of the Russian government under the leadership of Vladimir Putin in the invasion of Ukraine as amounting to genocide. This is a significant step but will have to be investigated into the future.

Genocide is extremely difficult to prove, and cases involve enormous amounts of documentary evidence, forensic evidence, reviews of killings and military orders, testimony, expert opinions and more. It can involve accusations of the killing of vast numbers of people, from hundreds to millions. The ICC 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), led by Adolf Hitler. Scholars suggest that under the widest definition of genocide, and including the deliberate extermination of Slavs, Romani, homosexuals, people with a mental illness, political opponents and Jehovah's Witnesses, the death toll was as high as 17 million people.

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, established to prosecute those most responsible for crimes committed during the breakup of the former Yugoslavia, and the International Criminal Tribunal for Rwanda, set up to prosecute those most responsible for crimes committed during the Rwandan genocide. Since its creation, the ICC has not yet convicted any person of genocide.

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Crimes against humanity

Crimes against humanity are acts 'committed as part of a widespread or systematic attack directed against any civilian population'. Included under Article 7 of the Rome Statute, the scope of crimes against humanity is significantly broader than genocide – see Analysis 6.1 on the following page for the definition in Crimes against humanity in Article 7 of the Rome Statute.

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 *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

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 they 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



Figure 6.2 In the Nuremberg trials following World War II, the Allied powers prosecuted prominent leaders of Nazi Germany for crimes against the international community. The tribunals charged the leaders with crimes against humanity, as well as war crimes.

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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 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.

Analysis 6.1

Find the Rome Statute on the International Criminal Court's website at https://cambridge.edu.au/redirect/10460, and read Article 7, which deals with crimes against humanity.

1. Referring to Article 7(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) contains extended definitions of the acts outlined in 7(1). 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.

Russian forces in the invasion of Ukraine have already been called out for the commission of war crimes due to the unfolding atrocities that are being uncovered as Russian troops withdraw from key areas such as the Ukrainian capital of Kyiv, and particularly in the towns of Bucha and Borodyanka. The ICC placed investigators on the ground in Ukraine while hostilities were ongoing to ensure evidence was able to be collected. As a result, in May 2023, the ICC issued an arrest warrant against Vladimir Putin.



Figure 6.3 In May 2023, the ICC issued an arrest warrant against Vladimir Putin.

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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 received 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 al-Bashir's arrest for committing war crimes, intentionally directing attacks against a civilian population, for 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.



Figure 6.4 Sudanese President Omar al-Bashir addresses parliament in Khartoum in 2019.

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 to support a charge of genocide, and so a second arrest warrant, which included three counts of genocide, was issued. Both warrants were not recognised by the Sudanese Government. The Sudanese Government also refused to recognise the jurisdiction of the ICC.

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 to ensure the accused appears in 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.

In December 2018, al-Bashir faced large-scale protests that demanded his removal from power. On 11 April 2019, al-Bashir was ousted in a military coup d'état. This was confirmed by the Sudanese Armed Forces in an 'important announcement' on state television. Omar al-Bashir was finally ousted in an uprising. He was being held in a prison, but after the outbreak of fighting between the army and paramilitary Rapid Support Forces he was moved to a military hospital.

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Analysis 6.2

Visit the International Criminal Court's website and complete the following tasks.

1 Read Article 8 of the Rome Statute and list the activities that are considered to be war crimes.

2 Explain what is meant by 'complementary jurisdiction'. Assess why this was important in the al-Bashir case.

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, 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 by the development of modern technologies. Due especially to the rise of rapid international telecommunications and international travel, local authorities and policymakers 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.

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

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 cyberterrorism 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.

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
- 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.

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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.

Due to the difficulties in transborder 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.

Review 6.1

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.

6.2 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 in the following pages.

International Criminal Court

The establishment of the 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 Rome Statute is the treaty that established the ICC. The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2002, when the requisite number of states (60) had formally ratified it. As of February 2024, there were 124 state parties to the ICC. Of those states, 33 are African states, 19 are Asia–Pacific states, 19 are from Eastern Europe, 28 are from Latin America and the Caribbean, and 25 are from Western European and other states.

The ICC was established by the international community as a permanent court and a separate international entity from the United Nations. It is independent of the United Nations 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.

Analysis 6.3

Use the QR code to watch Video 6.1.
1 Outline how the ICC was created.
2 Outline the the extent of the ICC's jurisdiction.
3 Explain what is meant by 'the ICC is a court of last resort'.
4 Explain the work of the ICC.
5 Describe the 'organs' of the ICC and their purpose.

Video 6.1 In 2013, the International Criminal Court produced a video to explain the nature of the court and its jurisdiction. (3.38)

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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

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. 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 would not be able to exercise its jurisdiction over this crime until there is international agreement. On 15 December 2017, the ICC's Assembly of States Parties agreed that the ICC could now prosecute crimes of aggression.

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 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
- 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.



Figure 6.5 A protester in 2023 asks the Australian Prime Minister, Anthony Albanese, to 'stop supporting war crimes', referring to the Israeli military action in Gaza. War crimes are actions carried out during a time of war that violate accepted international rules of war.

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International Criminal Court



Preamble to the *Rome Statute of the International Criminal Court* (1998)

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 …

Review 6.2



Read the Preamble to the *Rome Statute of the International Criminal Court* (1998) 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 the 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.

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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 in the following pages.

Crimes against the international community

The most significant 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. 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 federal *Criminal Code Act 1995* (Cth): 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).



Figure 6.6 Victoria Cross recipient Ben Roberts-Smith at court in 2021 during his trial against three Fairfax newspapers for defamation over reports he committed war crimes while serving in the Australian Special Air Services in Afghanistan.

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. Investigations in 2021–2023 into potential war crimes committed by Australian soldiers in Afghanistan will be prosecuted if required under Australian law while meeting its obligations under the Rome Statute and the notion of complementary jurisdiction.

Australia also has a role to play as a state party to the ICC and actively participates in discussions among the state parties and in administration of the court. Under the Australian legislation, the Commonwealth Attorney-General must report annually on the operations of the ICC, and on any impact that it has had on the Australian legal system.

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According to the report of the Attorney-General's Department for 2022–2023, 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.

Australia can also support international efforts to ensure that crimes against the international community, such as occurring in Ukraine in 2022, are opposed through the use of economic sanctions.

It is also argued the **Australian Federal Police (AFP)** needs a dedicated international crimes unit with the resources and the expertise to swiftly investigate allegations and pursue suspects of such crimes within Australia.

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

The 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.

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.

Some of the AFP's international operations include child protection, counter-terrorism operations, stopping human trafficking and drug operations. For example, in 2022, they worked in Fiji to improve cyber safety awareness and education of vulnerable communities within the Pacific region.

The AFP has also established the Jakarta Centre for Law Enforcement Cooperation in Indonesia, 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, Malaysia, and the International Law Enforcement Academy in Bangkok, Thailand.

The most serious transnational crimes impacting Australia in 2024 are illicit drugs, firearms, sexual exploitation of children, human trafficking and slavery, serious financial crime and cybercrime.

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

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



Figure 6.7 An Australian Federal Police detective superintendent at the Australian Centre to Counter Child Exploitation offices in Brisbane. One of the most serious transnational crimes impacting Australia is the sexual exploitation of children.

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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 deception. Often, women and children are trafficked 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 four million victims annually. In the last decade, over 250 human trafficking matters in Australia were referred to the AFP.

Since 2003, the Australian Government has introduced a number of measures 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, trafficking in people and forced labour. Similar legislation has been passed in Australian states and territories. The Australian Government has dedicated a significant amount of money (about $60 million since 2003) to the problem. The government has also set up numerous government bodies and has attempted to tackle the issue at every stage of the trafficking process, from the initial recruitment stage to the eventual reintegration of victims.

The Australian Government's response to human trafficking includes:

- 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.

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, 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 Criminal Intelligence Commission

The *Australian Crime Commission Act 2002* (Cth) established a national statutory body, the Australian Crime Commission, to combat serious and organised crime. In July 2016, this body merged with CrimTrac to become the Australian Criminal Intelligence Commission (ACIC). It investigates matters of national concern and, in coordination with other international law enforcement agencies, delivers specialist law enforcement capabilities to assist in investigating and analysing intelligence concerning national and transnational crimes. According to the ACIC's 2018 annual report, the role of the agency includes 'reducing serious and organised crime threats of most harm to Australians and the national interest, and providing national policing information systems and services'. Some areas that the ACIC specifically investigates include Southeast Asian organised crime (the primary source of the heroin that comes into Australia), money laundering and tax fraud, identity crime, cybercrime and human trafficking for sexual exploitation.

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Australian Border Force

Australian Border Force (formerly the Australian Customs and Border Protection Service) is a national 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

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, the NSW 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 6.3

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 transborder crime.

Crimes against the international community

Most of the international efforts aimed at preventing or prosecuting crimes against the international community have been previously discussed. Governments have showed continuing commitment and close cooperation in their development of international treaties such as the Geneva Conventions and the Rome Statute. 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 twentieth 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 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 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 were established for the conflicts in Sierra Leone and Cambodia.

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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 United Nations, whereas the *ad hoc* tribunals are imposed upon a government. This tribunal was closed in 2015. Eventually these tribunals will not exist once they have completed their work. All matters are now referred to the ICC.

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 International Criminal Court, on behalf of victims. Its website tracks the progress of cases involving crimes against the international community.

extradition
the legal surrender of a suspect or convicted criminal by one jurisdiction to another to face criminal charges or sentence

bilateral agreement
an agreement between two countries

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.

Legal Links

Situations that are under investigation by the International Criminal Court, as of April 2024, are:

- Democratic Republic of the Congo (June 2004)
- Darfur, Sudan (June 2005)
- Libya (March 2011)
- Côte d'Ivoire (October 2011)
- Mali (January 2013)
- Burundi (October 2017)
- Bangladesh/Myanmar (November 2019)
- Afghanistan (March 2020)
- State of Palestine (March 2021)
- Republic of Philippines (September 2021)
- Venezuela (November 2021)
- Ukraine (March 2022).

Research 6.1

On the website of the International Criminal Court (ICC) and on the internet generally, research one of the situations listed in the previous 'Legal Links' box and complete the following tasks.

1. Recall how the alleged events are provided for in the jurisdiction of the ICC.
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.

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 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.

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Figure 6.8 Malka Leifer was extradited to Australia to face child sexual abuse charges in 2022.

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 International Criminal Tribunal for the former Yugoslavia 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 Vasiljković illustrates some of the issues that may arise under an extradition request and how Australia fulfilled its obligations having ratified the Rome Statute. Vasiljković is an Australian citizen who, in the early 1990s, commanded a Serbian paramilitary unit during the ethnic conflict in the Balkans. In 2005 he was accused by Croatian prosecutors of committing war crimes, and Interpol issued a warrant for his arrest. He was arrested in Australia and was due to be extradited to Croatia. However, he appealed this on the argument that he would not receive a fair trial in Croatia. After multiple appeals, Vasiljković was extradited to Croatia in July 2015. In September 2017, a Croatian court found him guilty of the torture and killing of military and civilian prisoners. He was sentenced to 15 years' imprisonment, but the time previously served in Australian detention, as well as in Croatia, meant he had less than four years remaining.

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 in the following pages.

International Criminal Police Organization

The **International Criminal Police Organization (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 police agencies around the world



Figure 6.9 The entrance of the International Criminal Police Organization headquarters, known as INTERPOL, in Lyon, France

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At any given time, the organisation is engaged in numerous operations, investigating and providing advice to states' law enforcement agencies on 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 United Nations, to improve the skills of police peacekeepers and the sharing of communications networks and criminal data. One result of sharing resources and developing common standards might be an increase in the ability to track the movement of criminals around the world.

In 2022 INTERPOL established a police metaverse unit that is expected to function worldwide. It is believed that law enforcement agencies can benefit from the metaverse in a variety of ways, including remote work, networking, gathering and preserving evidence from crime scenes, and providing training.



Research 6.2

INTERPOL's website contains detailed information about transnational crime. Select one of INTERPOL's priority crime areas, research the crime area 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* (2000) is the main international instrument in the fight against transnational organised crime. This convention was adopted by the UN General Assembly in 2000 and began operation on 29 September 2000. The convention 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, Sea and Air*
- *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 about the *United Nations Convention against Transnational Organized Crime* (2000) and its protocols, visit the website of the UN Office on Drugs and Crime.

Pacific Transnational Crime Network

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, which 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

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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 set up around the region.

The PTCN has been successful in the region. For example, in 2021 the Queensland Police Service, the AFP and the Royal Papua New Guinea Constabulary collaborated on a two-year investigation into a planned drug import to Australia from Papua New Guinea. Over 500 kilograms of cocaine were seized in Papua New Guinea, and the people involved were prosecuted.

6.3 The effectiveness of measures dealing with international crime

Some of the most significant measures used to combat international crime were described previously. 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.

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 has had more success than any other such body, having indicted close to 260 people, with all but one of these cases having been 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 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 were ultimately suspended, 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.

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Figure 6.10 Bosnian families follow the final verdict hearing of the former Bosnian Serb general Ratko Mladic, also known as the 'Butcher of Bosnia', in the ethnic cleansing case by the International Criminal Tribunal, from a screen at Srebrenica Genocide Memorial in Potocari in Srebrenica, Bosnia and Herzegovina in 2021. The 78-year-old former general was sentenced by the UN court to life imprisonment in 2017 for genocide in Srebrenica and crimes against humanity between 1992 and 1995.

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 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 124 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). Russia, which is at the centre of a number of ICC war crimes investigations in Ukraine, is not a signatory to the ICC. However, a warrant for Vladimir Putin's arrest was issued in 2023 and should he leave Russia, he potentially could be arrested.

Most objecting states claim that joining the ICC would violate their state sovereignty. As previously discussed, 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. Further, the ICC only has jurisdiction for crimes committed after its establishment, though 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.

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Case Study

Thomas Lubanga Dyilo

In 2012, the ICC successfully prosecuted its first case. Congolese warlord Thomas Lubanga Dyilo was found guilty of war crimes.

Lubanga Dyilo was commander of the Patriotic Forces for the Liberation of Congo, who were combatants in hostilities taking place in the north-eastern part of the Democratic Republic of the Congo between 2002 and 2003. During this time he conscripted children under the age of 15 into his forces.

After Lubanga Dyilo was found guilty, a press statement from the Security Council emphasised particular concern over war crimes involving children and other vulnerable members of society, and the Council said that the verdict was an important step towards holding people accountable for such crimes.

Lubanga Dyilo was sentenced to 14 years' imprisonment in 2012, which some members of the international community believed was less than expected.



Figure 6.11 Judges preside at the hearing of Thomas Lubanga Dyilo in 2006. He was the first person to face trial for war crimes before the ICC in The Hague.

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 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 twenty-first century.

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Case Study

Investigations by the ICC

The ICC is investigating a number of cases across the world. The majority of these cases come from Africa. This is a contentious point in legal scholarship: while African conflicts are the focus of international tribunals, including the ICC, it's notable that European and more generally Western individuals who commit similar crimes are not pursued.

In 2017, there were calls by Human Rights Watch for the Security Council to investigate alleged crimes against the international community inflicted upon Rohingya Muslims in Myanmar by the Burmese Military. Human Rights Watch demanded that the ICC be allowed to investigate these incidences and monitor the progress of these cases and others as they arise.

Currently in 2023, there are a number of active investigations into Russia as a result of its invasion of Ukraine.



Figure 6.12 Ukrainian President Volodymyr Zelenskyy (fourth from right) arrives at the International Criminal Court in The Hague, on 4 May 2023, as part of his first visit in the Netherlands. He met with the leadership of the ICC, which had issued an arrest warrant for Vladimir Putin, President of Russia.

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.

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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 International Criminal Court 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.



Multiple-choice questions

1 Which of the following is an example of a crime against the international community?
- **a** Drug trafficking.
- **b** International terrorism.
- **c** Trafficking of child pornography.
- **d** Trading of enslaved persons.

2 The International Criminal Court (ICC) consists of __ judges.
- **a** 14
- **b** 16
- **c** 18
- **d** 20

3 What is the most serious penalty the ICC can impose upon an individual?
- **a** Forfeiture of assets.
- **b** Imprisonment for 30 years.
- **c** Life imprisonment.
- **d** Death penalty.

4 What piece of legislation had a section added to make crimes listed in the Rome Statute offences in Australia?
- **a** *Australian Federal Police Act 1979* (Cth).
- **b** *Extradition Act 1988* (Cth).
- **c** *Criminal Code Act 1995* (Cth).
- **d** *Australian Crime Commission Act 2002* (Cth).

5 Most of the states that are not members of the ICC have said this is because joining would:
- **a** expose their citizens to arrest.
- **b** require too much financial commitment.
- **c** subject themselves to investigations.
- **d** violate their state sovereignty.

Short-answer question

Assess the effectiveness of the legal system in dealing with international crime.

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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 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, and 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 International Criminal Court, INTERPOL or initiatives of the Australian Federal Police
  - 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.

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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 previously.
- 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.

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

Using a range of contemporary examples, you will investigate the notion of human rights and assess the extent to which legal systems embody such human rights and promote them in practice.

Themes and challenges

The themes and challenges covered in Part II include:

- the changing understanding of the relationship between state sovereignty and human rights
- issues of compliance and non-compliance in relation to human rights
- the development of human rights as a reflection of changing values and ethical standards
- the role of law reform in protecting human rights
- the effectiveness of legal and non-legal measures in protecting human rights.

Chapters in this part

Chapter 7 **The nature and development of human rights** 166

Chapter 8 **Promoting and enforcing human rights** 190

Chapter 9 **Contemporary human rights issues** 220

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Chapter 7
The nature and development of human rights

Chapter objectives

In this chapter, you 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* (1948) for the post-war development of international human rights law
- communicate the main features of *The Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966)
- evaluate the effectiveness of the *International Bill of Rights.*

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 21) and the 'learn to' activities (pp. 21–2) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Human rights' topic.

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Relevant law

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Treaty of Versailles (1919)
Convention to Suppress the Slave Trade and Slavery (1926)
The Atlantic Charter (1941)
Declaration of the United Nations (1942)
Charter of the United Nations (1945)
Convention on the Prevention and Punishment of the Crime of Genocide (1948)
The Universal Declaration of Human Rights (1948)
Geneva Conventions (1949)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Stockholm Declaration (1972)
Protocols to the Geneva Conventions (1977)
Declaration on the Right of Peoples to Peace (1984)
Rio Declaration (1992)
Kyoto Protocol (1997)
United Nations Declaration on the Rights of Indigenous Peoples (2007)
Treaty on the Prohibition of Nuclear Weapons (2017)

Legal oddity

Even though First Nations inhabitation of the Australian continent can be dated back over 60 000 years, there was no recognition of this fact in the *Australian Constitution* of 1901, or even recognition of their existence. First Nations peoples were never consulted on the Constitution, yet its preamble says that 'the Australian people' agreed to it, so effectively they were not considered to be Australians. The Voice Referendum held on 14 October 2023 aimed to rectify this by stating Aboriginal and Torres Strait Islander peoples as the 'First Peoples' of Australia. This proposed change to the *Australian Constitution* failed to win enough support for the referendum to be passed.

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7.1 The definition of human rights

human rights
rights that recognise the inherent value of each person, regardless of our background, where we live, what we look like, what we think or what we believe

rights
moral or legal entitlements about what a person is allowed to have

the Enlightenment
a European movement from the late 1600s to the early 1800s that transformed philosophy, science and politics by emphasising the superiority of reason over tradition and religion

abolitionism
a movement in the late 1700s and early 1800s, prominently in Western Europe and North America, to end slavery worldwide, that eventually brought an end to the trans-Atlantic slave trade

suffragettes
members of a movement for the right of all adult women to vote that reached its peak in the early 1900s

laws of war
a body of laws about how war should be conducted that originated with the Geneva Convention (1864), the Hague Convention and the final four-part Geneva Conventions (1949) – it is also known as the International Humanitarian Law

Human rights have been grouped into three categories:

- **First generation** – civil and political rights. These can be found in Articles 1–21 of *The Universal Declaration of Human Rights* (1948) and in the *International Covenant on Civil and Political Rights* (1966).
- **Second generation** – economic, cultural and social rights. These can be found in Articles 22–30 of *The Universal Declaration of Human Rights* (1948) and in the *International Covenant on Economic, Social and Cultural Rights* (1966).
- **Third generation** – These are rights that are international in scope and can only be addressed by global cooperation. The two most prominent of these rights are environmental rights and peace rights.

The moral aspects of human rights evolved gradually over thousands of years, though they were not codified in law or governance in the way we understand human rights today. The legal aspects of human rights as we know them originated in World War II as a response to the policies of the Axis Powers.

There is a connection between human rights and other **rights**. Ideas that people possessed rights and that all people have something in common were implied in a number of world religions and in Greek philosophy thousands of years ago. In the last few hundred years, particularly during **the Enlightenment** from the 1600s, there was a questioning of the traditional social and political order. Significant movements emerged in Europe and later in North America that aimed to improve the conditions that various people lived in. The first of these was the anti-slavery movement, or **abolitionism** as it came to be called. Movement for rights in other areas gathered pace in the 1800s for workers and for children. In the more economically advanced countries of Western Europe there were louder calls for universal male suffrage; that is, the right of all adult males to vote in elections. These movements were gradually successful and were followed by campaigns for women to be given the vote. The campaigners for the female vote, or women's suffrage as it was known, were called **suffragettes**. These and many similar movements predated the concept of universal human rights. Each movement was only able to secure legal recognition for the rights being campaigned for, within a limited jurisdiction usually restricted to a nation state. Success in any of these movements did not establish these as universal rights. However, when the legal concept of universal human rights was created in 1948, these earlier 'rights' were incorporated in *The Universal Declaration of Human Rights* (1948).

Another area of rights that developed over time was rights in wartime. These were first codified in the Geneva Convention of 1864, followed by the two Hague Conventions in 1899 and 1907. After World War II, these and other **laws of war** were codified in the four-part Geneva Conventions (1949). This body of legal rights remained distinct from universal human rights. The former dealt with rights in wartime and the latter with rights in peacetime. Within two years, and for the first time in history, rights in both war and peace were clearly laid down in international law.

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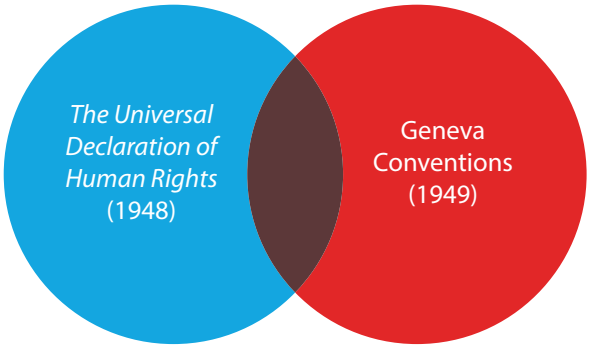


Figure 7.1 This diagram shows that by 1949 two key international documents laid down universal rights. The *Universal Declaration of Human Rights* (1948) identified human rights that applied in peacetime and the Geneva Conventions (1949) identified rights that applied in wartime. This meant that in theory, for the first time in human history, all people were seen as having certain rights whether in war or peace. However, at this point, there were no international mechanisms to enforce these rights.

Another right became connected with human rights. This was the right of nationhood, or self-determination. Due to the fact that nationalism had developed into such a powerful force for change by the late 1800s, there gradually developed a recognition that all peoples should have the right to determine their own destiny by having their own sovereign control over their own territory and government. Since nationalism was one of the factors that led to World War I (1914–1918), the peace settlement after the war attempted to deal with this problem by allowing for the creation of new nation states out of the dismembered empires of the defeated Central Powers.

During World War II, **self-determination** was included in the war aims of the Allies. This was particularly due to pressure from British, French and Dutch colonies and protectorates, and especially India, in the wartime anti-Axis alliance that wanted all peoples living in colonies belonging to Western empires to be given their independence. The United States, once it entered the war, contributed the greatest pressure towards this aim.

In the decades after the World War II, many nations were able to exercise their right of self-determination and form their own nation states. However, this often did not happen peacefully and required years of violent struggle, such as in Algeria, Vietnam and Indonesia. Self-determination has been enshrined in Article 2 of the *Charter of the United Nations* (1945). This Charter originally had 51 member nations. Since 1945, 142 new nations have been admitted to membership in the United Nations, making a total of 193 member nations, with two having observer status, the Vatican and Palestine.

In the two decades after the World War II, many new nations were formed and began exercising their right of self-determination. In these years, the attention of the international community was on the struggles for independence that occurred around the world, but particularly in Africa and Asia. Unfortunately, exercising their right of self-determination did not necessarily mean respecting the human rights of the citizens in these new nations, as many had corrupt or dictatorial regimes.

self-determination the right of nations or peoples to have their own sovereign nation state with their own government

Review 7.1

1 Human rights have gradually evolved over thousands of years of human history. Discuss.
2 Explain the concepts of first-, second- and third-generation human rights.
3 Investigate whether there is a connection between the earlier historic movement for rights and *The Universal Declaration of Human Rights* (1948).
4 Describe the relationship between *The Universal Declaration of Human Rights* (1948) and the Geneva Conventions (1949).

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7.2 Developing recognition of human rights

The abolition of slavery

The Universal Declaration of Human Rights (1948)

Article 4

No-one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

slavery
a type of forced labour in which a person is considered to be the legal property of another

transatlantic slave trade
the trading of African people by Europeans, who transported them as slaves from Africa to the colonies of the New World

Slavery had existed as a legal institution in nearly all civilisations since the dawn of human history. Slavery was considered an integral part of society and the economy. As shown above, *The Universal Declaration of Human Rights* (1948) declared that to enslave someone was a violation of their rights. However, the movement to abolish slavery was 150 years old. The abolition of slavery was one of the first successful movements for a globally recognised right.

In ancient and medieval times 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, brutalised and arbitrarily killed, and they had no real legal rights and no means of escape. Laws generally treated slaves as objects, rather than as subjects of the law.

When Europeans began to conquer the New World and their empires expanded, slavery took on a much more blatantly racist and barbaric form. More and more resources were required to grow and support new colonies. Slave labour was sought from newly discovered populations or races.



Figure 7.2 An engraving showing the arrival of a Dutch slave ship with a group of African slaves for sale in Jamestown, Virginia, 1619

European empires supported the use of slaves from new territories, but particularly from trade posts in Africa. Although the Roman Catholic Church prohibited the exportation of Christian slaves, it legitimised the use of non-Christian slaves in overseas territories.

Known as the **transatlantic slave trade**, this operated from the seventeenth century to the early nineteenth 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.

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 eighteenth century and gradually grew. An extremely effective anti-slavery campaign was led by British politician and campaigner William Wilberforce. This campaign exerted pressure on the British Government to end the trade in slaves in its overseas territories. Finally, the importation of slaves to the colonies officially

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ended in the British Empire with the passing of the *Slave Trade Act 1807* (UK). The United States followed in 1808. Finally, the *Slavery Abolition Act 1833* (UK) fully abolished slavery 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 slavery during the wars of independence from Spain (1810–1822).

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 (1861–1865). 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).

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 Brussels Conference Act of 1890 relating to the 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, and territories of the Ottoman Empire and Persia. The next significant attempt was the *Convention to Suppress the Slave Trade and Slavery* (1926), a comprehensive international convention on abolishing slavery worldwide, passed after the end of World War I by the League of Nations, the precursor to the United Nations.

After the end of World War II, the member states of the United Nations made a clear statement that slavery was prohibited, under Article 4 of *The Universal Declaration of Human Rights* (1948). In some parts of Africa, Asia and the Islamic world, slavery persisted as a legal institution further into the twentieth century, and later treaties addressed issues of ongoing slavery in more detail.

The last state to officially abolish slavery was Mauritania (West Africa), where slavery was abolished in 1981, criminalised in 2007 and designated as a crime against humanity under the 2012 constitutional reform. This constitutes a major achievement for the eradication of slavery practices. However, despite centuries of anti-slavery efforts, slavery still occurs today, with an estimated 45.8 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.

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



Figure 7.3 On 26 May 2023, Gambian Mama Fatima Singhateh, the United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children, gave a press conference in Montevideo.

Review 7.2

1 Outline the transatlantic slave trade.
2 Describe what abolitionism was and the impact it had on slavery.
3 Discuss how slavery was progressively outlawed from the mid-nineteenth century.

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Trade unionism and labour rights

The 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.

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.

Like the movement to abolish slavery, campaigns to improve labour rights and conditions have been waged since the 1700s. *The Universal Declaration of Human Rights* (1948) included labour rights in two of its 30 articles. 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 eighteenth and nineteenth 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 redefined society and acted as the catalyst for changes to labour laws.

Industrial Revolution
the rapid development of industry in the eighteenth and nineteenth centuries, characterised by changes in manufacturing, agriculture and transport

trade union
an organisation of workers created to preserve and further their rights and interests

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 limit 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 the right to organise.

Finally, the British Parliament passed – under pressure – the *Trade Union 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 nineteenth 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.

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 hours/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 nineteenth century aimed at improving safety and working conditions in many of the larger industries, such as mining and textiles.

These rights campaigns were waged within the context of trade unionism or socialism. Late in the nineteenth century, associations of workers began to link up with similar organisations in other countries to protect workers' rights internationally.

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Figure 7.4 Civil servants march through London in protest against wage cuts and working conditions on 12 October 1931.

The First International Workingmen's Association (1864–1876) and the Second International (1889–1916) were organisations of unions and political representatives from around the world urging 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 in which the League of Nations promoted modern human rights. After the League of Nations was disbanded, the ILO became an agency of the United Nations, and it continues its work today.

Labour rights were finally enshrined in Articles 23 and 24 of *The Universal Declaration of Human Rights* (1948). Later treaties, such as the **International Covenant on Economic, Social and Cultural Rights (1966)**, as well as the ongoing work of the ILO, have further defined those rights and sought to implement them around the world.

International Labour Organization
an international agency of the United Nations, created with the aim of improving conditions for workers around the world

labour rights
rights at work, including the rights to safe working conditions, minimum wages and paid leave, and to join a trade union

International Covenant on Economic, Social and Cultural Rights (1966)
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. Explain how the trade union movement gave birth to the Australia Labor Party.
3. Outline the key rights and conditions that were implemented due to the trade unions' campaigns in the past.

Research 7.1

Go to the International Labour Organization's (ILO) website and complete the following tasks.

1. Outline the work done by the ILO.
2. Describe how the organisation rates its achievements over the last 100 years.
3. Find a media report about the ILO's work today.

Universal suffrage

The Universal Declaration of Human Rights (1948)

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.

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Like the movements to abolish slavery and for labour rights, the movement for the right to vote had a long history stretching back to the mid-1800s. However, this movement only gained traction in Western nations as the populations living in European colonies had little capacity to protest. When nationalist movements arose among peoples of Africa and Asia, they protested for independence not the vote. As with the other historic movements, the right to vote was included in *The Universal Declaration of Human Rights* (1948). However, this right was not seriously considered a universal right until the end of the Cold War in 1990. Up until then, Communist countries did not allow the right to a free vote.

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 nineteenth 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 per cent of the adult male population.



Figure 7.5 The 2015 film *Suffragette* was set in 1912 and tells the story of brave women who fought for their right to vote in Britain before World War I. They finally achieved their aim in 1928.

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 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.

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,

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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, First Nations 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, First Nations peoples were effectively denied the right to vote until 1962. In that year, the Commonwealth legislated to ensure that First Nations 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 First Nations people the right to be counted in the Australian Census. The constitutional amendment became a symbol of public recognition of the rights of First Nations peoples in Australia. However, the success of the 'No' campaign in the Voice Referendum of October 2023 meant that First Nations peoples' request that they be acknowledged as the 'First Peoples' of Australia in the 1901 *Constitution* was rejected.



Figure 7.6 On 25 September 2023, Prime Minister Narendra Modi addressed an election rally at a town in Jaipur, Rajasthan, India. India is the biggest democracy in the world with over 900 million eligible voters. The most recent election was held between April and May 2024.

The right to vote was recognised as a universal human right in Article 21 of *The Universal Declaration of Human Rights* (1948), but it was only with the end of the Cold War in 1990 that this right had the prospect of being accepted globally. At the global level, in 2023 more people voted in the world than ever before, with over two billion people taking part in elections within 50 countries. However, since the global financial crisis, the failure of the Arab Spring the early 2010s, and the rise of authoritarianism, the tide has turned against democracy. This will result in fewer people in the world being able to exercise a free right to vote and to choose the form of government that will control their lives. According to a 2023 report by Freedom House, there has been a decline in political rights and civil liberties since 2005.

There is another area in which the right to vote does not yet exist. In 2003, British journalist George Monbiot, argued in his book *Age of Consent* that:

> everything has been globalised except for our consent. Democracy alone has been confined to the nation state. It stands at the national border, suitcase in hand, without a passport.

Monbiot and others like him argue that the right to vote mentioned in Article 21 of *The Universal Declaration of Human Rights* (1948) needs to go global so that all humans have some say in how decisions are made at the global level. Andreas Bummel, Director of Democracy without Borders and the International Campaign for a United Nations Parliamentary Assembly, argues that best way to achieve this is to create a democratically elected assembly of up to 900 delegates elected from all the countries of the world.

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Universal education

The Universal Declaration of Human Rights (1948)

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 free and compulsory education for all 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 learned directly through their daily work.



Figure 7.7 In London on 9 October 2023, 26-year-old Malala Yousafzai and Phoebe Dynevor attended Annabel's and The Caring Family Foundation's celebration of International Day of the Girl.

By 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 United Nations 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 Article 26 of *The Universal Declaration of Human Rights* (1948), 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 2015, the Sustainable Development Goals (SDGs) replaced the Millennium Development Goals. Goal 4 of the SDGs is: 'Ensure inclusive and equitable quality education and promote lifelong learning for all.'

Since the end of the Cold War, achieving quality education for every human on the planet had become a widely accepted norm. However, making real progress in education globally is a massive undertaking.

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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 is still accepted by nations in the world today.
4 Explain the debate around constitutional recognition for First Nations Australians.
5 Analyse the value of girls' education today. Research Malala Yousafzai and what she has done to raise the issue of girls' right to education.

Self-determination

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.

Political self-determination is something that has been fought for throughout history by peoples against various powers and regimes. It is closely related to the force of nationalism. Nationalism as a force in global affairs grew after the French Revolution and it was one of the causes of World War I. This is why self-determination was recognised in the *Treaty of Versailles* (1919). Self-determination was also recognised in *The Atlantic Charter* (1941) and the *Declaration of the United Nations* (1942) and became a key Allied war aim. Finally, it was the establishment of the *Charter of the United Nations* (1945) ('UN Charter'), 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 Article 15 of *The Universal Declaration of Human Rights* (1948).

Also, the *International Covenant on Economic, Social and Cultural Rights* (1966), adopted by the United Nations in 1966 and in force since 1976, includes self-determination as its primary right, under Article 1(1).

Charter of the United Nations (1945) 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.

The Universal Declaration of Human Rights (1948) Article 15

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.

International Covenant on Economic, Social and Cultural Rights (1966) Article 1(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.

It is no surprise that after the UN Charter and *The Universal Declaration of Human Rights* (1984) were created a large number of people under the colonial rule of Western imperial powers (such as Britain, France and the Netherlands) wanted to exercise their right to self-determination. These included former League of Nations mandate territories created after World War I, which now came under the UN.

right to 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

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Trusteeship Council inactive since 1994 but originally responsible for overseeing the transition of United Nations trust territories to self-government after decolonisationt

Chapter 13 of the UN Charter provided for a Trusteeship Council of the United Nations to provide international supervision for the transition of these 'trust' territories to self-government after the end of World War II. The Trusteeship Council suspended its operations on 1 November 1994, a month after the independence of Palau, the last remaining United Nations trust territory.

Colonial powers were encouraged to oversee the independence of their territories in the best interests of the territories' peoples. Since the UN came into being, 80 colonial territories have become self-governing independent states.

In our region, Timor-Leste (previously known as East Timor), exerted its right to self-determination 1999, when the 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 United Nations in 2002. However, there are many groups in the world today that would like to exercise their right to self-determination but have been prevented from doing so, such as the Palestinians, the Kurds and the people of Irian Jaya, though Palestine achieved observer status in the UN General Assembly in 2012.

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 United Nations adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (2007). This declaration took over 20 years to complete and, as with *The Universal Declaration of Human Rights* (1948), 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.



Figure 7.8 On 16 October 2023, Australian Independent Senator Lidia Thorpe controversially wore a Palestinian scarf, called a keffiyeh, as she spoke in the Senate chamber in Parliament House Canberra. She condemned the Hamas terrorist attack. However, she also drew parallels between the Palestinian struggle for self-determination and First Nations' struggles in Australia.

The Australian Human Rights Commission says of the Declaration:

> Self-determination is the central right of the Declaration [and] means that:
>
> 1 We have choice in determining how our lives are governed and our development paths.
>
> 2 We participate in decisions that affect our lives. This includes a right to formal recognition of our group identities.
>
> 3 We have control over our lives and future including our economic, social and cultural development.

'Self-determination', Australian Human Rights Commission website

Perhaps the most significant thing about self-determination is that for decades after the World War II this right has overshadowed other human rights. In many instances there has been a conflict between the struggle for independence and the recognition of human rights. Many new nations, particularly in Africa and Asia, suffered a similar fate in which determined freedom fighters won independence from an imperial power only to deny political and other rights to the citizens of their new nation. History shows that the pursuit of

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self-determination does not lead to respect for human rights. It would not be until most of the peoples of the world had gained their independence that human rights would become a serious focus in these countries.

Review 7.5

1 Identify which wartime documents supported self-determination.
2 Outline the role of the Trusteeship Council. Discuss why this UN organ is inactive today.
3 Explain why Timor-Leste is an example of self-determination.
4 Identify three peoples in the world today seeking self-determination.
5 Describe the impact of self-determination on human rights.

Environmental rights

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 and 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 relates not only to current generations but also to future generations. Climate change poses a threat to several internationally recognised human rights, including the rights to life, food security, water and health, and the right to live in your own country.

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 Article 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.



Figure 7.9 A monorail passes through a slum area on a smoggy evening in Mumbai, India. Mumbai is one of the most polluted cities in the world.

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 two degrees Celsius above pre-industrial levels. However, the Glasgow Climate Change Conference held in 2021 concluded that actions committed to by governments did not guarantee that catastrophic events caused by global warming would not occur.

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Another area in which environmental rights are being dealt with under international law is in the International Criminal Court (see page 147). 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).

Peace rights

Charter of the United Nations (1945)

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 ...

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* (1984) 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.

Civil society groups have taken up this cause. The theme of the International Day of Peace on 21 September 2014 was a commitment to reaffirming the *Declaration on the Right of Peoples to Peace* (1984). Peace groups around the world looked back to this important resolution on this significant international day.

More recently, on 30 October 2018, the UN Human Rights Council issued a new general comment on the *International Covenant on Civil and Political Rights* (1966). This stated that any use or threat of use nuclear weapons would be in violation of Article 6 of the 1966 covenant, which states that: 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.'

International Covenant on Civil and Political Rights (1966)

General comment No. 36 (2018) on Article 6

The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations.

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Figure 7.10 Some major nations, including Australia, have still declined to sign the treaty. Greenpeace protested Germany's failure to sign in Berlin (2021).

This statement by the UN Human Rights Council is in line with the *Treaty on the Prohibition of Nuclear Weapons* (2017), which was approved by the UN General Assembly on 7 July 2017. In its preamble the new treaty states:

Treaty on the Prohibition of Nuclear Weapons (2017)

Preamble

The States Parties to this Treaty, ...
Deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances, ...

Review 7.6

1. Assess if you think global action on climate change is a human right. Discuss.
2. Account for the establishment of 21 September as the International Day of Peace.
3. Assess if the *Treaty on the Prohibition of Nuclear Weapons* (2017) is connected to human rights.

For further information about the *Treaty on the Prohibition of Nuclear Weapons* (2017), visit the website of the International Campaign to Abolish Nuclear Weapons.

Table 7.1 shows the historical origin of, and relationship between, the main types of rights that are seen as significant in the world today.

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Table 7.1 Origin and development of rights

	Historic rights movements (within nations)	Human rights (applies to all humanity)	Rights in war (laws of war)	Rights of nations (self-determination)
Origin and development	Ancient law codes Monotheistic religions Ancient philosophies The Enlightenment Various movements within nations: • Anti-slavery • Workers' rights • Right to vote – male suffrage • Education • Right to vote – female suffrage • Children's rights • Gay and lesbian rights • Same-sex marriage rights	World War II Allied war aims Four Freedoms speech (1941) *The Atlantic Charter* (1941) *Charter of the United Nations* (1945) *The Universal Declaration of Human Rights* (1948) Late 1970s – Human rights becomes a global movement that intensifies after the collapse of communism at the end of the Cold War.	First Geneva Convention (1864) Hague Convention (1899) Hague Convention (1907) Geneva Conventions (1949)	Nationalism – a powerful force before World War I *Treaty of Versailles* (1919) New nations formed in Europe *The Atlantic Charter* (1941) *Declaration of the United Nations* (1942) *Charter of the United Nations* (1945) *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) Outlaws the mass atrocity crimes against minority ethnic groups within nations
Effectiveness of these rights	If a movement for a particular right is successful, then it is incorporated into a nation's legal system, thus giving legal status and protection for that right. Some nations have developed strong protections for rights; however, this has not occurred in nations without successful movements.	Though it is claimed that all people on the planet possess these rights, there is no world state or world government to enforce them. Enforcement depends on nation states signing and ratifying human rights treaties then implementing these rights into their domestic legal system. International courts offer limited protection.	The four-part Geneva Conventions (1949) has been signed by 196 nation states. However, non-state actors such as militias and terrorist groups often do not comply with the laws of war and in some cases deliberately flout them. Also, powerful nation states can blatantly defy the laws of war if they decide to. The United States did this in the 'War on Terror' by using torture, extraordinary rendition and Guantanamo Bay to hold people who have not been charged. Russia also targeted civilians in the Syrian Civil War and in the war on Ukraine.	Nationalism has been one of the most powerful forces of modern times. Every nation or people has a strong desire to become a self-governing nation state. This nationalistic impulse was one of the contributing causes of World War I. After World War I, new nations were formed in Europe, and after World War II many new nations were formed after colonies of Western imperial powers gained their independence. When the USSR collapsed in the 1990s more nations were formed.

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Table 7.1 *(Continued)*

	Historic rights movements (within nations)	Human rights (applies to all humanity)	Rights in war (laws of war)	Rights of nations (self-determination)
Issues today	One of the biggest issues in recent years is the growing inequality in terms of wealth and opportunities.	With the rise of authoritarian leaders, populism, nationalism and racism, along with a decline in democracy globally, human rights are under threat everywhere. Human rights are also undermined by internet platforms that have little sense of civic responsibility.	The nine nuclear weapons states have military nuclear war-fighting plans that involve targeting civilians with weapons of mass destruction. Thousands of weapons are on hair-trigger alert and could be fired in 15 minutes.	Secessionist movements within nation states are usually bitterly resisted and can have a destabilising effect on regions.

7.3 Formal statements of human rights

The Universal Declaration of Human Rights

In February 1947, a committee was chosen to develop a draft of a document identifying and defining what human rights were. The group was chaired by former First Lady of the United States, 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 committee finished their work in about two years and *The Universal Declaration of Human Rights* (1948) was created by the UN General Assembly on 10 December 1948.

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.
>
> United Nations General Assembly, 10 December 1948

The Universal Declaration of Human Rights (1948) has 30 articles, covering rights such as the right to life, liberty, security, thought, religion, education, work, equality of movement and asylum. The rights 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.

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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

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

The Universal Declaration of Human Rights (1948) 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, it 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 it 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 non-government organisations (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.



Figure 7.11 In 1949, Eleanor Roosevelt holds a copy of *The Universal Declaration of Human Rights* (1948). This declaration provided the first comprehensive definition of human rights. Eleanor Roosevelt commented on what this document means for ordinary people: 'Where, after all, do universal rights begin? In small places, close to home. Unless these rights have meaning there, they have little meaning anywhere.'

Analysis 7.1

Read the United Nations' web page about the drafting history of *The Universal Declaration of Human Rights* (1948) (http://cambridge.edu.au/redirect/10306).

1. Identify the members of the drafting committee.
2. Outline the backgrounds of the committee members.
3. Describe the religious, philosophical and ideological backgrounds of the committee members.

The Universal Declaration of Human Rights (1948) 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, it 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 in the following pages, as well as various treaty bodies that continue to monitor and report on the state of human rights around the world.

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Convention on the Prevention and Punishment of the Crime of Genocide

The *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) ('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 Jewish people in the concentration camps of Nazi Germany – particularly as information became available at the trials of the Nazi leaders in the case of *United States, France, UK & USSR v Hermann Goering* et al. (1945–1946) IMT, Nuremberg.

This convention 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 time as *The Universal Declaration of Human Rights* (1948), though by a separate committee and with no collusion between the two committees. It differed from *The Universal Declaration of Human Rights* (1948) 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 (1947–1991) 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 nineteenth 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.



Figure 7.12 Innocent civilians, such as these Palestinian children in the Khan Yunis refugee camp in Gaza on 20 October 2023, theoretically have protection under the Geneva Conventions. But there is no way to enforce these protections. The same applies to the protection of Israeli civilians. On 7 October 2023, Hamas launched a large-scale terrorist attack on Israel, killing over 1000 Israeli people, wounding thousands more, and taking over 240 hostages. In response, Israel cut Gaza off from fuel, water or aid, and launched a series of air strikes. By early 2024, more than 30 000 Palestinian people had been killed and 80 per cent of the population of Gaza had been displaced.

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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 (1949).

Nearly all states of the world today are signatories to the four treaties that make up the Geneva Conventions (1949) and to the three additional protocols to the Geneva Conventions that were added in 1977.



Review 7.7

1. *The Universal Declaration of Human Rights* (1948) is described as being 'soft law'. Clarify the meaning of this.
2. Evaluate the significance of the Genocide Convention (1949).
3. Outline the origins of the 'laws of war'.

International Covenant on Civil and Political Rights (1966)

Initially, whether treaty countries chose to sign the *International Covenant on Civil and Political Rights* (1966) or the *International Covenant on Economic, Social and Cultural Rights* (1966) (discussed in next section), or both, depended on which side they supported in the Cold War, or whether they were part of the **Non-Aligned Movement**. However, over time the majority of countries in the world have signed both treaties, with the *International Covenant on Civil and Political Rights* (1966) having 172 **state parties** and the *International Covenant on Economic, Social and Cultural Rights* (1966) having 169 state parties. Many of the signings and ratifications of these treaties have occurred since the end of the Cold War. Both of these treaties **came into force** in 1976 and together they are now known as the **Twin Covenants**. Together with *The Universal Declaration of Human Rights* (1948) they have also come to be known as the **International Bill of Rights**.

The *International Covenant on Civil and Political Rights* (1966) creates an obligation on states to respect the civil and political rights of individuals, including equality between men and women (Articles 2 and 3), the right to life (Article 6), the right to freedom of movement, the right to a fair trial and the right to be presumed innocent until proven guilty (Articles 9 and 14). It also guarantees freedom of thought, conscience, speech, religion and assembly (Articles 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 (Articles 23 and 24). Torture and slavery are outlawed, and prisoners must be treated with respect (Articles 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 (Article 26).

The *International Covenant on Civil and Political Rights* (1966) contains monitoring and periodic reporting arrangements for member states. It is overseen by the UN Human Rights Committee (a separate body from the UN Human Rights Council), which reports on compliance by member states and investigates violations. Notable exceptions to signing this treaty include China and Cuba, both of which have signed but not ratified the treaty. The United States ratified the *International Covenant on Civil and Political Rights* (1966) in 1992, but added many reservations that significantly reduced its domestic effects. A number of countries, including Myanmar, Malaysia, Saudi Arabia and Singapore, have to this day neither signed nor ratified the *International Covenant on Civil and Political Rights* (1966).

Non-Aligned Movement
a group of countries formed in 1961 that did not want to take sides in the Cold War

state parties
countries that have signed and ratified a treaty

coming into force or entry into force
occurs after a treaty has been signed and ratified and has legal force

Twin Covenants
the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966)

International Bill of Rights
combines *The Universal Declaration of Human Rights* (1948) with the Twin Covenants

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International Covenant on Economic, Social and Cultural Rights (1966)

The *International Covenant on Economic, Social and Cultural Rights* (1966) created an obligation on states to work towards granting economic, social and cultural rights to individuals. This covenant 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 – the covenant states that primary education should be compulsory and free for all.

The *International Covenant on Economic, Social and Cultural Rights* (1966) is overseen by the UN Committee on Economic, Social and Cultural Rights. Notably, the United States signed this covenant 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 this covenant include Burma, Malaysia and Saudi Arabia.

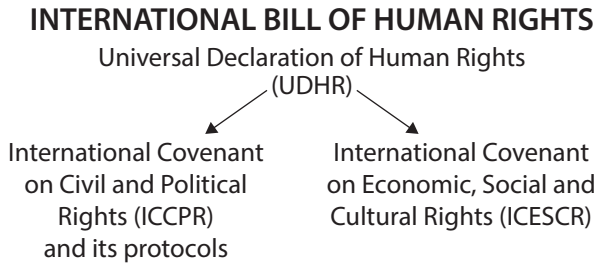


Figure 7.13 International Bill of Human Rights

At around the same time that the Twin Covenants entered into force in the mid-1970s there was a period of improved relations between the two Cold War superpowers. This period is known as détente. This led to a series of negotiation that culminated in the Helsinki Final Act (or Helsinki Accords) signed on 1 August 1975. The main purpose of this treaty was to deal with the peaceful settlement of disputes and agreement on borders. However, one section in this treaty emphasised human rights. This gave new hope to dissidents in communist Eastern Europe and in the USSR. This was followed in 1977 by the then US President (Jimmy Carter) making human rights a top priority in his foreign policy. From this time, human rights began to emerge as a truly global movement.



Figure 7.14 During his time as US President (1977–1981) Jimmy Carter made human rights a top priority of his administration. This was rare for a US President.

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Chapter summary

- Promoting human rights was an allied war aim in World War II.
- The term 'human rights' came into existence in a formal way in *The Universal Declaration of Human Rights* (1948). Human rights are the fundamental and inalienable rights and freedoms of every person on the planet.
- Human rights law and international humanitarian law outline rights that all people have in peace and war.
- Human rights are now an integral part of international law.
- The collective right of self-determination has been fuelled by the most powerful force of the modern era: nationalism. In the decades after World War II human rights were overshadowed by struggles for independence from imperial powers by many peoples, particularly in Africa and Asia.
- *The Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966) together make up what is called the *International Bill of Rights*, and together impose obligations on states to respect and promote human rights.
- From the mid-1970s human rights began to have global appeal due to détente in the Cold War and the Helsinki Accords.
- With the end of the Cold War and the collapse of communism, human rights became a global movement in the 1990s, which became known as the decade of human rights.
- Human rights are under serious threat in the 2020s with increasing geopolitical instability, the rise of racism, nationalism and populism, and the decline of democracy.
- There are many individuals and groups around the world working towards improving human rights.

Multiple-choice questions

1 The last state to officially abolish slavery (where slavery was abolished in 1981, criminalised in 2007 and designated as a crime against humanity under the 2012 constitutional reform) was:
- **a** Morocco.
- **b** Somalia.
- **c** Mauritania.
- **d** Nigeria.

2 In February 1947, a committee was chosen to draft a document that identified and defined human rights. The group was chaired by:
- **a** former UK Prime Minister, Neville Chamberlain.
- **b** former US President, Franklin D. Roosevelt.
- **c** former US First Lady, Eleanor Roosevelt.
- **d** former US First Lady, Betty Ford.

3 As a declaration, *The Universal Declaration of Human Rights* (1948) is:
- **a** a soft law, meaning officially non-binding but still influential.
- **b** a hard law, containing enforceable hard law obligations.
- **c** a flexible constitution that is not defined or set apart in a distinct document.
- **d** a civil law that is concerned with private relations between members of a community rather than criminal, military, or religious affairs.

4 The 1966 treaty is called the:
- **a** *International Covenant on Civic and Political Rights*.
- **b** *International Custom on Civil and Political Rights*.
- **c** *International Covenant on Civil and Political Rights*.
- **d** *International Covenant on Civil and Partisan Rights*.

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5 On 30 October 2018, the UN Human Rights Council issued a new general comment on the *International Covenant on Civil and Political Rights* (1966). This stated that:

- **a** Any use, or threat of using, nuclear weapons would be in violation of Article 56 of the *International Covenant on Civil and Political Rights* (1966) – 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.'
- **b** Any use, or threat of using, nuclear weapons would be in violation of Article 16 of the *International Covenant on Civil and Political Rights* (1966) – 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.'
- **c** Any use, or threat of using, nuclear weapons would be in violation of Article 26 of the *International Covenant on Civil and Political Rights* (1966) – 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.'
- **d** Any use, or threat of using, nuclear weapons would be in violation of Article 6 of the *International Covenant on Civil and Political Rights* (1966) – 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.'

Short-answer questions

1 What are 'individual human rights'? Describe using an example.

2 What are 'collective human rights'? Describe using an example.

3 Outline the meaning of self-determination.

4 Explain how one international human rights treaty contributes to the protection of human rights.

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Chapter 8
Promoting and enforcing human rights



Chapter objectives

In this chapter, you 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 human rights protection
- explain how the High Court of Australia can protect human rights
- discuss the arguments for and against having a Charter of Rights.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 21) and the 'learn to' activities (pp. 21–2) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Human rights' topic.

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Relevant law

IMPORTANT LEGISLATION

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)
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Montevideo Convention on the Rights and Duties of States (1933)
Charter of the United Nations (1945)
The Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Treaty on the Non-Proliferation of Nuclear Weapons (1968)
Rome Statute of the International Criminal Court (2002)

SIGNIFICANT CASES

Mabo v Queensland (No 2) (1992) 175 CLR 1
Toonen v Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee, 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 [2011] HCA 47

Legal oddity

There are only five human rights that are explicitly protected under the *Australian Constitution*. These are the right to vote, the protection against unjust acquisition of property under unjust terms, the right to trial by jury, freedom of religion, and the prohibition of discrimination on the basis of which state you live in.

Even though Australia has signed and ratified all the international human rights treaties, the rights in these treaties have not been incorporated into the legal system in a systematic way. There is no Human Rights Act or Bill of Rights in Australia, as there are in most other Western democracies. There was a committee set up by the Rudd government to look into creating a Human Rights Charter for Australia in 2008, but this was abandoned for political reasons.

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8.1 International community: 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 standard.

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

nation
a people that share a common heritage, language or culture and sometimes a common race

ratification
the process of a state formally approving a treaty, making it legally binding

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.

In international law, recognition as a state requires a number of factors. Outlined in Article 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 that exercises supreme independent authority over that area internally and externally. Therefore, a state must 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 United Nations is the clearest mark of statehood. However, there is no clear definition of 'statehood' that binds the international community. In practice, the granting of statehood 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* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966) into domestic law. As they live in an unrecognised state without UN membership, Taiwan's 24 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 8.1 On 10 October 2023, President Tsai Ing-wen of Taiwan addressed a crowd during the National Day celebration in Taipei, Taiwan. Tsai said maintaining the status quo is critical to seeking a peaceful coexistence with China as she delivered her last National Day speech before voters chose her successor in January 2024. Taiwan's sovereignty is disputed, and China has made it clear that it will use force if necessary to incorporate Taiwan into China.

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How many states are there?

The exact number of states in the world is disputed. In 2023, the status of states and disputed states was as follows:

- There were 193 fully recognised state members of the United Nations, though there were 195 in the world.
- Taiwan (Republic of China) has the characteristics of a state, but its international status is disputed. It originally represented all of China in the United Nations, 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 UN Security Council, further evidence that states are recognised as a result of political rather than legal considerations.
- Although Kosovo has been recognised as a nation state by over 90 other states by 2012, it is still not a member of the United Nations due to opposition from Russia, which, like China, can use its veto to block Kosovo's bid for UN membership.
- 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 United Nations.

Five states have veto power in the United Nations: the United States, Russia, China, France and the United Kingdom. The makeup of the UN Security Council has been contested. There are many disputed territories claiming statehood – including Somaliland, Abkhazia and Palestine – and some of these territories are gaining growing international recognition as states. 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 *Charter of the United Nations* (1945), all states are fundamentally equal – Article 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.

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, 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 *Charter of the United Nations* (1945), 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.

At the beginning of 2020, 173 states had ratified the *International Covenant on Civil and Political Rights* (1966) and 170 states had ratified the *International Covenant on Economic, Social and Cultural Rights* (1966) – and all UN states are subject to *The Universal Declaration of Human Rights* (1948).

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Figure 8.2 On 23 April 2023, a group of Ukraine supporters in Krakow, Poland, gathered on the 424th day of the Russian invasion of Ukraine and protested against Russia's ongoing war on Ukraine. Russia's military action in Ukraine has violated international human rights law and international humanitarian law.

Known collectively as the International Bill of Rights (see page 186), these treaties create concrete legal obligations on states to comply with their human rights provisions, which include submitting periodic reports to the UN 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. Recommend the most effective way to protect human rights.
2. Outline how human rights are promoted internationally.
3. Define the characteristics of a nation state.
4. Explain why the nation of Taiwan is unique. Assess whether Taiwan would like to change this situation.
5. Describe why a state's sovereignty is a major issue for human rights.

8.2 Role of the United Nations

Trusteeship Council inactive since 1994 but originally responsible for overseeing the transition of United Nations trust territories to self-government after decolonisation

UN General Assembly the UN organ representing all UN member states; it acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council the UN forum of member states responsible for overseeing and making recommendations on human rights in all member states

The United Nations 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 United Nations has five principal organs under the *Charter of the United Nations* (1945) (not including the former **Trusteeship Council**) – all of these have some role to play in the promotion or protection of human rights.

Organs of the United Nations: Human rights responsibilities

The UN has five organs that deal with human rights:

- **UN General Assembly** – 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 UN General Assembly, such as the UN Development Program. The principal human rights body of the United Nations, the **UN Human Rights Council**, reports directly to the UN General Assembly.

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- **UN Security Council** – 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 UN Security Council has five permanent members that 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 UN Security Council to reflect today's world more accurately, but this has yet to occur.
- **Economic and Social Council** – 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 UN General Assembly to become the UN Human Rights Council.
- **UN Secretariat** – this is the main administrative body of the United Nations, with over 44000 staff working worldwide. It provides the various information, studies, tasks and facilities needed by the United Nations. It includes the departments and offices of the United Nations, including the **Office of the High Commissioner for Human Rights**. The UN Secretariat is headed by the UN Secretary–General, as of 2024 António Guterres, the most visible and influential figure in the United Nations.
- **International Court of Justice** – this is the primary judicial organ of the United Nations. The International Court of Justice has jurisdiction, under the *Charter of the United Nations* (1945), 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.

Office of the UN High Commissioner for Human Rights

The Office of the UN High Commissioner for Human Rights (OHCHR) is an administrative agency under the UN Secretariat that works to promote and protect the human rights contained in *The Universal Declaration of Human Rights* (1948) and international law. Established in 1993 after a World Conference on Human Rights held by the United Nations, the OHCHR's purposes include:

- advancing universal ratification and implementation of *The Universal Declaration of Human Rights* (1948) 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 UN Human Rights Council and the Human Rights Committee.

The office is headed by the High Commissioner for Human Rights, who reports directly to the Secretary–General. On 17 October 2022, Volker Türk, an Austrian lawyer who has held various posts with the United Nations since the 1990s, was appointed as the eighth High Commissioner for Human Rights, taking over from former Chilean President Michelle Bachelet.

UN Security Council
the UN organ responsible for the preservation of international peace and security; it has the power to authorise military action and other measures

resolution
a decision passed by the UN General Assembly or UN Security Council; when passed by the UN Security Council, it can be legally binding on all member states

Economic and Social Council
the UN organ that acts as a forum for international economic and social cooperation and development

UN Secretariat
the UN administrative body headed by the UN Secretary–General; it contains the departments and offices of the United Nations

Office of the High Commissioner for Human Rights
the UN human rights office responsible for monitoring and reporting on human rights worldwide

International Court of Justice
the primary judicial organ of the United Nations; it has jurisdiction to hear disputes submitted by member states and issue advisory opinions

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Figure 8.3 On 17 August 2023, the United Nations High Commissioner for Human Rights spoke over video link during a Security Council meeting at UN headquarters on the human rights situation in the Democratic People's Republic of Korea (North Korea).

Analysis 8.1

Read the article 'Volker Türk: the man charged with protecting the world's human rights' on *The Guardian* website at http://cambridge.edu.au/redirect/10307. Note that this article was written at the beginning of 2023.

1. Outline the problems Volker Türk identifies as causing setbacks in human rights.
2. Identify where Türk sees international humanitarian law being flouted. Give details. Identify more recent conflicts that could be added to this list.
3. Identify crises that are being ignored. Discuss what will happen if the international community is indifferent to people in crisis situations.
4. Outline how Türk dealt with China's government over its treatment of the Uyghur people.
5. What were the plans to commemorate the 75th anniversary of *The Universal Declaration of Human Rights* (1948)?
6. In Türk's opinion, outline why *The Universal Declaration of Human Rights* (1948) is so important.

Legal Links

In 2023, it was 75 years since the creation of *The Universal Declaration of Human Rights* (1948). The United Nations' web page for the Human Rights 75 Campaign provided not only links to the events that were held but also to educational resources. The 75-year anniversary provides an excellent opportunity to assess the progress that has been made on human rights and also to evaluate the state of human rights in the world today.

Figure 8.4 This was the logo for the 75th anniversary of *The Universal Declaration of Human Rights* (1948) in 2023. It was a time of reflection on the significance of this milestone in human rights and on the present challenges to human rights.

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UN Human Rights Council

The UN Human Rights Council is a relatively new intergovernmental body under the UN General Assembly, and is 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. It works closely with the OHCHR to perform its duties.

The UN Human Rights Council was established in 2006 following a UN General Assembly resolution. It was set up to replace the previous Commission on Human Rights, which had been a part of the Economic and Social Council 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 UN Human Rights Council 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 *International Covenant on Civil and Political Rights* (1966) and other treaties)
- an Advisory Committee to provide expertise and advice and recommend issues for the council to consider.

Because the UN Human Rights Council is relatively new, it is too early to judge its success. The United States, under former President George W. Bush, originally refused to participate in the UN Human Rights Council. However, in 2009 then US President Barack Obama reversed the United States' position and joined the council, thereby strengthening its international influence. Then in June 2018, the Trump administration withdrew from membership of the UN Human Rights Council in protest at the UN body's frequent criticism of Israel's treatment of Palestinians. On 14 October 2021, the United States was back in the UN Human Rights Council with President Joe Biden saying that he looks forward to 'the United States once more being a constructive voice that works to help push the UN Human Rights Council to live up to its mandate and to protect the values we hold dear for all people'.

In recent years, the council has received some criticism, from former Secretaries-General Ban Ki-moon and Kofi Annan, as well as from the former High Commissioner for Human Rights. It has been criticised for acting not in the 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. However, this changed with the Russian invasion of Ukraine in February 2022. On 8 April 2022, the General Assembly voted 93 to 24 (with 58 abstentions) to suspend Russia from the UN Human Rights Council. This met the required two-thirds majority for expulsions, as abstentions are not counted. Ukraine's foreign minister, Dmytro Kuleba, reacted by saying that 'war criminals have no place in UN bodies' and that he is 'grateful to all member states which chose the right side of history'.

Analysis 8.2

Read the article 'Russia fails to win back seat on human rights council after UN vote' on *The Guardian* website at https://cambridge.edu.au/redirect/10348.

1. Identify when and how Russia was suspended from the UN Human Rights Council.
2. Evaluate how effective the Russian campaign was to return to the UN Human Rights Council.
3. Identify what other countries were elected with human rights concerns. Explain how serious these concerns were.
4. Outline the arguments made in this article for refusing Russia's return to the UN Human Rights Council.
5. Assess how certain Ukraine can be of the support of the UN Human Rights Council as Russia's war on Ukraine continues.

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Research 8.1

Despite heavy criticism of Australia over the issue of asylum seekers in the past, the Australian Government successfully lobbied other UN member states to support Australia's election to the UN Human Rights Council in 2018. Australia served its term to 2020. Research Australia's term on the council.

1 Assess the effectiveness of Australia's contribution to this UN body.
2 Evaluate how Australia is viewed in the UN Human Rights Council's periodic reviews. Identify the positive and negative observations about Australia's human rights record in recent years.
3 Do you think that Australia deserves to serve another term on the UN Human Rights Council in the future?

The Sustainable Development Goals

In 2002, at the end of a conference on world poverty, all member states of the United Nations agreed to the Millennium Declaration. This declaration outlined eight ambitious Millennium Development Goals (MDGs) that all member states pledged to try to reach by 2015. The goals covered areas of poverty, health, education, sustainability and development.

There was uneven progress in achieving the goals, which depended less on economic growth and more on the development of programs.

In the years up to 2015, a post-2015 development agenda was finalised after extensive consultations in 70 countries. The result was 17 'Sustainable Development Goals', or SDGs, agreed upon in 2015:

1 No poverty
2 Zero hunger
3 Good health and well-being
4 Quality education
5 Gender equality
6 Clean water and sanitation
7 Affordable and clean energy
8 Decent work and economic growth
9 Industry, innovation and infrastructure
10 Reduced inequalities
11 Sustainable cities and communities
12 Responsible consumption and production
13 Climate action
14 Life below water
15 Life on land
16 Peace, justice and strong institutions
17 Partnerships for the goals.

The goals were designed to achieve specific targets by 2030 – there are 169 targets in total. The aim, stated in in the UN document '17 Goals to Transform Our World', is to create a 'fairer, more prosperous, peaceful and sustainable world where no-one is left behind'. The SDGs have been guiding all international efforts at sustainable development since 2015.



Figure 8.5 The Sustainable Development Goals were created by the UN General Assembly in 2015. The aim is to achieve the goals by 2030.

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8.3 Roles of other international bodies

Intergovernmental organisations

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.

In 1909, there were 37 IGOs in the world, and by 1960 this figure had risen to 154. Today, the number stands at over 300. The United Nations, created by the *Charter of the United Nations* (1945), is the most important of all IGOs. Other powerful IGOs include the World Trade Organization, the International Monetary Fund, the North Atlantic Treaty Organization (see page 488) and INTERPOL (see page 155).

Apart from the United Nations, 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 include the following:

- **Commonwealth of Nations** – made up of 56 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 Commonwealth 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** – established in July 2002, the African Union includes all African states; currently, 55 African countries are members, with the most recent addition, Morocco, being admitted as a member state in January 2017. Adherence to democratic principles and sound economic practice are expected of African Union members. Madagascar and Mali are currently suspended due to coups d'etat. 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 of Justice and Human Rights.
- **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*.
  On 28 August 2019, the Organization of American States passed a resolution condemning the 'systematic violations of human rights in Venezuela including the use of torture, illegal and arbitrary detentions, extrajudicial executions, forced disappearances and the denial of the most basic necessities, especially those related to health, food and education'.



Figure 8.6 United Nations Secretary-General António Guterres (left) speaks with the then Palestinian Prime Minister Mohammad Shtayyeh (right) at the opening session of the 36th Ordinary Session of the Assembly of the African Union at the African Union Headquarters in Addis Ababa, Ethiopia, on 18 February 2023.

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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

The International Court of Justice (ICJ) is an organ of the United Nations. 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 judgments 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 **non-government organisations (NGOs)** such as the International Committee of the Red Cross 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 UN Security Council has yet to accept and enforce the ruling of the ICJ.

non-government organisation (NGO) an independent, non-profit group that often plays an important role in advocating, analysing and reporting issues worldwide (for example, human rights or the environment)

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

In 2014, the Marshall Islands, the site of 67 nuclear tests, filed a lawsuit against the nine nuclear weapons states for their failure to comply with Article 6 of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). China, France, Israel, North Korea, Russia and the United States refused to recognise the jurisdiction of the ICJ. The case was to be heard against India, Pakistan and Britain for allegedly failing to halt the nuclear arms race. But the lack of previous dispute negotiations led a majority of the 16-judge bench at the ICJ to uphold the objection to jurisdiction by these three countries.

In the United States, the Ninth Circuit Court of Appeals ruled on the US Federal District Court's dismissal of the Nuclear Zero lawsuit, brought by the Republic of the Marshall Islands.

The case was initially dismissed on 3 February 2015 on the jurisdictional grounds of standing and political question doctrine without getting to the merits of the case. Oral arguments were then heard in the Ninth Circuit Court of Appeals on 15 March 2017, and in July the court affirmed the dismissal of the lawsuit.

The ruling from the court held that Article VI was non-self-executing and therefore not judicially enforceable. The panel also found that the Marshall Islands' claims presented inextricable political questions that were non-justiciable and must be dismissed.

The Marshall Islands did not seek compensation. Rather, it sought declaratory and injunctive relief requiring the United States to comply with its commitments under the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) and international law.

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 the 'compulsory' jurisdiction of the court, but by 2010 only 66 states had done so, most – including Australia – with some form of reservation limiting the court's power. Despite these limitations, the court has issued important judgments that carry the weight of international law and act as significant guides to future actions.

In February 2022, Ukraine took Russia to the ICJ accusing it of invading their territory and committing grave and widespread violations of the human rights of the Ukrainian people.

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Russia refused to attend the first hearing on 7 March 2022. On 16 March 2022, the court ruled 13 to 2 that Russia must immediately suspend its military operations in Ukraine. The two dissenting judges were from Russia and China.

Other forums, including the UN Security Council (see earlier), the International Criminal Court, regional courts (such as the European Court on Human Rights) and the Uganda Human Rights Commission, are arguably much more effective for hearing matters of serious human rights violations.

International Criminal Court

The International Criminal Court (ICC) was established in 2002 to prosecute international crime (see page 147). The ICC was preceded by various tribunals (known as *ad hoc* tribunals) established for a particular purpose by the UN Security Council or the United Nations to deal with specific events involving serious international crimes.

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). 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.

Ad hoc tribunals

Ad hoc tribunals were set up by the UN Security Council in the 1990s. This was in response to human rights abuses that had taken place in Africa and the Balkans.

The International Criminal Tribunal for the Former Yugoslavia was created in 1993 by a resolution of the UN Security Council. As the name suggests, its focus is the former Yugoslavia, where breaches of the Geneva Conventions and international customary law had been taking place since 1991. A significant case was that of Slobodan Milosevic, former leader of Serbia. Milosevic was arrested in 2001, and placed on trial the next year, for war crimes and crimes against humanity in Kosovo. However, the trial had not been completed by the time of Milosevic's death in 2006.

The International Criminal Tribunal for Rwanda was established in 1994, which used the same model as the International Criminal Tribunal for the Former Yugoslavia, in response to the 1994 genocide in Rwanda. At this time the Rwandan Government was dominated by a particular ethnic group, the Hutu. In 1994, after President Juvenal Habyarimana was assassinated, the government and armed forces committed mass slaughter of members of the minority Tutsi people. Many of the people who masterminded this genocide were tried by the International Criminal Tribunal for Rwanda. In 2012, it began transferring cases to national jurisdictions, and it was wound up in December 2015.

Analysis 8.3



Read the 2019 article 'International Criminal Court and India' at the following link: http://cambridge.edu.au/redirect/10308.

1. Discuss why this article claims that the International Criminal Court (ICC) should investigate India.
2. Outline what the ICC could do if it did investigate India.
3. Research another country of concern to the ICC today.

European Court of Human Rights

The Universal Declaration of Human Rights (1948) was a landmark human rights document written in the wake of World War II. The European Court of Human Rights (ECHR) 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.

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Figure 8.7 In Strasbourg, France, on 27 September 2023, some young Portuguese citizens held placards outside the European Court of Human Rights (ECHR) for a hearing in a climate change case. The ECHR had just begun hearing a case brought by six Portuguese youths against 32 nations for not doing enough to stop global warming, the latest bid to secure climate justice through the courts.

The ECHR 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 ECHR. This has had an enormous effect on member state laws; for example, numerous laws of the United Kingdom had to be revised following ECHR rulings. Although the United Kingdom left the EU in 2020, it is still a member of the ECHR.

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 that assesses member state compliance with the *International Covenant on Civil and Political Rights* (1966) and can hear petitions raised by the states about each other's compliance. Significantly, this 1966 covenant also gives the committee jurisdiction to hear personal complaints brought by individuals of member states about human rights violations in their own country. Currently, 116 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 judgments 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 206).



Analysis 8.4

Read the article 'Portuguese youths sue 33 European governments at EU court in largest climate case ever' at http://cambridge.edu.au/redirect/10309.

1. Who are the plaintiffs in this case and who are the defendants?
2. Explain what makes this case a significant human rights case.
3. State the previous case on climate change brought to the European Court of Human Rights.
4. What is the plaintiff's claim?
5. Identify the articles of the European Convention on Human Rights that this case is based on.
6. What principles will the plaintiff appeal to?
7. Explain why this is classed as a 'hard case'.
8. Outline an effective outcome for this case.

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Review 8.2

1 Identify the Sustainable Development Goals (SDGs).
2 Outline five human rights being promoted by the SDGs.
3 Identify two cases at the International Court of Justice that have human rights implications.
4 Describe a major impediment to the International Court of Justice's effectiveness.
5 Explain how the work of the International Criminal Court differs from that of the International Court of Justice.

Legal Info

Human rights treaty bodies

A number of UN treaty bodies similar in function to the UN Human Rights Council 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.



Figure 8.8 On 24 October 2023, Professor Ben Saul, from the Sydney Law School, was appointed to the position of Special Rapporteur on Human Rights and Counter-terrorism at the United Nations. The title of 'Special Rapporteur' is used by experts called upon to report or advise on human rights. Professor Saul's job description is to promote and ensure the protection of human rights, particularly in situations where governments are dealing with terrorism. International humanitarian law protects all civilians, without discrimination. So, when going after terrorists, governments need to avoid measures that harm civilians, shut down legitimate protests or criminalise dissent.

Analysis 8.5

Read the 2023 article 'A war crime is still a war crime, even in retaliation', by Professor Ben Saul, which is available in the Interactive Textbook. Note that this article was written a week before Professor Saul's appointment to the position of Special Rapporteur on Human Rights and Counter-terrorism at the United Nations.

1 Identify the 'atrocious violations' by Hamas. Propose how they should be dealt with.
2 Outline Professor Saul's views on Israel's tactic of using a siege on Gaza.
3 Explain what international law requires of Israel in its military response to Hamas's terrorist attacks.
4 Explain what Professor Saul believes needs to be addressed to resolve this conflict.
5 Research recent articles on this conflict by Ben Saul and other experts on human rights and international humanitarian law.
6 Describe how this conflict has developed since October 2023 to the current time.
7 Outline to what extent the conflict was resolved, if at all. Describe what role human rights and international humanitarian law played.

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Non-government organisations

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 twenty-first century there were over 100 000 NGOs.

At the establishment of the United Nations 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 United Nations of human rights violations and progress. They help ensure greater government compliance by investigating, researching, documenting and publicising cases of human rights violations. Some NGOs will also work directly with violators or victims, providing evidence to international courts, or encouraging other states or the United Nations 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, which is made up of 190 National Red Cross and Red Crescent Societies that lead and organise relief assistance missions in response to large-scale emergencies.

Legal Links

Information is available online about the following well-known international non-government organisations working for human rights:

- Amnesty International
- Freedom House
- Human Rights Watch
- Carter Center
- International Committee of the Red Cross
- Reprieve
- A21.

Research 8.2

Visit two of the non-government organisation (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 people can access, and so affects the decisions they can make about their government.

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Figure 8.9 On 10 December 2022, Nobel Peace Prize–winning Filipino journalist Maria Ressa posed for photographers during the launch of her book *How to Stand Up to a Dictator*. Maria Ressa highlighted the campaign of extrajudicial killings conducted between 2016 and 2022 by Philippine President Duterte in his 'war on drugs'. At least 6000 people were murdered over this period. Ressa has been threatened multiple times, arrested twice and had false charges brought against her. However, she was undaunted in her campaign for human rights in her country.

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, at least 15 journalists were killed, 250 were jailed and 63 were missing in 2019. Iraq and Syria were the deadliest countries for journalists, while the countries Turkey, China and Egypt jailed the most journalists. Also, the international NGO Reporters Without Borders releases an annual index of media freedom of all states. In 2023, Australia ranked twenty-seventh in the world for degree of press freedom. The 2023 annual report by Reporters Without Borders released on 3 May (World Press Freedom Day) stated that in 70 per cent of countries journalism was under threat and journalists are only safe in 30 per cent of countries. The reports also identified the role that social and technological upheavals have in dramatically changing the environment for journalists.

8.4 Human rights in Australian domestic law

Australia is not currently party to any regional human rights instrument or human rights court, although these do exist for the European, African and American regions. 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. 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.

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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 Article 12 of *The Universal Declaration of Human Rights* (1948) and Article 17 of the *International Covenant on Civil and Political Rights* (1966). 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 Articles 2 and 7 of *The Universal Declaration of Human Rights* (1948) and Article 26 of the *International Covenant on Civil and Political Rights* (1966).

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 Article 17 of the *International Covenant on Civil and Political Rights* (1966), 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 *International Covenant on Civil and Political Rights* (1966) 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.

Sources of human rights in Australia

In Australia, there is no one document where all human rights can be found; instead, 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.

International treaties

When an international treaty is negotiated and formed, states indicate their agreement to the principles of the treaty by signing it. Signing a treaty means the country will have to act in the

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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 need to be **incorporated** into Australian law in some way. Parliament usually passes 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.

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

8.5 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 and division of powers

The doctrine of separation of powers 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 *Australian Constitution* provides for ministers to sit in parliament and to be part of the executive, which can make **delegated legislation**.

However, the High Court has 'consistently' ruled that strict separation of the judiciary from the other two 'political' branches is a fundamental principle in the *Australian 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 *Australian 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

separation of powers
the division of power between the executive, the legislature and the judiciary to prevent one person or group from gaining total power

division of powers
how powers are divided between the federal and state governments

delegated legislation
laws made by people or bodies to whom parliament has delegated law-making authority

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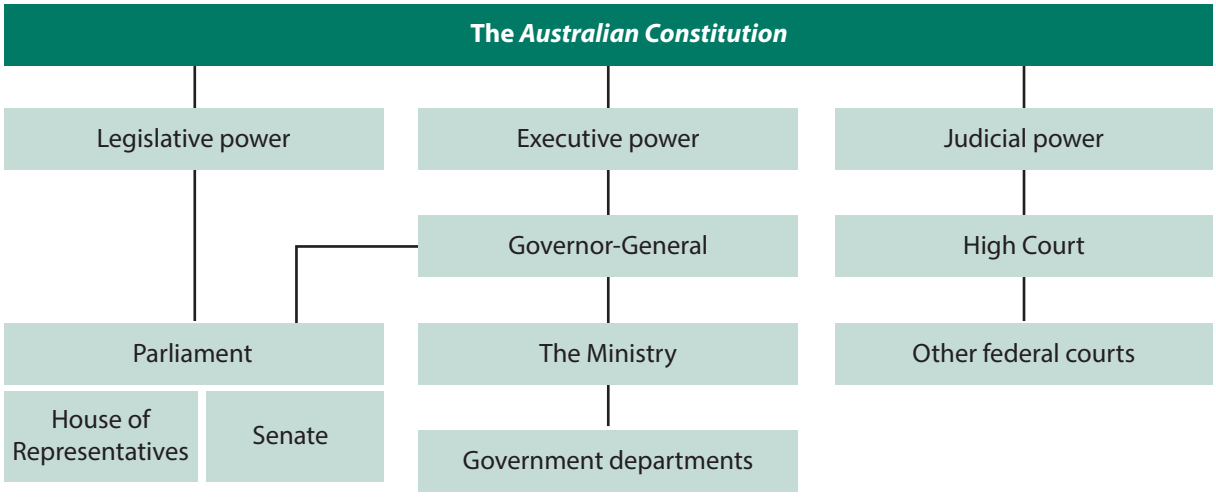


Figure 8.10 Under the *Australian Constitution*, judicial power is strictly separated from political power.

section 51 of the *Australian 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 *Australian Constitution* are **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.

The division of powers can act as a check on government by ensuring that power is not too centralised. However, the Commonwealth's power has grown significantly since Federation in 1901, especially, for example, in the area of the corporations power (s 51(xx)).

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 the authority to legislate on external affairs, which includes Australia's treaty obligations. 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.

heads of power powers listed in sections 51 and 52 of the *Australian Constitution*: the areas that the Commonwealth can legislate on

residual powers a government power that is not listed in section 51 of the *Australian Constitution* as a legislative power of the Commonwealth Parliament, and thus belongs to the states

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 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 *Australian Constitution* did include some rights; these are known as **express rights**. Additionally, over the last century the High Court has interpreted the *Australian 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 *Australian Constitution* to function effectively – these are known as **implied rights**.

Express rights in the *Australian 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 *Australian 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 *Australian 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 *Australian Constitution* to function effectively.

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Despite this, a finding of implied rights by the judiciary has often been controversial and the ability of the *Australian Constitution* to act as a protector of human rights is very limited. Most Australian human rights are found in other sources of law.

Review 8.3

1. Australia is a dualist system. Define what this means.
2. Explain the difference between the separation of powers and the division of powers.
3. Describe how the *Australian Constitution* enables international human rights law to influence domestic law in Australia.
4. Outline the express rights guaranteed by the *Australian Constitution*.
5. Define implied rights. Give an example.



Figure 8.11 Tanya Plibersek, Australia's environment minister, at a polling location during the Indigenous Voice to Parliament referendum in Sydney, Australia on 14 October 2023. The right to vote is one of the five express rights that appear in the *Australian Constitution*.

8.6 Other human rights roles in Australia

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)
- *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

Common law

The common law in Australia is the body of law made by judgments of the courts. 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 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 that were passed by the Commonwealth Government in the aftermath of the September 11 attacks on the United States in 2001, and after the Bali bombings on 12 October 2002, were widely criticised as removing long-standing rights for certain people.

The common law cannot be relied upon to develop new rights, as judgments will only define those rights on a case-by-case basis, if and when a relevant matter is brought before a court. 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

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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* [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.

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

The most significant human rights body in Australia is the Australian Human Rights Commission (AHRC).

An independent national body, it was established under the *Australian Human Rights 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 AHRC has had an important influence on Australia's laws. For example, in 1997 it conducted an inquiry into the separation of First Nations children from their families (known as the Stolen Generations). The AHRC's report, *Bringing Them Home*, recommended that the Australian Government make 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 former Labor Prime Minister Kevin Rudd.

The AHRC 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 AHRC 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 AHRC 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 AHRC 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 AHRC 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.

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Legal Links

The Australian Human Rights Commission website 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.

Royal commissions

Royal commissioners can independently investigate complex issues. The Royal Commission into Institutional Responses to Child Sexual Abuse 2013–2017 investigated the scale of institutional abuse, and failures to address it, through allowing survivors to speak directly to one of the six commissioners about their experiences. The commission also gathered evidence from institutions and examined prevention, identification, response and justice for victims. The final report was delivered to the Governor-General on 15 December 2017, and on 13 June 2018 the Australian Government tabled its response. This included the establishment of the National Redress Scheme on 1 July 2018 and a National Apology delivered on 22 October 2018.



Figure 8.12 Australia's former Prime Minister, Julia Gillard (left) – who started the Royal Commission into Institutional Responses to Child Sexual Abuse – is applauded by then Prime Minister Scott Morrison (second right) and opposition Labour leader Bill Shorten (right), as she addresses the public in Parliament House Canberra on 22 October 2018. Gillard issued a national apology to victims of child sex abuse in an emotional address, acknowledging that the state failed to stop 'evil dark crimes' committed over decades.

Two recent royal commissions were:

- the Robodebt Royal Commission, which released its final report on 7 July 2023
- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which released its final report on 29 September 2023.

Legal Links

The Royal Commission website provides detailed reports and educational information about royal commissions in Australia. All of these royal commissions involve some aspect of human rights.

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 *Australian 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 First Nations peoples' right to title in their traditional land. This principle became known as 'native title'.

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Combined with the court's power to declare legislation inconsistent or invalid, to uphold the rights provided for in the *Australian Constitution* and to continue to develop the common law, the High Court is arguably the most important protector of human rights in Australia.

Review 8.4

1. Discuss why the protection of rights offered under the common law is limited.
2. Identify the most recent statute law involving human rights.
3. Describe what action the Australian Human Rights Commission can take if it thinks human rights have been breached.
4. Identify one royal commission that involved human rights issues.
5. Identify three High Court cases that are human rights related.



Figure 8.13 The Refugee Challenge teaches school students about the challenges faced by the world's refugees. The Refugee Challenge uses a simulation that takes participants through a refugee's journey.

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 non-government organisations (NGOs) in Australia in the field of human rights include:

- New South Wales Council for Civil Liberties
- Civil Liberties Australia
- Australian Council of Social Service
- Asylum Seeker Resource Centre
- The Refugee Challenge.

Search the internet for information about these NGOs.

Research 8.3

Visit the website of the New South Wales Council for Civil Liberties and complete the following tasks.

1. Identify when the organisation was founded.
2. Identify who was appointed as the new president in 2023.
3. Describe some of the functions of the organisation.
4. Find and discuss some of the cases the organisation has conducted defending human rights.

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The media

In Australia in 2022, the issue of press freedom remains a major human rights concern. Since the September 11 terrorist attacks in 2001, successive Australian governments have created 75 pieces of anti-terrorism legislation. On 6 June 2019, Australian Federal Police officers raided the home of the News Corp journalist, Annika Smethurst, over a story about a leaked plan for greater powers to spy on Australians. This was followed by a raid on the Australian Broadcasting Corporation's head offices in Sydney in relation to an investigation about alleged unlawful killings in Afghanistan by Australian Special Forces. The Australian Federal Police used anti-terror legislation to conduct these raids, although it is understood that both cases were not related to terrorism. These raids alarmed many people who were concerned that freedom in Australia was being gradually eroded.

In a National Press Club of Australia event on 18 October 2023, Peter Greste dealt with the issue of the failure of whistle-blower protection in Australia and cited two cases in particular. One was Australian Taxation Office whistle-blower, Richard Boyle, who was vindicated in official investigations yet still faces prosecution. The other was Richard McBride, who had been accused of leaking classified information about alleged war crimes by some members of Australia's special forces in Afghanistan.



Figure 8.14 Frances Haugen, former product manager on the Facebook civic integrity team. Following the 2020 United States elections, Facebook dissolved this team, Haugen decided to become a whistle-blower over some of Facebook's activities.

This formed the basis of the *Four Corners* 'Afghan Files' episode in 2017, which led to the arrest of McBride in 2018 and the raid on the Australian Broadcasting Corporation in 2019. (A month after the National Press Club event, McBride pleaded guilty to the charges and was ultimately sentenced to five years, eight months prison in May of 2024. The lead investigative journalist on the 'Afghan Files', Dan Oakes, received a Medal of the Order of Australia for 'service to journalism' in the same year.)

The other major issue covered at the National Press Club on 18 October 2023 was disinformation, which was explained by Facebook whistle-blower Frances Haugen. Haugen explained that there was absolutely no transparency about how the social media networks such as TikTok, Facebook, Instagram and Twitter (now known as X) create their algorithms. There was also no accountability regarding the harmful effects of social media on society and politics, and there were powerful people weaponising a distorted version of free speech to dismiss any calls for such accountability. The proliferation of harmful material and hate speech online has a very negative effect on human rights and on democracy in Australia. Haugen also answered questions about the draft Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth).

Analysis 8.6

The National Press Club address by Peter Greste and Frances Haugen is available on YouTube. Watch their presentations and outline the human rights concerns they raised.

Research 8.4

1 Research the progress of the whistle-blower Richard Boyle. To what extent has justice been served in this case?
2 Research whether the draft Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) has been made into law yet.

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A Charter of Rights for Australia

Many states have opted to protect their citizens' rights by adopting 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*. 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. 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 Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966) – to protect human rights in relation to their legislation and decisions.

In 2008, on the sixtieth anniversary of *The Universal Declaration of Human Rights* (1948), 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 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 per cent 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 per cent were in favour of such a charter and only 12.6 per cent 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.

Table 8.1 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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Review 8.5

1 Explain the role of non-government organisations when it comes to human rights.
2 Compare a 'bill of rights' being embedded in the Constitution or being enacted by statute.
3 Outline what happened between 2008 and 2010 in the inquiry into a human rights charter for Australia.

Media

How the 'fair go' became the last bulwark for Australia's freedoms

Gillian Triggs

The Conversation

14 December 2015

Australian governments have, over the last few years, passed laws that explicitly, or in their effect, breach fundamental human rights.

Not only have our parliaments failed to exercise their traditional restraint to protect common law freedoms and liberties, they've also allowed the executive government to expand its discretionary powers and, increasingly, excluded the courts and judges from exercising judicial scrutiny or control.

Parliaments all too often ignore the separation of powers doctrine. The government's uncontested assessment of national interest and security often trumps the rule of domestic and international law, as well as Australia's obligations under human rights treaties.

Politics of fear

Operation Fortitude provides a powerful example of executive overreach in civilian affairs. The recently merged Department of Immigration and Border Protection's Operation Fortitude was to involve a number of agencies – including Victoria Police, Yarra Trams, Metro Trains, the Sherriff's Office, Taxis Services Commission and the Australian Border Force – targeting crimes ranging from 'anti-social behaviour' to outstanding arrest warrants. It was cancelled after a community outcry.

It is but one example of the tendency to increase executive power and to criminalise behaviour that, in the past, might have attracted a civil fine.

Australian governments have introduced, and parliaments have passed, scores of laws that infringe common law freedoms of speech, association and movement, the right to a fair trial and the prohibition on arbitrary detention.

These new laws undermine a healthy, robust democracy, especially when they grant discretionary powers to executive governments in the absence of meaningful judicial scrutiny.

What explains Australia's move to restrictive approaches to our fundamental freedoms and human rights over the last few years?

There's a conflation in the public mind of the events of 2001 – the Tampa crisis, the 'Children Overboard' claims and the September 11 terrorist attacks.

(Continued)

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Media—Continued

Since these events 14 years ago, governments and political leaders have played on community fears of terrorism and the unauthorised entry of refugees to concentrate power in the hands of the executive – to the detriment of Australian liberty.

Dubious laws

Particularly troubling is the phenomenon of the major political parties agreeing with each other to pass laws that threaten the fundamental rights and freedoms Australia has inherited from its common law tradition.

Compounding the concentration of power in the executive's hands is the recent increasing militarisation of government and the criminalisation of behaviour that has not hitherto been the subject of criminal penalties. This includes:

- Counter-terrorism laws: metadata retention and law enforcement agencies' access to that data without a warrant or independent or judicial authorisation and oversight.
- Criminalisation of Australians who enter 'declared areas' in Syria and Iraq, and placing the burden of providing a legitimate reason on the accused.
- Cancellation of visas and mandatory detention of those who become unlawful non-citizens by, for example, failing the new character test, which depends on the minister's suspicion that even minor offences have occurred. All this coupled with the minister's power to overturn Administrative Appeals Tribunal decisions.
- Lengthy administrative detention of the mentally ill or those unfit to plead without trial.
- Operation Sovereign Borders and secrecy of 'on-water activities'.
- Secrecy laws under the Australian Border Force Act that criminalise all immigration workers, consultants and service providers who disclose 'protected information' – an offence that attracts a penalty of two years' imprisonment.
- Legislative exclusion from the Administrative Decisions (Administrative Review) Act of decisions under counter-terrorism, national security and migration laws.

Whither protection?

It might be thought that Australians can rely on their courts to protect common law liberties. Judges have employed the principle of 'legality' to adopt a restrictive interpretation of legislation to protect common law freedoms.

Laws passed by parliament are not to be construed as abrogating fundamental common law rights, privileges and immunities in the absence of clear words or unmistakable and unambiguous language.

But, as our laws are now drafted with such precision – or are so constantly amended – ambiguities are increasingly hard for the courts to find.

Historically, parliament has been the bulwark against sovereign or executive power. But law professor George Williams estimates there are now more than 350 Australian laws that infringe fundamental freedoms. He suggests prioritising governmental power has become a 'routine part of the legislative process', stimulating little community or media responses.

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And an Australian Law Reform Commission interim report on rights and freedoms in Commonwealth laws has confirmed this assessment.

One of Australia's most effective safeguards of human rights is the cultural expectation that freedoms will be protected. Most Australians are unlikely to be able to describe the doctrine of the separation of powers. But they're quick to assert their liberties under the rubric of a 'fair go' – a phrase that's as close to a bill of rights as Australia is likely to get.

This cultural expectation is what keeps our freedoms alive today – as was illustrated by the overwhelming community response to Operation Fortitude. And to preserve section 18C of the *Racial Discrimination Act* when the Abbott government proposed stripping out legislative provisions protecting ethnic groups from hate speech.

But the scores of laws passed recently that infringe our rights have confirmed my view that Australia needs a legislated Charter of Rights. If we had such rights enshrined in the *Australian Constitution*, laws that infringe them could easily be repealed or amended.

This article is an edited extract of the Blackshield Lecture, delivered by Professor Gillian Triggs on 5 November 2015.

All of the arguments raised by Professor Gillian Triggs in 2015 are still valid. The campaign for a Human Rights Act for Australia continues. On 7 March 2023, the Australian Human Rights Commission released a position paper that contained a detailed proposal outlining what a Human Rights Act for Australia would look like and how it would function. The Australian Human Rights Commission's website features support documents and a video speech by the President, Emeritus Professor Rosalind Croucher AM.



Figure 8.15 Gillian Triggs, the president of the Australian Human Rights Commission, spoke at 'RightsTalk: Inspiring change in human rights' at the Sydney Town Hall on 14 June 2017.

Analysis 8.7

Read the media article on pages 215–17.

1. Explain what Triggs means by the 'politics of fear'.
2. Identify the 'dubious laws' that Triggs says have been passed.
3. Demonstrate instances in which the 'fair go' has protected human rights.
4. Examine whether a charter of human rights would improve the situation.

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Chapter summary

- *The Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966) together make up what is called the International Bill of Rights and impose obligations on states to respect and promote human rights.
- Protection of human rights differs internationally and domestically.
- State sovereignty can be used to promote or hinder human rights.
- The various UN bodies and international courts have differing roles to play in the protection of human rights.
- Many intergovernmental organisations and non-government organisations play an important role in promoting human rights internationally.
- The UN Human Rights Council can hear complaints submitted directly by citizens of states.
- The International Criminal Court 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 *Australian 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. However, these are being undermined by anti-terror legislation that has been enacted since 2001.
- 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. Calls for a human rights charter resumed in 2019.



Multiple-choice questions

1 The Office of the UN High Commissioner for Human Rights is an administrative agency under the UN Secretariat that works to promote and protect the human rights contained in *The Universal Declaration of Human Rights* (1948) and international law. It was established in:
- **a** 1993.
- **b** 2003.
- **c** 2013.
- **d** 1983.

2 Non-government organisations are organisations that are:
- **a** independent of, and without representation of, any government.
- **b** government representatives.
- **c** independent but part of a government agency.
- **d** dependent on government funding.

3 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)) are what type of rights in the *Australian Constitution?*
- **a** Common rights.
- **b** Express rights.
- **c** Implied rights.
- **d** Assumed rights.

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4 The High Court has the power to:
   - **a** set precedents that are non-binding on other courts and is not able to overturn state or Commonwealth legislation where it conflicts with the *Australian Constitution*.
   - **b** set precedents that are binding in the Supreme Court only.
   - **c** set precedents that are binding on other courts but it is not permitted to overturn state or Commonwealth legislation where it conflicts with the *Australian Constitution*.
   - **d** set precedents that are binding on other courts and to overturn state or Commonwealth legislation where it conflicts with the *Australian Constitution.*

5 The role of a free and impartial media and people's right to information is recognised as a human right. Article 19 of *The Universal Declaration of Human Rights* (1948) states that:
   - **a** 'only some organisations have the right to ... seek, receive and impart information and ideas through any media and regardless of frontiers'.
   - **b** 'everyone has the right to ... seek, receive and impart information and ideas through some media outlets while taking into consideration some frontiers'.
   - **c** 'everyone has the right to ... seek, receive and impart information and ideas through any media and regardless of frontiers'.
   - **d** 'no-one has the right to ... seek, receive and impart information and ideas through any media and regardless of frontiers unless they have been given prior government permission'.

Short-answer questions

1 Describe how a domestic law has been used in response to an international human rights issue.

2 Discuss the notion that a Charter of Rights is required in Australia.

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Chapter 9
Contemporary human rights issues

Reader advice

Some of these issues contain material that some students may find confronting. Students should consider this when deciding which issue/s to focus on in this chapter.

Chapter objectives

In this chapter, you will:

- identify and apply legal terminology to contemporary human rights issues
- describe how international and domestic laws are used to promote 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 way of progressing human rights issues
- evaluate how effective legal measures are in promoting human rights
- communicate legal information about contemporary human rights issues using logical and well-structured arguments
- analyse how international law and domestic legal systems promote human rights.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 21) and the 'learn to' activities (p. 22) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Human rights' topic.

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Legal oddity

In 2023, the US Biden administration identified 17 governments that were complicit in recruiting and using child soldiers. This was a requirement of the *Child Soldiers Prevention Act* (2008) (US). Any countries that are on the list are not able to access US weapons, equipment and training. However, the US President can issue a waiver so that the requirements of the *Child Soldiers Prevention Act* (2008) does not have to be met to receive US aid. In September 2023, it was reported by Human Rights Watch that Egypt, which is on the list of countries that use child soldiers, was issued a presidential waiver so that it could receive US$1.3 billion in military aid. So, a presidential waiver can easily undercut an important law aimed to prevent the use of child soldiers.

In Victoria in 2020, a restauranteur offered a married migrant couple full-time work at his Indian restaurant and promised to sponsor their visa applications. However, he underpaid them severely and forced them to work long hours. They had to live in a storeroom above the restaurant and were threatened with violence and with having their visa sponsorship withdrawn. The Federal Circuit Court fined the restaurant owner for breaching the *Fair Work Act 2009* (Cth). As well, the County Court of Victoria imposed a jail sentence in 2020, which was suspended to a three-year, good-behaviour bond for the criminal offence of forced labour.

Issues

To meet the requirements of the NSW Legal Studies syllabus, only one of the following three issues must be studied:

- Issue 1: Human trafficking and slavery
- Issue 2: Child soldiers
- Issue 3: Exploitation of workers.

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Issue 1

Human trafficking and slavery

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Criminal Code Act 1995 (Cth)
Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)
Modern Slavery Act 2018 (NSW)
Modern Slavery Act 2018 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

The Universal Declaration of Human Rights (1948)
Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)
United Nations Convention against Transnational Organized Crime (2000)

Reader advice

This section contains material that may be confronting. Some students may find it appropriate to focus on one of the other issues in this chapter.

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9.1 Contemporary slavery

Contemporary slavery can occur in many situations. For most of human history, slavery has been legal. Movements that gradually led to the abolition of slavery were ultimately successful. Today, the globally accepted norm is that slavery is both immoral and illegal. However, slavery still exists. The difference is that all modern slavery is illegal. Over recent decades, all the different forms of slavery have been identified and outlawed at the international level. However, combatting modern slavery is an ongoing battle.

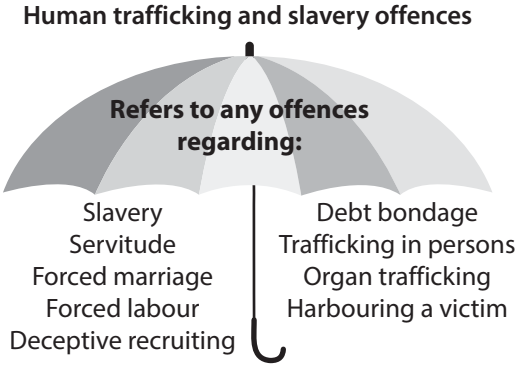


Figure 9.1 The Australian National Action Plan to Combat Modern Slavery 2020–2025 uses 'modern slavery' as an umbrella term to describe a range of offences.



Figure 9.2 On 28 September 2022, demonstrators in Bogota, Colombia, hold signs and feminist flags during the International Day for the Remembrance of the Slave Trade and its Abolition.

Research 9.1

Search online for the following reports (the most current versions):

- *The Global Report on Trafficking in Persons* – produced by the United Nations Office on Drugs and Crime
- *The Global Slavery Index* – produced by the Walk Free Foundation
- *Human Trafficking by the Numbers* – produced by Human Rights First
- *Forced Labour, Modern Slavery and Human Trafficking* – produced by the International Labour Organization.

Draw up a table like the one below. For each report, make some notes about the organisation that produced the report, list some key facts from the report, and comment on the usefulness of each report for developing an understanding of the global problem of human trafficking.

Report	About	Key facts	Usefulness
The Global Report on Trafficking in Persons			
The Global Slavery Index			
Human Trafficking by the Numbers			
Forced Labour, Modern Slavery and Human Trafficking			

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contemporary slavery
a form of forced or bonded labour, with or without pay, under threat of violence

forced labour
all work or service that is exacted from any person under the menace of any penalty and for which a person has not offered themselves voluntarily

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 a victim to provide sexual services; it often takes the form of forced prostitution or forced labour where sexual abuse is also common

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

Contemporary slavery can take a number of forms. The main categories include:

- **forced labour** – the International Labour Organization estimates that around 25 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, 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 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 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.

There are other more specific situations that may result in conditions of slavery, which might arguably fall into one or more of the categories mentioned. They include domestic workers kept in captivity, the adoption of children who are in effect forced to work as slaves, **child soldiers** (see page 236) and those pushed into a **forced marriage**.

Figure 9.3 Migrant workers from Myanmar in a textiles factory in Thailand. Despite a 2017 law meant to fight exploitation in the country, 'recruitment agents' still regularly trick migrant workers into debt bondage labour.



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9.2 Defining the issue

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, 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* (2000) was adopted by the United Nations in 2000; it has since been ratified by 173 countries, and came into force in 2003. It is a protocol to the *United Nations Convention against Transnational Organized Crime* (2000).

Australia is primarily a destination country for people trafficked from Asia, particularly Thailand, Korea, the Philippines and Malaysia. Australia's slavery, slavery-like and human trafficking offences are set out in Division 270 and 271 of the federal *Criminal Code Act 1995* (Cth).

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.

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.

The victims might be falsely imprisoned, 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 a domestic worker). Thailand and Brazil are considered to have the worst child trafficking statistics.

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

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

Analysis 9.1

Use the QR code to watch Video 9.1.

1. What forms can modern slavery take? Under what conditions do people in forced slavery work?
2. What is human trafficking? Discuss how and why some people fall victim to human trafficking.
3. Outline the forms of help that are available. What can individuals do to help?

Video 9.1 Short, community education film from Anti-Slavery Australia (06:02)

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9.3 Extent of the issue

According to the Global Slavery Index, in 2023 it was estimated that over 50 million people existed in a state of slavery. Over half of these were in forced labour. Estimates of the number of people trafficked across international borders vary dramatically. The UN Office on Drugs and Crime estimates that there are over 21 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. Whereas instances of forced labour and debt slavery, as well as forced marriage and domestic servitude, may be less well documented. The International Labour Organization estimates that at least 57.6 per cent 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 in human trafficking and slavery, has suggested that profits from human trafficking worldwide are over US$150 billion, which, according to the International Labour Organization, 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 9.4 On 21 December 2022, six Malaysian men rescued from a human trafficking syndicate in Myanmar arrived at Kuala Lumpur International Airport in Sepang. The men said they were duped by the syndicate to work in Myanmar with promises of high salaries through job advertisements on social media.



Figure 9.5 A Rohingya girl from Myanmar tries on clothes donated by Indonesian residents at the confinement area for migrants at Kuala Cankoi in Aceh province on 28 May 2015.

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Legal Info



The Trafficking in Human Persons Report

In dealing with human trafficking it is very important to have accurate data. Each year the US State Department issues the *Trafficking in Human Persons Report*. This report assess the efforts to combat human trafficking by international agencies and all governments around the world. It also evaluates the legal and non-legal strategies used to deal with this crime and protect the victims. It also gives a ranking to every country in the world based on their record in dealing with human trafficking. Countries are ranked in four broad categories based on certain minimum standards laid down in US law, in the *Victims of Trafficking and Violence Protection Act 2000* (US):

- **tier 1** – countries that fully comply with minimum standards
- **tier 2** – countries that are making significant efforts but as yet do not fully comply
- **tier 2 watch list** – countries that are making significant efforts but have a very high number of victims of trafficking, or there is a lack of evidence on how they are performing
- **tier 3** – countries that do not comply with the minimum standards and make no effort to do so.

Although produced in the United States, the *Trafficking in Human Persons Report* is a significant source of data about human trafficking globally that is updated annually. It provides people and organisations working in this area the following information:

- a comprehensive list of all the multilateral organisations working in this area including the United Nations, **intergovernmental organisations**, **non-government organisations** (NGOs) and regional organisations
- a list of the minimum standards
- a report card on the progress of each country
- the individuals and groups that are working in the field
- a list of the relevant international conventions.

intergovernmental organisation
an organised group of two or more states, set up to pursue mutual interests in one or more areas

non-government organisation
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide (for example, human rights, the environment)

Analysis 9.2



Find the full version of the current US State Department's *Trafficking in Human Persons Report*.

1. Identify the four minimum standards by which government performance with human trafficking is assessed on.
2. From the list of multilateral organisations combating human trafficking, identify five that have relevance for Australia.
3. Identify one country from each of the four categories; that is, tier 1, tier 2, tier 2 watch list and tier 3.
4. Read the report on Australia. Assess to what extent this report can be used to assess the effectiveness of legal and non-legal measures in dealing with human trafficking.

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Research 9.2

Your teacher will assign you in a group to one of the following categories:

- forced labour
- forced marriage
- trafficking in children
- trafficking in adults
- slavery
- sexual servitude.

Using your category, search online for at least two stories about human trafficking outside of Australia and give court cases for each. As a group, draw up a table like the one below for compiling this research.

Name	Source	Location	Details	Legal/non-legal responses

Discuss your group's findings with the class. Evaluate the effectiveness of legal and non-legal responses in each of these cases.

Review 9.1

1. Describe how society's attitude to slavery has changed since World War II.
2. Identify the different types of human trafficking.
3. Identify five facts that best explain the scope of human trafficking today.
4. Identify four international organisations that play an important role in the fight against human trafficking.
5. Explain how the US State Department's *Trafficking in Human Persons Report* is a useful resource in the campaign against human trafficking internationally.



Figure 9.6 Children ride a rowboat at Lake Nokoue in Ganvie Village of Cotonou, Benin, on 22 August 2023. This water village was founded by escaped slaves in the 17th century is one of the most visited tourist attractions in the country.

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9.4 Responses to the issue

Legal responses

International responses

The earlier history of slavery and the advancement of the abolitionist movement were discussed in Chapter 7. As discussed in that chapter, the first major movement to abolish slavery began in the eighteenth century. It culminated in the development of numerous anti-slavery treaties in the twentieth century, leading eventually to the abolition of slavery, and Article 4 of *The Universal Declaration of Human Rights* (1948).

> ***The Universal Declaration of Human Rights* (1948)**
> **Article 4**
> No-one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

This was followed up with the creation of hard law in the form of two conventions in 1949 and 1956. In Australia, this culminated in the *Modern Slavery Act 2018* (Cth).

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.

Human trafficking is largely a form of international crime. 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.



Figure 9.7 Increasingly, businesses are more aware of the necessity to deal with slavery in their supply chains to avoid reputational damage.

The International Labour Organization estimates that in 2020 over 40 million adults and children were in forced or bonded labour, or commercial sexual servitude. This is more people than at any other time in history.

Today the main international instrument in the fight against organised crime is the *United Nations Convention against Transnational Organized Crime* (2000) adopted by the UN General Assembly on 15 November 2000. Signifying that the member states of the United Nations regarded this as a serious issue, the convention was designed to foster and enhance close international cooperation in order to tackle international crime. Attached to this convention was the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (2000), which came into force in December 2003. This was the first global legally binding instrument with an agreed definition on trafficking in persons. This instrument also was designed to ensure that domestic and international measures were synchronised to enable the prosecutions and support the victims of human trafficking in persons with full respect for their human rights and in recognition of their dignity as persons.

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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* (2000) with effect from 14 October 2005.

Australia first introduced sexual-slavery laws with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) (repealed). This Act refined sexual-slavery laws and added more specific human-trafficking offences to the federal *Criminal Code Act 1995* (Cth). The current provisions are in 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 encompass:

- **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.

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. 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.

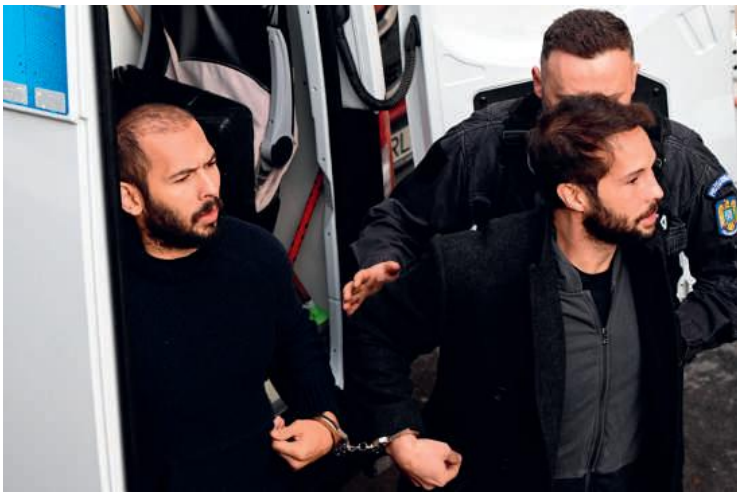


Figure 9.8 On 1 February 2023, British–American influencer Andrew Tate (left) and his brother Tristan Tate (right) arrived at a courthouse in Bucharest, Romania to hear the court decision on their appeal against pre-trial detention for alleged human trafficking, rape and forming a criminal group.

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Research 9.3

Find the Antislavery Australia website. Select five court cases, one from each of these categories:

- forced labour
- forced marriage
- trafficking in children
- trafficking in persons
- slavery
- sexual servitude.

Draw up a table like the one below and fill in the details for each case.

Case	Crime	Details	Sentence

Evaluate the effectiveness of the legal responses in each of these cases.

Australia's *Modern Slavery Act 2018* (Cth)

Australia's *Modern Slavery Act 2018* (Cth) calls for corporations worth $100 million and over to report on slavery in their supply chains in a public repository. The legislation establishes a 'modern slavery reporting requirement' that requires eligible Australian entities and foreign entities that are carrying on business in Australia to submit 'modern slavery statements' every 12 months.

Modern slavery statements must be submitted to the Australian Government Minister for Home Affairs and must include the following information:

- the identity of the reporting entity
- the structure, operations and supply chains of the reporting entity
- the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls
- the actions taken by the reporting entity, and any entity that the reporting entity owns or controls, to assess and address those risks
- how the reporting entity assesses the effectiveness of such actions
- the process of consultation with any entities the reporting entity owns or controls or is issuing a joint modern slavery statement with
- any other information that the reporting entity, or the entity giving the statement, considers relevant.



Figure 9.9 On 28 June 2023, Ms Lynn Bell was appointed as the Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking. Part of her job is to represent Australia in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. This is a forum within the Asia-Pacific region, co-chaired by the Ministers for Foreign Affairs for Australia and Indonesia, that supports collaboration on these matters.

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In 2023 there was a review of the 2018 Modern Slavery Act. The author of the review was Professor John McMillan and his review made 30 recommendations. A key focus of the recommendations was the role that universities could play in educating students about risks of modern slavery such as forced marriage and exploitative types of employment.

On 13 October 2023, there was event at the Sydney University Law School, titled 'The Modern Slavery Act Review: Can the law drive meaningful change?' There were presentations by the author of the review, Professor John McMillan, along with Lynn Bell, the newly appointed Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking.



Analysis 9.3

Watch the Sydney University Law School's event from 13 October 2023 titled 'The Modern Slavery Act Review: Can the law drive meaningful change?' on YouTube.

1. Discuss why the review was undertaken.
2. What did Professor John McMillan identify as the four main outcomes of his report? (from 29:00)
3. What recommendations were made about strengthening the reporting mechanisms of the Act? (46:00)
4. Outline the points made by the other speakers: Professor Jennifer Burn, Associate Professor Anna Bouch, Ms Esty Marcu and Professor Simon Bronitt.

Modern Slavery Act 2018 (NSW)

The *Modern Slavery Act 2018* (NSW) was created in response to a NSW Parliament inquiry into slavery in 2017. The Act:

- establishes Australia's first Anti-Slavery Commissioner to raise community awareness of modern slavery, with a clear advocacy and educative function
- provides support for victims of acts of modern slavery
- requires NSW Government agencies to identify and report on risks of modern slavery in their supply chains
- requires commercial organisations with employees in New South Wales and with an annual turnover of $50 million or more to report on modern slavery risks in their operations and supply chains
- introduces new offences into the *Crimes Act 1900* (NSW) to better protect victims.



Review 9.2

1. Identify the key provisions of the *Criminal Code Act 1995* (Cth) that relate to human trafficking.
2. Discuss what international instruments are at the centre of the campaign against human trafficking.
3. Evaluate the effectiveness of the *Modern Slavery Act 2018* (Cth).

Non-legal responses

International responses

Another major front in the war on human trafficking is the business community. This is because many of the products that we consume have some form of slavery in their supply chain. The majority of trafficked slaves today are victims of exploitation in private sector activities such as manufacturing, construction and agriculture. Forced labour and slavery is big business. It is estimated that over $220 billion of products sold around the world are generated by slave labour. For the last decade, there has been a greater focus on the performance of business in relation to human rights, particularly in regard to slavery. In June 2011, the UN Human Rights Council unanimously endorsed the *Guiding Principles on Business and Human Rights*. These principles provide a global standard for preventing and addressing the risk of adverse human impacts linked to business activity. In today's economy modern slavery represents a significant reputational risk to businesses if they are 'named and shamed' by NGOs and the media for violating human rights. Therefore, businesses are facing increasing pressure to tackle the crisis of modern slavery seriously as consumers demand more responsibility from their preferred brands.

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Alliance 8.7

Alliance 8.7 is another global initiative with the aim of using the Sustainable Development Goals, specifically target 8.7, which states:

> **Sustainable Development Goals Target 8.7**
> Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

The International Labour Organization launched the Global Alliance to Eradicate Forced Labour, Modern Slavery, Human Trafficking and Child Labour at the Ford Foundation in New York on 21 September 2016. It is known now as Alliance 8.7.

Code 8.7

Linked to Alliance 8.7 is another initiative known as Code 8.7. The origin of this campaign was a conference in February 2019 run by the United Nations, the Computing Community Consortium and other organisations. The conference was titled 'Code 8.7: Using Computation Science and AI to End Modern Slavery' and it explored ways that big data could be used to further the SDG target 8.7 directed at forced labour, human trafficking and child labour. An example of how their initiative might work in practice was given by one participant who had mapped satellite images of brick kiln sites, which could help local organisations to identify places where forced labour was likely to be occurring.

Research 9.4

Find the websites of Alliance 8.7 and Code 8.7. Also search the internet for recent media reports about these initiatives.

Evaluate the effectiveness of both Alliance 8.7 and Code 8.7 in making an impact on modern slavery.

Domestic responses

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; the documentary 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 documentary's 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, the 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.

Legal Links

The Anti-Slavery Australia website, run by the University of Technology Sydney, is a one-stop shop for anyone wanting to explore modern slavery in Australia and the legal and non-legal responses to it.

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Case Study

Sound of Freedom

Not all film portrayals of human trafficking play a useful educational role. *Sound of Freedom* was a highly successful American film released in July 2023, based on the story of Tim Ballard (played by Jim Caviezel), a former US government agent who carried out his own mission to rescue children from traffickers in Colombia. The producer of the film, Eduardo Verastegui, pictured below, played a role in the film. The highly fictionalised plot centres on Ballard's exploits as part of an anti–sex trafficking network, Operation Underground Railroad. While the film received many positive reviews from audiences, it was heavily criticised by experts working in the field of human trafficking. One of the criticisms is that the film portrayed anti-trafficking work as an adventure and promoted a vigilante-type justice. Real anti-trafficking work is not glamorous or adventurous, and the film is sensationalist rather than educational.



Figure 9.10 On 29 August 2023, Eduardo Verastegui spoke to the press during the red carpet for the movie *Sound of Freedom* at Cinemax Antara Polanco in Mexico City, Mexico. In 2023, he would use his fame from the movie to run as a candidate for the 2024 presidential elections in Mexico.

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 not having the resources to fight these forms of exploitation and transnational crime
- 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 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.

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While some states vigorously pursue offenders, others may be unwilling or unable to effectively tackle the problem.

The United Nations, the International Labour Organization and NGOs all play a crucial role in encouraging such countries to continue their efforts, and reporting mechanisms such as the US State Department's *Trafficking in Human Persons Report* help expose the continuing deficiencies of these countries' efforts.

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.

In Australia, one of the major areas of interest will be the impact of the *Modern Slavery Act 2018* (Cth) and the *Modern Slavery Act 2018* (NSW). The effective interaction between the enforcement of these two laws will be closely watched by many who work in the field of combatting modern slavery, such as Andrea Tokaji:

> The NSW Act seeks to complement the Commonwealth Act and reflect international best-practice. Like the Commonwealth Act, the NSW Act is designed to create and expand transparency in business operations and supply chains. It requires commercial organisations falling within its scope to undertake due diligence on their modern vfindings.
>
> Andrea Tokaji, international human rights lawyer

Review 9.3

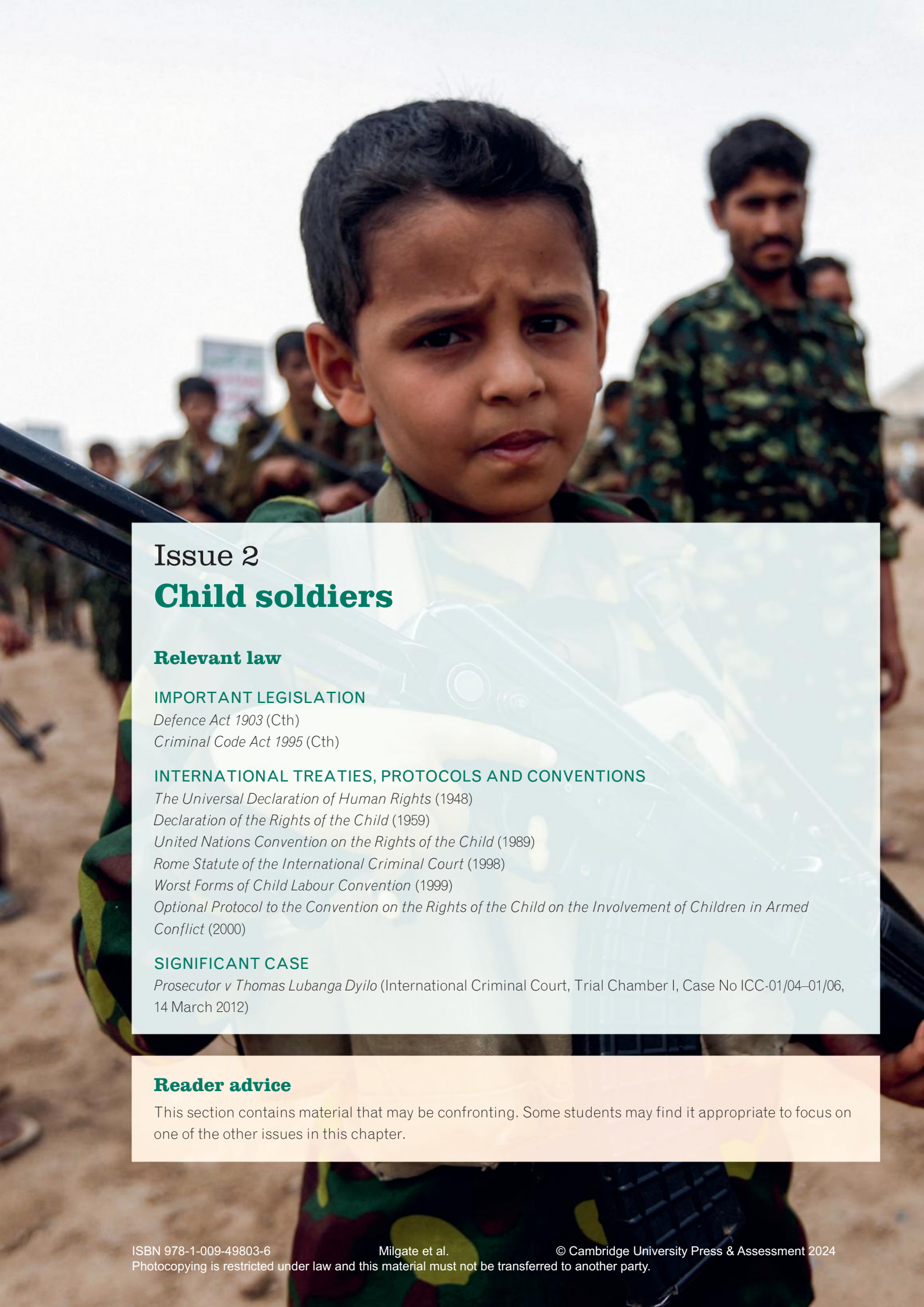
1. Explain why the business world is a new front on the war on human trafficking.
2. Describe how the United Nations and the International Labour Organization are tackling human trafficking.
3. Explain the role of the media, non-government organisations and other non-legal responses in combating human trafficking. Evaluate how these groups can complement the legal measures in place.
4. 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.

Research 9.5

Search for scholarly articles and media reports on the effectiveness of the Modern Slavery Acts (2018) of the Commonwealth and New South Wales and then complete the following tasks.

1. Describe to what degree these two Acts complement each other.
2. Discuss if there have been any difficulties in the relationship between the two Acts.
3. Outline to what extent the appointment of an Anti-Slavery Commissioner has raised community awareness about modern slavery.
4. Discuss if these two Acts have enhanced government and community efforts to deal with the issue of modern slavery in Australia today.

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Issue 2

Child soldiers

Relevant law

IMPORTANT LEGISLATION

Defence Act 1903 (Cth)
Criminal Code Act 1995 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

The 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)
Worst Forms of Child Labour Convention (1999)
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)

SIGNIFICANT CASE

Prosecutor v Thomas Lubanga Dyilo (International Criminal Court, Trial Chamber I, Case No ICC-01/04–01/06, 14 March 2012)

Reader advice

This section contains material that may be confronting. Some students may find it appropriate to focus on one of the other issues in this chapter.

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9.5 Defining the issue

A United Nations report in 2023 stated that between 2005 and 2022 at least 105 000 children had been enlisted by armed forces or militias. This was part of a total of 315 000 incidents against children which included 120 000 deaths, 16 000 cases of sexual violence and 32 000 child abductions.

Children, like adults, are entitled to the protection of human rights. *The Universal Declaration of Human Rights* (1948) 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 Article 25 of *The Universal Declaration of Human Rights* (1948), which provides that children are 'entitled to special care and assistance'. In 1959, the United Nations expanded on this with the adoption of the *Declaration of the Rights of the Child* (1959). The declaration restates several provisions of *The Universal Declaration of Human Rights* (1948) 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 9.11 On 30 October 2023, Executive Director of UNICEF Catherine Russell spoke during a Security Council meeting on the Israel–Hamas war at the UN Headquarters in New York City. She expressed concern at the Security Council meeting for the impact of the Hamas–Israel war on children.

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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

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

human shield
the placement of civilians in or around military targets to deter the other party from attacking that target

In some countries, children are also recruited into armed forces as **child soldiers**.

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 and support personnel 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 twentieth 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 through the use of force, intimidation or deception, and they are used for labour in conflict areas or sexually exploited.



Figure 9.12 On 19 July 2017, Thomas, an 11-year-old Yazidi boy from Shingal, Iraq, was kidnapped by ISIL for three years, taken away from his parents and held hostage in Mosul while being brainwashed to become a suicide bomber.

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, 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, easier to abduct and manipulate or more willing than adults to take risks. Also the opposing side may 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.

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 or 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**.

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9.6 Extent of the issue

The practice of recruiting and using child soldiers is viewed as one of the gravest violations and abuses against children. However, by the time of writing, the situation has been deteriorating for over a decade, even though there is an international mechanism for monitoring and reporting on violations against children. The use of child soldiers is connected to the other five violations against children: sexual violence, abduction, attacks on schools or hospitals, killing and maiming, and denial of humanitarian access.

The simple fact is that children are used in armed conflict because they are seen to be more expendable, they are paid less and they are less likely to question orders. Children are also often sent to the front lines. Due to the number of on-going conflicts, like the 12 years of the Syrian Civil War, and the more recent war between Israel and Hamas, there has been an increase of child soldiers globally. The international mechanism to monitor and report on violations against children has improved, but there is a lack of political will of the leaders of many member states to take effective action in dealing with the problem.

The issue of child soldiers began receiving global attention due to conflicts in Sierra Leone, Liberia, Uganda and Iraq. Child soldiers may serve in government armies, but they also serve in government-linked militias and opposition or rebel forces. 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 United Nations reported at least 56 armed groups worldwide using child soldiers.

For example, conflicts in Afghanistan, Somalia, Syria, Yemen, Democratic Republic of Congo (DRC), 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 kidnapped over 30 000 children and used them as soldiers and slaves. According to the 2009 US State Department's *Trafficking in Human Persons Report*, boys in the rebel group were 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 were 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 were kidnapped in 2014. These young people were used as soldiers, sex slaves and suicide bombers in Boko Haram's rebel army. In February 2018, Boko Haram militants raided a girls' school in north-eastern Nigeria and abducted another 110 girls. Since then, some of the girls have escaped and several were released, but others died in captivity. In April 2024 *The Guardian* reported that about 100 of the girls are still missing, and their sources said that the government is no longer putting effort into negotiating for releases.



Figure 9.13 At a UN centre for children associated with armed groups in Niamey, Niger, a boy from Nigeria, who was formerly associated with armed groups in the Boko Haram–controlled region of Nigeria, sits behind his sewing machine at a UNICEF-supported rehabilitation centre. His identity is withheld for his protection.

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Analysis 9.4

Read the article 'Two women rescued nine years after Chibok schoolgirls abduction' on *The Guardian* website at https://cambridge.edu.au/redirect/10349.

1 Outline what had happened to each of the girls over the previous nine years.
2 Outline the current status of Boko Haram.

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, 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 are 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 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-18-year-olds 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 staffing 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-18-year-olds joining the military.

A landmark case in dealing with child soldiers was that of Charles Taylor. 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.



Figure 9.14 The use of children in armed conflict is usually highly exploitative and is often considered to be a form of contemporary slavery or human trafficking.

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Case Study



Child soldiers – victims' stories

The following stories illustrate some of the suffering endured by children who are forced to serve in armed conflicts. These stories also highlight the different circumstances and places around the world where children are forced to become soldiers.

- In the Democratic Republic of Congo, 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. The children were only given only one plate of maize per day to share between 12. 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. At only 12 years old, Aung was frequently sent into combat, and at 13 years old he witnessed members of his unit murder 15 women and children. When he was 14 years old, 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 and his family would be at risk.
- In Uganda, rebel soldiers from the Lord's Resistance Army 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 dying 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, Estelle 'voluntarily' joined the guerrilla movement, FARC, when she was 11 years old to escape the physical and sexual abuse she suffered at home. Estelle believed that FARC would offer her protection and a support network. However, once she joined, she was told that if she attempted to escape that she would be sentenced to death. Before managing to escape, Estelle was forced to kill, and lived in constant fear of being killed.

Review 9.4



1 Identify the ages, genders and home countries of the children involved in the previous Case Study.
2 Identify whether the children in these stories were recruited by official or non-government forces. Describe how the children were recruited.
3 Describe the tasks the children were forced to do and how they were treated, including any abuse or hazards they were exposed to.

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9.7 Responses to the issue

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 (see page 185), 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 Article 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.
- The *Worst Forms of Child Labour 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 United Nations, NGOs and countries around the world became particularly focused on eradicating the use of child soldiers towards the end of the twentieth century. In 2000, the United Nations 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* (2000).

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 received wide support and has now been ratified by over 130 countries.

Many countries, however, including Australia and the United States, 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'.

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Analysis 9.5

Read the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) at http://cambridge.edu.au/redirect/10311.

1. Read the preamble to the protocol and 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 or conflicts with the purpose and obligations of the treaty.

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, 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.



Figure 9.15 UN Special Representative for Children and Armed Conflict Virginia Gamba presents the 2019 Children and Armed Conflict report. This report is released annually, with the most recent being on 27 July 2023.

Analysis 9.6

View the Reports and Resolutions section of the United Nations' website 'Children and Armed Conflict' at http://cambridge.edu.au/redirect/10312 and locate the latest report titled *Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the General Assembly*.

1. Recruiting child soldiers is one of 'the six grave violations'. What are the other five?
2. 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 20 conflict situations). Identify the regions where the use of child soldiers is particularly widespread.
3. In the 'recommendations' section at the end of the report, identify the recommendations that relate to child soldiers. According to the Special Representative, whose responsibility is it to address the concerns about children in armed conflict?
4. What is your impression of the overall situation that is portrayed in the report regarding child soldiers?
5. Search for recent media reports about child soldiers in three of the countries mentioned in the report.
6. In the report, find an example of a program that is having success with demobilising and educating former child soldiers.

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The framework is still relatively new and will take time to take full effect. However, the ICC, under the Rome Statute, has charged a number of individuals with war crimes relating to child soldiers in armed conflicts; for example, the 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 below.

In Court



***Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court, Trial Chamber I, Case No ICC-01/04–01/06, 14 March 2012)**



Figure 9.16 Former Congolese militia commander Thomas Lubanga Dyilo was accused of recruiting hundreds of children under the age of 15 to fight in the armed wing of his Union of Congolese Patriots in the Congolese civil war between September 2002 and August 2003.

The year 2006 marked the first time a person was arrested under a warrant issued by the ICC. Thomas Lubanga Dyilo of the Democratic Republic of the Congo (DRC) was a rebel militia leader who was accused of conscripting child soldiers to fight in armed conflicts in the DRC during 2002 and 2003. His 2009 trial for these offences was the first trial held by the ICC.

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 led to the deaths of around four million people, either directly through killings or from disease and starvation.

It was alleged that Lubanga had served as commander-in-chief of the 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, where he was held in a prison cell. Lubanga 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 (Article 8(2)(b)(xxvi) of the Rome Statute).

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- **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 (Article 8(2)(e)(vii) of the Rome Statute).

Human rights organisations claimed at one point that Lubanga had 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.

Trial

The ICC held multiple hearings in preparation for the Lubanga trial to determine what evidence and victim and witness testimony was to be presented, and the process and form of the trial. Eight lawyers representing 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 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' imprisonment. This sentence was confirmed by the Appeals Chamber on 1 December 2014. On 3 March 2015, the Appeals Chamber instructed the Trust Fund to implement a plan for collective reparations for victims.

The Lubanga judgment 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 conscripting 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 judgment 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 involved in hostilities even if they were not involved in direct fighting. The ICC imposed a US$10 million liability on Lubanga for reparations to 425 recognised victims. Lawyers on both sides appealed the decision but the ICC judges rejected Lubanga's appeal.

On 15 March 2020, Thomas Lubanga Dyilo was released after serving a total a total of 14 years in prison. Lubanga said he had a spirit of forgiveness but claimed that he was jailed due to a cultural misunderstanding and that the newly formed ICC had made him a 'guinea pig' to experiment with exercising their powers.

Further information about the trial of Thomas Lubanga Dyilo in the ICC is available on the court's website.

Review 9.5



1. Identify the articles of the Rome Statute under which Lubanga was charged and what crimes Lubanga 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. Locate and read about other cases involving child soldiers on the International Criminal Court's website. Assess the extent to which justice has been served in these cases.
5. Critically evaluate the effectiveness of the International Criminal Court in achieving justice for the victims. Consider issues of national resources, delay, exposure and deterrence.

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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 used 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 section 59 of the *Defence Act 1903* (Cth) is 18 years, but voluntary recruitment is different. After ratification of the Rome Statute in 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 Act 1995* (Cth) 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 18-year-olds 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 six 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'.

Over the last decade, child soldiers have become a domestic concern in Australia due to 'foreign fighters' going to Syria and Iraq to fight with ISIS or Islamic State. 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, 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, that aim to combat the causes and effects of the recruitment and use of child soldiers worldwide.

International responses

At the international level, the United Nations plays an important role in monitoring the use of child soldiers around the world. The International Labour Organization and the UN Children's Fund (UNICEF) in particular play a role in research into and studies of the problem, providing recommendations to the United Nations 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 Chad Government held a conference that sought to end the use of child soldiers by armed forces and groups across Central Africa.

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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 about child soldiers is available from the websites of the following intergovernmental organisations and non-government organisations:

- the Roméo Dallaire Child Soldiers Initiative
- Amnesty International
- International Labour Organization
- Child Rights International Network.

Domestic responses

Raising awareness

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. In 2002, one strong movement developed internationally – 'Red Hand Day' – which enables local interest groups, individuals, schools and other institutions to take part in a global effort to raise awareness about children in armed conflict. The campaign 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.



Figure 9.17 This image of red hands was exhibited at the International Day against the Use of Child Soldiers on 12 February 2020, or Red Hand Day. The 12th of February 2024 will mark the 24th anniversary of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. Events are held on this day each year to increase public awareness of the issue and to make appeals to world leaders for more determined action.

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Reintegration programs

Reintegrating former child soldiers is crucial. At the domestic level, there are groups 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. However, former child soldiers do not re-integrate easily. On return to society, many will be viewed with suspicion and experience rejection by their families, communities and governments.



Analysis 9.7

An academic paper prepared by Benedetta Wasonga in February 2023 highlighted the lack of effective reintegration programs for former child soldiers. This paper, entitled 'Why aren't child soldiers treated as human trafficking survivors?', is available online at http://cambridge.edu.au/redirect/10313.

1 Identify all of the factors that make the reintegration of former child soldiers difficult.
2 What possible solutions does the author provide?

Media

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. For example, the 2006 movie, *Blood Diamond*, 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. 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.



Video 9.2 UNICEF supports reintegration centres for former child soldiers. This case is an example of effective reintegration. (02:10)

Despite the significant efforts of the international community, particularly in the last 15 years, 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. There has been a huge increase in the number of child soldiers around the world, with the number more than doubling since 2012, according to the United Nations.

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.



Review 9.6

1 Discuss how non-government organisations (NGOs) and governments have tackled 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 existing legal measures.
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.

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Issue 3

Exploitation of workers

Relevant law

IMPORTANT LEGISLATION

Fair Work Act 2009 (Cth)
Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth)
Modern Slavery Act 2018 (Cth)
Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Convention Concerning Forced or Compulsory Labour (1930)
The Universal Declaration of Human Rights (1948)
International Covenant on Economic, Social and Cultural Rights (1966)

SIGNIFICANT CASES

Ex parte H.V. McKay (1907) 2 CAR 1 (Harvester case)
Fair Work Ombudsman v 85 Degrees Coffee Australia Pty Ltd [2022] FCA 1317
Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 3) [2023] FCA 201

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9.8 Defining the issue

Previous issues in this chapter have highlighted the prevalence of modern slavery and its strong connection with human trafficking and child soldiers. There are also strong connections between modern slavery, human trafficking and the **exploitation** of workers, but there are also important distinctions. People that have been trafficked are often then exploited in a variety of workplaces, but not all exploited workers have been trafficked. This section will highlight a range of examples from Australia and overseas in which workers are being exploited to varying degrees and the effectiveness of the legal and non-legal responses.

exploitation
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

The nature of worker exploitation

The notion of 'what we want to be' or 'what we do for a living' relates to what work, employment or 'career' we may choose. What drives most of us to go to work includes a regular income to support ourselves and family members, a sense of industry 'identity', friendships with co-workers and a chance to move forward or be promoted within any workplace.

Indeed, governments benefit from a robust workforce by collecting tax payments, reducing the need for welfare payments. Moreover, crime rates tend to be lower in countries where employment rates are higher, thus reducing the need for police and crime prevention.

Since employment offers many benefits for both individuals and society, it is important that workers make a free choice about what work they wish to perform, that the wages they are paid are fair and the conditions in which they work are safe.

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 whereby workers sold their labour to business owners in exchange for wages.

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 Tolpuddle Martyrs, a group of six farmers in the United Kingdom, formed a campaign for higher wages in the 1830s. They were arrested and sentenced to seven years in Australia. Many other groups formed and struggled for unionism until 1871, when the *Trade Union Act 1871* (UK) finally passed.

One of the first important judicial decisions in Australia, 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 before the formation of the International Labour Organization, and it set a benchmark for many future decisions on basic wage cases across the globe.

Despite the legalisation and recognition of trade unions in the 1800s, the International Labour Organization was formed in 1919 in response to an alarming rise in the exploitation of workers in industrialising nations. This organisation was the first specialised agency of the United Nations and turned 100 in 2019. It creates decent employment opportunities and promotes workers' rights and conditions. The International Labour Organization is devoted to promoting social justice and internationally recognised human and labour rights. The organisation brings together governments, employers and workers representatives of 187 members to set labour standards, develop policies and programs promoting decent work for all workers.

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Under the International Labour Organization's *Convention Concerning Forced or Compulsory Labour* (1930) exploitation of workers may include:

- abuse of vulnerability
- deception
- restriction of movement
- physical and sexual violence
- retention of identity documents
- withholding of wages
- abusive working and living conditions
- excessive overtime.

From the list, this text will focus on deception, restriction of movement, withholding wages and excessive overtime in both Australia and Thailand.

9.9 Extent of the issue

The 2017 Global Estimate of Modern Slavery by the International Labour Organization estimated that there were around 25 million victims of **forced labour**, in areas such as domestic work, construction, fishing and agriculture. Some of the world's 'hotspots' for worker exploitation have traditionally been in South-East Asian nations, where mostly women and children can work for less than 10 cents per hour and trade union membership is discouraged.

In Australia, a 2019 federal government report about the Migrant Workers Taskforce focused on the employment experience of temporary migrants with international student and working holiday-maker (backpacker) visas. The report highlighted problems of wage underpayment being widespread and continuing to grow. The report on the issue suggests as many as 50 per cent of temporary migrant workers may be being underpaid in their employment. Since 2014, Thailand, one of the worlds' leading fish exporters, has faced very serious allegations of both exploiting workers and enforcing slave-like conditions for Burmese and Cambodian migrants in the fishing industry.

forced labour
all work or service that is exacted from any person under the menace of any penalty and for which a person has not offered themselves voluntarily



Figure 9.18 A house maid from the Philippines washes the dishes at her employer's apartment in Beirut, Lebanon. Domestic work is one of the areas the 2017 Global Estimate of Modern Slavery by the International Labour Organization highlighted as having victims of forced labour.

Domestic situation

Despite extensive workplace laws, high-profile cases and media, Australia is not immune to worker exploitation. Since wages represent approximately 70 per cent of costs to businesses, whether large or small, employers who are able to reduce their wages bill create greater profits for themselves and/or their shareholders. Legal means of reducing costs rely on improved productivity, but reducing costs through under payment, excessive overtime or deception has been exposed since 2015.

The three media articles following highlight clear examples of forced labour as defined by the International Labour Organization in the categories of withholding of wages and excessive overtime.

In *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 3)* [2023] FCA 201 (15 March 2023), the Federal Court of Australia found that employers of a restaurant chain Din Tai Fung had significantly underpaid its employees during 2017 to 2018.

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Media

$4 million penalties, second-highest ever secured, against former Taiwanese restaurant operators for 'a calculated scheme to rob employees'

Fair Work Ombudsman media release (extract)

10 April 2024

The Fair Work Ombudsman has secured $4 million in court-ordered penalties against the former operators of three popular Taiwanese restaurants for deliberately and systematically underpaying vulnerable migrant workers and using false records. …

Justice Anna Katzmann found two companies [DTF World Square Pty Ltd, which employed workers at Din Tai Fung restaurants, and Selden Farlane Lachlan Investments Pty Ltd, which employed workers at the Emporium store], with the involvement of senior management, … deliberately underpaid 17 employees $157 025 under the Restaurant Industry Award 2010 and kept and provided false records to Fair Work Inspectors. …

Fair Work Ombudsman Anna Booth said the penalties, being the second-highest secured in FWO's history, underlined the seriousness of the offences.

'We welcome these penalties that demonstrate the serious nature of the offending by the respondents in this matter. Their actions resulted in vulnerable migrant workers being underpaid hundreds of thousands of dollars,' Ms Booth said.

'The court has characterised the conduct of Din Tai Fung as "a calculated scheme to rob employees of their hard-earned wages". The FWO agrees that the underpayment of wages in this matter was extremely serious. Serious consequences await any business found to be engaging in such calculated and systemic conduct such as the type uncovered in this matter.' …

FWO investigated after receiving a request for assistance from an affected worker.

During the investigation, inspectors found 17 employees were underpaid between November 2017 and June 2018, with the exception of one full-time employee, the highest underpaid, whose underpayment was assessed for a longer period from July 2014 to May 2018. The workers included cooks, waiters, a dishwasher and restaurant managers.



Figure 9.19 Kitchen workers in an outlet of the Din Tai Fung restaurant chain. The company, which operated restaurants in Sydney and Melbourne, allegedly paid its employees below award rates and kept false/misleading records to conceal the underpayments.

The flat hourly rates paid to 13 casual workers and fortnightly salaries paid to four full-time workers did not meet various Award entitlements including minimum rates for ordinary hours, penalty rates for weekend, public holiday and evening hours, split shift allowances, overtime rates, and casual loading. Some workers were also requested or required to work unreasonable additional hours. …

Justice Katzmann found [Ms Hannah Handoko and Ms Sinthiana Parmenas, former General Manager and HR Coordinator of DTF World Square] were involved in numerous contraventions by the two companies, and Ms Handoko requested or required some workers to work unreasonable additional hours and 'created or at least maintained the system of false or misleading record keeping' [while] 'both Ms Handoko and Ms Parmenas were involved in setting the unlawful pay rates'. …

Individual underpayments ranged from $2 165 to $50 588. Most of the highest underpaid worker's alleged underpayments related to unpaid overtime.

The Court has previously ordered both companies to back-pay the underpaid employees in full, plus interest and superannuation.

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Media



Suffer in silence or speak up? Exploited migrant workers face perverse dilemma

Ben Doherty

The Guardian

23 February 2022

Migrants in Australia say they can lose their visas if they report an employer – and a government bill that is meant to protect them won't help. Michael* has called Australia home for nearly a decade. He has a partner and a child here, friends and a community, a career he wants to pursue. But he has consistently faced a perverse choice: tolerate exploitation for job security, or risk losing his protections and right to stay.

'My first employer used to bully me, all the time. I was forced to work long hours for no overtime, sometimes more than 60 hours without any more pay,' he tells Guardian Australia.

'At first I accepted to work like that, because I cannot do anything: I am relying on the visa.

'I have a son who is three-and-a-half years old. I sacrifice everything to give him a better life in Australia. I never give up hope because of my son's future. But the government's policies have taken all my efforts.'

The government's proposed migration amendment (protecting migrant workers) bill has been promoted as addressing migrant worker exploitation by establishing new criminal offences for 'coercing … migrant workers to accept exploitative work arrangements'. It would also introduce broader ministerial powers to ban companies that break the law from sponsoring migrant workers.

Read the rest of this article at: http://cambridge.edu.au/redirect/10314.

Media



Pacific nationals working on Queensland farms claim they are barely making enough money to survive

Johanna Marie

ABC News Wide Bay

1 February 2022

Australia's seasonal worker schemes are being likened to modern slavery, with a group of Pacific workers in Queensland's Bundaberg region speaking out against their pay and living conditions.

The 18 workers, who are employed by several labour hire firms, met with a lawyer in Bundaberg to discuss their grievances.

'We've been involved in other cases of exploited workers, but I've seen nothing quite as bad as what's happening at the moment,' said lawyer Stewart Levitt.

'It's so widespread. It's so heartless.'

Willie* came to Australia under the Seasonal Worker Program (SWP) in January last year to make money and support his five children in Vanuatu.

He said hundreds of dollars were deducted from his pay each week for expenses, including accommodation and transport to work on farms. 'Sometimes, you only end up with $200. How can you survive with that,' he said.

'When I send the money home, I haven't got none.'

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Review 9.7

1. Define the term 'exploitation'.
2. List the key reasons why employers may exploit workers.
3. Explain what you think a minimum wage should provide a worker. See *Ex parte HV McKay* (1907) 2 CAR 1 ('Harvester case')
4. Read the three media articles on the previous pages and describe two examples of exploitation of workers using the definitions provided by the International Labour Organization.
5. Choose one area in which exploitation has occurred. Explain the methods used by employers to exploit their employees.

International situation

As mentioned, the International Labour Organization defines forced labour in the *Convention Concerning Forced or Compulsory Labour* (1930) 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'. In addition, Article 23 of *The Universal Declaration of Human Rights* (1948) states:

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.

Furthermore, Article 6 Part 2 of the *International Covenant on Economic, Social and Cultural Rights* (1966) states that nations should provide technical and vocational training programs, policies and techniques to achieve economic, social and cultural development, and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Despite these international covenants, millions of workers in a range of industries are still being exploited. Analysis 9.8 investigates exploitation in Thailand's fishing industry, where an estimated 200 000 migrant workers from Cambodia, Myanmar and Laos are prone to exploitation.

The rest of the world is implicated in this exploitation as some of the 'trash fish' caught by enforced labour on these boats is used as pet food sold in supermarkets around the world, as well as used as a cheap protein feed in prawn farming for international markets.



Figure 9.20 The Uyghur people in the Xinjiang-Uyghur Autonomous Region in China are another group of people exploited for labour. Pictured here are campaigners from London's Uyghur community protesting outside the Chinese embassy in December 2022 against human rights violations.

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Analysis 9.8

Read the article, 'Industrial Fishing and Human Rights Abuses' on the Human Rights Pulse website at http://cambridge.edu.au/redirect/10315.

1. Explain what you understand by the sentence: 'The Gulf of Thailand has been labelled as the "global epicentre of abuse"'.
2. How are men from Cambodia and Myanmar/Burma treated in the Thai fishing industry?
3. View the YouTube clip at http://cambridge.edu.au/redirect/10316 (15 minutes) and then describe the ways in which many Thai fisherman are exploited.
4. Recall what suggestions have been made by Human Rights Watch to alleviate the exploitation of workers.

9.10 Responses to the issue

Legal responses

In Australia, the working conditions for the majority of workers are protected by the *Fair Work Act 2009* (Cth), the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) and the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth). This legislation is administered by the Fair Work Ombudsman. Punitive action may be taken against employers for failing to provide the negotiated wages and conditions. For the majority of Australians, wages and conditions have been negotiated over many years and are set in legislated contracts known as **awards**. Further, the Fair Work Commission increased the National Minimum Wage by 5.75 per cent on 1 July 2023.

The Fair Work Ombudsman (formerly Fair Work Australia, and prior to that the Australian Industrial Relations Commission) is the legislative body that resolves disputes between employers and employees. Under section 558C of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), workers may commence proceedings against the contravening employer for withheld wages or entitlements and the proceedings may be commenced in Federal courts. In addition, the legislation has increased penalties for 'serious contraventions' of workplace laws and makes it clear that employers cannot ask for 'cashback' from employees or prospective employees. Employers who do not meet pay-slip obligations will need to disprove wage claims made in a court (this is also referred to as a reverse onus of proof).

award
a legal agreement made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

In Court

***Fair Work Ombudsman v 85 Degrees Coffee Australia Pty Ltd* [2022] FCA 1317**

85 Degrees Australia Pty Ltd breached section 535 (1) of the *Fair Work Act 2009* (Cth) by failing to keep employee records (in English) for seven years (as prescribed by the Act). The business therefore had not kept any records as to whether its employees were full or part-time (reg 3.32 (c)); permanent, temporary or casual (reg 3.32 (d); or had completed any overtime (reg 3.34 (a)).

The court held that the employer also failed to give its employees a *Fair Work Statement* before they started work, pay their workers according to the relevant award (Retail), pay penalty rates for working on Saturdays and public holidays, make employee superannuation contributions and, finally, pay overtime rates.

The Federal Court held that 85 Degrees Coffee Australia Pty Ltd had contravened numerous civil penalty provisions of the *Fair Work Act 2009* (Cth) and imposed a penalty of $475 200 to be paid within 28 days.

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There has also been a gradual trend in anti-slavery legislation towards supply chain reporting, commencing in California, with the *Transparency in Supply Chains Act 2010* (US). The Act increased penalties and strengthened powers to exclude companies from federal contracts if they failed to report on human trafficking in their supply chain. Further, the *Uyghur Forced Labor Prevention Act 2022* (US) was legislated with the sole aim of preventing companies from profiting from products manufactured using forced labour from the Xinjiang-Uyghur Autonomous Region in China.

The UK government has made it a priority to tackle modern slavery both domestically and internationally through its *Modern Slavery Act 2015* (UK) and has made recommendations to strengthen transparency in the supply chain.



Figure 9.21 A 2022 protest again Apple's use of Uyghur labour, held outside an Apple store in Washington DC.

Similarly, in 2020, Canada introduced a prohibition under its Customs Tariff legislation, on the importation of goods produced in whole or in part by forced labour.

In Australia, the *Modern Slavery Act 2018* (Cth) compels companies that are turning over more than $100 million per annum to report on their supply chains. Further, the federal government, as the largest procurer in the Australian market, entered 84 054 domestic and international contracts worth $69.8 billion in the 2020–2021 financial year. In order to nullify any modern slavery risk associated with such contracts, it prioritised the 'visibility of its supply chains'. New South Wales legislation also requires companies with an annual revenue of more than $50 million to report on their supply chains; these companies face fines of $1 million for having slavery in their supply chain.

In Thailand, a 2019–2021 government program was launched promoting fair and decent work programs through trade union membership and organisations. Unions have traditionally been able to protect the wages and conditions of workers and represent employees with little education in receiving their entitlements from bosses using often brutal tactics to underpay their workers. However, union membership in Thailand sits at approximately two per cent of workers, whereas in 2022 the Australian Bureau of Statistics reported that 12.5 per cent of Australian employees (1.4 million) were trade union members, with the highest membership being in the education and training industry (30%) and the professionals occupation group (19%).

Review 9.8

1. Outline the major breaches of the *Fair Work Act 2009* (Cth) in *Fair Work Ombudsman v 85 Degrees Coffee Australia Pty Ltd* [2022] FCA 1317.
2. Evaluate the effectiveness of the law in achieving fairness for the employees of 85 Degrees Coffee Australia Pty Ltd.
3. Examine recent international laws that have attempted to combat the exploitation of workers. Describe how supply chain legislation may be effective in its elimination.
4. Explain why union membership could be an important factor in tackling the problem of forced labour.

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Non-legal responses

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.

Human Rights Watch website

Human Rights Watch (HRW) has been monitoring working conditions in the Thai fishing industry over the past few years. In 2018, HRW published a report claiming that the Thai Government has not taken the steps necessary to end forced labour and other serious abuses on fishing boats.

In addition, the Seafood Taskforce, a global coalition of stakeholders tackling human rights issues in Thailand, is working on supply chain issues to ensure companies are compliant in the use of Thai fish caught using forced labour.

The media can also help create law reform by raising awareness of and publicity for exploitation in particular industries.

Case Study

Minimum wage for fruit pickers

In December 2020, a report commissioned by the Australian Workers Union (AWU) alleged that labour hire firms that recruited fruit pickers on the New South Wales north coast were 'severely and intentionally underpaying their workers'.

When reporting on this, the ABC contacted three foreign labourers working in the area, who said they had been exploited and underpaid in exchange for assistance in extending their visas. It also reported that, 'Labour hire firms recruiting for the region refused to speak on the record when contacted by the ABC'.

Following the report, the AWU applied to the Fair Work Commission to amend the horticultural award. The award at the time allowed farmers to pay based on the amount of fruit or vegetables picked, known as 'piecework'. The AWU sought to ensure that farm workers would receive the minimum casual wage (at that time, $24.80 per hour).

In November 2021, the Fair Work Commission found that 'the pieceworker provisions in the Horticulture Award are not fit for purpose', as they did not provide a fair minimum safety net. It ruled that pieceworkers must be guaranteed a minimum wage.

You can read more about this case at http://cambridge.edu.au/redirect/10317.



Figure 9.22 A report commissioned by the Australian Workers Union stated that fruit pickers on the New South Wales north coast were severely and intentionally underpaid.

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Research 9.6

1. Read the 'What is slavery?' page on the website of Anti-Slavery Australia. Also examine the Seafood Taskforce website.
2. Provide one other example of worker exploitation from overseas. Describe in what way this example highlights what forced labour does.
3. Discuss how effective the Seafood Taskforce might be with supply chain legislation.

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 plight of visa-holding restaurant staff and farm workers clearly demonstrates that employees with poor English skills, who are in desperate situations, are often targeted by unscrupulous employers looking to make higher profits by paying their workers as little as possible. Accusations of physical and sexual abuse should be reported to police and involve criminal sanctions. However, being foreign workers, many lack the requisite confidence, knowledge and linguistic skills to pursue unprincipled employers.

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; that is, the prevalence of a fatalistic view 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.

Figure 9.23 Visa-holding workers in the Australian hospitality industry are often underpaid and exploited by owners in a bid to reduce overhead costs for the business.



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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 intergovernmental organisations and non-government organisations 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.
- The Commonwealth and NSW governments have both enacted modern slavery laws to increase the effectiveness of legal measures dealing with human trafficking and slavery.

Issue 1 short-answer 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 15 years, and the first international trial before the International Criminal Court has occurred.
- Intergovernmental organisations and non-government organisations 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 short-answer 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.

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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 International Labour Organization, Amnesty, Human Rights Watch and the Seafood Taskforce.
- 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, have 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 short-term. Boycotting major supermarket chains 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 short-answer questions

1 Discuss the problems of exploitation of workers in Australia. What are the consequences of enforcing awards and agreements?

2 Outline the origins of the International Labour Organization. Evaluate the effectiveness of the organisation in achieving fairness for workers worldwide.

3 In terms of foreign worker exploitation, evaluate the effectiveness of strategies designed to boycott major brand labels. How will these impact workers in developing nations?

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Themes and challenges for Part II – Human rights

The changing awareness in the connection between human rights and state sovereignty

- World War II led to an appreciation of the importance of having governments that protect human rights.
- Without a world state, universal human rights are dependent on sovereign states for protection.
- When sovereign states cooperate, great strides can be made in human rights, as happened in the 1990s.

Issues of compliance and non-compliance in relation to human rights

- Struggles for self-determination in Asia and Africa largely overshadowed universal human rights in the first two decades after *The Universal Declaration of Human Rights* (1948).
- Despite the gradual growth of international human rights in the decades after 1948, human rights only became a truly global movement after the end of the Cold War.
- In the 1990s, there was an increase in the number of democracies in the world and an upsurge in compliance with the principles of international human rights law.
- Since the global financial crisis in 2008, there has been a gradual erosion of compliance with human rights.

The development of human rights as a reflection of changing values and ethical standards

- Human rights have grown in number since *The Universal Declaration of Human Rights* (1948). Third-generation human rights, such as environment rights and peace rights, have been added to the list of human rights concerns.
- With the end of the Cold War, the pursuit of democratic rights gained greater global acceptance.
- In recent years, changing ethical standards have led to the prominence of gender rights.

The role of law reform in protecting human rights

- The creation of universal human rights is in itself a massive reform of the international legal system.
- Law reform protects human rights by creating a more efficient legal system, promoting justice and addressing changing societal values.

The effectiveness of legal and non-legal measures in protecting human rights

- UN human rights treaties have led to a greater understanding of the different areas of human rights.
- Nation states that sign and ratify human rights treaties then incorporate them into their domestic legislation, which has led to the human rights of many people being protected.
- Non-government organisations have become a major force in world affairs by promoting human rights via the use of non-legal measures.

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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 each chapter.

Themes and challenges
Each option has its own set of themes and challenges, listed at the start of each 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. You will be required to answer two of these questions, each relating to a different option you 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 the response is around 1000 words (approximately eight examination writing booklet pages).

Chapters in this part
Each option is in a separate chapter. You must study two options (each option amounts to 25% of course time).

Chapter 10 **Option 1: Consumers** 264

Chapter 11 **Option 2: Global environmental protection** 316

Chapter 12 **Option 3: Family** 374

Chapter 13 **Option 4: Indigenous peoples (digital-only chapter)** 421

Chapter 14 **Option 5: Shelter** 422

Chapter 15 **Option 6: Workplace (digital-only chapter)** 469

Chapter 16 **Option 7: World order** 470

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Chapter 10
Option 1: Consumers

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate the legal rights of consumers and the effectiveness of the law in achieving justice for consumers.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the role of the law in encouraging cooperation and resolving conflicts in regard to consumers
- issues of compliance and non-compliance
- laws relating to consumers as a reflection of changing values and ethical standards
- the role of law reform in recognising the rights of consumers
- the effectiveness of legal and non-legal responses in achieving justice for consumers.

At the end of this chapter, there is a summary of the themes and challenges relating to consumers. This summary draws on key points from the chapter and links each point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 23) and the 'learn to' activities (pp. 23–4) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Consumers' topic.

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Relevant law

IMPORTANT LEGISLATION

Conveyancing Act 1919 (NSW)
Sale of Goods Act 1923 (NSW)
Minors (Property and Contracts) Act 1970 (NSW)
Student Assistance Act 1973 (Cth)
Trade Practices Act 1974 (Cth)
Legal Aid Commission Act 1979 (NSW)
Contracts Review Act 1980 (NSW)
Community Justice Centres Act 1983 (NSW)
Fair Trading Act 1987 (NSW)
Telecommunications Act 1997 (Cth)
Australian Securities and Investments Commission Act 2001 (Cth)
Corporations Act 2001 (Cth)
Spam Act 2003 (Cth)
Do Not Call Register Act 2006 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Competition and Consumer Act 2010 (Cth)
Tattoo Parlours Act 2012 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Motor Dealers and Repairers Act 2013 (NSW)
Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2021 (NSW)

SIGNIFICANT CASES

Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387
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
Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991) 22 NSWLR 298
Astley v Austrust (1999) 197 CLR 1
Australian Communications and Media Authority v Clarity1 Pty Ltd [2006] FCA 410
Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd [2010] SASC 37
Australian Competition and Consumer Commission v Harvey Norman Holdings Ltd [2011] FCA 1407
Australian Competition and Consumer Commission v ByteCard Pty Ltd [2013]
Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd [2015] FCA 1263
Australian Competition and Consumer Commission v Origin Energy Electricity Ltd [2015] FCA 278
Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181
Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd [2017] FCA 204
Baxter v Telgate Pty Ltd [2017] NSWCATAP 17
Australian Competition and Consumer Commission & Anor v Australian Institute of Professional Education Pty Ltd [2021] NSD453/2016
Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd [2022] FCA 875

Legal oddity

In 2023, a federal lawsuit for false advertising was launched against fast-food giants McDonald's and Wendy's. The two companies' advertisements both showed burgers with patties that were proportionally larger than in the actual burgers. The judge found that the plaintiff had failed to prove that the advertisements would mislead a reasonable customer.

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10.1 The nature of consumer law

The developing 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 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 and because there was little product packaging, goods could be inspected closely prior to purchase, consumers did not need to have much protection.

Early markets were also characterised by the common law notion of ***caveat emptor***, a Latin term that means 'let the buyer beware'. *Caveat emptor* was 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.

Early consumer markets were based on a ***laissez-faire* economy**, where the interaction between buyers and sellers of goods and services was considered to be a private realm, and there was little government intervention. However, 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. On observing this, governments began to create laws that would, in time, address the need for consumer protection.



Figure 10.1 When making purchases, consumers have a range of expectations about what they are buying and expect products to work properly for a certain period of time.

Today, contemporary consumers often need to rely upon the expertise of others (for example, shop assistants or financial advisers) when making purchasing decisions abouts such things as electrical equipment or superannuation products. For many purchases, a highly specialised level of product knowledge is required in the marketplace of the twenty-first century. Therefore, it is essential that legislators put safeguards in place to resolve conflict and protect consumers from exploitation.

The definition of consumer

Part I section 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 resale. A person who acquires a vehicle for use in the transport of goods on public roads is also deemed to be a consumer, irrespective of the price.

When making purchases, consumers have a range of expectations about the products and/or services they are buying. Consumers expect that the products they buy will work properly for a certain 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.

Every time we purchase a commodity or service, there is a legal expectation that parties will behave in a manner that ensures fair treatment of both buyer and seller. Without this legal arrangement, purchases

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would be characterised by mistrust and uncertainty, with greatly increased vulnerability for the party in the weaker bargaining or enforcement position. In most cases consumers can decide whether or not to purchase an item – whether it is a can of soft drink, a computer or an insurance policy – but we are often influenced by marketing and advertisements.

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
- 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
- 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
- regulating contractual relationships between buyers and sellers – especially 'unfair' contract terms
- guarding against unsafe and defective products
- helping vulnerable and disadvantaged consumers.

remedy
a means by which redress or reparation is provided for the breach of a legal right

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



Figure 10.2 A person confirms the arrival of a home delivery of groceries which had been ordered online via an app. The primary objective of consumer law is to protect the legal rights of consumers, especially in a time of global advertising, mass marketing and e-commerce.

Research 10.1

Access the Australian Consumer Law (ACL) website home page and complete the following tasks.

1. Identify when the ACL came into force.
2. Identify the main features of the ACL.
3. The ACL applies nationally, across all states and territories, and to all Australian businesses. Outline the benefits of Australia having one consumer law.
4. Each state signed the Memorandum of Understanding in regard to the ACL. Look at this document and identify the national parties to this understanding. What body is responsible for overseeing laws in New South Wales?

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Review 10.1

1 Define *caveat emptor*.
2 Explain why the need for consumer protection has grown over time.
3 Justify the necessity for legislative consumer protection in the twenty-first-century marketplace.
4 Define *laissez-faire* economy. Examine this economic model and explain why it is problematic for contemporary consumers.
5 Define 'a consumer' in relation to the Australian Consumer Law.

10.2 Contracts

contract
a voluntary agreement made between two or more people that is recognised by the courts as being legally binding on the parties

offeror
the person making an offer of an agreement

offeree
the person to whom the offer of an agreement is made

Video 10.1 NSW Fair Trading on contracts and consumer rights (01:21)

Types of contracts

A **contract** is a voluntary 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 an agreement, which in most cases consists of an offer made by one party to another person, an acceptance of the offer by that person and consideration for the promise made. 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**.

Once the terms and conditions of a contract have been agreed to, a contract must be 'executed'. This means that the contract must be 'signed off' in order to demonstrate the parties' agreement to the terms. This enables the contract to become effective or 'on foot', as it is often described. Unless a contract has been properly executed, a court may find that it has been improperly formed and may set it aside at the request of one of the parties. Consumer contracts can be executed:

- in written form, by signing a document
- orally, by agreeing in person or over the phone
- by a combination of the previous two points
- by clicking an 'I agree' button on a web page.

Written contracts

Many consumer contracts are in writing, especially those involving large amounts of money, such as the sale or lease of real estate. 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 that 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.

Parties to contracts will opt for written contracts in order to:

- avoid having to prove that the contract existed
- avoid having to prove what the terms of the agreement actually were
- 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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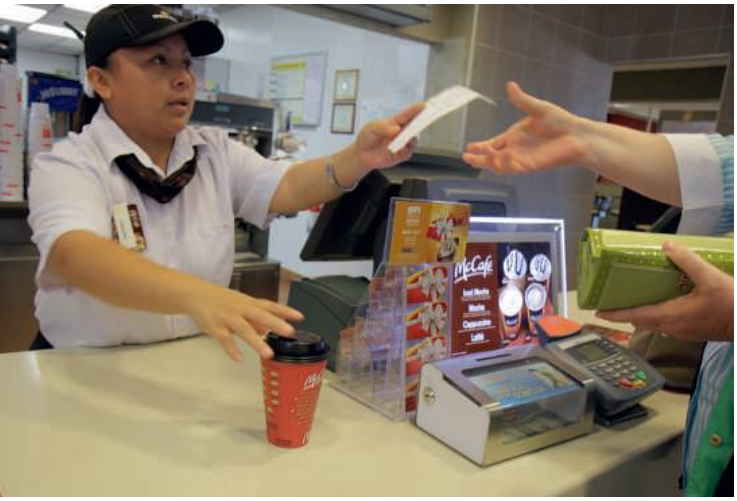


Figure 10.3 Many contracts are carried out in an oral format, such as when purchasing a drink. Often the only contract for this type of sale of goods is a receipt.

Oral contracts

Many contracts are carried out in an oral format; for example, when we buy a hamburger or a drink we enter into a contract for the sale of goods. The only writing we may have could 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 dispute arises and 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' applies. If a written agreement appears to be a complete record of the agreement, it will be accepted against a contradictory term made orally.

Review 10.2

1. Outline the primary objective of consumer law.
2. Define a 'contract' and identify the parties to a contract.
3. Identify four ways in which contracts can be executed.
4. Outline the elements that a court will consider when deciding whether a contract exists (orally or written).

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 unconditional 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 had the intention 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 so would not entitle you to sue them for breach of contract. However, where an agreement

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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

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

consideration
something given, done or suffered by the promisee in return for a promise in a contract

is made while carrying out 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 no acceptance, and hence no agreement between the parties. When a seller (or offeror) advertises something, or has it displayed on a shelf in a shop, they are providing an **invitation to treat** (that is, enter into a treaty). When the prospective buyer responds to the advert or takes the item off the shelf and to the counter, this is known as making 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 price set by the seller. Prices on marked articles in shop windows are just invitations to treat – they are not an offer 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.



Figure 10.4 An invitation to treat is an initial invitation to others to make an offer. A bid, such as during an auction sale, is not an offer and its acceptance cannot give rise to a contract.

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 (or sent by email in today's modern world). The postal acceptance rule states that acceptance is completed when the contract is posted, not when it is received.

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 counteroffer 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 a time period is not 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 and is based on something of value being exchanged for something else of value (which cannot be illegal or unlawful). In most cases, consideration is in the form of money given in return for goods or services.

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In Court

***Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 (28 July 2022)**

The Australian Competition and Consumer Commission (ACCC) was able to successfully take action against Samsung Electronics Australia Pty Ltd. It initiated court proceedings in 2019 against the company in the Federal Court for false, misleading and deceptive representations in advertising the water resistance of various 'Galaxy' branded mobile phones. Samsung Australia's advertisements for its Galaxy phones showed people using their phones in pools and in the sea – activities that could actually cause significant damage to the phones. In June 2022, Samsung was ordered to pay $14 million in penalties by the court. The fact that these adverts were shown to consumers in 2016 and 2017 and the judgment was made in 2022 demonstrates how long court proceedings can take. But ultimately, the actions of the ACCC in pursuing proceedings such as these, and the media reporting, act as a warning to businesses to do the right thing.

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 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



Figure 10.5 Parties must have the capacity to enter into a contract and must be capable at law of entering a voluntary agreement. A contract signed by a person who lacks contractual capacity, such as a child, may not be enforceable.

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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; breaching a warranty 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

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; a term can be implied by custom or law, or because of the presumed intentions of the parties

acceptable quality
an implied guarantee in the Australian Consumer Law that goods sold are fit for purpose, acceptable in appearance, free from defects, safe and durable

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)

fit for purpose
an implied term in the Australian Consumer Law, guaranteeing that the goods sold will do what they were designed to do

Terms of contracts

The terms of a contract relate to the basis of the agreement; for example, Amy agrees to sell certain goods to Dinesh, and Dinesh 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 Dinesh 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.

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** are those based on trust that the seller is providing the purchaser something that is fit to carry out the purpose that it is intended to do. For example, it should not need to be written into a contract that a pair of shoes should allow the buyer to walk in them; this is an implied fact.

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 the **Australian Consumer Law (ACL)**, which is Schedule 2 of the *Competition and Consumer Act 2010* (Cth). In simple terms, this means that when a consumer makes a purchase, there is an implied term in the contract of sale 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 can seek a remedy.

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 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

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Figure 10.6 Acceptable quality is an implied guarantee in the Australian Consumer Law that goods sold are fit for purpose, acceptable in appearance, free from defects, safe and durable.

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.

Review 10.3

1. Investigate the elements that must exist before a contract can come into existence.
2. Explain the difference between an 'offer' and an 'invitation to treat'.
3. Outline the meaning and application of the 'postal acceptance rule' and explain why it is 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.

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 because 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.

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.

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.

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In Court



***Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447**

An elderly Italian couple, neither of whom were 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 based on 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.

In Court



***Australian Competition and Consumer Commission & Anor v Australian Institute of Professional Education Pty Ltd* [2021] NSD453/2016**

In late 2021, the Federal Court ordered $153 million in penalties against Australian Institute of Professional Education Pty Ltd (in liquidation) (AIPE), with $150 million of this for systemic unconscionable conduct, and the remaining $3 million for misleading or deceptive conduct against 12 individual consumers.

Between May 2013 and December 2015, AIPE had been taking in students for online diploma courses under the VET FEE-HELP loan program that existed at the time. It had been telling students their courses were free, which was found to be misleading since each student would accrue a VET FEE-HELP debt of up to $20 000. As well as this, 'free' laptops were offered as an inducement to students.

ACCC Chair Rod Sims said, 'This is the highest total penalty amount ever imposed under the Australian Consumer Law, which reflects the appalling conduct engaged in by AIPE and the substantial benefit it gained as a result of the conduct. … AIPE enrolled consumers, many of whom had limited reading and writing skills or could not use a computer, into online courses they were unlikely to ever be able to complete, but which left them with large lifetime debts'.

Justice Bromwich, who handed down the penalties, said: 'Substantial penalties are called for when a commercial enterprise systematically predates on both a government education support scheme designed to help disadvantaged members of the Australian community, and consequently, upon those consumers.'

Sims also pointed out: 'The magnitude of these penalties should serve as a significant warning to all Australian businesses that there can be very serious consequences for those who choose to engage in misleading and unconscionable conduct.'

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Research 10.2

Access *A Guide to the Unfair Contract Terms Law* on the Australian Competition and Consumer Commission's website and complete the following tasks.

1. Outline what a standard form contract is and provide some examples of such contracts.
2. In deciding whether a contract is a standard form consumer contract, describe what factors a court must take into account.
3. Read Schedule 2, section 24(1) of the Australian Consumer Law and section 12BG of the *Australian Securities and Investments Commission Act 2001* (Cth), and briefly outline the test to determine unfairness in a consumer contract.

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 (acceptable) 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 of the United Kingdom (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.

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- Products must be fit for the purpose for which they are acquired. In *Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd* [2010] SASC 37 the South Australian Supreme Court of Appeal held that a custom-built unit for delivery of medical services was not fit for its 'contemplated purpose'. The builders were advised that the unit was to be fitted to the back of a particular vehicle, but the resulting rig was too heavy for use on public roads. It was therefore deemed by the court to be unfit for the purpose for which it was ordered. The builder was ordered to pay for the additional cost of a larger replacement vehicle, and the fitting of the service unit to that vehicle.
- 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 *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377, the defendant (trading as Europcar) was found to have relied on a number of terms in their 2013 standard rental agreement that the court deemed to be unfair and, therefore, void. Europcar was also ordered to pay a penalty of $100 000 for making false or misleading representations about consumers' liability in the event of vehicle damage.



Figure 10.7 A person may seek help for contracts which were affected by undue influence. This is where a party exploits a relationship of influence to induce the other party into entering the contract, such as leaving them assets in a will.

Case Study

Telstra

In 2017, under the scrutiny of the Australian Competition and Consumer Commission, Telstra offered remedies to around 42 000 customers for offering National Broadband Network plans with stated maximum speeds that were not actually achievable in real-world conditions.

Telstra was also fined for acting unconscionably and breaching the Australian Consumer Law when staff at five licensed Telstra-branded stores signed up 108 First Nations consumers to post-paid mobile contracts, even though these people did not understand and could not afford the packages. Telstra was required to waive the debts and refund the customers' money. It also had to establish measures to reduce the likelihood of similar conduct occurring in the future. There was also a court-enforceable undertaking by Telstra that it would make improvements to its compliance program, improve its First Nations telephone hotline, and enhance its digital literacy program for consumers in certain remote areas.

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Review 10.4

1 Outline the concept of an equitable remedy.
2 Examine the matter of *Johnson v Buttress* (1936) 56 CLR 113. Explain why the court's ruling is a good example of equitable relief for unconscionable conduct.
3 Evaluate the decision in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 and discuss how this case contributes to the law for consumer protection.
4 Outline the meaning of the phrase 'fit for purpose' as provided in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). What problems do you think may arise when applying this definition in settling a consumer complaint?
5 Explain the notion of an unconscionable contract. Identify the remedies available to individuals who enter such contracts.

Statutory protection

The ACL established uniform consumer laws in all states and territories in Australia and commenced on 1 January 2011. The provisions of the ACL broadly reflect those in the *Trade Practices Act 1974* (Cth), 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 several 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)
- *Australian Securities and Investments Commission Act 2001* (Cth)
- *Fair Trading Act 1987* (NSW)
- *National Consumer Credit Protection Act 2009* (Cth)
- *Contracts Review Act 1980* (NSW).

The *Contracts Review Act 1980* (NSW) 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. In 2016, a law reform provided better protection for small businesses from unfair contract terms in standard form contracts by extending section 23 of the ACL to apply to small business contracts as well as consumer contracts. This led five businesses including Uber and Fairfax to change terms of their contractual terms.

The *Australian Securities and Investments Commission Act 2001* (Cth) sets out the powers of the Australian Securities and Investment Commission and governs consumer protection in relation to financial services, including education of consumers through a financial literacy framework and enforcement of court-ordered remedies.

The ACL also introduced a new protection for consumers in dealing with standard form contracts. A **consumer 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 order to protect the

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

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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).

In determining whether a term in a consumer contract is unfair, a court must take into account:

- the contract as a whole
- the extent to which the term is clear and readily understood by the parties.

The court may also take into account any other matters it considers relevant.

A good example can be seen in *Australian Competition and Consumer Commission v ByteCard Pty Ltd* [2013]. This was the first case where the Australian Competition and Consumer Commission (ACCC) commenced legal proceedings under the new unfair contract terms provisions of the ACL. ByteCard, an internet service provider, could vary the price under an existing contract without providing the customer the right to terminate the contract. The Federal Court found that ByteCard Pty Ltd's standard form of consumer contracts was unfair and therefore void.

Research 10.3

Go to the NSW Fair Trading home page and 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. Identify the products and services guaranteed under the Australian Consumer Law.
3. Describe the conditions under which the consumer guarantees do not apply to you.



Figure 10.8 The Australian Securities and Investment Commission governs consumer protection in relation to financial services.

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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.

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 current 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)
- 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 after they have already entered 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 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).

negligence
a breach of the duty of reasonable care owed by one party to another, and damage to the plaintiff resulting from this breach

Some examples of product recalls include the following:

- Takata airbags (2017) were installed in 2.3 million cars in Australia and have been the subject of the largest vehicle recall in history. Some of these are faulty on deployment, having caused serious injury (April 2017) and a death (July 2017).
- In August 2023, some children's Oodies (leisure wear) were recalled as the product lacked the required fire hazard labelling and so did not comply with the requirements of the mandatory safety standard for nightwear for children.

Product Safety Australia, an arm of the ACCC, is responsible for monitoring safety at a national level. It publishes the list of recalls on its website, providing the reason for the recall and what consumers need to do if they have bought the product.

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.

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Figure 10.9 Suppliers have a duty to warn consumers of products that are considered to have dangerous characteristics after they have already entered the market. Under consumer law, they may also be required to recall the product.

For example, in April 2017, the Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 was revised by the Minister of Small Businesses to include enhanced safety guidelines.

Research 10.4

Search online for the Australian Competition and Consumer Commission's product safety recall list. The Christmas period always sees many recalls. Find three examples of a product safety recall and outline the reason why each item was recalled.

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 ACL.

Deceptive or misleading conduct

Section 18 of the ACL, formerly section 52 of the *Trade Practices Act 1974* (Cth), contains provisions providing protection against deceptive or misleading conduct.

Conduct is considered misleading if it has the capacity to lead into, or cause, error. 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 and will look at what a reasonable person's reaction would be to the representation. However, the ACL does not consider 'puffery', a term used to describe exaggerated and fanciful claims about a good or service, to be misleading or deceptive conduct. For example, a fast-food restaurant declaring their burger to be the best in the world is puffery, but saying that the burger includes Australian beef when it doesn't, is deceptive conduct.

It makes no difference whether the company intended to mislead or deceive consumers; even omitting to say something can amount to misleading or deceptive conduct if this is considered 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.

'Drip pricing' is another form of misleading conduct that is illegal under the ACL. For example, in 2015, Jetstar and Virgin's 'drip pricing' conduct drew consumers into an online process to purchase tickets with a headline price, but failed to provide adequate disclosure of additional fees and charges that are likely to apply (*Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263 and *Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd* [2017] FCA 204). Both airlines were subsequently fined for this behaviour.

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Under the ACL, a consumer can recover damages for the loss or damage suffered by the conduct of another that 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. For example, in order to reduce the issues around the reselling of tickets, in June 2018 Fair Trading New South Wales introduced new ticket reselling laws which are different from the rest of Australia. It is illegal to resell tickets for more than 10 per cent over the original value. The NSW laws also prevent event organisers from cancelling tickets that have been resold at or below face value plus 10 per cent.

Media



Concerns over 'loopholes' in law as NSW vows to protect Taylor Swift fans

Linda Morris

The Sydney Morning Herald

28 June 2023

NSW Premier Chris Minns is promising to crack down on ticket scalpers who resell tickets to the in-demand Taylor Swift concerts for exorbitant prices and flagged, if necessary, a potential tightening of consumer protections.

The government's consumer protection agency, Fair Trading, has written to online sales platforms including eBay, Ticketek, and Gumtree warning them of their obligation to protect consumers under legislation that Labor said five years ago was 'a waste of time' and open to loopholes.

Minister for Fair Trading Anoulack Chanthivong said Fair Trading was watching platforms to identify any tickets being sold above a ten per cent mark up on the ticket price.

The government was not only concerned about concert sales but also the FIFA Women's Soccer World Cup, and the NRL's State of Origin.

Arts minister John Graham said the government wanted to make sure that resellers doing the wrong thing were caught and punished.

In opposition, Labor had warned that tightened legislation was not going to solve the problem with ticket bots – programs that buy up large numbers of tickets and then resell them onto secondary sites. Fair Trading, it said then, did not have the staff numbers to enforce proper compliance.

'If there are loopholes or changes needed to improve the system we will make them so people are not ripped off and can enjoy these events without paying an arm and a leg to be there,' Graham said.

'Fans can help by reporting tickets being sold at more than 110 per cent of their original price so we can go after the people doing the wrong thing.'

It is illegal to profit from the resale of tickets and advertise tickets with an asking price of more than 10 per cent of the original price.

Choice has issued warnings that limited VIP packages to Swift's February concerts were already being exploited by scalpers. These packages to Swift's five Sydney and Melbourne shows went on sale on Monday. Scalpers exploited the high demand, seeking to resell the tickets at excessively high mark-ups, Choice said.

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Analysis 10.1

Read the media article on the previous page.

1. Outline the behaviours on which the NSW Government is vowing to crackdown.
2. Outline the issues in trying to enforce laws in this area.
3. What can fans do to help in the crackdown of this behaviour?

False or misleading representations

In addition to the provisions concerning misleading and deceptive conduct, the ACL contains specific provisions regarding representations (s 29), which 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.

For example, in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, the Nurofen manufacturer was found to have engaged in misleading conduct by representing that its Nurofen Specific Pain products could each treat a specific type of pain, when the products were in fact identical. Their prices were also significantly higher than other general pain relievers. The Nurofen manufacturers were originally fined $1.7 million, which was later increased to $6 million on appeal by the ACCC. Similarly, in March 2017, Hoyt Food Manufacturing Industries Pty Ltd was fined $10 800 by the ACCC for false representation that its oregano product was only oregano, when 50 per cent of the package had olive leaves.



Figure 10.10 The manufacturer of pain relief tablet Nurofen was found to have engaged in misleading conduct and fined.

Media

Samsung Australia to pay $14m penalty for misleading water resistance claims

ACCC media release

23 June 2022

Samsung Electronics Australia Pty Ltd (Samsung Australia) has been ordered by the Federal Court to pay $14 million in penalties after it admitted misleading consumers about the suitability of various Samsung Galaxy phones to be submerged in pool or sea water, in proceedings brought by the ACCC.

The false or misleading claims were made about the water resistance of the S7, S7 Edge, A5 (2017), A7 (2017), S8, S8 Plus and Note 8 Samsung Galaxy phones (Galaxy phones). There were more than 3.1 million of these Galaxy phones sold in Australia.

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Between March 2016 and October 2018, Samsung Australia conducted a marketing campaign that included nine ads, published across Facebook, Twitter, Instagram, on its website, and in-store, which represented that these Galaxy phones were suitable to be used in pool and sea water.

Samsung Australia has acknowledged that if the Galaxy phones were submerged in pool or sea water there was a material prospect the charging port would become corroded and stop working if the phone was charged while still wet.

'Samsung Australia's water resistance claims promoted an important selling point for these Galaxy phones. Many consumers who purchased a Galaxy phone may have been exposed to the misleading ads before they made their decision to purchase a new phone,' ACCC Chair Gina Cass-Gottlieb said.

'We reviewed hundreds of complaints from consumers who reported they experienced issues with their Galaxy phones after it was exposed to water and, in many cases, they reported their Galaxy phone stopped working entirely,' Ms Cass-Gottlieb said.

Prior to the launch of the Galaxy phones, Samsung Australia's parent company, Samsung Electronics Co., Ltd. (SEC), was already seeking to mitigate the effects of this charging port corrosion caused by charging following exposure to water. Despite this, Samsung Australia's marketing campaign promoted Galaxy phones being used in pools and sea water while there remained a material prospect the Galaxy phones would be damaged due to corrosion.

Source: ACCC © Commonwealth of Australia

Analysis 10.2

Read the media article on pages 282–3.

1 Identify the parties in the court case and outline the role they played.
2 Describe the reasons that Samsung was taken to court.
3 Outline the verdict, the reason for it and the penalty that Samsung had to pay.



Figure 10.11 Samsung Galaxy phones were advertised as being water resistant.

Unconscionable conduct

The ACL (ss 20–22) provides protection for consumers against unconscionable conduct. This conduct involves the use of undue influence, pressure or unfair tactics to induce a consumer to enter into a contract.

Offering gifts and prizes

Suppliers who entice consumers to buy their goods or services by offering gifts, prizes or other free items, but with the intention of not providing the advertised gift, contravene section 32 of the ACL. Suppliers participating in such marketing schemes are considered to have been engaging in deceptive practice.

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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. Customers who come to buy the product are then offered another product to buy; thus, they have been baited by the original offer.

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

cooling-off period a period of time that gives buyers an opportunity to rethink their decision to enter into a contract of sale

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 section 35 of the ACL.

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 section 35 of the ACL (it was then sections 56(1), (2) of the *Trade Practices Act 1974* (Cth)). 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. Similarly, in *Australian Competition and Consumer Commission v Harvey Norman Holdings Ltd* [2011] FCA 1407, six Harvey Norman franchises were fined for bait advertising. They had advertised the Kodak 'Playsport' pocket video camera but were unable to supply the product to consumers, as they did not stock the camera.

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 sections 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.

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. This is commonly evident in door-to-door sales. For example, in *Australian Competition and Consumer Commission v Origin Energy Electricity Ltd* [2015] FCA 278, Origin Energy was fined $2 million for using illegal tactics in negotiating energy contracts during door-to-door sales involving undue harassment and coercion.

In March 2017, the ACCC issued a Public Warning Notice about the alleged conduct of a Danish online retailer LuxStyle, which posted the goods to consumers along with an invoice demanding payment even though consumers had only viewed the goods online and not proceeded to make any purchase.

Under section 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 section 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 a **cooling-off period** in relation to certain contracts because the law acknowledges the existence of high-pressure sales tactics that can influence consumers to make purchases they otherwise would not. These tactics may not constitute unconscionable conduct but may result in purchases that put the buyer at a disadvantage.

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Figure 10.12 A cooling off period provides buyers with an opportunity to rethink their decision to enter into a contract of sale. Legislation in New South Wales provides for a five-day cooling-off period for sales of residential property.

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).

Research 10.5

Read the Australian Consumer Law sales practices guide online and complete the following tasks.

1. Outline what is meant by unsolicited (unrequested) goods and services. Provide one consumer right and one supplier right in regard to unsolicited goods.
2. Describe the circumstances under which a business or person can issue an invoice for unsolicited goods or services.
3. Outline under what conditions businesses are allowed to send credit and debit cards.

Review 10.5

1. Describe the circumstances in which a consumer becomes entitled to bring an action in negligence.
2. Explain the significance of *Grant v Australian Knitting Mills* [1936] A.C. 562.
3. Investigate and outline the sections of the Australian Consumer Law (ACL) that relate to the protection of consumers from unsafe products.
4. Discuss why section 18 of the ACL is considered such an important piece of legislation.
5. Describe the expression 'false and misleading representation'. Provide some examples of circumstances where businesses have been found guilty of making these claims.
6. Distinguish between 'referral' and 'pyramid' selling. Explain why they are deemed to be illegal, in terms of the harm these schemes do.

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 that complements its statutory regime.

That system is administered by Ad Standards (formerly known as the Advertising Standards Bureau) through the Advertising Standards Board (ASB) 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.

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Ad Standards provides a free complaint resolution service to the public. It also makes decisions on complaints about most forms of advertising and marketing. Complaints that 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 Boards.

In another example, Ad Standards upheld a complaint in 2023 where a KFC advertisement showed an overloaded power board at a party. Its reasons were that showing an overloaded power board in the advertisement would be considered by many members of the community to be normalising and in some ways promoting unsafe behaviour.

Students can access the Ad Standards site to see cases that have been dismissed and upheld 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**, rather than through expensive and time-consuming litigation.

alternative dispute resolution 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 and Beverages Code, and the AANA Code for Advertising and Marketing Communications to Children.

Review 10.6

1. Describe how statute law combats high-pressure sales tactics.
2. Define the term 'cooling-off period'. Explain why a cooling-off period exists. Identify the statutes that have inbuilt cooling-off periods.
3. Outline the non-statutory controls that address deceptive and/or misleading marketing and advertising in Australia.

Legal Links

The Australian Association of National Advertisers codes can be viewed online.

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

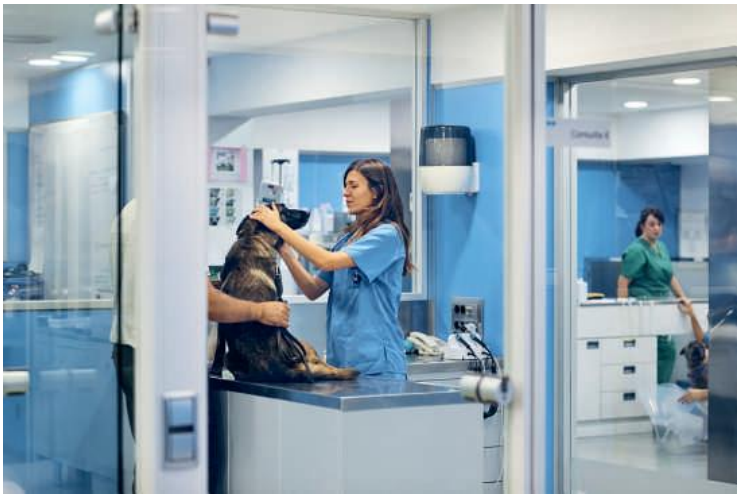


Figure 10.13 The imposition of licensing and registration is an attempt to guarantee that people employed in various occupations, such as veterinarians, have the requisite skills and perform their roles honestly.

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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

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 AMA is a national body that regulates the ethics, work standards and academic qualifications of doctors, and the Law Society 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 addressed the need for legislation to ensure that all practitioners meet standards of competence and ethical behaviour.

Review 10.7



1 Outline three ways in which professions and occupations are regulated in Australia. Explain why you think regulation is necessary.
2 Identify two examples of professions that are self-regulated and identify what professional behaviour is self-monitored in each case.
3 Explain why self-regulation is potentially problematic.

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. Examples of statutory licensing regimes in New South Wales for automobile dealers and repairers, and tattoo parlours are discussed on the following page.

fiduciary duty where one person (the fiduciary) undertakes to act in the interests of a second person (the beneficiary) and has the power to affect the interests of the beneficiary; in the case of real estate, real estate agents have the onus to behave honestly and ethically in the interests of the client (seller or buyer)

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Licensing of tattoo parlours

The *Tattoo Parlours Act 2012* (NSW) regulates tattoo parlour operators and tattooists. Anyone who performs body art tattooing procedures for a fee or reward, or who runs a body art tattooing business in New South Wales needs to be licensed. A licence is granted for three years and can be renewed. An individual must be 18 years of age to be eligible for a tattoo licence, and consent to a National Police Check. The key objective of this legislation was to promote hygiene as well as control outlawed motorcycle gangs. In 2013, police raided 31 tattoo parlours under the new legislation to enforce the provisions of the legislation and caution the parlour owners with associations with outlawed motorcycle gangs.

licensee
licence holder

procedural fairness
the body of rules that ensure that decision-makers act fairly, in good faith and without bias when resolving disputes

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) (this legislation replaced the older laws – the *Motor Dealers Act 1974* (NSW) and the *Motor Vehicles Repairs Act 1980* (NSW)). This Act was amended in 2021 (*Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2021*) to include some specialised repair features. 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. Unlicensed motor dealing has a maximum penalty of $110 000 and a subsequent offence can also result in a 12-month jail term. Odometer tampering can also result in a maximum penalty of $22 000. 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 that could potentially harm a vehicle owner or cause further damage to the car.

Review of licensing decisions

The regulatory body for a particular profession or occupation may grant or revoke a licence. When it 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 NSW Civil and Administrative Tribunal (NCAT; see page 294) for further review.

Table 10.2 Reasons for a licence to be refused or revoked

Possible reasons for refusing 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

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10.4 Consumer redress and remedies

Awareness and self-help

Awareness about consumer rights is promoted through media, social media and useful websites. Televisions shows such as *A Current Affair* run segments that highlight troublesome business behaviour. The ACCC maintains websites and has launched free apps to raise awareness among consumers. The Product Safety Recall website informs consumers about unsafe products that have been recalled, while the Scamwatch website warns consumers about potential scams to prevent exploitation. The Recalls Australia app is easily accessible, and the ACCC shopper app provides useful information to consumers about their rights. In fact, the term *caveat emptor* is also known as 'let the buyer beware' and is based on the assumption that, if consumers have enough knowledge, they will make sensible purchases, and so will eliminate the need for redress.

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 addressed promptly can become an ambassador for that supplier through word of mouth.

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

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 1980* (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, country of origin and design standards).	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW) Food Labelling Standard 2016

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Complaints to manufacturers

Consumers do not always have direct access to manufacturers and, due to e-commerce, the manufacturer may be in another country. However, once the location of the manufacturer has been determined, it is prudent for the aggrieved consumer to contact them via telephone and/or 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.

Manufacturers must also meet the requirements for acceptable quality and fitness for purpose.



Figure 10.14 Under consumer law, manufacturers have an obligation to fulfil their express warranties and to ensure that a supply of spare parts and repair facilities is reasonably available for a reasonable period of time following a sale.

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 acceptable quality.	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)

State government organisations

There are various bodies within or authorised by the NSW Government that deal with consumer complaints. The roles of these agencies include:

- educating the public about their rights around 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 in the following text.

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

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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. It has also released short YouTube video clips on consumer rights in 11 different languages to increase accessibility to new migrants.

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 the website of NSW Fair Trading and complete the following tasks.

1 Research and make brief notes on each component of consumer rights – the myths and the facts.
2 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 NSW Government. It lists the type of services consumers can lodge a complaint about. 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 funding from these departments. It also conducts reviews of people in care and monitors community service issues. The NSW Ombudsman can assist anyone who is a consumer of 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 the services at local neighbourhood centres
- 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. Legal Aid NSW can help with consumer law issues such as matters relating to the purchase of goods and services, credit matters, matters relating to unconscionable contracts and unfair contract terms, as well as matters relating to insurance and superannuation. All Australian states and territories have legal aid, but not all provide as much assistance in civil matters.



Figure 10.15 Legal Aid NSW is an independent statutory body that can help with consumer law issues such as matters relating to the purchase of goods and services.

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Other legal and advocacy organisations in New South Wales

Other legal and advocacy organisations that are funded by government and that assist people on low incomes are:

- Community Legal Centres NSW – free legal advice services
- Financial Counsellors' Association of NSW Inc. – free services for people with debts and problems with money
- Tenants NSW – free tenancy advice funded by government.

Federal government organisations

Several Commonwealth agencies deal with the regulation of industries and protect consumer rights.

The Treasury

The Treasury provides advice to the Commonwealth Government on the consumer policy framework contained in federal legislation and on how to promote competitive and efficient markets to enhance the wellbeing of Australians. This includes advice on the policy and regulatory frameworks for promoting competition, and for consumer protection.

Commonwealth Consumer Affairs Advisory Council

The Commonwealth Consumer Affairs Advisory Council 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; for example, it compiled a report on statutory implied conditions and warranties in 2009 to inform the development of the ACL in 2010
- advise the minister of any emerging issues that could affect Australian markets and Australian consumers.

monopoly exclusive control of a market by one company, which generally results in increased prices because there are no alternative suppliers

Australian Securities and Investments Commission

The Australian Securities and Investments Commission (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 powers include:

- commencing prosecutions, usually conducted by the Commonwealth Director of Public Prosecutions
- seeking civil penalties from the courts
- operating as a consumer credit regulator; licensing and regulating businesses engaging in consumer credit activities as per the *National Consumer Credit Protection Act 2009* (Cth), and banning any businesses from such activities, if necessary
- operating as a market regulator; ensuring financial markets are compliant in being fair and transparent.

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is the independent statutory authority that administers the ACL. Its role is to promote competition and fair trade in the marketplace and to discourage and disallow the rise of **monopolies**. Competition is important as it provides consumers with a variety of products at a range of prices. However, competition can also lead some businesses to behave in a less than ethical or legal way to attract customers to their product.

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

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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 1974* (Cth) 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).

In a more recent case, in August 2023, steel manufacturer BlueScope Steel was found to have attempted **price-fixing** behaviour over flat steel products supplied in Australia. The Federal Court found that BlueScope and the general manager had attempted to induce eight steel distributors in Australia and an overseas manufacturer to enter agreements related to fixing the price of flat steel products. The Court imposed a $57.5 million penalty on BlueScope, and a $575 000 penalty on its former general manager.



Figure 10.16 The Hon. Anoulack Chanthivong (second from left) is the NSW Minister for Better Regulation and Fair Trading; Minister for Industry and Trade; Minister for Innovation, Science and Technology; Minister for Building; Minister for Corrections. He is a member of the Consumer Affairs Forum.

Consumer Affairs Forum

The Consumer Affairs Forum (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.

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

price-fixing
suppliers keeping prices in the market at a certain level by agreeing among themselves not to lower or raise their prices

Review 10.8

1. Describe the role that the NSW Ombudsman plays in the delivery of government services to consumers.
2. Outline what types of assistance Legal Aid NSW provides to consumers.
3. Explain the significance of the ACCC's work in protecting consumers' rights and suing businesses to enforce consumer law.
4. As e-commerce transactions become easier and more customers make online purchases, identify issues this creates in terms of consumer redress and remedies.

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 industry. It has a national code of practice setting out acceptable standards for commercial behaviour and ethics, by which its members are bound.

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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, as well as 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.



Figure 10.17 Master Builders Australia is an employers' group that represents and protects businesses in the building and construction industry.

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 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. Similarly, the Telecommunications Industry Ombudsman provides a free, independent dispute resolution service for consumers who have a complaint about their telephone or internet service in Australia. Australian residential consumers and small businesses made 60 998 complaints to the Telecommunications Industry Ombudsman in the last six months of 2018. While telephone complaints were down, those about internet service have risen.

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

The *Civil and Administrative Tribunal Act 2013* (NSW) governs the operation, functions and powers of the NSW Civil and Administrative Tribunal (NCAT). NCAT is a 'super tribunal' that replaced 22 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 70 locations in

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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
- 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 tribunal can make a range of orders of up to $40 000 (except in cases of new car or property agent's commission) regarding consumer claims (*Fair Trading Act 1987* (NSW)):

- for the supplier to pay money to the consumer, including a refund
- for the consumer to return goods or goods to be collected by the supplier
- for the supplier to repair or replace goods
- to relieve a consumer from paying the supplier
- for the consumer to pay money owing to the supplier (if the consumer is not successful).

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. For example, in *Baxter v Telgate Pty Ltd* [2017] NSWCATAP 17, Baxter was claiming a full refund on furniture purchased from Telgate on the grounds of unacceptable quality. NCAT dismissed the application as it found there was no major failure that could not be remedied with minor repairs under the ACL.

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), alternative dispute resolution or the relevant tribunal, another option is **litigation**. The courts resolve disputes by:

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

- 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.

Federal Circuit Court

The Federal Circuit Court has jurisdiction with respect to claims under the following provisions of the *Competition and Consumer Act 2010* (Cth):

- Section 46 (Misuse of Market Power)
- Section IVB (Industry Codes)
- Part XI (Application of the ACL as a law of the Commonwealth)
- Schedule 2 (ACL).

The court can provide injunctive relief and award damages up to $750 000. The court oversees consumer credit matters under the *National Consumer Credit Protection Act 2009* (Cth) with provision for access to small claims procedures in relation to certain compensation matters.

Federal Court

Cases arising from Schedule 2 (ACL) of the *Competition and Consumer Act 2010* (Cth) constitute an important part of the Federal Court's workload. These cases often raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealing or false advertising. It also hears appeals from the Federal Circuit Court.

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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 legal action collectively.

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 the 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. For example, it hosts the 'Shonky Awards' website, which names and shames the shonkiest products and companies taking advantage of Australian consumers.
- **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.



Figure 10.18 Choice magazine consumer product testers inspecting the winning products of the annual Shonky Awards in 2007. The awards website names and shames the shonkiest products and companies taking advantage of Australian consumers.

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.

Review 10.9

1. Distinguish between industry-based dispute resolution and customer-focused compliance programs.
2. Outline the consumer redresses available through tribunals and courts in Australia.
3. Describe and discuss the roles non-government organisations play in the preservation of consumer rights in our society.

Consumer 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

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- **rescission** and modification of contract – where the court will set aside a contract and restore the parties to their original precontractual 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.

Alternative dispute resolution

Mediation and **conciliation** are commonly referred to as alternative dispute resolution 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 conciliation. In mediation, a neutral umpire helps an unhappy 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 across the state. These centres 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.



Figure 10.19 World Consumer Rights Day is held every year on March 15. It aims to spread awareness about consumers' rights and needs, and demands that their rights be respected and protected.

injunction
a court order directing someone to do something or prohibiting someone from doing something

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties to reach 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

Review 10.10

1 Describe the range of court-based remedies available to consumers.
2 Distinguish between 'mediation' and 'conciliation' in alternate dispute resolution processes.
3 Explain why it is important for society to have predictable mechanisms to guarantee consumer redress in the marketplace.

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Legal Links

The Consumer Action Law Centre website has information about consumer issues, and a full list of consumer advocacy groups.

Case Study

COVID-19 and the consumer

With the onslaught of COVID-19 in early 2020, ongoing restrictions around social distancing meant that many people changed their shopping habits. More and more transactions took place remotely, using the internet and home delivery. As consumers used technology to buy a range of goods and services ranging from takeaway food to groceries and clothing, they made themselves more vulnerable to scams.

The ACCC has been very conscious of this vulnerability and has been actively working to update and educate consumers on the techniques used by scammers. They regularly release information regarding this, including the *Targeting Scam*s report. In June 2021, this report stated that Australian consumers lost over $851 million to scams in 2020.

Another area of concern was the high prices charged by suppliers of rapid antigen tests (RATs). In late 2021 and early 2022, as these tests became a requirement for interstate travel and return to workplaces, RATs went into short supply. This provided an opportunity for providers to sell the product at very high prices, and consumers to see no alternative but to pay the high prices. It also allowed for customers to fall for scams. The ACCC monitored the situation and put out media announcements to assist consumers in making appropriate buying decisions. In addition, in January 2022, the Australian Government introduced measures under the *Biosecurity Act 2015* (Cth) to prohibit price gouging and impose restrictions on the improper export of RATs, with prosecutions to take place for those who engage in this conduct.

Analysis 10.3

Read the ACCC media release 'Scammers capitalise on pandemic as Australians lose record $851 million to scams' at http://cambridge.edu.au/redirect/10318.

1. Describe how the *Targeting Scams* report is compiled.
2. Identify which scams are increasing.
3. Explain why the reported total amount of money that people lost is actually lower than the real amount.
4. Identify the advice given to consumers in regard to scams.

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10.5 Contemporary issue: Credit

Many individuals in our consumer-driven society obtain goods and services via the use of a credit card or loans. In a sense, the twenty-first century is rapidly becoming a 'cashless society' in which credit providers issue loans almost too readily. The Reserve Bank of Australia (RBA) carried out a study in 2016, with its results showing that card payments had overtaken cash for the first time, accounting for 52 per cent of all payments. In 2022, the RBA found that around 80 per cent of payments over $10 were made using cards.

In fact, many consumers spend beyond their income and, as a consequence, risk exploitation by unscrupulous lenders. Clearly, people from low socioeconomic backgrounds suffer significant financial hardship in such situations. 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.

Credit card providers in Australia have been criticised by the media, CHOICE and the 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 accrued in 2018 totalled $33 billion, despite mortgage and general interest rates being relatively low.

Rising interest rates may have affected some consumer use of credit cards, but RBA credit card data revealed that total credit card debt accruing interest hit $17.76 billion in April 2023.

Another issue regarding credit is credit card fraud. The 2018 *Australian Payments Fraud Data Report* found that for every $1000 spent on credit cards, fraud accounted for 75 cents, driven by identity thefts, data breaches and phishing. In 2019 the industry introduced a card-not-present Fraud Mitigation Framework, which encouraged secure technologies and required some merchants to strengthen their customer authentication processes. As a result, by the 2023 report, the rate of fraud had dropped to 57.3 cents per $1000. However, this problem has not gone away, and with many online purchases made during COVID-19 lockdowns, consumers have continued to make themselves vulnerable to debt and scams, in spite of government and non-government consumer education programs about credit card scams.



Figure 10.20 Credit card fraud is a major global concern. The 2018 *Australian Payments Fraud Data Report* found that for every $1000 spent on credit cards, fraud accounted for 75 cents, driven by identity thefts, data breaches and phishing.

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,

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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.

In accordance with the National Partnership Agreement to Deliver a Seamless National Economy, all Australian jurisdictions are now 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 that apply with equal force to all forms of consumer lending and to all credit providers, and that are consistent across all jurisdictions in Australia. The National Credit Code replaces previous state-based consumer credit codes and the Uniform Consumer Credit Code and is administered by ASIC. All information regarding using credit and managing debt is provided on ASIC's MoneySmart website.

The code not only guarantees standardisation but also requires credit information to be provided in a format that is clear and understandable. Banks, building societies, credit unions, finance companies, 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 that are free, and thus accessible to all consumers experiencing credit concerns. These include the following:
- **NSW Fair Trading** (https://cambridge.edu.au/redirect/10319) – 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** (https://cambridge.edu.au/redirect/10320) – 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.

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- **Australian Financial Complaints Authority** (https://cambridge.edu.au/redirect/10321) – 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.
- **Financial Rights Legal Centre** (https://cambridge.edu.au/redirect/10322) – provides free telephone and financial counselling advice, particularly for low-income consumers. The centre is a community legal centre specialising in financial services.
- **Redfern Legal Centre** (https://cambridge.edu.au/redirect/10323) – 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 independent, non-profit community legal centre that provides face-to-face and telephone advice about credit and debt.

The Banking Royal Commission

Despite the regulations placed on the provision of credit, the supervision of the financial industry has been seen to be too relaxed. After much media attention into the behaviour of the banking, superannuation and financial services industry sector, which included the growth of a 'culture of greed', a Royal Commission was established by the federal government in December 2017. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, also known as the Banking Royal Commission, was given the task to inquire into and report on misconduct in the banking, superannuation and financial services industry.

In the course of the hearing, the Royal Commission (and public, through the media) heard about less than ethical practices that had been used in the pursuit of profits. Commissioner Hayne released his report on 1 February 2019. It included 76 recommendations to overhaul the banking sector. While he did not make or name any specific individual who should face criminal charges, his report made 24 recommendations relating to institutions and individuals about dishonest misconduct and charged the regulators with the responsibility for taking action to stop this behaviour. The media was critical that some of the findings weren't tough enough and felt that ASIC should be given greater direction to penalise businesses and their management.

The Royal Commission did shake up the financial industry, and media reporting of the actions taken by businesses to gain a customer created greater consumer awareness. However, an analysis by the newspaper *Guardian Australia* found in 2021 that of all 76 of Hayne's recommendations, 45 had yet to be implemented and four had been abandoned.

Responsiveness of the legal system

The uniform laws outlined previously 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 that let ASIC respond swiftly in penalising breaches of the law
- compensation or other remedies that can put aggrieved consumers back in their original position prior to the financial loss suffered.

Review 10.11

1 Outline and discuss two major credit issues that exist for consumers in the twenty-first-century economy. Discuss whether current consumer law provides adequate protection to deal with these issues.
2 Explain the benefits associated with Australia having a single uniform law for the regulation of credit.

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10.6 Contemporary issue: Product certification

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 in the world. 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.



Figure 10.21 Under Australian law, product suppliers and manufacturers are obliged to ensure that they only sell safe products.

Legal responses

The 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
- 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 notice and its 'Standards Australia' benchmark.

There are two types of mandatory product standards in Australia:

- **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, such as label information as to contents and risks for cosmetics and tobacco products, and label information as to care for clothing and textile products. An example is the Country of Origin Food Labelling Information Standard 2016, under which the ACL requires that country of origin representations are clear, accurate and truthful. Country of origin representations must now include an explicit claim of where the good was

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grown, produced or made. They must also use images or words to clearly suggest from where the product originated. The 2015 case of Australians contracting hepatitis A after eating frozen berries sourced from China was probably a key influence in the introduction of this food standard.

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, 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
- the 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. Many products with current mandatory safety standards are related to infants, like baby walkers, bath toys and dummies. Other products include bicycles, blinds and curtains, and bean bags. For example, a mandatory standard applies to bean bags and bean bag covers that have openings through which the filling can be accessed or can escape and prescribes a labelling requirement for packages containing bean bag filling. The ACCC also has an educational role and provides information and advice to consumers and suppliers about the requirements of the mandatory product standards.

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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.

- 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).
- 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.

Research 10.7

Access the Australian Consumer Law (ACL) product safety guide and complete the following tasks.

1. Outline how the ACL regulates consumer goods and product-related services. Discuss if this is an effective level of regulation.
2. Outline the legal responsibilities of suppliers.
3. Outline what can be included in a safety warning notice.
4. Describe under what conditions a minister can impose a ban on a consumer good or product-related service.

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Non-legal responses

Individuals may take action through one of the independent consumer groups that 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.

Media



Thermomix fined $4.6 million for failure to report burns

Stephen Letts

ABC News

11 April 2018

The Australian distributor for kitchen appliance giant Thermomix has been fined $4.6 million over its failure to report numerous cases of serious burns caused by its top-end blender.

The action was brought by the Australian Competition and Consumer Commission after complaints flooded in about injuries caused by the now superseded TM31 model, which sold for about $2000.

The ACCC alleged Thermomix in Australia failed to comply with mandatory reporting requirements for injuries arising from the use of the appliances, made false representations, and engaged in misleading conduct regarding the safety of the TM31 model, and made false and misleading statements about its 2014 recall.

Under consumer law a company, on learning that one of its products has killed or injured someone, must report it to a government agency within 48 hours of the incident.

Documents submitted to the Federal Court showed Thermomix in Australia admitted it knew nine women and one child had been burned by the appliance before issuing a public safety recall.

Justice Bernard Murphy found Thermomix in Australia became aware of the safety issue as early as 7 July 2014, and despite seeking advice from its German manufacturer took no action until September.

'Although they [Thermomix in Australia] continued to make inquiries of, and seek guidance from, Vorwerk [the manufacturer] and tested TM31 appliances, they made the deliberate decision not to inform the relevant consumers of the safety issue,' Justice Murphy said.

Thermomix in Australia notified customers about a recall in September 2014 in a Facebook post. It sent emails to the more than 100 000 affected TM31 customers notifying them of the safety issue two days later.

Court documents show the distributor sold another $16 million worth of TM31 appliances in the time between first becoming aware of the problem and issuing the recall.

Bianca Mazur from Thermomix said the company was deeply apologetic to the affected customers.

Thermomix in Australia faced a number of charges under the ACL, including telling customers its products 'were absolutely safe', were never subject to safety recall action, and telling a number of affected customers they were not entitled to refunds.

(Continued)

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Media–Continued

Each breach carries a maximum penalty of $1.1 million.

The ACCC and Thermomix in Australia made a joint submission on the penalties to be levied:

- Implied safety representations: $2.5 million
- Recall representations: $1 million
- No refund representation: $1 million
- Failure to make mandatory reports: $108 500
- Total: $4 608 500

Thermomix was also ordered to pay the ACCC's legal costs of $230 000.



Figure 10.22 An employee works at a production plant of German group Vorwerk-Semco where the Thermomix kitchen food processor is manufactured. In 2018, the Australian distributor for Thermomix was fined for failing to report numerous cases of serious burns caused by its top-end blender.

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 businesses about product safety, as well as producing 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. For example, in September 2017 the ACCC published a list of all the vehicles affected by the recall of Takata airbags on its Product Safety website. Three corporations, Grays Ecommerce Group Limited, Berwick Motor Group Pty Ltd and HG Innovations Pty Ltd, were issued infringement notices, and then fined by the ACCC for allegedly selling or advertising vehicles that were fitted with defective Takata airbags and part of the compulsory recall.

Review 10.12

1. Summarise why standardised product certification is important in a global trading environment.
2. Discuss the essential obligations product suppliers and manufacturers have under Australian law to ensure product safety.

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10.7 Contemporary issue: Marketing innovations

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 quickly.
- Overseas pyramid-selling schemes are proliferating.
- 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.

Phishing continues to be a problem for consumers and law-makers. You should access the ACCC Scamwatch site at regular intervals to see the latest statistics regarding reports of phishing and financial losses due to it.

Spam is also 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 to use address-harvesting software to build distribution lists of recipients. The Act also gives powers to Australian Communications and Media Authority (ACMA) to search and seize equipment and impose penalties of $1.7 million per day for breaches to the Act. In 2006, ACMA's first case was *ACMA v Clarity1 Pty Ltd* [2006] FCA 410 in which Clarity1 was ordered to pay a pecuniary penalty of $4.5 million for breach of the *Spam Act 2003* (Cth). Despite this, its use is on the rise by e-marketing companies. For example, in 2019 Brand Link Media Pty Ltd paid a $12 600 infringement notice following an ACMA investigation that found it had sent commercial electronic messages without the consent of consumers.

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, 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. As discussed earlier in this chapter (see page 280), the key provisions that relate to marketing can be summarised as follows:

- Section 18 outlaws deliberate misleading or deception of consumers.

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- 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 ACCC's Scamwatch website and complete the following tasks.

1. Define 'phishing'.
2. Describe how you can 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.
4. What has happened to the phishing figures over the past few years? Can you think of any explanations for the changes?

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. It provides information to consumers and small businesses regarding the recognition, avoidance and reporting of scams. Despite this, all types of scams are on the rise and, according to the ACCC, more than $3.1 billion was lost to scams in 2022 – an 80 per cent increase from 2021. Investment scams were where the highest loss occurred ($701 million), followed by payment redirection scams ($227 million) and then romance scams ($142 million).
- **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. According to a media release in 2016, ACMA issued a formal warning to Web 1000, an online marketing business.
- **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?

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Figure 10.23 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.

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.

Review 10.13

1 Explain why marketing innovation poses new challenges to the Australian legal system.
2 Outline the provisions contained in the Australian Consumer Law that directly relate to marketing.
3 Assess the effectiveness of Australian law in dealing with transnational marketing.

10.8 Contemporary issue: Technology

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
- electronic service delivery programs based on customer convenience; for example, websites that provide consumer protection advice 24/7.

This problem has grown, especially during the extended period of the COVID-19 pandemic and its associated lockdowns when consumers used technology at an increasing rate to buy products. Added to this, many people worked from home so it provided the opportunity for unscrupulous individuals and organisations to access personal individuals using more sophisticated methods. Also, many legitimate organisations also conducted business via technology. As a consequence, consumers have become confused about the legitimacy of phone calls, messages and internet links and fallen victim to scams and other cybercrime.

As global marketing and virtual shopping becomes the norm, Australian and international law will have to work hard to protect consumers regardless of whether a product is purchased domestically or internationally. Many areas of technology were discussed earlier in the chapter; for example, scams, spam, telemarketing, phishing, online fraud and credit.

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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 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.



Figure 10.24 As more and more consumers purchase goods online, they can become victims of unscrupulous behaviour. But 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.

- 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 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.

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- 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 to other organisations without the person's consent.

The *Competition and Consumer Act 2010* (Cth) empowers the ACCC to enforce the prohibitions contained in that Act, and, as noted previously, 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. The *Do Not Call Register Act 2006* (Cth) is regulated by the Australian Communications and Media Authority, and offers the Do Not Call Register, a secure database for consumers to register their telephone numbers to opt out of receiving telemarketing calls.

Non-legal responses

A number of organisations have a role in ensuring that technology is not misused. These include:

- **Australian Communications and Media Authority**, 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.
- **Australian Direct Marketing Association**, 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.
- **Internet Industry Association**, a similar organisation for internet service providers. It has developed several codes of practice, notably the Spam Code of Practice (registered in 2006) to supplement the *Spam Act 2003* (Cth), explaining its requirements and how to comply with it.
- **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.

Federal and state governments, as well as private and government agencies, are very concerned about the rise in scamming activity that uses technology to reach consumers. As stated earlier, more than $3.1 billion was lost to scams in 2022, an 80 per cent increase from 2021. Thus the federal government has undertaken intense marketing campaigns, including television and radio advertisements,

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to heighten consumer awareness about scamming behaviour.

In addition, in 2023, the ACCC set up the National Anti-Scam Centre to combat scams by coordinating government, law enforcement and the private sector. This centre aims to build on the work of the ACCC's Scamwatch service. The education of consumers is one way to counter the international nature of scams, so that the different methods used by scammers can be easily recognised.

Both the Office of Fair Trading and the NSW Police Force provide advice on their websites about recognising and dealing with cybercrime. Both provide an extensive list about types of scams.

Review 10.14

1. Describe at least two influential electronic consumer services that have evolved because of the enormous increase in internet-derived technologies. Identify consumer issues that may be related to these services.
2. Evaluate the effectiveness of Australian law as it relates to the use of technology in the global marketplace. Identify and discuss some of the limitations of Australian law when it is used to fight cybercrime.
3. Discuss the potential effectiveness of consumer education as a way of dealing with cybercrime.

Research 10.9

Read about the work of Associate Professor Marios Savvides at Carnegie Mellon University – particularly his work on iris- and face-recognition technology – and 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.

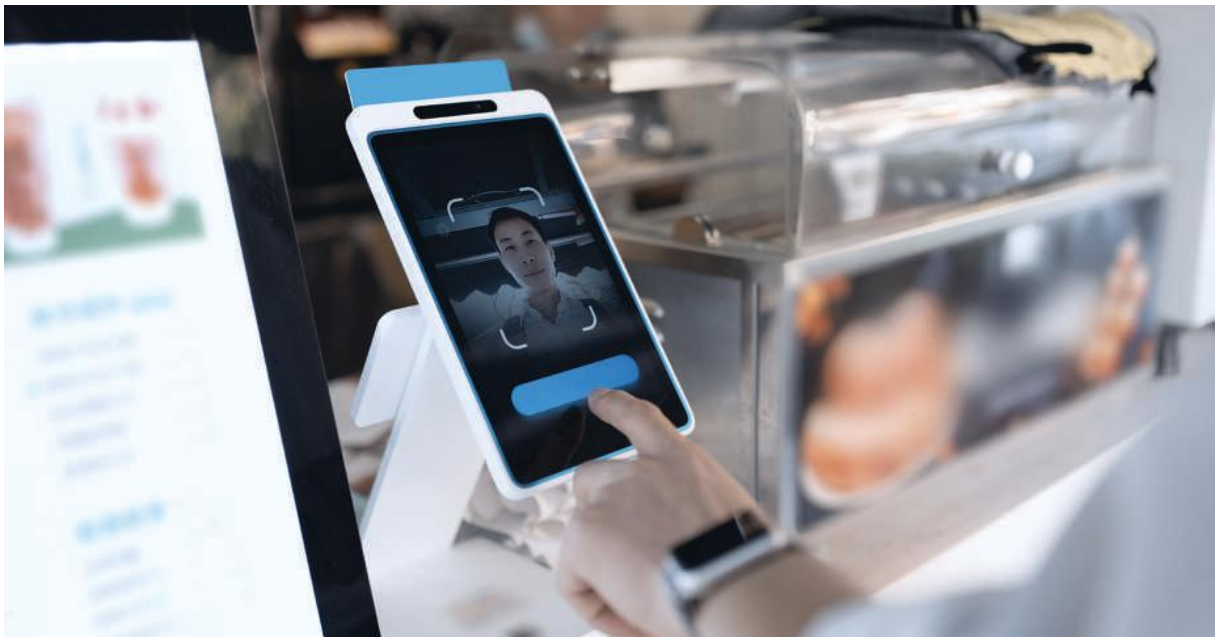


Figure 10.25 Iris- and face-recognition technology is just one evolving technology that has the potential to dramatically alter the way we use the internet and influence cybercrime.

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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 Australian Consumer Law 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.

Short-answer questions

1 Outline the essential elements of a contract.
2 Outline three ways a consumer can seek a remedy for injury or loss suffered as a result of defective goods.
3 Identify the major statutory provisions that govern marketing and advertising.
4 Briefly describe the main avenues available to consumers seeking redress.
5 Explain why both marketing innovations and technology pose challenges for consumer protection law.

Extended-response questions

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 in the digital version of this textbook. Refer to these criteria when planning and writing your response.

1 Assess the effectiveness of 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.
5 Describe the modern consumer market and discuss the ability of current remedies to meet issues in this market.

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Themes and challenges for Chapter 10 – Option 1: Consumers

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* economic 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 acceptable quality, match their description and are fit for purpose.
- The Australian Consumer Law 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.

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.

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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 *Competition and Consumer 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* (NSW) 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 previously listed 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. Education of consumers plays a key role in this area.

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Chapter 11

Option 2: Global environmental protection

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate the effectiveness of legal and non-legal processes in promoting and achieving environmental protection.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the impact of state sovereignty on international cooperation and the resolution of conflict in regard to environmental protection
- issues of compliance and non-compliance
- the impact of changing values and ethical standards on environmental protection
- the role of law reform in protecting the global environment
- the effectiveness of legal and non-legal responses in protecting the environment.

At the end of this chapter, there is a summary of the themes and challenges relating to global environmental protection. This summary draws on key points from the chapter and links each key point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you should be able to:

- identify the key legal concepts and terminology that relate to global environmental protection, especially the need to protect the global environment
- describe 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 thus compliance) 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 how changing societal standards (values and ethics) can impact global environmental protection
- impart legal information using arguments that are logical, cohesive and well-structured
- assess the effectiveness of legal and non-legal responses to the global environment
- analyse different perspectives on contemporary issues concerning global environmental protection.

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Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 25) and the 'learn to' activities (pp. 25–6) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Global environmental protection' topic.

Relevant law

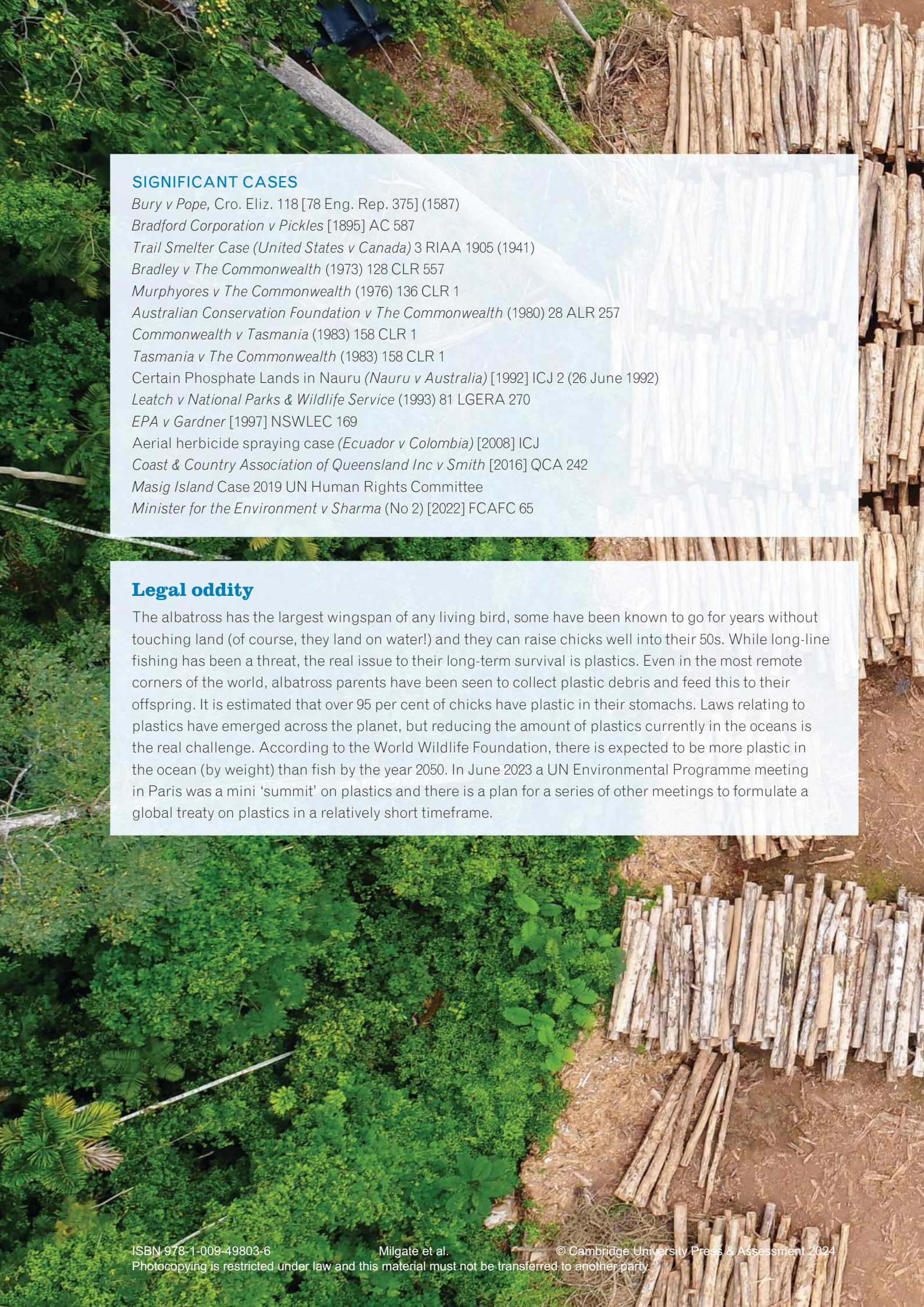
IMPORTANT LEGISLATION

Forestry Act 1916 (NSW)
National Parks and Wildlife Act 1974 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth)
Local Government Act 1993 (NSW)
National Environment Protection Council Act 1994 (Cth)
Fisheries Management Act 1994 (NSW)
Protection of the Environment Operations Act 1997 (NSW)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Water Act 2007 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

International Convention for the Regulation of Whaling (1946)
Convention relating to the Status of Refugees (1951)
Treaty on the Non-Proliferation of Nuclear Weapons (1968)
Convention on Wetlands of International Importance (1971) (Ramsar Convention)
Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
Convention on the Conservation of Migratory Species of Wild Animals (1979)
United Nations Convention on the Law of the Sea (1982)
Vienna Convention for the Protection of the Ozone Layer (1985)
Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) (Basel Convention)
Convention on Biological Diversity (1992)
Agenda 21 (1992)
Rio Declaration on Environment and Development (1992)
United Nations Framework Convention on Climate Change (1992)
United Nations Convention to Combat Desertification (1994)
Kyoto Protocol (1997)
Paris Agreement (2016)
Glasgow Climate Change Conference (2021)

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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
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)
Leatch v National Parks & Wildlife Service (1993) 81 LGERA 270
EPA v Gardner [1997] NSWLEC 169
Aerial herbicide spraying case *(Ecuador v Colombia)* [2008] ICJ
Coast & Country Association of Queensland Inc v Smith [2016] QCA 242
Masig Island Case 2019 UN Human Rights Committee
Minister for the Environment v Sharma (No 2) [2022] FCAFC 65

Legal oddity

The albatross has the largest wingspan of any living bird, some have been known to go for years without touching land (of course, they land on water!) and they can raise chicks well into their 50s. While long-line fishing has been a threat, the real issue to their long-term survival is plastics. Even in the most remote corners of the world, albatross parents have been seen to collect plastic debris and feed this to their offspring. It is estimated that over 95 per cent of chicks have plastic in their stomachs. Laws relating to plastics have emerged across the planet, but reducing the amount of plastics currently in the oceans is the real challenge. According to the World Wildlife Foundation, there is expected to be more plastic in the ocean (by weight) than fish by the year 2050. In June 2023 a UN Environmental Programme meeting in Paris was a mini 'summit' on plastics and there is a plan for a series of other meetings to formulate a global treaty on plastics in a relatively short timeframe.

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11.1 The nature of global environmental protection

The definition of global environmental protection

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 two elements of environmental law represent competing interests.

The definition of 'environment' in section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) clearly illustrates how the impact of changing social attitudes on the legal system has shaped the perception of the 'environment'. Laws are now designed to take a more **holistic** view of components, causes and effects. In addition, this definition encompasses what decision-makers need to take into account when deciding on matters that have environmental implications.

The definition of the environment in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 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).

Early legal decisions

The Industrial Revolution saw increased food production, improved medical services and increased urbanisation. These factors led to an explosion in population, and while industry and economies flourished, the environment 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.

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 water supply for the town of Bradford ran. He wanted to sell his land to the council at an inflated price. To 'encourage' this sale Pickles diverted the water 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. Such common law decisions in contemporary times would be overturned by legislation.

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.'

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

holistic taking into account all aspects; looking at the whole system rather than just specific components

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)

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Such common law decisions meant a party who suffered harm as a result of such actions could use torts to seek relief (for example, nuisance, negligence or trespassing) or compensation. The law was reactive and not proactive in regard to environmental damage. The law could act only 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.

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group has to matter in order to be permitted to bring an action

Over time, however, communities began to feel the consequences of things like acid rain, species extinction, ocean acidification, 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 from local factories, the government introduced the *Alkali Act 1863* (UK). 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 that have since spread across the globe. As you will see later in this chapter, changing societal standards (evolving values and ethics) places pressure on governments to reform the law. After trade, the environment has become the most common area of global rulemaking.

In Court



***Australian Conservation Foundation v The Commonwealth* (1980) 28 ALR 257**

The Australian Conservation Foundation (ACF) is an organisation that aims to protect the environment. When the federal government granted approval for a tourist resort near Rockhampton, this was challenged by the ACF. The ACF sought a declaration from the Federal Court that the government's decision did not comply with the requirements of the relevant Act of the time, which was the *Environment Protection (Impact of Proposals) Act 1974* (Cth) (repealed).

The ACF was denied **locus standi** because it was held to lack a 'special interest' in the subject matter. In other words, the case was not even analysed on its merits because the court ruled that the ACF had no right to bring the case to court as it had only 'a mere intellectual or emotional concern'.

Standing and interests

Since the decision in *Australian Conservation Foundation v The Commonwealth* (1980) 28 ALR 257, a more liberal approach to standing has been taken by the legal system in Australia. This shift very much reflects changing values and ethical standards and, interestingly, only 20 years later the same court noted that 'public perception of the need for the protection and conservation of the natural environment and for the need of bodies such as the ACF to act in the public interest has noticeably increased'.

At state level, the *Environmental Planning and Assessment Act 1979* (NSW) grants 'open standing' to anyone.

***Environmental Planning and Assessment Act 1979* (NSW)**
Section 123



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.

The shift from the common law decisions in *Bradford Corporation v Pickles*, *Bury v Pope* and *ACF v The Commonwealth* regarding 'standing' and the 'environment' to the legislated definitions is highly significant. Under the common law, before

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Figure 11.1 The Australian Conservation Foundation is an organisation that aims to protect the environment. In 2009, it flew a hot air balloon with the message 'No more hot air – climate action now' in front of the Sydney Harbour Bridge.

any legal action could commence there had to be definitive damage and only those who were harmed could take action; the legal response was purely reactive. Now with section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and section 123 of the *Environmental Planning and Assessment Act 1979* (NSW) there is the opportunity for any person to take action to prevent damage; the focus of legal responses has become proactive.

In Court



***Coast & Country Association of Queensland Inc v Smith* [2016] QCA 242**

This case, the 'alpha coal mine case', was the first time the High Court of Australia had to consider a case involving a coal mine contributing to climate change.

The proposed Adani mine in the Galilee Basin in Queensland is a typical example of the difficulty in balancing competing economic and environmental interests. This project has resulted in widespread protests and many legal challenges.

The federal Environment Minister granted a mining lease to Adani under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). In April 2019, the federal government granted the Adani Mine final Commonwealth environmental approval and the Queensland Government gave its approval in June 2019. Adani produced its first shipment of coal in 2021. The Adani Mine is considered the 'project that's become a global emblem for opposition to fossil fuels' according to Bloomberg press. Environmental activists continue to protest against the mine and the 'Stop Adani' protest movement is prominent in this regard.

Although there are still restrictions on standing at a 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. The Act also extends standing to organisations established with the purpose of protecting the environment that have been involved in conservation activities for the past two years or more (ss 475(6), (7), 528).

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Figure 11.2 The protests against the Adani Mine were the largest environmental actions in Australia since the Franklin Dam protests of the 1980s. The involvement of school students in these protests, and with other climate change actions, has been an interesting phenomenon of recent times.

While environmental issues affect everyone, the role of state, federal and international law in balancing a multitude of interests is complex. The different perspectives of people, shaped by their individual values and ethics, as well as by the events that confront them on a daily basis, ensure that conflict and heated debates inevitably arise when discussions turn to prioritising environmental issues, especially over economic interests.

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. Explain how the common law typically is 'reactive' to environmental issues whereas legislation is more 'proactive'.
2. Define the term 'environment'.
3. Explain why global environmental protection requires a holistic approach.

Research 11.1

1. Research the competing views over the Adani coal mine. Assess if you agree with the statement that 'Australia is exporting its greenhouse gas emissions'.
2. Research and explain the views of First Nations people regarding the Adani coal mine. Who were the traditional owners of the land on which the mine was built and how did they react to the news? A useful starting point for your research is https://cambridge.edu.au/redirect/10458.

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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. In 2017, this process was highlighted by the ABC's television program *War on Waste* and in 2019 by school students protesting about climate change.

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** and climate change placed environmental issues firmly in the public arena.

In Australia, legislation focusing on pollution prevention and control began to emerge in the 1970s. Since this time, much of Australian state and federal legislation relating to the environment concerned environmental impact assessments (refer to the *Environmental Planning and Assessment Act 1979* (NSW) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)) and pollution control legislation (setting standards for the quality of air, water and soil).

Significant changes involving major shifts in values and ethics 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. From the late 1980s, the terms 'global warming' and 'climate change' began to go mainstream, and over time young people became particularly concerned for the future. The 2019 protest by Australian school students, mentioned earlier, was part of a global movement, inspired by Swedish environmentalist Greta Thunberg. A simple search of 'student protests about climate change' images highlights a multitude of actions across Australia and the globe.



Figure 11.3 Concern about pollution has 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

multilateral treaty an international agreement involving three or more parties

convention another term for a treaty; an international agreement (or instrument) between parties who are subject to international law (states and international organisations such as the United Nations and its bodies)

International conferences and treaties

These social changes, plus high-profile pollution and ecosystem disasters (see later in this chapter), created a push for change that led to the emergence of a number of international conferences and **multilateral treaties**. For example, the *United Nations Convention on the Law of the Sea* (1982) was the result of the third UN Conference on the Law of the Sea, 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 the *United Nations Convention on the Law of the Sea* (1982) deals specifically with environmental protection, which had not previously been a central element of international law with respect to the seas. In fact, Article 192 of the convention reads: 'States have the obligation to protect and preserve the marine environment'.

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. It has become the foundation upon which the global environmental framework has developed. Every 10 years since, there has been an attempt to hold a conference with a global environmental focus. Later in this chapter we will look at these 'mega' conferences in greater detail.

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ratification
the process of a state formally approving a treaty, making it legally binding

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

free trade
trade between countries that is subject to few or no government restrictions

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; these are called 'monist' nations. In many other countries, including Australia, a treaty does not have a direct effect unless and until it is incorporated into domestic law by the enactment of a statute; these are called 'dualist' nations. There are many domestic statutes that implement and reflect Australia's international treaty obligations (see later in this chapter).



Research 11.2

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. In the right-hand column, describe the corresponding global initiatives relating to that issue. Some relevant issues include fishing regulations, littering (plastic) and biodiversity loss.

Class discussion

Analyse if these issues are dealt with differently at local and global levels.

(Note: These differences will become clearer later when we look at the role of 'sovereignty'.)

The need for global environmental protection

Environmental impact of consumption and development

Human activities have global dimensions. The delicate balancing act between environmental and economic interests has become the critical issue in global environmental protection. Poorer nations are very reluctant to impose restrictions on industries that provide income and employment, even though it may be beneficial to the environment – quite simply, the needs of the current population are their priority.

Globalisation not only gives markets worldwide operation, providing consumers with the goods they desire from other countries, but also multiplies the problems associated with the production of those goods. The digital revolution has reshaped the world, but with it has come environmental implications. 'E-waste' is any electronic waste from phones, televisions, computers and the like. 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 – only 12 per cent is recycled.

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.

A globalised economy also has indirect impacts. 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

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or lead to the relocation of industries to nations without strong environmental controls.

Like today's markets and economies, detrimental environmental effects are also global. Pollution, ocean acidification, global warming, plastic waste, 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.

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 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 *Convention relating to the Status of Refugees* (1951), as they are not 'fleeing persecution'.

In May 2019, eight Torres Strait Islanders from Masig Island submitted a claim to the United Nations that Australia's failure to take action on climate change is a violation of their human rights. They are requesting funding for sea walls to protect their island home. As Sophie Marjanac (a lawyer for ClientEarth) stated:

> They are losing everything – they can't just pick it up and go somewhere else; their culture is unique to that region ... If Indigenous people are disposed of their homelands, then they can't continue to practice their culture.

Marjanac S, 2019, quoted in 'Their Islands Are Being Eroded. So Are Their Human Rights, They Say', *The New York Times,* 12 May.

Case Study

Environmental disasters have contributed to the need for global environmental protection. Many of these disasters were the result of corporations trying to limit costs to improve their profit margins at the expense of environmental protection.

Environmental disaster 1: London, UK, 1952

In the winter of 1952–1953, it was unusually cold in London so large numbers of people travelled by car rather than walking and required additional coal combustion to heat their homes. The copious emissions of black soot, gaseous sulphur dioxide and sticky particles of tar led to the heaviest winter smog ever recorded. Approximately 12000 people were killed, mostly children, the elderly and sufferers of chronic respiratory or cardiac disease.

Environmental disaster 2: Chernobyl, Ukraine, 1986

In April 1986, a nuclear reactor exploded at the Chernobyl nuclear power plant, killing 31 people immediately. Hundreds of thousands of people and 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.

Environmental disaster 3: Alaska, United States, 1989

In March 1989, the *Exxon Valdez* oil tanker hit a reef in Prince William Sound, Alaska. The tanker spilled approximately 40 million litres of crude oil. The spilled oil killed as many as 500000 seabirds, and devastated fish and otter populations in the area.

Environmental disaster 4: Gulf of Mexico, 2010

On 20 April 2010, the *Deepwater Horizon* rig was drilling for oil 60 kilometres off the Louisiana coast when it exploded and killed 11 workers. The rig was finally sealed after 85 days, but by then had

(Continued)

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Case Study–Continued



Video 11.1 Former New South Wales Fire and Rescue Commissioner Greg Mullins is interviewed in December 2019 about the catastrophic bushfires then raging in NSW and Victoria. (03:10)

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 $24 billion to settle all legal claims against the company, on top of over $40 billion it had already paid in clean-up costs.

Environmental disaster 5: Fukushima, Japan, 2011

On 11 March 2011, a tsunami hit the nuclear power plant in Fukushima. After the tsunami – and the associated earthquake that measured a magnitude of 9.0 – three of the Fukushima plant's six reactors suffered a meltdown. Three hundred thousand people were evacuated, and it is estimated that it will take decades to clean up the radioactive waste.

Environmental disaster 6: Australia, 2019–2020

From late 2019 to early 2020, unprecedented bushfires decimated the south-east of Australia. It has been estimated that the fires contributed up to two-thirds of Australia's annual emissions budget and over half a billion native animals perished. The fires coincided with record temperatures across the nation and a prolonged drought.

Review 11.2

1. Discuss how environmental catastrophes have promoted the need for global environmental protection.
2. Use examples to illustrate the conflict between economic growth and environmental protection.
3. Explain how globalisation contributes to environmental degradation. Give examples.
4. Research and then explain why the 'pollution haven hypothesis' typifies the problem of balancing environmental and economic interests.

Research 11.3

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.
2. Over 500 billion disposable coffee cups are manufactured each year. Assess if reusable coffee cups really make a difference.

Interdependence and cooperation

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

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 UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services in May 2019, more than one million species of plants and animals were at risk of extinction) and ecosystems are being destroyed at alarming rates.

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Figure 11.4 A member of the Australian Defence Force with a koala that has been treated for burns after the 2019 bushfires on Kangaroo Island, South Australia. While hundreds of koalas were rescued, it is estimated that over 25 000 koalas were killed in these fires. The Australian Koala Foundation estimates there are fewer than 100 000 koalas left in the wild, possibly as few as 43 000. At least eight million koalas were killed for the fur trade between 1888 and 1927, with their pelts shipped to London, the United States and Canada.

While the international community has only taken these concerns to heart over the last 40 years, it was noted in 1854 by Chief Seattle in his famous speech:

> 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.

Seathl (Chief Seattle), Letter to US President Pierce, 1885.

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. In 2018 the Food and Agriculture Organisation of the United Nations estimated that 33 per cent of species were being fished at an unsustainable level.

One means of halting the commercial trade in certain fish is to have them listed as endangered under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973). It may be the case that measures such as 'plans of implementation' need to be supplemented by additional agreements, and by binding, 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.

The importance of ecologically sustainable development

In 1983, the United Nations asked a commission to study the consequences of environmental degradation on economic and social development. The World Commission on Environment and Development produced an influential report in 1987 titled *Our Common Future*, also known as the *Brundtland Report*. The commission was concerned with how economic growth could be encouraged in poorer nations while tackling the problems of environmental degradation and resource depletion that accompany such development. It concluded that both of these urgent goals can be met, but to achieve **ecologically sustainable development**, both individuals' lifestyles and governments' policies regarding people's environmental impact would have to change.

ecologically sustainable development development that 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.

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Central principles of ecologically sustainable development

Four central principles of ecologically sustainable development are found in the agreements produced by the Rio Conference (1992). 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 ecologically sustainable development. The main Australian legislation on the environment, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), refers to ecologically sustainable development in section 3A.

biodiversity
the variety of life forms on Earth; the complete range of types that are possible within an ecosystem, biome or species

***Environment Protection and Biodiversity Conservation Act 1999* (Cth)**

Section 3A

The following are principles of ecologically sustainable development:

a decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations

b if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation

c inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations

d the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making

e improved valuation, pricing and incentive mechanisms should be promoted.



Figure 11.5 A worker from the community of Ivory near Johannesburg, South Africa, walks past eco-friendly insulation blocks made from recycled foam and concrete in EcoCity. EcoCity is one of several innovative projects with the long-term goal of creating a self-sufficient and ecologically friendly community.

Globally, the key elements of ecologically sustainable development are:

- biodiversity
- intergenerational equity
- intragenerational equity
- the precautionary principle.

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.

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).

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The *Convention on Biological Diversity* (1992) 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 on Environment and Development* (1992) ('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. This concept was affirmed in the case of *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65.

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

In Court



***Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65**

Anjali Sharma (16 years old at the time) and Sister Marie Brigid Arthur (81 years old at the time) litigated in the Federal Court that the Federal Environment Minister had a duty of care to the children of Australian 'over the risk of emissions of carbon dioxide into the Earth's atmosphere causing personal injury or death to all Australian children'.

In the original case, the applicants forecast the effects of climate change on the environment and human experience. Justice Bromberg found the forecast had 'plausible evidence' and the devastation 'will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted'.

On appeal the Federal Court did not change Bromberg's factual findings, but the three appeal judges did rule that under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) the Environment Minister did not hold such a duty. *Environmental Law Australia* noted that this case '… is likely to drive a tidal wave of climate litigation in the future. Coal companies and other fossil fuel producers are like asbestos manufacturers in the 1980s facing a tsunami of litigation'.

Intragenerational equity

Intragenerational equity, in contrast to intergenerational equity, 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 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. Principle 8 articulates their duty to reduce and eliminate wasteful patterns of production and consumption. The Masig Island case referred to earlier in this chapter highlights 'intragenerational equity'.

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 ecologically sustainable development, and their unique contributions.

intragenerational equity
fair and just treatment of people and groups within a generation; in terms of environmental issues, a concept that focuses on the fair management and use of Earth's resources among different groups of the same generation

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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 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

Ecologically sustainable development in domestic law

As mentioned previously, the principles of ecologically sustainable development are well established in the domestic and international arenas. Numerous countries, including Australia, have incorporated them in their domestic legislation. The importance of ecologically sustainable development 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. It is important to note that ecologically sustainable development is considered to be a holistic package; that is, for effective application all four elements need to be considered.

In 1997, the Council of Australian Governments 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 includes section 136(2)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which states that the relevant minister must consider the principles of ecologically sustainable development 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.

Figure 11.6 The Lake Liddell coal-powered station in the Hunter Valley, New South Wales, closed down in April 2023. The site is being repurposed as an industrial renewable energy hub.



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Various state laws include the principles of ecologically sustainable development; for example, the *Fisheries Management Act 1994* (NSW) and the *Local Government Act 1993* (NSW). In *Leatch v National Parks & 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.

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.

Review 11.3

1. Explain why ecologically sustainable development (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. In your own words, summarise ESD's four central principles.
3. Outline how elements of ESD are legislated in 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 of *Bradford Corporation v Pickles* and *Bury v Pope* and compare them with the key elements of ESD).

11.2 Responses to global environmental protection

Nation state and state sovereignty

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 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 (Article 2 of the UN Charter explicitly states that the UN is 'based on the principle of the sovereign equality of all its members'). Tension therefore arises between a consistent global approach to environmental protection and national sovereignty. At times what is best for the environment is not 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. Examples of state sovereignty in action include various nations' approaches to addressing climate change and Japan's insistence on whaling for 'scientific purposes' and then, in July 2019, withdrawing from the International Whaling Commission to re-commence commercial whaling.

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 enter into treaties with foreign states)

Some have argued that environmental health is crucial to long-term wellbeing or that economic prosperity

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without it is short-lived. 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 the UN Environment Programme, 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.

Toepfer K, 2002, Address to Johannesburg Summit, 26 August.

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 document produced at the summit, *The Future We Want*, would provide a clear guide for global sustainable development, Greenpeace International Executive Director Kumi Naidoo felt that the summit was a failure.

In other words, the 'consensual theory' and the doctrine of sovereignty have together formed a major barrier to a global, holisitc response to sustainable development.

> 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.

Naidoo K, 2012, quoted in 'Rio+20 Earth Summit: campaigners decry final document', *The Guardian*, 23 June.

It is the implementation of various international agreements and how vigorously they are acted upon that will determine their effectiveness in providing global environmental protection. Every sovereign state has the right to modify or reject international law even if it is a signatory to the treaty in question. The *Glasgow Climate Pact* (2021), for example, resulted in a compromised position. As the UN Secretary–General noted, the final deal 'reflects the interests, the contradictions, and the state of political will in the world today'.

As stated earlier, in Australia treaties and conventions are not part of domestic law until 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, as was found in *Bradley v The Commonwealth* (1973) 128 CLR 557. State sovereignty therefore enables nations to implement international agreements, but also to reject them if they so choose.

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 the 'Rhodesia Information Centre' – which purported to be an official body of the Rhodesian Government – cease. 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 they are enacted into domestic legislation.

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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.

The United Nations

The United Nations 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.

As discussed in Chapter 8 (see page 194), the United Nations has five principal organs or bodies:

- **UN General Assembly** – the main organ, made up of representatives of all 193 member states
- **UN Security Council** – the organ with responsibility for international peace and security
- **UN Secretariat** – the body that handles the day-to-day work of the United Nations, carrying out tasks in all areas dealt with by the United Nations
- **Economic and Social Council** – the body that coordinates the work undertaken by the United Nations and its specialised agencies in this large area
- **International Court of Justice** – the judicial organ, which settles disputes between states and provides advisory opinions to the United Nations and its agencies.

Figure 11.7 Former US President Barack Obama speaks at the 69th UN General Assembly at UN Headquarters on 24 September 2014 in New York City.



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The full UN organisation is much larger, encompassing 15 specialised agencies and related bodies, secretariats of conventions; for example, the *United Nations Framework Convention on Climate Change* (1992) and the *United Nations Convention to Combat Desertification* (1994). The specialised agencies are linked to the United Nations by agreements; they report to the Economic and Social Council and/or the UN 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 United Nations to deal with environmental issues. The main ones are outlined below. Additionally, many UN bodies have other primary tasks but nonetheless include environmental protection and sustainable development as objectives in their activities. Some of these are as follows:

- **Food and Agriculture Organization** – this specialised agency aims to defeat hunger and achieve sustainable agricultural, forestry and fishing practices.
- **United Nations Development Programme** – established by the UN 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.

instrument
a document by which some legal objective is achieved; it may be binding (for example, statutes, treaties, conventions and protocols) 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 issues worldwide (for example, human rights or the environment)

UN Environment Programme

The UN General Assembly established the UN Environment Programme (UNEP) in 1972, following the UN Conference on the Human Environment (Stockholm Conference). It is a subsidiary body of the UN 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.

United Nations Environment Programme website, 'About UN Environment Programme'.

In 2019, the UNEP produced the sixth *Global Environment Outlook* report. This report called on decision-makers to take immediate action to address pressing environmental issues. The report also stressed the urgency of achieving the Sustainable Development Goals and other internationally agreed environment goals. The United Nations is currently developing its seventh report and more details can be found at: https://cambridge.edu.au/redirect/10370.

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 United Nations 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 the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973), the *Convention on Biological Diversity* (1992) and the *Convention on the Conservation of Migratory Species of Wild Animals* (1979).

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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 United Nations) established the Intergovernmental Panel on Climate Change, the primary international source of scientific information about climate change.

Since the 1992 Rio Conference and the new focus on ecologically sustainable development, the scope of the UNEP's activities has expanded. For example, in May 2019, 187 nations agreed to a global plastic waste pact to ensure that its management is safer for human health and the environment. The countries used an existing international agreement, *The Basel Convention Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989), to introduce the legally binding amendment in extremely quick time for international law.

In June 2023, at the UN Educational, Scientific and Cultural Organization headquarters in Paris, 180 nations agreed to fast track a legally binding treaty to regulate plastic. This recognised the fact that while the Basel Convention did provide an effective mechanism to regulate and minimise the impact of transboundary movements of such wastes, it did not address the core problem of plastic production and disposal within nations to begin with.



Research 11.4

1 Visit the website of the UN Environment Programme (UNEP) – click on 'What We Do'. Divide the class into three groups. Each group is to prepare a presentation on the key role of the UNEP in regard to:
   - **a** Climate action
   - **b** Nature action
   - **c** Chemicals and pollution action.

   At the completion of the presentations, have a class discussion on how 'sovereignty' impacts on the work of the UNEP.
2 During 2023, the UNEP commenced work on a global treaty for plastics – as a class research where this proposal has landed.

Intergovernmental Panel on Climate Change

The Intergovernmental Panel on Climate Change (IPCC) is open to all member states of the United Nations and of the World Maritime Organization. Member states participate in the review stage 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 relating to climate change from around the world. It does not itself conduct scientific research. Reviews are conducted by scientists 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.

In March 2023, the IPCC released a Special Report on the impacts of global warming.

> The IPCC finds that there is a more than 50% chance that global temperature rise will reach or surpass 1.5 degrees C (2.7 degrees F) between 2021 and 2040 across studied scenarios, and under a high-emissions pathway, specifically, the world may hit this threshold even sooner – between 2018 and 2037.
>
> Boehm S & Schumer C, 2023, '10 Big Findings from the 2023 IPCC Report on Climate Change', *World Resources Institute* website, 20 March.

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.

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Figure 11.8 'Le Globe Symbolique' on display at the UN Educational, Scientific and Cultural Organization headquarters in Paris in 2023

UN Educational, Scientific and Cultural Organization

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 UN Educational, Scientific and Cultural Organization (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 sustainable development and biodiversity along with overcoming poverty and preserving cultural heritage. Its Natural Sciences Sector has a particularly direct role in fostering ecologically sustainable development.

Review 11.5

1. Evaluate how and why the approach to the environment by the United Nations has changed over time.
2. Describe the functions of UNEP and UNESCO.
3. Explain the origin of IPPC and describe its functions.

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 (enforcement mechanisms are specified in the document). 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. It is important to note that 'enforcement' at international law is very different from what exists at domestic levels. 'Enforcement' at an international level needs to be looked at through the 'lens' of the themes and challenges – it aims to encourage compliance.

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 that regulate states' relations with one another.

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Table 11.1 Selection of international instruments

International law	Year signed	Hard or soft law	Mission or aim	Number of parties*
Convention on International Trade in Endangered Species of Wild Fauna and Flora	1973	Hard law	To ensure that international trade in wild animals and plants, and products made from them, do not threaten their survival.	183
Vienna Convention for the Protection of the Ozone Layer	1985	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	1987	Hard law	Sets out a mandatory timetable for the phasing out of ozone-depleting substances.	197
Convention on Biological Diversity	1992	Hard law	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 law	Sets out a plan to balance the capacity of Earth with population and consumption in a sustainable manner.	178
Rio Declaration on Environment and Development	1992	Soft law	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
United Nations Framework Convention on Climate Change	1992	No legally binding targets or enforcement mechanisms but subsequent protocols (amendments to treaties) did introduce enforcement mechanisms	To stabilise atmospheric concentrations of greenhouse gases at a level that would prevent harm to the climate system.	197

(Continued)

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Table 11.1 *(Continued)*

International law	Year signed	Hard or soft law	Mission or aim	Number of parties*
Kyoto Protocol (linked to the UN Framework Convention on Climate Change)	1997	Hard law	The Kyoto Protocol was significant as it set internationally binding emission reduction targets. The Protocol placed a heavier burden on developed nations under the principle of 'common but differentiated responsibilities'.	192
Paris Agreement (linked to the UN Framework Convention on Climate Change)	2016	Hard law	Commits countries to undertake 'nationally determined contributions', which are each country's self-defined mitigation goals for the period beginning in 2020. The Paris Agreement reaffirms the two-degrees Celsius temperature increase goal, while urging efforts to limit the increase to 1.5 degrees Celsius above pre-industrial levels.	197
Basel Convention Control of Transboundary Movements of Hazardous Wastes and Their Disposal	1989	Hard law	The May 2019 amendment means the 187 signatories will have to monitor and track movements of plastic waste (and other hazardous wastes) outside their borders.	187
Glasgow Climate Pact	2021	Hard law	Glasgow was the 26th **Conference of the Parties (COP)** to the UN Framework Convention on Climate Change. Its aim was to 'to keep alive the goal of limiting global temperature rise to 1.5 degrees'.	197

*In the case of a treaty, 'number of parties' means the number of states for whom the agreement has entered into force.

Conference of the Parties (COP)
the decision-making body of an international convention; the first Climate Change Conference of the Parties (COP 1) was in Berlin, in 1995, and there has been one every year since, except 2020

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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 they do not include specific commitments. They have the potential to become hard law in the future, should their provisions be 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 where 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 *United Nations Framework Convention on Climate Change* (1992), followed by the *Kyoto Protocol* (1997), setting out binding commitments, and later the *Paris Agreement* (2016), which established a set of binding procedural 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).

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 on Substances that Deplete the Ozone Layer* (1987) is an addition to the *Vienna Convention for the Protection of the Ozone Layer* (1985).

Most international agreements, despite being termed 'hard', have compliance mechanisms aimed at encouraging compliance. According to a paper produced by UNEP, 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' behaviour and benefits of compliance that outweigh the costs of non-compliance.

United Nations Environment Programme (UNEP), 2009, 'Issues of Compliance: Considerations for the International Regime on Access and Benefit Sharing', *Division of Environmental Law and Conventions* (DELC), p. 4.

It is important to realise that a treaty or protocol may contain enforcement mechanisms, but their effectiveness is debatable. States' ability to exercise their sovereignty will sometimes mean that a country refuses to comply with its international obligations. Another crucial point is that 'enforcement mechanisms' in international law are vastly different from those commonly implemented in the domestic arena. International laws are far more effective when nations recognise that they ultimately benefit from compliance, so more often than not so-called 'enforcement' looks more like support rather than a punishment (see Table 11.2).

International law makers now recognise that a 'big stick' will not work when designing legal frameworks; for example, the *Paris Agreement* (2016) deliberately allowed parties to set their own emissions targets to encourage participation and ambitious targets. This approach is designed to be flexible enough to create a durable framework that will allow further reductions in emissions over time: it encourages compliance rather than 'punish' non-compliance.

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

Table 11.2 highlights the enforcement mechanisms contained within some of the key international laws discussed in this chapter.

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Table 11.2 International law enforcement mechanisms

International law	Enforcement mechanism
Montreal Protocol on Substances that Deplete the Ozone Layer (1987)	Article 2 set out timeframes for nations to eliminate CFCs (chlorofluorocarbons). Each party was required to produce annual reports outlining the phasing out of CFCs. The Montreal Protocol was the first international environmental law to specify non-compliance procedures, namely: • an implementation committee monitored and reported on non-compliant nations • to assist nations to comply, the committee could provide technical or financial assistance. The Montreal Protocol incorporated multilaterally determined penalties with an initial warning (only enacted once) and the power to suspend rights and privileges of non-compliant nations (never required due to international consensus to comply).
Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)	Parties can self-report or report other parties about compliance matters to the UN Secretariat, which then advises on appropriate remedial action. If the issue is not resolved the enforcement mechanisms include: • advice provided to remedy situation (could include in-country or technical assistance) • warnings issued with a request for compliance • recommendations that trade in the species referred to in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) be suspended • monitoring of compliance and reporting on progress by *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) Standing Committee.
Convention on Biological Diversity (1992)	The Biodiversity Convention requires parties to produce National Biodiversity Strategies and Action Plans (NBSAPs). The Biodiversity Convention in Article 26 requires parties to prepare reports on their NBSAPs. If a nation is not compliant, enforcement mechanisms include the following: • Technical assistance is provided to support the nation. • Article 21 provides for a mechanism to provide financial resources to developing nations to assist them. • Article 27 states that nations in dispute should negotiate or have a dispute mediated and, if this is not successful, they can have their dispute arbitrated in the International Court of Justice.
International Convention for the Regulation of Whaling (1946)	Article 9 states that contracting governments shall take appropriate measures to apply the convention and ensure that they 'punish any infractions' (in domestic situations). While the Whaling Convention established the International Whaling Commission (IWC), it has no authority to impose direct sanctions, but rather relies on parties to implement compliance practices; for example, the International Observer Scheme whereby nations agreed to have independent observers on vessels to monitor catches in the 1970s. The IWC produced guidelines for the Japanese Whale Research Program in Antarctica, and it was for breaches of this permit that Australia took Japan to the International Court of Justice in 2013 and won. The Japanese 2017 whale 'research' program is discussed later in this chapter.

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Table 11.2 *(Continued)*

International law	Enforcement mechanism
Paris Agreement (2016) and *Glasgow Climate Pact* (2021) (linked to the UN Framework Convention on Climate Change)	The Paris Agreement outlined emission reductions from 2020 through a system of 'nationally determined contributions' (Australia pledged to emissions 26–28% below 2005 levels by 2030). The Paris Agreement included provisions for a 'global stocktake' every five years beginning in 2018; this would inform future emission pledges. The Glasgow Climate Pact calls on 197 countries to report their progress towards more climate ambition in 2022 at the 27th Conference of the Parties (COP 27) on 7–18 November 2022 in Egypt. The Pact determined that the 2020s is to be the decade of climate action and support, which includes tighter deadlines to reduce emissions. Nations have been called upon to phase down unabated coal power and inefficient subsidies for fossil fuels.
Basel Convention	An Implementation and Compliance Committee oversees specific submissions (where a party informs the committee of potential breaches) or general reviews (general issues of compliance and implementation). The following 'remedies' are available to the committee: • financial and technical support • introduction of a voluntary compliance action plan • establishing a regulatory regime. Article 9 allows for the return of 'illegal traffic' to the exporter.

Case Study

International Commission for the Conservation of Atlantic Tunas

In 2007, the International Commission for the Conservation of Atlantic Tunas (ICCAT) (linked to the Law of the Sea Convention) introduced strict quotas, reduced poaching and limited longline fishing. This has been extremely successful (probably the most effective since the Montreal Protocol). As 'Planet Tuna' (an NGO) stated ' … since the political will to enforce has been in motion the bluefin is no longer in danger of becoming extinct'.

This mirrors the increase in bluefin tuna stock in the Pacific Ocean. By 2007, stocks had plummeted to 4 per cent and Australia became aware that Japan had illegally taken over $6 billion in bluefin tuna stocks. As a result, independent observers were placed on all vessels to verify catches.

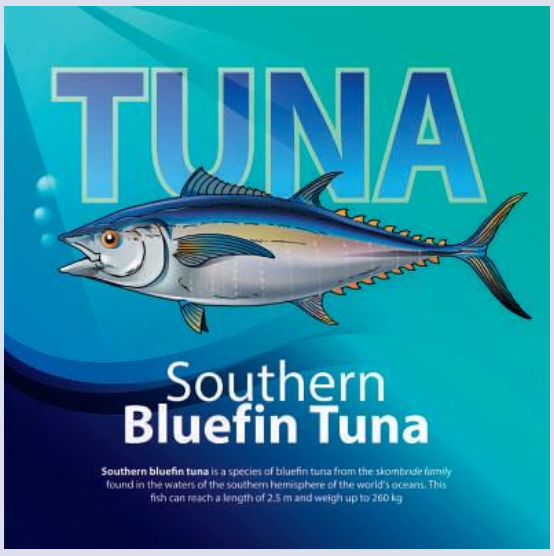


Figure 11.9 Southern bluefin tuna stocks have increased since legal protections were implemented.

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Courts

Ad hoc tribunals and the International Court of Justice

Prior to the establishment of the United Nations (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. 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.

ad hoc
for a particular purpose, usually exclusive and often temporary

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 International Court of Justice, 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.

Only states (nations) can be parties to a case before the International Court of Justice. 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



Figure 11.10 View of the city of Trail and the lead and zinc smelter in British Columbia, Canada

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refuse to appear before the court because it totally rejects the court's jurisdiction (thereby exercising its sovereignty – the United States did this when they withdrew from a 1986 case with Nicaragua). This limits the effectiveness of this judicial body.

Article 38 of the *Statute of the International Court of Justice* (1945) lists the sources of international law that the International Court of Justice 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.

Environmental disputes have never dominated the International Court of Justice. The United Nations did recognise the importance of global environmental issues in 1993, establishing the Chamber for Environmental Disputes (a discrete section of the International Court of Justice) to provide a forum for settling disputes in this area. However, it has never been used, and in 2006 the United Nations stopped holding annual elections for the chamber's membership.

One problem with the International Court of Justice'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, considering that corporations are responsible for a vast number of the environmental problems today but cannot be held accountable by the International Court of Justice.

The 2019 amendment to the Basel Convention to better regulate the trade in plastic waste was highlighted by the Malaysian decision to send back to the country of origin (Spain) non-recyclable plastic scrap. In July 2019, Indonesia sent back to Australia 'paper waste' that included nappies and electronics. After China banned such imports, numerous recycling factories opened in Malaysia – many with little or no environmental regulation. Malaysia's Minister of Energy, Technology, Science, Climate Change and Environment noted that much of the imported materials violated the Basel Convention on the trade of plastic waste and its disposal. Australia has dramatically increased its exports of plastic waste to Indonesia, Vietnam, India and Malaysia. During 2019, protestors in Indonesia had 'Take Your Shit Back From Indonesia' demonstrations outside Australian consulates. Note that the proposed global treaty on plastics may complement or even supersede these Basel Convention innovations.

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

In Court



Aerial herbicide spraying case (*Ecuador v Colombia*)

The significance of the *Ecuador v Colombia* [2008] ICJ case is that it was the first time in a generation that the International Court of Justice was requested to resolve a case essentially centred on global environmental protection. This case highlighted the role of sovereignty in both assisting and impeding global environmental issues. Ecuador is the eighth most biodiverse country on Earth and its habitats and ecosystems are threatened by the aerial spraying of illegal coca (the key raw ingredient in cocaine) and poppy plantations conducted by the Colombian Government.

The Colombian Government instituted aerial spraying to eradicate illegal drug plantations, which is in line with its responsibilities under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988). 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'.

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In Court–*Continued*

In its application to the International Court of Justice, 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.

In April 2008, Ecuador instituted proceedings against Colombia and in its application stated: 'The spraying has already caused serious damage to people, to crops, to animals and to the natural environment'. In addition, Ecuador claimed to have made 'repeated and sustained efforts to negotiate an end to the fumigations [but] these negotiations have proved unsuccessful'.

In September 2013, the International Court of Justice announced that the *Ecuador v Colombia* 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 International Court of Justice case that covered the issue of transboundary harm. The case does highlight how the judicial processes (negotiation and mediation before arbitration) of the International Court of Justice promoted a resolution that was acceptable to both parties.

Cases heard by the International Court of Justice

Since the establishment of the International Court of Justice in 1945, a range of environmental cases have been heard. One of these was 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.

Another was Australia's 2013 case against Japan, which concerned the *International Convention for the Regulation of Whaling* (1946) (Whaling Convention) – 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. Australia argued this was in breach of the Whaling Convention. As *The Sydney Morning Herald* noted on 17 July 2013, '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 International Court of Justice ruled in favour of Australia; the court voted 12 to four that Japan had breached the Whaling Convention and demanded Japan stopped whaling with 'immediate effect' in the Antarctic. This was the first attempt by any country to use the International Court of Justice to stop whaling.



Figure 11.11 Members of the Japanese delegation wait prior to the verdict in the case against Japanese whaling at the International Court of Justice in 2014. This was the first attempt by any country to use the court to stop whaling.

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Figure 11.12 While whaling continues to be a major global environmental issue, whale 'tourism' has been a major drawcard and an economically viable operation.

Ironically, the Japanese delegation stated after the case that the decision did not apply to its Northern Pacific Ocean hunt as it was outside the scope of the proceedings before the court. While Japan did call off the whale hunt in 2014, it submitted the 'New Scientific Whale Research Program in the Antarctic Ocean' on the basis of research relating to the reproductive and nutritional cycles of minke whales, and thus began whaling again as the new hunt did not relate to the JARPA II decision. In March 2017, March 2018 and March 2019, the Japanese fleet returned home with its catch of 333 minke whales. Japan announced in late 2018 that it would withdraw from the International Whaling Commission in June 2019 and recommence 'commercial whaling'.

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. Using examples describe how the 'enforcement mechanisms' of treaties attempt to encourage compliance.
4. 'The International Court of Justice is ineffective as a means of resolving serious environmental issues.' Discuss.
5. Investigate the transformation in societal attitudes towards plastic waste in the last decade. Examine how this is reflected in the 2019 amendments to the Basel Convention. Discuss how Malaysia's actions of returning waste align with the concept of intragenerational equity.
6. Analyse Japan's whaling actions and how they reflect its attitude towards the International Court of Justice and the International Whaling Commission.

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Conferences

Before 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 Concerning Protection of the Salmon Stock in the Baltic Sea* (1972)).

reactionary responding to a situation after it has occurred

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

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 United Nations, 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. The Conference of the Parties (COP), the decision-making body of a convention, meets at intervals to continue negotiations for specific, legally binding commitments from the state parties. For example, the Conference of the Parties to the *United Nations Framework Convention on Climate Change* (1992) meets every year. The 1997 Conference of the Parties in Kyoto, Japan (COP 3), gave rise to the *Kyoto Protocol* (1997). COP 21 was held in Paris during December 2015 and resulted in the *Paris Agreement* (2016).

Stockholm Conference 1972

According to the UN Environment Programme, formed as a result of the Stockholm Conference, held in Sweden, 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.

While it can be argued that the Stockholm Conference produced nothing concrete in international law, it did result in the formation of the UN Environment Programme.



Figure 11.13 Former child movie star Shirley Temple Black represents the United States at the 1972 United Nations Conference on the Human Environment in Stockholm.

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Stockholm's real success lay in the foundations it provided for all subsequent international environmental law conventions. It produced non-binding guidelines that were open to wide interpretation, but it also introduced the concept of ecologically sustainable development. The UN Environment Programme became the major forum for promoting global environmental protection.

The 'Stockholm+50' international meeting (see on page 349) took place in Stockholm on 2 and 3 June 2022 to commemorate 50 years since the first international conference promoting sustainable development.

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 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, 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 (soft law) is that it placed pressure on states to implement ecologically sustainable development.

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:

- receiving commitments and funding for sustainable energy programs in developing countries
- achieving increased ratification of environmental agreements including the Kyoto Protocol (1997) – Thailand, India, Canada and Russia all announced their intention to ratify, or that they had ratified, this protocol.

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's key theme was '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 remained high, marine and land ecosystems were being destroyed, carbon emissions were increasing, and the unsustainable use of natural resources continued unabated.

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The Rio+20 outcomes document, *The Future We Want*, is at best a declaration that provides only a superficial statement about the need for action but lacks any real commitment initiatives.

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'.

A plan to protect the high seas was blocked by the United States, Nicaragua, Canada and Russia and replaced with a statement that nations will try to prevent overfishing and ocean acidification, as well as reduce the amount of plastics entering the oceans. Clearly plummeting fish stocks have indicated this has not occurred.

COP 21: Paris 2015

The Paris Conference objective was to achieve a legally binding and universal agreement on climate change.

The UN Climate Change Conference held in Paris, France (December 2015) adopted a historic accord for a new treaty to commence in 2020. Its aim was to limit global warming to well below two degrees Celsius with an aspirational target of 1.5 degrees Celsius. Formally adopted by 195 countries, the first universal climate deal aimed 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.

To encourage compliance nations are able to set their own targets, and the instigation of global stocktakes combined with a review mechanism to assess each country's performance was implemented. The agreement acknowledged 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.



Figure 11.14 A Fulani pastoralist gives water to his sheep at a water point in the Matam region in Senegal. For pastoralists, the direct effect of the extreme heat is that their livestock drink double the water than they usually do, forcing them to continuously purchase more water. Since April 2023, the Matam region has regularly been flagged as the hottest place on Earth. Despite numerous pledges to reduce carbon emissions at various Conferences of the Parties to the Climate Change Convention, global temperatures continue to rise, according to the IPCC.

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COP 26: Glasgow 2021

The intention was for Glasgow 2021 to produce stringent rules regarding cuts to emissions to solidify the framework established at Paris. However, in the concluding stages, India and China intervened and the plan to end coal power and fossil fuel subsidies was watered down. Ultimately, Glasgow did explicitly require nations to reduce the use of coal but instead of a 'phase out' the pact refers to a 'phase down'.

COP 27: Sharm el-Sheikh (Egypt) 2022

Sharm el-Sheikh Climate Change Conference 2022 in Egypt (COP 27) reaffirmed the commitment to limit the global temperature rise to 1.5 degrees Celsius above pre-industrial levels. One of its key developments was to enable more efficient financial support for low emission initiatives and climate resilient development. In the lead-up to COP 27, Australia legislated a new 43 per cent emissions reduction target by 2030 (up from 26–28%).

Stockholm+50 2022

Fifty years on from the original international environmental conference that created the Stockholm Declaration, Stockholm+50 was held in June 2022. According to the United Nations, the aim was far than just a commemoration but was designed to tackle: 'the triple planetary crisis of climate change, nature and biodiversity loss, and pollution and waste' (Secretary–General UNEP – Inger Anderson).

The theme was 'A Healthy Planet for the Prosperity of All' and has implemented a 'planetary health approach', which looks at human development against both intragenerational equity as well as intergenerational equity. One key emphasis of the Stockholm+50 was the continued focus to promote a global treaty to end plastic pollution.

COP 28: Dubai 2023

COP 28 finished with an agreement that supposedly is the 'beginning of the end for fossil fuels' as countries committed to turn pledges into real-economy outcomes. This involved phasing down coal power, removing inefficient fuel subsidies and a 'tripling of renewable energy capacity'. COP 28 also produced the findings of the first global stocktake, as introduced in Paris, which highlighted the very slow progress towards tackling climate change.

The future

While there is no doubt about the historic nature of some of these accords, the real challenge for nations will be to implement the required domestic changes to reduce emissions while at the same time making energy affordable for their citizens. The key question is whether these global initiatives are actually reflected in domestic laws and whether companies, institutions and individuals 'think global and act local'.

Research 11.5

Investigate the latest developments with the 'Plastics Treaty'. For the HSC you should be able to state its purpose, the enforcement mechanisms and its intended outcomes once finalised.

Review 11.7

1. Outline the key developments of the six 'mega conferences' (held every 10 years, starting in 1972).
2. Explain the purpose of a conference of the parties to a framework convention.
3. Discuss how sovereignty influences the effectiveness of the conferences.

Intergovernmental organisations

Intergovernmental organisations (IGOs; see page 199) are created by nation states when multilateral treaties are developed. Technically the United Nations is an IGO but there are various international bodies not directly linked to the United Nations that also play a role in global environmental protection. The European Union (EU) set up an Environment Agency to implement environmental policies for member states; this also includes an EU Sustainable Development Strategy that took effect in 2006.

The Organisation for Economic Cooperation and Development (OECD) has as a primary focus the economic growth, employment and living standards

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of its member nations, but it too has recognised the need for the environment to be taken into account. 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 2019, the Director of the OECD Environment Directorate, Rodolfo Lacy, stated:

> Facing the whole spectrum of global environmental problems at the same time is not an easy task, as we are accustomed to tackling environmental challenges with a 'silo' approach, based on sector-specific regulations. In this context, we must support the UN's Global Environmental Pact proposal that could deliver in the future a comprehensive array of rights and obligations that will help avoid global ecological and humanitarian disruptions.

Lacy R, 2019, 'Message from Rodolfo Lacy, Director for the Environment Directorate', 30 January.

The fact that even those institutions with a dominant focus on economic matters recognise the need for environmental frameworks and adherence to international laws 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.

observer status in the UN General Assembly, the position of an organisation or other entity that has been granted the right to speak at the UN General Assembly 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

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
- Friends of the Earth
- Plastic Pollution Coalition.

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 by governments, notably in Agenda 21. Some NGOs have **observer status** at the United Nations, and they are often consulted for their views when international law on the environment is being drafted.

The most famous NGO activities are their '**envirostunts**', which are used to pressure and sometimes embarrass governments and corporations into changing their behaviour. NGOs rely on financial contributions from citizens to fund their operations; it is critical that they are free from pressure from nations and corporations so they can operate without undue influence. Many high-profile personalities have supported these causes. For example, David Gilmour, the guitarist from Pink Floyd, sold the guitar he used on most of their albums for $5.7 million in June 2019 and donated the proceeds to ClientEarth (the NGO running the Masig Island case). A NGO's best weapon is the media.



Figure 11.15 Climate protests with young people emphasising the inequity of the current population stealing 'their future' (intergenerational equity) are becoming more common. The actions of the NGO 'Extinction Rebellion' have been particularly controversial.

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Case Study

Action by non-government organisations

1 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 Greenpeace's actions and a large section of the public exerted its own pressure by boycotting Shell service stations. Shell then agreed to dismantle *Brent Spar* and recycle it on land. The action led to a worldwide ban on scuttling and dumping oil rigs in the sea.
2 The Wilderness Society and the Australian Conservation Foundation were instrumental in stopping the construction of a dam in the 'Wild Rivers' region of Tasmania.
3 People for the Ethical Treatment of Animals (PETA) often use attention-grabbing promotions to raise awareness of environmental issues involving animals.
4 The Plastic Pollution Coalition aims for a 'plastic free world'.



Figure 11.16 A People for the Ethical Treatment of Animals (PETA) online campaign poster



Figure 11.17 A Greenpeace protest at the France v Germany UEFA match in 2020. A protester parachuted into the game with a parachute reading 'KICK OUT OIL!' and 'Greenpeace'.

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The media

The traditional media, and now also social media, are a powerful influence on the planet. They have 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.

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, so 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' or 'fake news' is important. The financial resources of corporations mean they have the potential to influence public understanding and perspectives on environmental issues, and the balance of such reporting can be questionable.

In Australia, the power of the media in environmental matters was first 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. In more recent times the coal seam gas debate has been influenced by the actions of protest groups using the media to voice their views across Australia.

residual power
a government power that is not listed in section 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 section 51 of the *Australian Constitution*

Social media campaigns have more recently been used by many parties in regard to environmental issues. Sometimes referred to as 'clicktivism', various social media platforms have been used to instantly spread images and messages, and thus attempt to influence decision-makers one way or the other.

The frenzy on social media relating to the 2019–2020 Australian bushfires also highlights how various groups try to exert pressure on decision-makers, the government and the public.

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. (In the HSC, you will need to be able to refer to specific examples or cases.)

Australia's federal structure

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** (s 51) of the federal parliament, and therefore it traditionally belonged to the states. Like the rest of the world, Australia was unaware of the full consequences of exploiting the environment until relatively recently. New South Wales passed the *Forestry Act 1916* (NSW), but it was primarily concerned with the regulation of the timber industry and made little reference to the responsible management of this resource.

During the 1960s and 1970s, New South Wales passed a number of laws that were aimed at protecting the environment, including the Clean Air Act, Clean Waters Act and

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Pollution Control Act (these three Acts were repealed and replaced by the *Protection of the Environment Operations Act 1997* (NSW), which consolidated these Acts and added significant new provisions). The *National Parks and Wildlife Act 1974* (NSW) was also a significant law with a clear focus on environmental issues.

Federal powers and legislation

The *Australian Constitution* limited the role the Commonwealth could play in environmental affairs for much of the twentieth 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 following 'In Court' boxes illustrate how this was accomplished through interpretations of the *Australian Constitution* by the High Court.

The main federal environmental law is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). 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 (*Convention on Wetlands of International Importance* (1971))
- 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.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the pivotal domestic law that reflects Australia's international law obligations.

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 K'gari (formerly known as Fraser Island). Today, such a proposal would not be considered, 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. However, the Commonwealth did have power over exports and imports under section 51(i) of the *Australian Constitution*. 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. The case also showed that the Commonwealth was prepared to intervene in affairs traditionally handled by the states if necessary.



Figure 11.18 K'gari is a World Heritage–listed sand island off the coast of Queensland. The island is part of the traditional lands of the Butchulla people.

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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.



Figure 11.19 Franklin–Gordon Wild Rivers National Park in Tasmania was at the centre of an environmental dispute between the state and federal governments.

The Tasmanian Government argued that the building of the dam was a residual power and that 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, Bob Hawke, 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) (now repealed), which specified that areas of special significance should be protected. The Franklin was included as one such area. This created a conflict as a state law allowed the construction of the dam while a federal law demanded 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 section 109 of the *Australian 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.

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The significance of this case is enormous because:

- the Commonwealth could now make environmental laws using the external affairs power if this was necessary 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 (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.

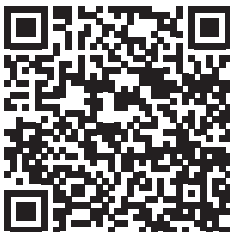
Relationship between federal and state environmental law

Australia's three-tiered system of government (federal, state and local) has resulted in a degree of fragmentation of environmental authority. To better define state and federal roles, reduce jurisdictional disputes, foster a cooperative approach and ultimately provide better environmental protection, the National Environment Protection Council was set up under the *National Environment Protection Council Act 1994* (Cth). As stated in section 3 of this Act, the objectives of the legislation are to ensure that people enjoy 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.

The National Environment Protection Council makes National Environment Protection Measures, which are special national objectives designed to protect or manage targeted environmental issues and are implemented in each state individually. You can see the current National Environment Protection Council projects on its website.

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 that 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 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), 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. A January 2019 report by the Australian Productivity Commission strongly criticised the effectiveness of the agreement, stating that 'reform is required'. In 2022 a review changed the way it operates to make it more 'agile and responsive'. This is an example of law reform in action.



Video 11.2 The Murray–Darling Basin Authority on why we need water for the environment, © Victorian Environmental Water Holder (02:20)

Review 11.9

1. Explain the difference between enumerated and residual powers.
2. List some ways in which federal and state governments cooperate with respect to environmental protection law.
3. Outline the significance of the Tasmanian Dam case.
4. Outline the importance of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

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11.3 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 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. This is reflected in the HSC 'themes and challenges' relating to compliance and non-compliance.

At an international level, treaties and protocols set out the rules with respect to environmental protection. The International Court of Justice is the pre-eminent body for resolving disputes between nation 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 of corporations and other agents. The primary actors at international level, however, are states, and national sovereignty is enshrined in the UN Charter (Article 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 $24 billion plus $40 billion in clean-up costs for the nearly five million barrels of oil spilt) 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 (see the 'In Court' box, below).

When the world's states do work collaboratively, the results can be spectacular.

In Court



***EPA v Gardner LEC* [1997] NSWLEC 169**

From October 1993 to April 1996, Charles Gardner – while operating a caravan park in Karuah, New South Wales – 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. 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 Environment Protection Authority, and he noted after the decision: 'I see the function of prosecuting environmental criminals as equally if not more important than prosecuting murderers.'

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Case Study

Ozone layer destruction

The hole in the ozone layer was first recognised as a global issue in 1978, when satellite technology enabled the size of the hole – and over the next few years, its growth rate – to be measured. Chlorofluorocarbons (CFCs) – chemical compounds that can break the bonds between ozone molecules used in aerosols, refrigerants and packaging – 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. The ozone prevents the most harmful UVB light (ultraviolet radiation of relatively short wavelengths) from reaching 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.

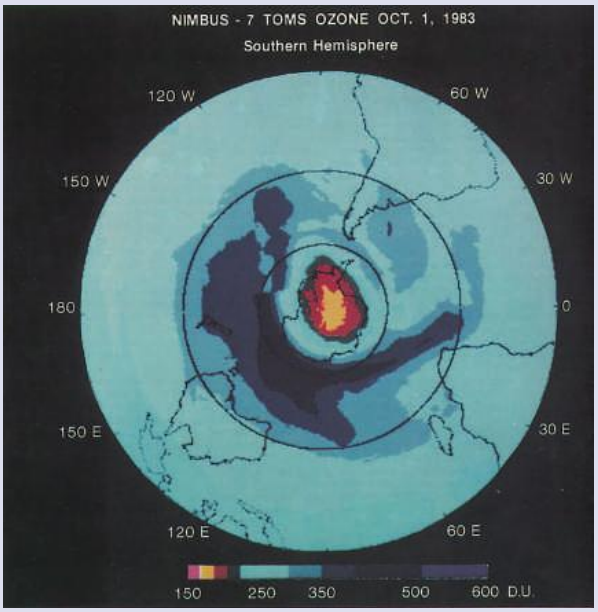


Figure 11.20 Atmospheric scientist Pawan Bhartia presented this satellite-based image as the first evidence of the scale of the Antarctic ozone hole. This ultimately led to the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987).

The Vienna Convention for the Protection of the Ozone Layer was negotiated in 1985 and came into force in 1988. The accompanying *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) came into force in 1989 and set out legally binding reduction targets for states. A management plan for phasing out CFCs 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. A 2019 report by the UN Environmental Effects Assessment Panel projected the hole to shrink back to its pre-1980s levels by the middle of the twenty-first century. Kofi Annan, a former Secretary–General of the United Nations, once referred to it as 'perhaps the single most successful international agreement to date'. Interestingly, in October 2021 the ozone hole was larger than average due to a colder than usual southern hemisphere winter, but NASA acknowledged that 'it is substantially smaller than those in the late 1990s and early 2000s'. As noted by World Meteorological Organization Secretary–General Michel Jarraud, in 2014, '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 climate change'. In January 2023, the UNEP estimated that with the reduction of harmful UV rays the Montreal Protocol will save an estimated two million people annually by 2030 from skin cancer.

As discussed earlier, the comparative ease of switching from CFCs to cheaper and safer alternatives made this an international law that nations were more than willing to comply with, but the same cannot be said of the complexities and enormous expense of tackling climate change. It is a classic example of nations exercising their sovereignty according to their own best interests.

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The *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) ('Montreal Protocol') highlights what can be achieved through global cooperation. Regarding international laws relating to global environmental protection, the Montreal Protocol is the benchmark, but it is important to analyse why subsequent treaties and conventions have not been so successful. As emphasised, nation states will comply when it is in their best interests to do so, and often it is the 'economic imperative' that overrides environmental concerns (refer to the earlier bluefin tuna example). Certainly, nations did universally acknowledge the problem of ozone depletion (unlike the climate change 'debates') so there was international cooperation to resolve the conflict. Nations consented to comply with the reforms to international law that occurred with the Montreal Protocol and thus an effective legal response eventuated to protect the environment.

But was there another significant influence that made the nations of the world so readily comply? CFCs were the culprit, and they could easily, and cheaply, be replaced in industry by hydrofluorocarbons, which do not harm the ozone layer. Contrast this situation with the cost of economies shifting from coal and oil energy sources to renewable sources and it becomes apparent why 'compliance' and 'effectiveness of legal responses' in regard to the greenhouse gas emissions has become problematic. It will be interesting to see how the global community responds to the acknowledged threat that plastics are having on our environment (see the Basel Convention in this chapter) and the proposed new Plastics Treaty being formulated.

Case Study



Endangered species trade

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) has 183 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 the treaty's 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 the 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.

During 2021, World Customs and Interpol worked with CITES and conducted Thunder 2021 (the last in a series of operations since 2017) to target wildlife and timber crime. It resulted in hundreds of arrests and the seizure of an enormous amount of illegal wildlife products.

Interestingly, arrests in South West Queensland in June 2023 highlighted the lucrative nature of this trade. The manager of Queensland Parks and Wildlife Service noted that while most people think of African animals in regards the most trafficked animals:

' … Australian reptiles are overwhelmingly the most commonly trafficked live native animal, with native lizards in particular, followed by snakes, then occasionally birds.'

In response to these difficulties, NGOs have tried 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, actively monitors wildlife trade to ensure that it does not pose a threat to the conservation of species and their habitats. 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 and 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 discussed earlier illustrate the effectiveness of NGOs.

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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 on Substances that Deplete the Ozone Layer* (1987).
3 Compare and contrast enforcement mechanisms at international and domestic levels.
4 Using examples, indicate how non-government organisations can influence the law.

Research 11.6

A key HSC theme is to analyse the effectiveness of the law. Develop a Case Study for your HSC revision by undertaking the following tasks.

1 Identify one 'hard law' environmental international instrument (for example, Basel Convention, Climate Change Convention or CITES) and outline its primary purpose.
2 Describe examples of the problems/issues that this 'hard law' was designed to overcome. Refer to the four elements of ecologically sustainable development where appropriate.
3 Describe the work of a non-government organisation that has a focus on this issue/problem.
4 Outline the obligations on nation states who are signatories to this 'hard law'.
5 Identify the 'enforcement mechanisms' attached to this international law. Describe how they encourage compliance.
6 Is this law effective? Discuss why or why not.
7 Indicate how this international law is reflected in Australian domestic legislation.

11.4 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, this is the fundamental concern raised by the concept of

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Figure 11.21 This box for the McDonald's Filet-O-Fish in California has a MSC certified sustainable seafood seal, part of sustainability efforts of the fast-food chain.

intergenerational equity. 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 and the Story of Stuff Project website) 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. This concept is encapsulated by the 'intragenerational equity' debate. 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 *United Nations Framework Convention on Climate Change* (1992) formulated at Rio was the first step, but later Conferences of the Parties regularly highlighted the conflict between resource use and global environmental protection.

The *Kyoto Protocol* (1997) 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'. Since then the various 'Conferences of the Parties' have slowly evolved to produce a more comprehensive global response. Copenhagen in 2009 and Durban in 2011 only produced weak political accords. However, as indicated, the *Paris Agreement* (2016) did achieve a (nearly) global consensus and the *Glasgow Climate Pact* (2021) clearly indicated that a more motivated global community is determined to limit climate change to less than 1.5 degrees Celsius.

Case Study

Fossil fuels and greenhouse gas emissions

Fossil fuels (for example, oil, gas and coal) have long been major contributors to greenhouse gas emissions and to climate change. According to the US Energy Information Administration, about 75 per cent of anthropogenic (human-caused) greenhouse gas emissions have come from the burning of fossil fuels over the last 20 years.

Greenhouse gases negatively impact the environment. As sunlight enters the atmosphere, Earth warms up as it absorbs the infrared radiation. Greenhouse gases limit the re-radiation of the sunlight back into space.

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, the consumption of fossil fuels in developing countries has exceeded the consumption of these fuels in 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.

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COP 28, in Dubai 2023, highlighted that the first 'global stocktake' of the world's efforts to address climate change under the Paris Agreement was 'too slow' across all areas of climate action. It did, however, call on governments to speed up the transition away from fossil fuels to renewables.

Undermining the success of the Climate Change conferences (and its COPs) are the usual key stumbling blocks. For HSC purposes, these are the issues that make international law less effective and make nations reluctant to comply, such as:

- **equity** – states must agree on targets for emissions cuts or rely less on particular resources such as coal, gas and oil. This would involve considerations including past emissions, prior attempts to limit emissions, the cost of shifting to renewables and how they can continue to develop, especially if a shift from fossil fuels would significantly impact economic growth. Consequently, there can be considerable antagonism between states on unilateral emission cuts. This was why under the *Paris Agreement* (2016) nations were able to set 'nationally determined contributions' encouraging compliance as each country sets its own emission target.
- **funding** – developing countries are demanding financial support if they are to cut emissions, as this will affect living standards domestically.
- **sovereignty** – political leaders have different philosophies, and when states change leaders there is often a different perspective on how resources should be utilised. Global financial concerns already have seen environmental issues regularly weakened or pushed aside.
- **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 International Court of Justice 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. A critical point here is the nature of enforcement mechanisms at international levels – they are designed to encourage compliance (see Table 11.2).

Case Study

Uranium and nuclear energy

Australia has about 40 per cent of the world's uranium. One tonne of uranium can generate the same amount of energy as 13000 tonnes of coal. Burning 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?

Although Australia does sell uranium to 36 nations that are signatories to the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), the roll-out of nuclear energy has stalled due to fears related to plutonium. Plutonium is produced in the nuclear process and is the building block for nuclear weapons. Also, any nuclear accidents could have dire consequences, as occurred in Chernobyl in the Ukraine in 1986 and in Fukushima in Japan in 2011. Interestingly, Finland's Greens announced in 2018 that they are not dogmatically opposed to nuclear energy as they stated that, 'green economic policy [should be] based on sustainability and reason'.

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. In your answer use the term 'intragenerational equity'.

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11.5 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) *Australian 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 *Australian 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.

Non-government organisations 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 on elected representatives from parts of the community. Governments respond to community demands because of the power of elections. Australia's shift in policies regarding climate change, carbon taxes and energy supply over the last decade highlight how difficult it is for a consistent approach to be implemented regarding such critical issues.

If a policy or law is not aligned with community views and expectations, a government's election chances are in peril, and such views can often fluctuate. Climate change was also significant in the 2022 federal election, with the emergence of 'teal independents' challenging traditional Liberal party seats. These independents combined generally conservative fiscal policies with a strong focus on climate. (The colour teal is a combination of blue – the traditional Liberal party colour – and green.) Most of the teal independents received funding from Climate 200, an independent group established in 2019 by businessman and philanthropist Simon Holmes à Court. The teal independents achieved six seats in the lower house, with the Greens taking four seats.

The 2022 federal election was a classic example of governments responding to community demands, as a change of government resulted in a pledge to reduce greenhouse gas emissions by 43 per cent below 2005 levels by 2030 (up from 26–28%).

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. Over the last 15 years, Australia has been in the middle of the so called 'climate wars' where successive governments rejected and amended the legislation concerning the climate legislation based on their political perspectives. The Gillard government introduced the *Clean Energy Act 2011* (Cth) (repealed), 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 was replaced with the Direct Action Plan, which had the Emissions Reduction Fund as its centrepiece and involved providing



Figure 11.22 Climate change was a significant issue in the Australian 2022 federal election.

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financial incentives for polluters to reduce emissions. The 2019 election saw the Morrison government recommit to the Direct Action Plan. As indicated earlier, the 2022 change to the Albanese government again saw a shift back to increasing commitments under the *Paris Agreement*.

Enforcement of environmental laws

The enforcement of laws aimed at global environmental protection is another way in which Australia (at federal and state levels) has responded to global initiatives. The case of *EPA v Gardner* (see In Court on page 356) highlighted the growing recognition of 'environmental crimes' relating to pollution and toxic waste in domestic jurisdictions. Punishments for environmental crimes can be severe and they reflect community standards on environmental protection. For example, developers of a pub in Carlton, Melbourne, were fined $600 000 for the illegal disposal of asbestos in 2018.



Figure 11.23 The enforcement of laws aimed at global environmental protection is another way in which Australia has responded to global initiatives.

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 11.3.

Table 11.3 Key international laws relating to global environmental protection ratified by Australia

International law	Date of Australian ratification	Australian law reflecting international obligations
Convention on Wetlands of International Importance (1971) (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
Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)	1976	Initially by the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth) (repealed), but since 2002 by Part 13A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
Montreal Protocol on Substances that Deplete the Ozone Layer (1987)	1989	*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth)
Convention on Biological Diversity (1992)	1993	*Environment Protection and Biodiversity Conservation Act 1999* (Cth); Australia's fifth national report was released in 2014 and can be viewed on the website of the Australian Government Department of Environment and Energy
United Nations Framework Convention on Climate Change (1992)	1994	Following ratification of the *Kyoto Protocol* the Australian Government has attempted to introduce measures to reduce national greenhouse gas emissions. In 2022 the Australian Government increased its commitment under the *Paris Agreement* to reduce greenhouse gas emissions by 43 per cent below 2005 levels by 2030 (up from 26–28%).
Kyoto Protocol (1997) *Paris Agreement* (2016) *Glasgow Climate Pact* (2021)	2007 2016	

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Legal Links

A range of environmental law cases are outlined on the Environmental Law Australia website.

Legal Info

Illegal wildlife imports and exports

Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the maximum penalty for wildlife smuggling is 10 years' jail and/or a $210 000 fine. This is an example of the domestic enforcement of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973).



Figure 11.24 Members of the Pakistan Falconry Association take care of that which had been confiscated by Pakistani authorities from smugglers in 2020. A single falcon can fetch thousands of dollars on the black market.

Review 11.12

1. Describe the changes in the Australian Government's climate change policy since the 1990s.
2. Refer to Table 11.3 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.

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Research 11.7

To prepare for the HSC complete the following extended-response:

'Analyse the effectiveness of legal and non-legal processes in promoting and achieving environmental protection in regard to Australia's response to international initiatives.'

In your answer include discussion of the following:

- sovereignty
- ecologically sustainable development
- *Bradley v The Commonwealth*
- the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- 'hard international law' (with two specific examples)
- the Tasmanian Dam Case
- non-government organisations (with two specific examples).

11.6 Contemporary issue: Barriers to achieving an international response to global environmental protection

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 United Nations 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 Substances that Deplete the Ozone Layer* (1987) 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 to sign and ratify the UN Climate Change Convention in 1992, but once legally binding targets were proposed and expanded upon at the subsequent Conferences of the Parties (COPs) many were reluctant to comply. This situation was further exacerbated by the emergence of climate change sceptics, pressures of economic instability and the immediate cost of shifting to renewable forms of energy. The support for the *Paris Agreement* (2016) and the *Glasgow Climate Pact* (2021) signifies a major shift in global priorities and, possibly, a move towards a holistic approach to climate change. Pressure from NGOs and dramatic changes in community standards are also placing pressure on nations to act.

Environmental processes and natural phenomena are different from political and other social events; they do not fit with political election cycles, and they are arguably more difficult to deal with in the process of negotiation and compromise due to wide range of competing interests. Environmental policymakers (at both international and domestic levels) must have at least some understanding of the science supporting the instruments they propose to enact, while, at the same time, be able to resolve the various tensions that exist between industry, NGOs and other parties. Aligning new laws

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with contemporary values and ethics is critical in encouraging compliance.

The United Nations is large and labyrinthine, and there is some lack of coordination between the UN General Assembly and the other organs and agencies as well as between the various development funds and programs. These all may be factors in international bodies' difficulties in influencing national laws and policies and can be a barrier to a cohesive and holistic response.

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. And when hard international law does emerge, the 'enforcement mechanisms' are often geared to encouraging compliance rather than punishing breaches. In regard to effectiveness, it should be noted the use of enforcement mechanisms that encourage compliance is more effective than punitive measures that nations can simply not comply with due to sovereignty.

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. For example, the proposed Plastics Treaty was supposed to have a draft in place by COP 28 in Dubai in 2023. But at the third round of talks in Nairobi (Kenya) in November 2023, despite the vast majority of nations supporting the treaty, a deadlock occurred when a few of the nations called for a loose voluntary agreement. Critics claim these nations have 'deep petrochemical interests'. As a result, work on the treaty has been delayed until mid-2024.

Other challenges for international environmental protection stem from the fact that the world is much more complex than it was when the United Nations 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. Also, the impact of social media on driving agendas in regards resource use, climate change, animal extinction and energy use has placed pressure on governments and can be a barrier to achieving a coordinated international response.



Figure 11.25 Art installation the *Perpetual Plastic Machine* was unveiled in Paris in 2023 for the Global Plastics Treaty to highlight runaway plastic and use. Pictured is artist and activist Benjamin Von Wong.

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Case Study



Basel Convention

The Basel Convention has become highly contentious over the last decade. While this section focuses on discussing the barriers to achieving an international response to global environmental protection, you should be able to see how this case study can be used to answer a range of questions related to the HSC's 'Themes and challenges'.

- **Formal name** – *Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989) (Basel Convention).
- **Signatories** – 186.
- **Background** – The public outcry over the disposal of toxic wastes in developing countries led to the formulation of the Basel Convention (research the Khian Sea waste disposal incident as one example of 'toxic colonialism').
- **Purpose** – To control the imports and exports of hazardous materials as outlined in the various annexes of the convention.

Article 4 promotes the reduction of waste to a minimum.

Article 9 refers to 'illegal traffic', which includes the right of a member state to return to the 'exporter or generator' any materials deemed to have breached the convention. During 2019, Malaysia did just that – it returned five containers of imported materials to Spain that had been 'misrepresented' as recyclable plastic. The Malaysian Minister for the Environment stated that, 'Malaysia will not be the dumping ground of the world'.

The United Nations has estimated that there will be more plastics in the sea by 2050 than fish the 'Great Pacific Garbage Patch' has 1.8 trillion pieces of floating plastic, while it is estimated by National Geographic that on Earth 6.9 billion tonnes of plastic have become waste and a staggering 6.3 billion tonnes of that never made it to a recycling bin.

The 2019 Conference of the Parties amended the annexes to the Basel Convention to tighten up the controls relating to plastic waste. It included a specific amendment related to 'Marine Plastic Litter and Microplastics' that *invites* member states: 'To set targets and adopt adequate measures to ensure that, by 2030, all plastic packaging is designed to be recyclable or reusable in a cost-effective manner.'

The critical barrier to achieving an international response to global environmental protection is highlighted by the word in italics – *invites*. It is a reflection of the need to acknowledge each nation's sovereignty. This wording is deliberate, as it is an attempt to encourage compliance by gaining consensus rather than using a 'big stick' approach. The recognition that plastic waste is becoming a major issue that sovereign states are willing to take serious action on was evidenced by the 2019 Basel amendment, which took effect in January 2021. It requires exporters of plastic scrap to obtain prior consent from the destination country and gives countries the legal authority to refuse unwanted or unmanageable waste.

The proposed Plastics Treaty has the potential to greatly enhance global environmental protection regarding the use and disposal of plastic. It is a recognition that while the Basel Convention is effective in regard to the transboundary movements of plastics, a more holistic and proactive approach is required to address the multitude of problems caused by plastics. According to UNEP this includes:

(Continued)

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Case Study—Continued

- the endangerment of over 800 marine and coastal species
- the 11 million tonnes of plastics flowing into oceans annually
- that at current rates, plastics production, use and disposal will account for 15 per cent of total greenhouse gas emissions by 2050.

With such obvious examples of the disastrous consequences of plastic in our environment, the key question is 'how did the planet get to such a situation?' One interesting fact is that no one denies the impact of plastics, which is in stark contrast to some that believe climate change is a 'hoax'. If all of the world believes it is a problem, then why didn't proactive global action take place decades ago? Why isn't there a hard law environmental treaty as demanded by Marco Lambertini, World Wildlife Fund International Director General?

> We need urgent action at government, business and consumer levels, and a global treaty with global targets to address plastic pollution.

Lambertini M 2019, quoted in 'Revealed: plastic ingestion by people could be equating to a credit card a week', World Wildlife Foundation website, 12 June.

Ironically, the historical answer lies in the search for products to replace dwindling natural resources. Elephant ivory was used to make combs, billiard balls and piano keys. Then an inventor named John Hyatt developed 'celluloid' in the mid-1800s, declaring his new product would eliminate the need 'to ransack the Earth in pursuit of substances which are constantly growing scarcer'.



Figure 11.26 A significant shift has occurred with public behaviour and opinion with global awareness regarding the overuse of plastics, leading to a major change in people's ethical values and behaviour.

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This humble development was the forerunner of the plastics industry. Plastics were cheap and industry designed and marketed them for 'throwaway living'. Every industry used plastic, and with the growth of industrialisation in developing nations across Asia the problem was exacerbated. A chief barrier to an international response was that plastic became an integral component of our lifestyle, it was fundamental to our standard of living, people were not aware of its insidious side effects, and they were certainly not prepared to pay for alternatives.

But the work of non-government organisations and the change in public opinion (reflecting intergenerational and intragenerational equity) has seen a gradual shift in domestic laws and corporate policy to reduce the use of plastics. Some of the domestic enforcements of plastic use are significant:

- Rwanda was the first nation to introduce a plastic ban in 2008 – the penalty is up to six months' imprisonment.
- France banned all plastic bags in 2015 and plastic cutlery in 2016.
- In 2016 California banned plastic bags (but you can buy a handgun legally).
- The European Union and Canada has declared a ban on a range of plastic products by 2021.

Major corporations have announced significant initiatives to combat the plastic problem. For example, Coca Cola has announced a goal to 'collect and recycle the equivalent of' 100 per cent of its packaging by 2030.

Perhaps the most significant shift has occurred with public behaviour and opinion. Over the last decade, global awareness has led to a major change in people's ethical values and behaviour. Consumers are demanding that companies use biodegradable plastic, and many people will not use single use plastic bags or drinking straws. Recently, innovative ways to reduce the impact of plastics have begun to reverse the negative impacts of plastics on the environment. For example:

- The City of Kwinana in Western Australia introduced the 'drain sock' in 2018 to capture rubbish from stormwater drains. It has generated global interest.
- The City of Cockburn in Western Australia started building roads out of recycled plastics.
- The non-government organisation Seabin announced in June 2023 that the number of plastic bags in Sydney Harbour has reduced by 70 per cent in one year due to the ban implemented in June 2022.

Review 11.13



1 Outline the barriers to a coordinated international response to global environmental protection.
2 Explain how collaboration between states can positively influence global environmental protection.
3 Using the Basel Convention as an example, explain 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 should be the basis of all efforts aimed at global environmental protection.
- The four key elements of ecologically sustainable development are biodiversity, intergenerational equity, intragenerational equity and the precautionary principle.
- The United Nations and its various agencies (UN Environment Programme and UNESCO) have a major role in promoting ecologically sustainable development 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 *United Nations Framework Convention on Climate Change* (1992) 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 International Court of Justice is the main forum for resolving environmental disputes between states. International enforcement mechanisms aim to promote cooperation and encourage compliance.
- Intergovernmental and non-government organisations 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 interest, and this can both assist and impede international law.

Short-answer 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 International Court of Justice in resolving environmental disputes.
5 Explain how the world's demand for resources conflicts with the need for global environmental protection.

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Extended-response questions

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 in the digital version of this textbook. Refer to these criteria when planning and writing your response.

1 With reference to environmental issues, assess the effectiveness of both legal and non-legal processes in achieving environmental protection.
2 Discuss the relationship between domestic law and international law. With reference to contemporary environmental issues, describe the role of sovereignty in this relationship.
3 Assess the role of law reform in protecting the global environment.
4 Choose one global environmental issue (such as plastics, climate change, exploitation of fishing or whaling stocks, loss of biodiversity, transboundary pollution and depletion of non-renewable resources) and complete the following tasks.
   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 International Court of Justice 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 non-government organisations that have taken action over this issue.

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Themes and challenges for Chapter 11 – Option 2: Global environmental protection

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 and compliance with international initiatives.
- Sovereignty is a fundamental right of nation states, as is clearly stated in Article 2 of the charter of the United Nations.
- 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. The Montreal Protocol and ICCAT (Atlantic Tuna) are both examples of effective international measures – both had the political will of nations behind them.

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, Deepwater USA*), compliance at an international level often involves intense negotiations and compromise (as occurred in the International Court of Justice case of *Ecuador v Colombia*).
- The means of enforcing compliance (for example, by the International Court of Justice) are limited, yet enforcement is the cornerstone of the law's effectiveness. At an international level, 'enforcement' is more effective in regards global environmental protection when it encourages compliance (financial and technical support) rather than being punitive in nature.
- 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 interest.
- Overcoming the effects of climate change by reducing greenhouse gas emissions is clearly in everyone's best interest, but international compliance is limited by economic considerations.
- Differences in the circumstances of developed and developing nations mean that they have different perceptions of a just and fair agreement that will limit energy use and industrial development to protect the environment. This is the central issue of intragenerational equity.

The effect of changing values and ethics 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. The 'mega conferences' have played a role in highlighting global concerns and these have had an impact on people's values and ethical viewpoints.
- Real time information about the environment has influenced people's values and attitudes. Environmental catastrophes, species extinction, dwindling resource supplies and pollution have a strong effect on people's wellbeing.
- Social attitudes places pressure on governments and businesses by voters and consumers to implement change; for example, the use of plastics, the *Brent Spar* and the Tasmanian Dam protests and the increase in Independent ('Teal') and Australian Greens Members of Parliament. Non-government organisations play a pivotal role here in shaping opinions on global environmental protection.
- A major example of changing values is the emergence of ecologically sustainable development as the basis for environmental protection, particularly the idea of considering future generations when making decisions involving the environment.
- The 2019–2020 Australian bushfires and the 2022 Northern Rivers floods triggered enormous debate about climate change and transformed many people's views – how this impacts domestic and international responses will be an interesting phenomenon.

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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
  - resource depletion and corresponding changes in the prices and markets for non-renewable resources
  - the failure of existing law
  - new technology.
- There has been a plethora of international laws relating to the environment. Even the UN Environment Programme has acknowledged that there is 'treaty congestion'.
- 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 twenty-first 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

- Non-legal efforts such as the campaigns of non-government organisations 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.
- The effectiveness of international legal measures must be assessed according to their stated aims (for example, whether they contain achievable targets). It is important to acknowledge how 'enforcement mechanisms' strive to encourage compliance at an international level.
- The *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987), ICCAT (linked to the Law of the Sea Convention) with the protection of Atlantic tuna, and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) are considered the most successful international legal responses aimed at global environmental protection.
- The shift in attitudes towards the use of plastics and developments regarding the Basel Convention (and the proposed Plastics Treaty) is a significant contemporary issue that will highlight how effective legal and non-legal responses can be.

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Chapter 12
Option 3: Family

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate the legal nature of family relationships and the effectiveness of the law in achieving justice.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the role of the law in encouraging cooperation and resolving conflict in regard to family
- issues of compliance and non-compliance
- changes to family law as a response to changing values in the community
- the role of law reform in achieving just outcomes for family members and society
- the effectiveness of legal and non-legal responses in achieving just outcomes for family members.

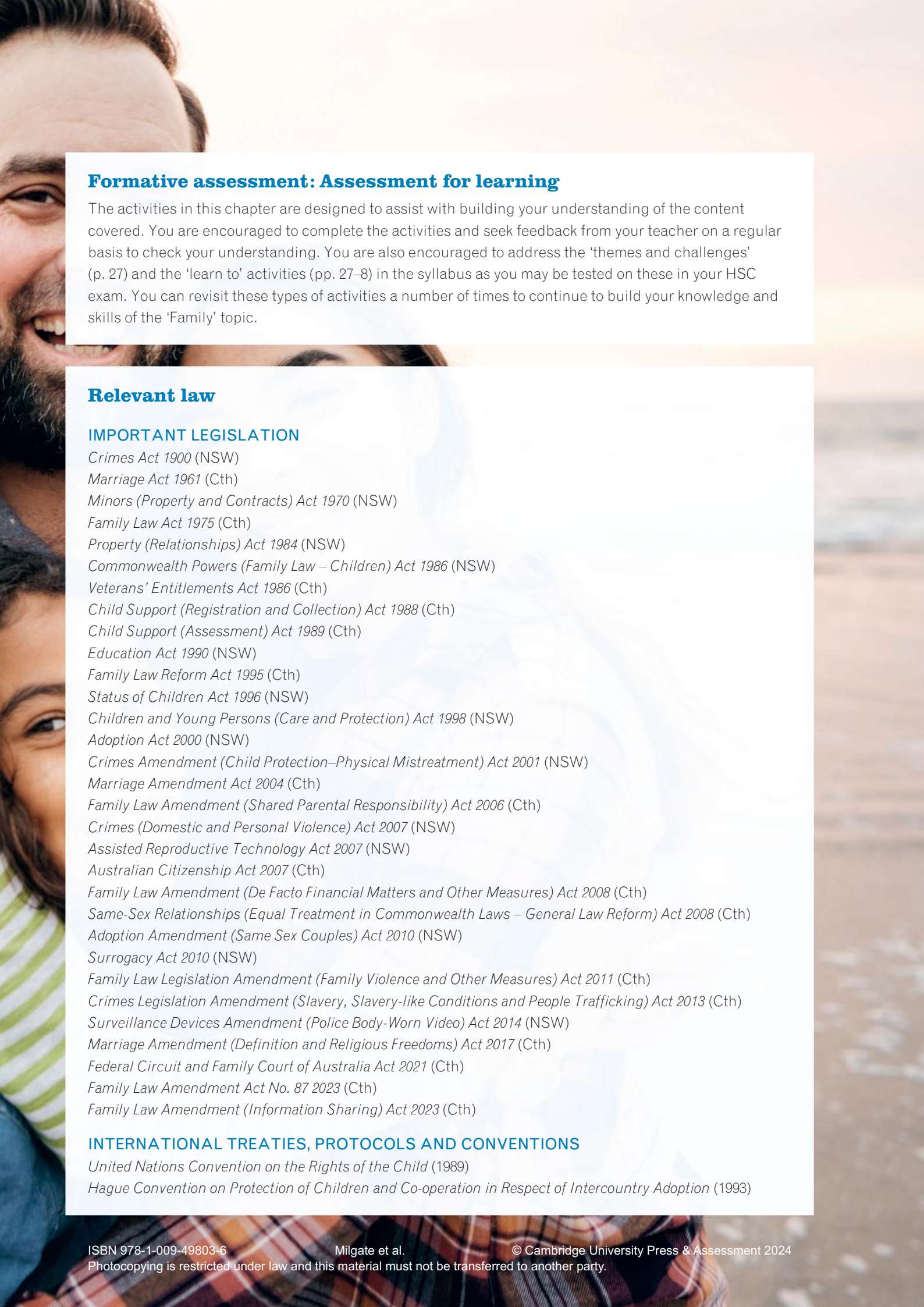
At the end of this chapter, there is a summary of the themes and challenges relating to the family. This summary draws on key points from the chapter and links each key point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- communicate legal information using well-structured and logical arguments
- discuss the problems with defining 'family' and how the concept of the family is changing
- discuss the difference between federal and state family law
- 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 the media and other non-government organisations in issues relating to family
- 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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Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 27) and the 'learn to' activities (pp. 27–8) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Family' topic.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Marriage Act 1961 (Cth)
Minors (Property and Contracts) Act 1970 (NSW)
Family Law Act 1975 (Cth)
Property (Relationships) Act 1984 (NSW)
Commonwealth Powers (Family Law – Children) Act 1986 (NSW)
Veterans' Entitlements Act 1986 (Cth)
Child Support (Registration and Collection) Act 1988 (Cth)
Child Support (Assessment) Act 1989 (Cth)
Education Act 1990 (NSW)
Family Law Reform Act 1995 (Cth)
Status of Children Act 1996 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Crimes Amendment (Child Protection–Physical Mistreatment) Act 2001 (NSW)
Marriage Amendment Act 2004 (Cth)
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)
Assisted Reproductive Technology Act 2007 (NSW)
Australian Citizenship Act 2007 (Cth)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)
Adoption Amendment (Same Sex Couples) Act 2010 (NSW)
Surrogacy Act 2010 (NSW)
Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)
Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)
Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 (NSW)
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)
Federal Circuit and Family Court of Australia Act 2021 (Cth)
Family Law Amendment Act No. 87 2023 (Cth)
Family Law Amendment (Information Sharing) Act 2023 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

United Nations Convention on the Rights of the Child (1989)
Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)

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SIGNIFICANT CASES

Hyde v Hyde & Woodmansee (1866) LR 1 P&D 130
In the Marriage of Sanders (1976) 10 ALR 604
F v Langshaw (1983) 8 Fam LR 832
B v J (1996) 21 FamLR 186
R v Majdalawi [1996] NSWSC
Falconio v Conchita [2009] FamCA 1323
Re Michael: Surrogacy Arrangements [2009] FamCA 691
Kreet & Sampir [2011] FamCA 22
Hoffman v Hoffman [2014] FamCAFC 92
Thorne & Kennedy [2017] HCA 49
Simic & Norton [2017] FamCA 1007
Covington v Covington [2021] FamCAFC 52
Isles & Nelissen [2022] FedCFamCIA 97

Legal oddity

An Australian couple had been married for 19 years before their marriage broke down. In 2013 they sought a court order regarding the sale of their house. The wife argued that one room in their matrimonial property was haunted. The court found the wife's claim of a haunting to be implausible and an attempt to obtain a low valuation of the house so that she could retain the former marital home.

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12.1 The nature of family law

The concept of family law

There is difficulty in defining the concept of 'family' as social and community values change continuously. The once traditional 'nuclear family' of married male and female parents with children, living under the same roof, now represents only about 33 per cent of Australian households. Family can now be only broadly defined as 'two or more people residing together joined by **marriage**, birth or adoption'.

Therefore, family law has also undergone shifts in focus and purpose, and currently is best explained as a body of laws that attempts to resolve conflicts and encourage cooperation within families and between family members. Family law primarily aims to protect rights and ensure responsibilities regarding the raising of children and the allocations of assets when relationships break down. Over time, family law has been reformed to focus more on cooperation and compliance in a less adversarial environment.

While the main function of the family has remained the care and protection of all family members, social values continue to change to accept separation, divorce, adoption and single-parent families as variations to the traditional 'nuclear family'. Many different definitions and family arrangements in Australian society have emerged. These include First Nations families, **de facto relationships**, **step families**, **blended families**, **extended families** and same-sex families. The 2017 plebiscite on same-sex marriage, and the subsequent passing of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), revolutionised the traditional definition of a marriage.

State and federal laws regarding families

Under sections 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 1975* (Cth) was to reform the law governing the end of a marriage. In the past, only state parliaments could pass legislation about divorces and 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. In New South Wales, the *Family Law Act 1975* (Cth) obliges couples seeking a divorce need only demonstrate 'irretrievable breakdown' of a marriage with a one-year separation period.

The *Family Law Act 1975* (Cth) also established the Family Court, which hears all matters related to marriage and divorce. The Family Court lasted as a separate court until 2021, when the *Federal Circuit and Family Court of Australia Act 2021* (Cth) merged it with the Federal Circuit Court of Australia to form the Federal Circuit and Family Court of Australia. This court has jurisdiction to deal with all matters that previously fell under the Family Court's jurisdiction: thus, where this chapter makes historical references to the jurisdiction of the Family Court (such as to powers granted under the *Family Law Act 1975* (Cth)), these can be assumed to continue in the present day as powers of the Federal Circuit and Family Court of Australia.

marriage
the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) defines marriage as 'the union of two people 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

step family
a couple family in which one or more children is the stepchild of the partners in the couple, and the couple has no natural or adopted children together

blended family
a couple family with at least one child who is the stepchild of one of the partners in the couple, and at least one child who is the natural or adopted child of both partners in the couple

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

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 section 51(xxxvii) of the *Australian Constitution*

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Legal requirements of marriage

Under the *Marriage Act 1961* (Cth), individuals who intend to marry must take into consideration the legal consequences of this union. When two people marry, they make a promise, before witnesses, to provide and care for each other. 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. Despite changes under the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), married couples receive a marriage certificate that confirms the relationship under law, whereas de facto couples may still need to provide evidence of a domestic relationship in various legal situations.

The descriptions of marriage in Australian legislation are based on the definition in the English case of *Hyde v Hyde & Woodmansee* (1866) LR 1 P&D 130, in which John Hyde was granted a release from his marriage to an adulterous wife. 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). This judgment forms the basis of the legal requirements for marriage under the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) that amended the *Marriage Act 1961 (Cth)* and the *Marriage Amendment Act 2004* (Cth).

polygamy
having more than one wife or husband at the same time

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

Therefore, marriage by definition is 'the union of two people to the exclusion of all others, voluntarily entered into for life'. Some cultures and societies do allow individuals to have more than one spouse – this is known as **polygamy**. However, polygamous marriages entered into within the Australian context are considered illegal and are not recognised.

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.

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 parents of the couple consent and/or if the couple are shown to be mature and financially independent). Pregnancy alone will not guarantee an order. In 1997, a Western Australian couple aged 17 and 22 wanted to marry before the young woman turned 18 as she was pregnant. The couple sought to marry prior to the birth of the child, but the magistrate refused to allow the marriage to go ahead citing the circumstances as not being 'exceptional or unusual'. On appeal, the couple were allowed to marry, the Supreme Court ruling that the circumstances need only be 'sufficiently exceptional' (*Ex Parte Willis* [1997]).

Prohibited relationships

A person cannot marry if they are married to someone else. They 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



Figure 12.1 A person may only marry at the age of 18 years. Those between the ages of 16 and 18 must apply to a judge or magistrate for an order authorising the marriage.

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and ancestors who are related to the person by marriage. However, a person can marry their uncle or aunt, niece or nephew, or a first cousin.

Notice of marriage

Section 42 of *the Marriage Act 1961* (Cth) mandates that 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 signed by both parties in the presence of a witness. Parties who intend to marry must provide proof of age, usually their birth certificates. The celebrant issues a marriage certificate after the ceremony is completed. This document is legal proof that the ceremony took place according to law. If either party has been married previously, they must provide evidence that a previous marriage has been dissolved by death of the spouse or annulment.

Void marriages

A marriage can be declared void (*ab initio*), or invalid, if it fails to meet the definition of marriage – if, for example:

- 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 be deemed void if it fails to meet the criteria for a valid marriage; 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).

Any form of forced marriage was formally criminalised under the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth). This law was successfully applied for the first time in September 2017, when a Victorian judge sentenced a 35-year-old male to 18 months in jail for marrying a 14-year-old girl, describing his behaviour as 'morally indefensible'.

If a marriage is found to be invalid, the court can **nullify** the marriage. This **annulment** means that, in the eyes of the law, the marriage never had a valid existence, and was therefore illegal.

However, any children born during the marriage are considered to be the legitimate children of the marriage.

celebrant
a person who is authorised to perform a civil or religious marriage ceremony

nullify
to declare legally void or invalid

annulment
a declaration by a court that a supposed marriage is void

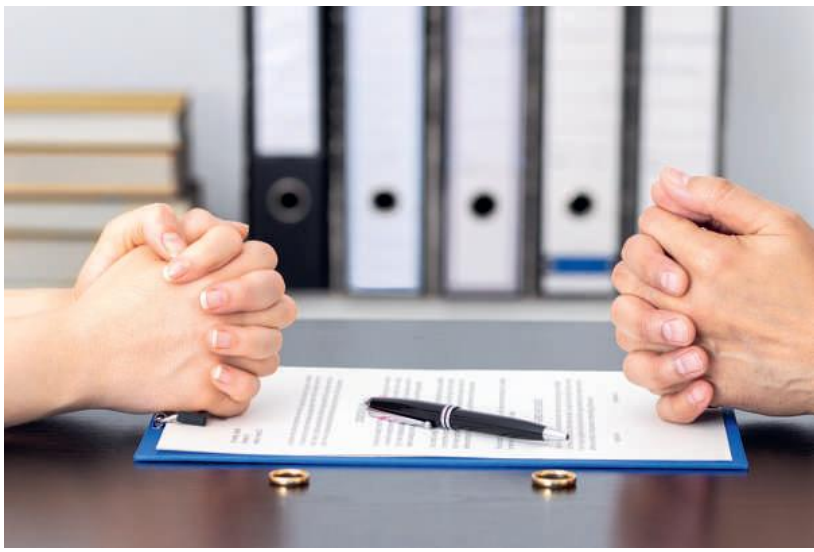


Figure 12.2 If a marriage is found to be invalid, the court can nullify it and this annulment means the marriage never had a valid existence.

In Court

***Kreet & Sampir* [2011] FamCA 22**

A 17-year-old Melbourne girl travelled to India with her parents, believing she could marry her Australian boyfriend. But once in India, her parents took her passport and insisted she marry a different man, chosen by them. They said that if she did not do this, they would have the mother and sister of her boyfriend harmed. The girl also stated that she had been hit in the face twice by her father.

The Family Court subsequently held that the marriage was void as the young woman's consent was not real and was obtained under duress. Hence, because she had been physically and mentally coerced, the arranged marriage could not be recognised under Australian law.

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Review 12.1

1. Outline various definitions of 'family' and how these may reflect social and community values.
2. Describe the concept of 'family law' and how families have changed. Provide examples to illustrate your answer.
3. Explain the meaning of Lord Penzance's judgment and how this forms a legal requirement of marriage.
4. Define 'prohibited relationship' and provide examples of whom a person is permitted and not permitted to marry.
5. Outline the reasons why a marriage may be declared invalid using case law.

Alternative family relationships

First Nations peoples' customary law marriages

Relationships within First Nations 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 First Nations 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 First Nations peoples should be recognised and given legal status.

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 First Nations children are specifically provided for in legislation such as the *Family Law Act 1975* (Cth). So, for example, section 61F states that a court making decisions about parental responsibility must take into account kinship. Therefore, if a First Nations customary marriage breaks 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. These 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 First Nations culture and traditions.

In the Marriage of Sanders (1976) 10 ALR 604, the Family Court ruled that a child from a marriage between a non-Indigenous father living in Brisbane and the Aboriginal mother living in the Northern Territory, should live with the mother. This decision was a reversal of an original decision for the child to live with his father in an 'environment' best suited to his physical needs, rather than the child's emotional needs and maternal attachments.

De facto relationships

A de facto relationship is defined in section 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
- are living together on a genuine domestic basis as a couple, and
- have cohabited for a minimum of two years unless they have had a child together.

According to the Australian Institute of Family Studies in March 2023, approximately 81 per cent of couples married had lived together prior to marriage. De facto relationships also included same-sex couples.

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Since 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 have also been determined under the *Family Law Act 1975* (Cth). This amendment removed a form of 'institutionalised discrimination' faced by family members as both matters could now be settled in the Family Court, giving non-married couples the same legal rights.

Children, **ex-nuptial** or nuptial, are protected under the *Family Law Act 1975* (Cth) and the *Status of Children Act 1996* (NSW).

Single-parent, step and blended families

Changing values in the community have contributed to the growth of single-parent, step and blended families. According to the 2021 Australian Bureau of Statistics Census, there were just over 6.7 million families in Australia; of these, 15.9 per cent were single-parent families. The majority of these were single-mother families; that is, 79.8 per cent of one-parent families.

When two single-parent families unite, they form a step or blended family. A step family consists of the parents and any stepchildren, while if the parents then have a natural or adopted child together, they become a blended family. The 2021 Census revealed that 12 per cent of 'couple families with dependent children' were deemed to be either 'step' or 'blended'. Indeed, 25 per cent of all registered marriages in Australia in 2021 involved individuals who were marrying for the second time.



Figure 12.3 According to the 2021 Australian Bureau of Statistics Census, there were just over 6.7 million families in Australia; of these, 15.9 per cent were single-parent families. The majority of these (79.8%) were single-mother families.

Data from the 2021 Census also reveals that there were 182 229 step-families, representing eight per cent of couple families with dependent children, and 99 564 blended families, accounting for four per cent of couples with dependent children.

ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born to parents who are not married

Legal Links

For more information about changes to family structures, visit the website of the Australian Institute of Family Studies.

Although a step-parent may be deemed 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. 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).

In the case of *Falconio v Conchita* [2009] FamCA 1323, Mr Conchita sought to oppose his ex-wife's second husband from adopting his children aged 14 and nine years old. The court ruled that under the *Adoption Act 1993* (ACT) the child's best interests would be best served under their adopted father, rather than their biological father, who had spent limited time with his children due to geographic distance.

Same-sex marriages

In December 2017, the federal government responded to a postal survey and passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Australia joined the growing number

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of countries that have legalised same-sex marriage, including, Canada, France, New Zealand, Norway, the United Kingdom and Germany. According to the Australian Bureau of Statistics, as of June 2021 there were 99 000 same-sex couples living in Australia.

Review 12.2

1. Outline a range of alternative family relationships.
2. Discuss the status of traditional First Nations and polygamous marriages within current social and community values.
3. Compare and contrast single-parent, step and blended families.
4. Define 'de facto relationship' and outline the extent to which the law recognises de facto relationships.

Legal rights and obligations of parents and children

Universally, the rights of children are paramount as the most vulnerable members of any culture. The rights of children are articulated and protected by the *United Nations Convention on the Rights of the Child* (1989), which has been signed and ratified by 194 United Nations member states. The convention has 54 articles and 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 the Convention in 1990 and hence is bound to its terms under international law.

Both state and federal legislation therefore requires parents to act upon a range of obligations and responsibilities regarding their children whether they are together in a relationship or separated. NSW laws govern the behaviour of parents regardless of their relationship. Federal law governs the behaviour of parents if they separate.

In New South Wales, a number of laws allow parents to raise their children as they see fit, within general guidelines. Parents should:

- provide adequate food and shelter
- protect their child from abuse or neglect
- provide access to education
- provide discipline
- provide medical treatment.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), parents that do not provide the basic requirements for proper development (food, shelter, hygiene, medical and dental care, adequate supervision and emotional security) may face 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.

Media

Parents narrowly avoid jail after neglecting injured toddler to smoke meth

Heather McNeill

The Sydney Morning Herald

29 September 2022

A Perth couple whose two-year-old daughter was repeatedly injured after they left her unsupervised while [the parents were] smoking methamphetamine has narrowly avoided jail.

Travis Heise, 42, and Natasha Bland, 32, admitted that in 2019 they would lock themselves in the bedroom of their Lockridge home to take around 'a gram a day' of the illicit drug while up to 10 children were in other areas of the house.

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Heise's youngest child was regularly attacked and injured by the other older children while unsupervised, with the couple failing to seek medical treatment for her for eight months until she developed cauliflower ear.

Once the child was taken to a doctor, medical staff raised concerns about child neglect and police arrested her father and took the toddler to Perth Children's Hospital.

The little girl had sustained extensive injuries including large bruises to her face, ears, neck, chest, back, arms and abdomen. There were also cuts and bite marks on the child's arms and her toes and fingertips were showing early signs of infection.

Both parents were subsequently charged with engaging in reckless conduct that resulted in the suffering of a child and were sentenced in the Perth District Court on Thursday.

Judge Andrew Stavrianou said the offence existed to protect children in the community and sentenced both parents to a 15-month suspended jail term.

The NSW Government Department of Family and Community Services (FACS) is responsible for implementing the laws. If child abuse or neglect is suspected, FACS may initiate a Joint Child Protection Response (JCPR) program, which is a collaboration between FACS, NSW Police and New South Wales Health. Since 2017, JCPR programs have provided a timely and coordinated intervention in instances where child neglect or abuse is suspected or is proven. A JCPR may investigate claims of abuse or neglect, provide care and support services, or refer the individual to crisis counselling.

Education

Parents cannot refuse their child an education, but they do have the right to choose where their child will be educated. Changes made in 2009 to the *Education Act 1990* (NSW) make it compulsory for a child to attend an educational facility from the age of six until 17. 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.

There are provisions for the parent to educate the child at home, as long as the child is educated according to curricula approved by the state NSW Education Standards Authority. Failure to enrol a child in a school or to give the child access to an education is a criminal offence and carries fines of up to $5500. Children over the age of 15 can be fined or given community service for failing to attend school under section 22 of the *Education Act 1990* (NSW).

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 unreasonable or excessive.

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

New South Wales is the only state in Australia that has stipulated what is deemed 'unreasonable' corporal punishment. The *Crimes Amendment (Child Protection–Physical Mistreatment) Act 2001* (NSW), amended under section 61AA, states that force applied to any part of the head or neck of a child or to any other part of the body that results in bruising, marking or other injury lasting longer than a 'short period' is unreasonable. Corporal punishment has been banned in over 30 countries. In 2015, the United Nations recommended a total ban on all forms of physical punishment for children, citing the link between physical forms of discipline experienced as a child as a justification for acceptance of violence in adult life in certain circumstances.

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Figure 12.4 Parents have the right to discipline their child by using 'reasonable' physical force in order to correct their child's behaviour. Only New South Wales has stipulated what is deemed 'unreasonable' corporal punishment.

Legal Links

You can read about a recent Australian case in the article, 'Woman accused of hitting girl, 5, with spoon "because she wanted to"' on the 9 News website at https://cambridge.edu.au/redirect/10368.

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 to be in the child's best interests.

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 1998* (NSW) defines a child as a person who is under 16 years and a young person as one who is aged 16 or 17. 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.

In 2015, a Brisbane family refused to allow their seven-year-old son a blood transfusion during a liver transplant due to their religious beliefs. The Supreme Court ordered the transfusion to take place as it would 'significantly improve the quality of the boy's life'.

Review 12.3

1. Outline the influence of the *United Nations Convention on the Rights of the Child* (1989) 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 using either of the cases *In the Marriage of Sanders* (1976) 10 ALR 604 or *F v Langshaw* (1983) 8 Fam LR 832.
3. Explain the concept of parents' responsibility or obligations to their children, using media articles.
4. Outline the aim of the NSW Joint Child Protection Response program.

Separated parental obligations 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 the child is the chief factor that courts must take into consideration when parents separate and wish to make parenting orders.

The *Family Law Act 1975* (Cth) has undergone numerous amendments over the years, including significant amendments with respect to children. For example, the *Family Law Reform Act 1995* (Cth) removed the term 'custody' and set out principles underlying the concept of 'best interests of the child'.

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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, and introduced the presumption that 'equal shared parental responsibility' was in the best interests of the child, except in the case of abuse or family violence.

Most recently, the *Family Law Amendment Act 2023* (Cth) simplified the objectives of Part VII (Children) of the *Family Law Act 1975* (Cth). The aim was to ensure the best interests of children were met (including the safety of the child and their carer from exposure to family violence, abuse, neglect, or other harm), and and to give effect to the Convention on the Rights of the Child 1989.

The 2023 amendment, which came into effect on 6 May 2024, removed the presumption of shared parental responsibility, and introduced a refined list of factors for the Courts to consider when deciding what is in a child's best interests:

- the safety of the child and their carer/s, which includes looking at any history of family violence
- the views of the child
- the needs of the child (developmental, psychological, emotional and cultural)
- what capacity the person who will be responsible for the child has to provide for these needs
- the benefit the child will gain from a relationship with parents and other significant people, where it is safe to do so
- anything else relevant to the child's specific circumstances.

In addition, various culturally specific factors are carefully considered when determining the best interests of children from Aboriginal or Torres Strait Islander backgrounds.

The Child Support Scheme was introduced to enforce maintenance orders on parents who do not reside with their dependent 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. The scheme ensures that parents fulfil their financial responsibility towards their children, thereby ensuring compliance with the law.

Review 12.4

1. Identify the requirements that must be satisfied before a person can leave school.
2. Explain why consent to medical treatment is necessary, and why age determines legal capacity to give consent.
3. Evaluate the extent to which parents should be able to smack their children.
4. Outline the ways child support legislation makes parents compliant with financial responsibilities.

Adoption

Adoption is a state responsibility and in New South Wales is governed by the *Adoption Act 2000* (NSW). The aim of adoption law is to ensure that the best and most appropriate parents are found for the child. The needs of the adults are secondary to the needs of the child. This Act has been repeatedly amended in line with changing community values. As mentioned previously, definitions of family have changed significantly over recent decades and adoption is no exception. Over the last 30 years, the rate of adoptions has fallen dramatically. In 2021–2022, only 208 adoptions were finalised in Australia, compared to 9798 in the 1971–1972 period. This is a reflection of changing social and community values where traditionally

adoption
the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

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unplanned teenage pregnancies were kept secret and frowned upon. Young mothers were often encouraged to 'give their child up' for adoption to an older family that were not able to have their own children.

Over time, improvements in birth control and technologies, attitudes towards ex-nuptial children and four-year wait lists have seen a massive decrease in adoptions in both New South Wales and Australia.

Biological parents

relinquishing parent a parent who nominates their child for adoption

Both biological or **relinquishing parents** must give consent for adoption; however, there is a 30-day revocation period during which they can change their minds. A single mother can give consent; however, the father must have been notified prior to the adoption and be given 14 days to respond. A birth mother cannot consent to adoption within three days of her child's birth. Children aged over 12 years must consent to their adoption themselves. 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.

Adoptive parents

Under the *Adoption Amendment (Same Sex Couples) Act 2010* (NSW), prospective adoptive parents:

- can be married couples or those in long-term, stable de facto relationships (including same sex couples)
- can be individuals who are not in a relationship
- must be over 21 but under 51 years of age
- must be at least 18 years older than the child (for male parents) and at least 16 years older than the child (for female parents).

The *Adoption Amendment (Same Sex Couples) 2010* (NSW) sparked significant community debate as it challenged traditional ideals of parenting, marriage and sexuality. As mentioned previously, definitions of family and family law continue to change, and many conservative members of the community were outraged by the decision to allow same-sex couples to be parents.

Other key outcomes of declining adoption rates since 2011 include 'open' adoptions, whereby both biological and adoptive parents remain in contact and agree to support children in adopted situations. In 2014, the *Child Protection Legislation Amendment Act 2014* (NSW) (repealed) was passed in response to approximately 18 000 children being 'foster cared'.

Media

Adoptions fall to 30 year low amid court delays, border closures

Mary Ward

The Sydney Morning Herald

3 December 2021

Adoption in Australia has dropped to its lowest level in three decades as services say pandemic family court delays and border closures have resulted in a backlog of cases amid a general downward trend.

There were 264 adoptions finalised in Australia in 2020–21, the fewest since national reporting began in 1990–91.

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Adoptions from overseas in 2019–20 and 2020–21 were the lowest on record, although these have been in decline since the late 2000s.

In its report, the Australian Institute of Health and Welfare said COVID-19 travel restrictions and the pandemic's impact on visa applications likely contributed to the low number of inter-country adoptions finalised in the past two years, and noted they may appear in next year's data.

Renée Carter, chief executive of Adopt Change, said the drop in numbers was 'concerning'.

'We know there has been an impact from the COVID environment, however permanency is more important than ever,' she said. 'It is critical we recognise our responsibility to provide a home for every child.'

The biggest change was in adoptions where the child is known by the adoptive parents – typically adoptions by foster carers – which dropped from 249 in 2019–20 to 183 in 2020–21.

However, the AIHW said this was mostly due to a decline in NSW, where carer adoptions rose significantly last year following amendments to legislation in 2018.

'COVID certainly has had an impact on the courts because they went online, so there have been delays and backlogs,' said Barnardos chief executive Deirdre Cheers.

'But the bigger driver, which is not new, is that child protection workers are not prioritising adoption, possibly because of the historical implications.'

Ms Cheers said Barnardos had 40 to 50 families on its books in NSW hoping to adopt a child. The organisation facilitated 33 adoptions during the 2020–21 financial year; all were open adoptions, meaning the children still have contact with their birth families.

While adoption was not right for all children – particularly Indigenous children and children who can be returned to their homes – Ms Cheers said young children were being disadvantaged by long wait times when 'time is of the essence'.

Ms Carter agreed. 'There are not enough carer homes for children who are not able to remain safely with their family of origin, and there are not enough children being provided with the stability of adoption when they have been living with a family for many years,' she said.

Associate Professor Amy Conley Wright, director of the University of Sydney's Research Centre for Children and Families, did not believe the pandemic had a significant impact on the decline in adoptions, noting it has been a trend for several years.

'There's a lot of caution about using adoption in the out-of home care system in Australia, and that is a result of past harms, through the Stolen Generation,' she said.

'Particularly with inter-country adoption, [the] decline is a global phenomenon and is the result of the development of local solutions so that children do not need to be taken away from their culture.'

Dr Conley Wright said given the bulk of adoptions in Australia now followed established foster arrangements, adoption often did not mean a change in a child's care.

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Analysis 12.1

Read the media article on the previous pages.

1 Explain why rates of adoption in Australia are at their lowest level in three decades.
2 Where has the biggest change in adoptions occurred? Why do you think this may be so?
3 Discuss how COVID-19 impacted the rates of adoption across Australia.
4 Define an 'open adoption'. Do you think they would be beneficial to adopted children? Discuss why or why not.
5 Is adoption a viable option for all children? Discuss why or why not.
6 Discuss why inter-cultural adoptions are currently experiencing a global decline.



Figure 12.5 Hollywood star Angelina Jolie (second from the left) has adopted several of her children from overseas countries.

Overseas adoptions

Inter-country adoptions are governed by the Hague Convention on *Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) 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 advice line for families intending to adopt a child from overseas. In 2017, the responsibility for managing and establishing Australia's intercountry adoption programs moved to the Australian Government Department of Social Services. However, globally the number of children being adopted has declined. In 2022, the United Nations estimated that around 260 000 adoptions take place worldwide each year.

Review 12.5

1 Define 'adoption'. Explain how changing community values have led to a huge decline in adoption.
2 List the conditions that must be met by prospective adoptive parents. Evaluate these requirements with regards to the child's 'best interests' and how the traditional role of parents has changed. Use legislation and media as evidence.
3 Describe why an increasing number of parents sought overseas adoptions. Examine how legal and non-legal measures assisted adopted families to seek justice.

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12.2 Responses to problems in family relationships

Divorce

Divorce is the legal dissolution (termination) of a marriage. Under section 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. According to 2021 Census data, 30 per cent of Australian marriages end in divorce. Moreover, the Institute of Family Studies indicated that 56 244 divorces were granted in 2021. Indeed, 2021 Census statistics revealed that over 1.8 million people were divorced (1 831 952) and over 600 000 were separated (674 590) at that time.

Before 1975, married couples who wanted to divorce had to apply under the *Matrimonial Causes Act 1959* (Cth) (repealed) 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 1959* (Cth) (repealed) included adultery, cruelty (family violence), insanity, chronic alcoholism and desertion. Divorce hearings were conducted in District Courts and required lawyers and evidence in highly adversarial and often public courtrooms. As a consequence, many couples either stayed in unhappy marriages or lived apart without lawfully remarrying.



Figure 12.6 According to 2021 Census data, 30 per cent of Australian marriages end in divorce.

The *Family Law Act 1975* (Cth) 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 removed 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. 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 they do not want to continue. Couples 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.

divorce
the legal termination of a marriage by an official court decision

Although the *Family Law Act 1975* (Cth) 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 section 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.

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Since the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), compulsory mediation before the parties can seek a divorce order has been introduced.

With the introduction of the no-fault divorce, the crude divorce rate peaked in 1976 at 4.6 per 1000 residents. Data from the Australian Bureau of Statistics released 1 December 2023 indicates the divorce rate was 2.4 per 1000 in 2022. In approximately 95 per cent of separation cases, families are able to avoid resolutions by the court. Unfortunately, in some cases, disputes can end bitterly and become extremely expensive.

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 and a divorce order is issued. The parties have 12 months from the date of the **divorce order** to resolve issues regarding payment of maintenance and division of property. The parties can apply for an extension for more time, but the court may not grant the extension.

decree nisi
an order that is made by the Federal Circuit and Family Court to signal the intended termination of a marriage

decree absolute
a final decree of the dissolution of marriage

divorce order
a final divorce certificate that is proof 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 this 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.

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, the term 'residence' is used, and 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.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) introduced compulsory mediation between disputing parents and established 65 Family Relationship Centres to encourage an amicable resolution, especially where children were involved. Parenting plans can be formulated at these centres. 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.

The *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) also introduced the presumption that equal shared parental responsibility is in the best interests of the child. The exception was in cases where there was reasonable grounds to believe that the child has been subject to abuse or family violence (see *Isles & Nelissen* [2022] FedCFAMC1A 97), where the priority for the Federal Circuit and Family Court is the protection of the child rather than the maintenance of a meaningful relationship with an abusive parent. The Magellan Program was developed by the Court to protect children who have been allegedly exposed to abuse by dealing with such cases within six months to determine an appropriate parenting order. In such instances, the compulsory mediation requirement is also waived to ensure the welfare of the children.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) was criticised on a number of grounds. One of these was that it did not deal adequately with family violence, thus exposing children who had previously been victims of parental abuse to the possibility of further abuse.

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Another criticism centred on the idea that the child's views were not given enough weight. There were also complaints that the Act did 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 or a 'one week on, one week off' arrangement.

The *Family Law Amendment Act 2023* (Cth) addresses some of these criticisms, by stipulating that the best interests of the child are most effectively served by considering their views in the formulation of parenting orders. Further, the notion of shared care has now been changed with the 2023 amendments removing the presumption of equal shared responsibility, noting there has never been a requirement for children to spend equal time with each parent. The Act now provides a set of factors the court must consider when deciding what is in a child's best interests (see page 385).

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. In 2019, approximately five per cent of parents could not reach an agreement and applied to the then Family Court of Australia to make parenting orders. Section 64B of the *Family Law Act 1975* (Cth) 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.

In Court



***Simic & Norton* [2017] FamCA 1007**

In the process of an acrimonious divorce, Mr Simic and Ms Norton (names have been changed) spent more than $860 000 in legal fees.

Justice Robert Benjamin expressed concern at the 'win at all costs' mentality, and observed that 'the consequences of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children'.

He referred the matter for investigation by the Legal Services Commissioner of New South Wales.

You can read more about this case at http://cambridge.edu.au/redirect/10324.



Review 12.6

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' with reference to the 'kiss and make up' clause.
3. Read the media article "Obscenely high": How Family Court costs are destroying parents and their children'. Assess the extent to which the *Family Law Act 1975* (Cth) achieves justice for divorcing couples.
4. Contrast 'shared parental responsibility' and 'shared parental care'.
5. Explain why 'shared parental responsibility' might not be in the 'best interest of the child'.

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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 Federal Circuit and 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 Federal Circuit and Family Court. When determining property allocation under sections 75 and 79 of the *Family Law Act 1975* (Cth) (or sections 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 homemaker 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 Federal Circuit and 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. For example, in the case of *Hoffman v Hoffman* [2014] FamCAFC 92, the judge rejected Mr Hoffman's claim of 70 per cent of the $10 million assets and ruled a 50–50 split, recognising Mrs Hoffman's contribution as a homemaker was not 'menial'. Mr Hoffman's claim of 'special contributions' in relation to his entrepreneurial skills was not sufficient to sway the judge to award him more than an equal share of the family assets.

Financial agreements – 'pre-nups'

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, 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. (Note: agreements regarding children are illegal.)



Figure 12.7 While 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.

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Financial 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. A financial agreement in *Thorne v Kennedy* [2017] HCA 49 was heard before the High Court of Australia. The court held that a financial agreement signed by one of the parties under undue influence was both unconscionable and unenforceable.

Review 12.7

1. Describe the factors that are considered 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 Federal Circuit and Family Court can make and comment on the number of families needing courts to resolve their disputes.
4. Discuss the value of 'pre-nups' in both celebrity and non-celebrity households.

Dealing with domestic violence

Domestic violence continues to be one of the main social, judicial, political and economic issues within the Australian community and media. The most alarming statistic of one woman being killed weekly across the nation dates back to 1996, when Jean Lennon was shot dead by her estranged husband, Hoss Majdalawi, outside the Family Court in Parramatta. The subsequent case of *R v Majdalawi* ([1996] NSWSC), and hundreds of others similar, serve as a reminder that dealing with domestic violence is a complex process and reducing harm to victims through legal and non-legal methods has been extremely difficult to achieve.

Women are four times more likely to be assaulted by a known person and approximately 73 per cent will experience repeated attacks. Additionally, 61 per cent will have children in their care. According to the New South Wales Bureau of Crime Statistics and Research, in 2021 there were over 32 000 domestic-related assaults in New South Wales and domestic assaults accounted for over half (53.3%) of reported assaults. A 2023 Australian Bureau of Statistics report also indicated that 64 per cent of all homicides occurred in a residential location, and that family violence against women and their children was projected to cost both the NSW and the Australian communities $4.5 and $13.6 billion, respectively.

Federal responses

The Australian community has conducted range of major reviews into domestic violence, some of which are:

- *Family Courts Violence Review: A Report*, Professor Richard Chisholm (2009)
- *Family Violence: A National Legal Response*, ALRC Report 114 (2010)
- *Domestic Violence: Issues and Policy Challenges*, Parliament of Australia (2015)
- *Personal Safety Survey*, Bureau of Crime Statistics and Research (2019).

Analysis 12.2

Watch the video 'What is family violence?' produced by the Federal Circuit and Family Court of Australia, and available online at https://cambridge.edu.au/redirect/10459.

1. What fraction of the cases before the Federal Circuit and Family Court of Australia involve allegations of family violence?
2. Explain what you understand by the notion of family violence.
3. Provide examples of behaviour that is classified as family violence.
4. Is all family violence physical? Discuss why or why not.
5. What do you understand by the notion of coercive control? Give some examples.
6. Why are court-created safety plans utilised? Explain why they are important in the court process.
7. Where can couples find more information about family violence?

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In citing these reviews, it is apparent that substantial resources have been committed to dealing with the causes, process and outcomes of domestic violence. One of the main legal responses has been the federal government's 'National Plan to Reduce Violence against Women and their Children 2010–2022', which aimed for a 'significant and sustained reduction in violence against women and their children' in Australia, in partnership with state and territory governments and other key stakeholders.

One initiative from this plan is the Australian Domestic and Family Violence Death Review Network, established in 2011 by state and territory coroners with goals to reduce domestic and family violence-related homicides. The Network published its first report in May 2018, providing national data with respect to all intimate partner homicides that occurred between 2010 and 2014.

In October 2022, when the first National Plan concluded, a new National Plan to End Violence against Women and Children 2022–2032 was released. The new plan highlights what is required to end gender-based violence in a single generation, and identifies four domains:

- prevention
- early intervention
- response
- recovery and healing.

Violence involving children

Article 19 of the *United Nations Convention on the Rights of the Child* (1989) declares that no child shall 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, abuse, neglect, maltreatment or exploitation, including sexual abuse.

The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) broadened the definition of domestic violence to include controlling or coercive behaviour and serious neglect of a child. Under this amendment, courts had to follow new provisions for child-related cases in order to deliver on a child's best interests.

NSW Government responses

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 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

Case Study

Rosie Batty

In 2015, Rosie Batty's former partner beat their 10-year-old son Luke to death. The father had requested time with his son despite a restraining order placed on him by Victorian police and Rosie had agreed to allow the father time with Luke, only to witness the horrific scene, which took place at cricket training.

The father was shot dead by police after the incident, which inspired Rosie to campaign tirelessly for an end to such circumstances.

Rosie received the 2015 Australian of the Year award for her work in trying to rid the Australian community of domestic violence.



Figure 12.8 Rosie Batty speaks at the funeral service for her son Luke Batty.

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- threatening behaviours, such as stalking and damaging the victim's property
- effecting social isolation by preventing someone from contacting family and friends
- intentional damage or destruction to property, including harm to animals.

It also includes 'threatening behaviour' that coerces, controls or causes the victim to be 'fearful'.

In enacting the legislation governing domestic violence, the NSW Parliament expressly stated that **domestic violence** in all its forms is unacceptable. Under the *Crimes (Domestic and Personal Violence Act 2007* (NSW) (s 9), victims of domestic violence and police officers can apply for an **Apprehended Domestic Violence Order (ADVO)**. They work by listing behaviours that the **defendant** must not do – such as not assault, threaten, harass or intimidate the **protected person**.

These are called 'conditions' of the ADVO. 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 and receive up to two years' imprisonment.

Under the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (NSW) police are able to film incidents of reported domestic violence, which can be used in evidence to support a conviction.

In 2018, the *Crimes Act 1900* (NSW) (s 37) was amended to add harsher penalties for perpetrators of choking, strangling or suffocating their victims. Under previous common assault legislation, such offences carried only a maximum two-year sentence. Now, such offences carry up to five years' imprisonment. In addition, ADVOs remain in force for two years and can remain indefinite in certain circumstances. The amendments also highlight the occurrence of such violence as a red flag in relation to more fatal outcomes.

Violence involving children

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) covers abuse as well as neglect. Specifically, section 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 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 Apprehended Violence Order (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)).

Effectiveness of the law in protecting victims of domestic violence

Educational campaigns have 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. The constant reminder of one death per week on average continues to drive legislative reform.

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.



Video 12.1 NSW Police informational video from 2017 about conducting ADVO compliance checks (01:59)

domestic violence any act, whether verbal or physical, of a violent or abusive nature that takes place within a domestic relationship

Apprehended Domestic Violence Order (ADVO) a specific type of Apprehended Violence Order issued under Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) when the perpetrator of violence is a family member

defendant (violence) the person subjected to an Apprehended Violence Order

protected person (violence) the person applying for protection through an Apprehended Violence Order

breach to fail to obey

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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. In a Bureau of Crime Statistics and Research report, Dr Don Weatherburn stated that, in four out of the five cases, ADVOs had been successful in putting a stop to violence, intimidation and harassment.

Several states have introduced mandatory counselling for perpetrators of domestic violence. Criminal penalties apply if they fail to attend. In 2015, a $60 million package was introduced in New South Wales to target perpetrators of domestic violence. Men who have been jailed for about nine months are required to undergo mandatory behaviour change programs to change their views on women, power and relationships. The NSW Government also has the 'Minimum Standards for Men's Behaviour Change Program' to help shape the behaviour of the perpetrators of 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. A 2019 Senate inquiry began investigating these matters. Research by the Australian Institute of Family Studies (AIFS) shows that in 93 per cent of cases, former partners share responsibility when they agree to consent orders.

During its 12 years of operation, the 'National Plan to Reduce Violence against Women and their Children 2010–2022' had four action plans, each lasting three years.

- The innovative Domestic Violence Response Training program (DV-Alert) was expanded to offer free training to health workers. The plan also targeted workplaces, and in 2014, ACT public services introduced leave for domestic violence purposes.
- The Second Action Plan (2013–2016) focused on strengthening the First Nations community and other vulnerable women who may be disabled or are from a diverse cultural background. It launched the National Aboriginal and Torres Strait Islander Women's Alliance to promote safety for First Nations women. Funding was granted for the 'Stop the Violence' program to help people with a disability who are subjected to violence. DV-Alert was extended to First Nations health workers to notice and report domestic violence. It also focused on improving programs for men who commit acts of violence.
- The Third Action Plan (2016–2019) focused on prevention and early intervention by changing societal attitudes towards violence and stopping violent behaviour through early action. Its key focus was on First Nations women and children who experience violence in their homes, and the development of information to support women start a new life after escaping violence.
- The Fourth Action Plan (2019–2022) agreed on five national priorities to reduce family, domestic and sexual violence, and set out an ambitious but practical agenda to achieve change and eradicate the unacceptable acts of violence against women and their children.

Other initiatives include Australia's National Research Organisation for Women's Safety, Our Watch and The Line social marketing campaign. Evaluation of these campaigns revealed more than 85 per cent of people claimed they understood what constituted violent behaviour and expressed their intention to change their behaviour.

The 'NSW Domestic and Family Violence Prevention and Early Intervention Strategy 2017–2021' was launched to help government and non-government organisations working together to design and implement prevention and early intervention strategies. More recently, in August 2017, the NSW Government allocated $25 million towards the 'Rent Choice Start Safely' program providing private rental subsidy to help people on moderate incomes escape domestic and family violence. In 2019, the NSW Government announced rental reforms allowing victims of domestic violence to immediately break their lease to escape violent homes. Although tenants will

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need to provide evidence from a doctor or a police officer, the initiative helps to keep victims safe in situations of share tenancy arrangements.

According to a report, 80 to 90 per cent of victims of domestic violence are also subject to financial abuse. The Penda app was launched in September 2017; Penda is Australia's first app that aims to secure financial independence for victims aged between 18 to 55 years, as well as for young women in regional areas.

The 2017 federal budget launched a 'National Affordable Housing Agreement' with funding of $115 million per year to prioritise support for homeless people, including those affected by domestic violence. It provides long-term funding for secure women refuges from 2018.

The 'National Domestic Violence Order Scheme' allows for the interstate transfer of information about domestic violence perpetrators. New South Wales adopted this scheme through the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016* (NSW) (repealed). In the 2017 state budget, New South Wales continued to lead with funding of more than $350 million over the next four years to tackle domestic violence.

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) redefined domestic violence and placed more weight on the safety of the child. The priority was 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 be redefined to include actual or threatened conduct that causes a family member to reasonably fear or be concerned about their safety.



Review 12.8

1. Define 'domestic violence'. Calculate its cost to the community.
2. Describe the main legal responses to domestic violence at both state and federal levels.
3. Evaluate some of the main responses to dealing with domestic violence in Australia, using statistics and media articles.

Media



Cheers in court as Perth man who stabbed ex-wife to death handed life sentence

Rebecca Peppiatt

WA Today

1 September 2023

A Perth man has been sentenced to life in prison over the violent murder of his wife.

Justice Anthony Derrick said he was satisfied Paul Cannon had intended to take Lynn's life on the night of the murder, but that it was not premeditated or planned.

At a sentencing hearing on Wednesday, the court was told how, after decades of emotional abuse and an eventual separation, Paul had sent threatening texts to Lynn in the months and days leading up to her death.

Derrick sentenced Paul Cannon to life in prison, with a minimum term of 19 years to be served. As the sentence was handed down, there was an eruption of cheering and clapping from Lynn's family and friends in the public gallery.

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Methods of resolving disputes

Family dispute resolution

Family dispute resolution is defined in section 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. If there is a history of family violence, family dispute resolution may not be appropriate.

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 – but disputing parties can go to private providers of counselling services if they choose. The Federal Circuit and Family Court of Australia 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 Federal Circuit and 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 Federal Circuit and 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 judgment or ruling. The Federal Circuit and Family Court of Australia can make decisions regarding division of property, maintenance, and 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 file an application for divorce online through the Commonwealth Courts Portal. A small administrative fee is payable once the application has been made. This fee can be waived in certain circumstances (for example, for those who hold government concession cards or are experiencing financial hardship).

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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 Federal Circuit and Family Court of Australia focuses more on reconciliation and on encouraging compliance than on arbitration and the use of sanctions or coercion.

The merger of the 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 was a specialised court – that is, outside the judicial hierarchy – and it heard matters relating to separation, divorce and other disputes related to marriage. Its jurisdiction was 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, subsequently called 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 had a similar jurisdiction to the Family Court in that it heard matters relating to divorce, the division of property, maintenance and children, and it heard these for both married and de facto couples. It did not 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 (about 80%) were heard in the Federal Circuit Court, and more complex issues, such as the intention of a parent to move interstate or to emigrate, medical interventions like transgender and hormone therapy, and serious allegations of family violence or child abuse (Magellan cases) were heard in the Family Court of Australia. All other issues (such as adoption, child support, inheritance and wills) were heard in the appropriate state courts.

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). This meant that in New South Wales, any matter relating to the care and maintenance of a child would be heard in the Family Court, and the same federal provisions cover all children.

In 2018, at the National Family Law Conference, it was argued that the family law system was in desperate need of reform and improved resourcing. The courts administering family law were suffering with unsustainable workloads and significant backlogs resulting in unacceptable delays, with over 105 000 family law proceedings issued each year and over 20 000 of those requiring judicial determination. The pending cases in both courts were causing great challenges.

In September 2021, new *Family Law Rules* were published governing the operation of the newly merged Federal Circuit and Family Court of Australia. The rules (in conjunction with *The Lighthouse Project* and the *Evatt List*) were designed to reduce unnecessary cost and delay; ensure the safety of families and children; and facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. Further, the federal government introduced the Family Law Amendment Bill 2023 to Parliament in March 2023. This Bill passed the Senate with amendments on 19 October 2023 and was subsequently given Royal Assent by the Governor-General on 6 November 2023. The *Family Law Amendment Act No. 87 2023* (Cth) has been designed to make Australia's family law system simpler, safer and more accessible. Details of the Bill are on the Parliament of Australia website.

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The Children's Court

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.

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.

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 is decided, 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.

The role of non-government organisations

There are a number of non-government organisations (NGOs) that provide support for families and individuals who may be struggling with personal relationships and other family issues. Some of the better-known organisations are operated by religious groups such as the Salvation Army or the Anglican Church (Anglicare).

Non-government organisations that are not associated with religious groups and that provide similar services include Relationships Australia and the Smith Family. 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 NSW Government has committed $750 million to 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. Barnados Australia is a charity that supports children in a range of services including adoption, out-of-home care and children education. Other NGOs that lobby against domestic violence include the Luke Batty Foundation, White Ribbon and Polished Man.

The role of the media

The Family Law Courts have embraced new media technologies, providing self-help guides, brochures, 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, and to provide referrals for legal advice. Major media outlets publish high-profile cases on a regular basis, which serve both their interests and those of the general public. Unfortunately, shocking stories of violence are constant and serve as a reminder that the consequences of family violence can be gruesome and unacceptable.

Notwithstanding the public interest, the courts need to protect the privacy of individuals affected by the breakdown of a relationship, so they restrict how the media publish court proceedings, and thus protect the personal information of separating families. Media outlets can face fines for the publication and identification of family members, and the Federal Circuit and Family Court of Australia uses pseudonyms for all family members.



Figure 12.9 There are a number of non-government organisations, such as the Salvation Army, that provide support for families and individuals struggling with family relationships.

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Media

National survey on attitudes toward domestic violence shows widespread misunderstanding of issue

Nour Haydar

ABC News

29 March 2023

Almost half of Australians incorrectly believe women and men equally commit domestic violence, according to a major survey which shows 'extremely troubling' community attitudes towards violence against women …

More than one-third of respondents believed that women going through custody battles make up or exaggerate claims of domestic violence, while a similar number believed it is common for sexual assault accusations to be used as a way of getting back at men …

To read the rest of this article, visit the *ABC News* website at https://cambridge.edu.au/redirect/10350.

Review 12.9

1 Explain the concept and purposes of 'family dispute resolution'.
2 Explain the difference between adjudication and other methods of dispute resolution.
3 Justify why a separate Children's Court is necessary.

12.3 Contemporary issue: Recognition of same-sex relationships

About the issue

The history of same-sex relationship reform is an important factor in understanding current legislation. The *Marriage Act 1961* (Cth) and various state statutes gave heterosexual couples a number of rights and obligations from which same-sex couples were excluded. Although the *Sex Discrimination Act 1984* (Cth) and state anti-discrimination Acts protected heterosexual de facto couples against discrimination on the basis of marital status, same-sex couples did not enjoy the same protection because their legal marital status remained 'single'.

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.

compensation a monetary payment made to a person to make amends for any loss, injury or damage to property they have suffered

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At the time, this was consistent with other countries across the world. However, 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, including the United States, the United Kingdom, France, Brazil, Ireland, Canada, New Zealand and Germany. In 2024 Thailand became the first South-East Asian country to legalise same-sex marriage.

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), amending the definition by adding those words to section 5(1) of the *Marriage Act 1961* (Cth). The purpose of the amendment was to clarify that parties to a marriage must be one man and one woman. This meant that any same-sex marriage was 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.

The Relationships Register Amendment (Recognition of Same-Sex and Gender-Diverse Relationships) Bill 2014 (NSW) had the potential to allow same-sex couples who had married overseas to have their marital status recognised by the NSW Relationships Register for administrative purposes. This meant that same-sex couples would have been able to register their marriage and declare themselves as 'married' when completing forms. However, this Bill lapsed in 2015. Tasmania (2010) and Queensland (2011) had previously passed similar legislation recognising same-sex marriages performed overseas. This did not mean that same-sex 'marriages' had any legal standing within Australia.



Figure 12.10 Thousands celebrate in Prince Alfred Park, Sydney in 2017 when the result of the national postal survey was announced.

It was not possible for any same-sex marriage to gain legal standing in Australia until the definition in the Act had been amended to allow same-sex marriages. This happened in 2017, when a national postal survey was held and a majority of people taking part voted in favour of same-sex marriage.

The vote was not binding, but the desire of the voters was recognised. So the government responded by passing new legislation and on 9 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) came into effect.

Legal responses

The law 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) (repealed) 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 2010, 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 (now the Federal Circuit and Family Court of Australia). In 2009, the *Veterans' Entitlements Act 1986* (Cth) was amended to include same-sex relationships for war widow pensions. In September 2010, the NSW Parliament passed the *Adoption Amendment (Same-Sex Couples) Act 2010* (NSW) allowing same-sex couples to adopt.

A major change in state laws concerns the recognition of a same-sex partner as the 'parent' of their partner's child. Male partners in a heterosexual marriage or de facto relationship have

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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 Federal Circuit and Family Court of Australia 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) (repealed) granted equal parenting rights for the female partners of mothers, and both are listed as mothers on the child's birth certificate. This change gave children born into same-sex relationships equal rights to inheritance from both parents and protected the rights of both mothers in matters involving the children if the relationship ended.

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 were highly critical of any added protection of the rights of same-sex couples. However, it should be noted that over the years there was a steady shift in public opinion in favour of same-sex marriage. In a Nielsen poll conducted in 2013, 65 per cent of respondents supported same-sex marriage. More significantly, however, was the 2017 postal survey of Australian voters conducted by the Australia Statistician on behalf of the federal government. It asked, 'Should the law be changed to allow same-sex couples to marry?' and 12.7 million responses were returned with 61.6 per cent answering 'Yes'. This led to the legislative amendment outlined below.

The Australian Human Rights Commission (AHRC) held a number of inquiries into areas of discrimination and human rights violations. AHRC also made recommendations to the government regarding the removal of institutionalised discrimination and legislation that did 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 lobbied and campaigned for the legal rights and social equality of gay and lesbian couples include Australian Marriage Equality and the NSW Gay and Lesbian Rights Lobby. Australian Marriage Equality argued that the legally recognised institution of marriage should not exclude these couples. A different classification sent the message that their relationships were of a lesser standard or character and that the people were second-class citizens. Justice required changing the law to make marriage available to all Australians who chose 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 LGBTQIA community on their rights and providing referrals to legal and welfare services.

Many of the lobby groups that opposed equal rights for homosexual couples have a religious affiliation. Under current discrimination laws, religious groups are still 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.

Anti-Discrimination NSW (ADNSW) 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. ADNSW's third function is to advise the government and make recommendations.

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It has made a number of submissions to both 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 enjoyed by married couples.

In November 2017, following the national postal survey, Western Australian Liberal Party Senator, Dean Smith, introduced a private senator's bill – The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) – into the Senate. Key elements of the bill were the redefinition of the word 'marriage' in the *Marriage Act 1975* (Cth), to read 'two people' rather than 'a man and a women'; and the repeal of section 88EA of the Act, which banned the recognition of same-sex marriages lawfully entered into in foreign jurisdictions. The bill was first presented to the Senate on 15 November 2017, and on 29 November it was passed by 43 votes to 12. The bill went to the House of Representatives on 4 December, and on 7 December the vote was held, resulting in 128 votes in favour and four against.



Review 12.10

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.
3. Identify the ways our current laws represent the views of our community on same-sex relationships.

12.4 Contemporary issue: The changing nature of parental responsibility

About the issue

In the opening sections of this chapter, the rights of children and obligations of parents in a range of areas were described and explained. Regardless of the relationship status between parents, there is little difference between a parent's legal obligations and responsibilities in relation to their children. When relationships have broken down in the past, some parents sought 'custody and control' over their children, enforcing their parental rights. However, the concept of parental responsibility has changed.

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, 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 to that effect. 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 and on the safety of children.

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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 per cent of parenting plans and orders, children spend more than half of their time with their mother, although cases where the child spends no time or less than 30 per cent of their time with one parent are less common. Where significantly less time is spent with a male parent, the reason is likely to be a concern about abuse or family violence and/or entrenched conflict. In the case of the female parent, it is concerns regarding their mental health, and issues surrounding transport or finances, as well as abuse.

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), namely 'primary' (for example, positive and meaningful relationship with parents; protection from violence and abuse) and 'additional' considerations (for example, financial ability of a parent to care for a child; ability of a parent to provide a child with emotional and intellectual support). The *Family Law Amendment Act 2023* (Cth) however has produced a much more refined version of the section 60CC factors and spends additional time focusing on child-centric decisions. The new factors used to determine a child's best interests were outlined on pages 384–385.

Section 60CC(2A) in the *Family Law Amendment Act 2023* (Cth) now stipulates that the Court must consider any history of family violence, abuse or neglect as well as any family violence order, past or present, when determining what measures would serve to ensure the safety of a child and each person who is charged with the care of that child. Moreover, the presumption of equal shared parental responsibility has now been rescinded and, significantly, the mandatory consideration of 'equal time' or 'substantial and significant time' with parents has also been revoked. Indeed, there is no obligatory requirement for children to spend equal time with each parent.

The 2023 amendments to the *Family Law Act 1975* (Cth) therefore provide a new framework for decision-making and parental responsibility.



Figure 12.11 The focus of the law is on ensuring that parents fulfil their legal obligations towards their children.

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For example:

- If it is safe to do so, and subject to any court orders stating otherwise, parents are encouraged to consult each other regarding major long-term issues pertaining to a child (with the best interests of the child being the paramount consideration): s 61CA of the *Family Law Act 1975* (Cth).
- Courts will continue to make orders relating to parental responsibility and will now provide for joint or sole decision-making on major long-term issues: s 61D(3) of the *Family Law Act 1975* (Cth).
- Parties are required to consult with each other and make a genuine effort to come to a joint decision where they have an order for joint decision making on major long-term issues: section 61DAA of the *Family Law Act 1975* (Cth).

Non-legal responses

Community- and church-based institutions, as well as nationwide 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.

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 provides 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.

The Lone Fathers Association is another non-legal support organisation that provides counselling, legal support and advice for fathers. In addition, Lone Fathers, through media outlets, has vowed to fight any changes that may affect their access to children.

Responsiveness of the legal system

Sometimes changes to the law have led to changes in what the community accepts as moral behaviour, and at other times laws 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 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. Concerns with the 2006 reforms to the *Family Law Act 1975* (Cth) led to further amendments in 2023, as the government aims to provide a structure within which the court can act in the 'best interests' of the child.



Review 12.11

1. List the issues surrounding equal parental responsibility and discuss the effectiveness of legal and non-legal responses to these issues.
2. Discuss why the presumption of equal shared parental responsibility has now been rescinded.
3. Discuss why the Lone Fathers have vowed to fight any changes that may affect their access to children.

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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 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 1996* (NSW) 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

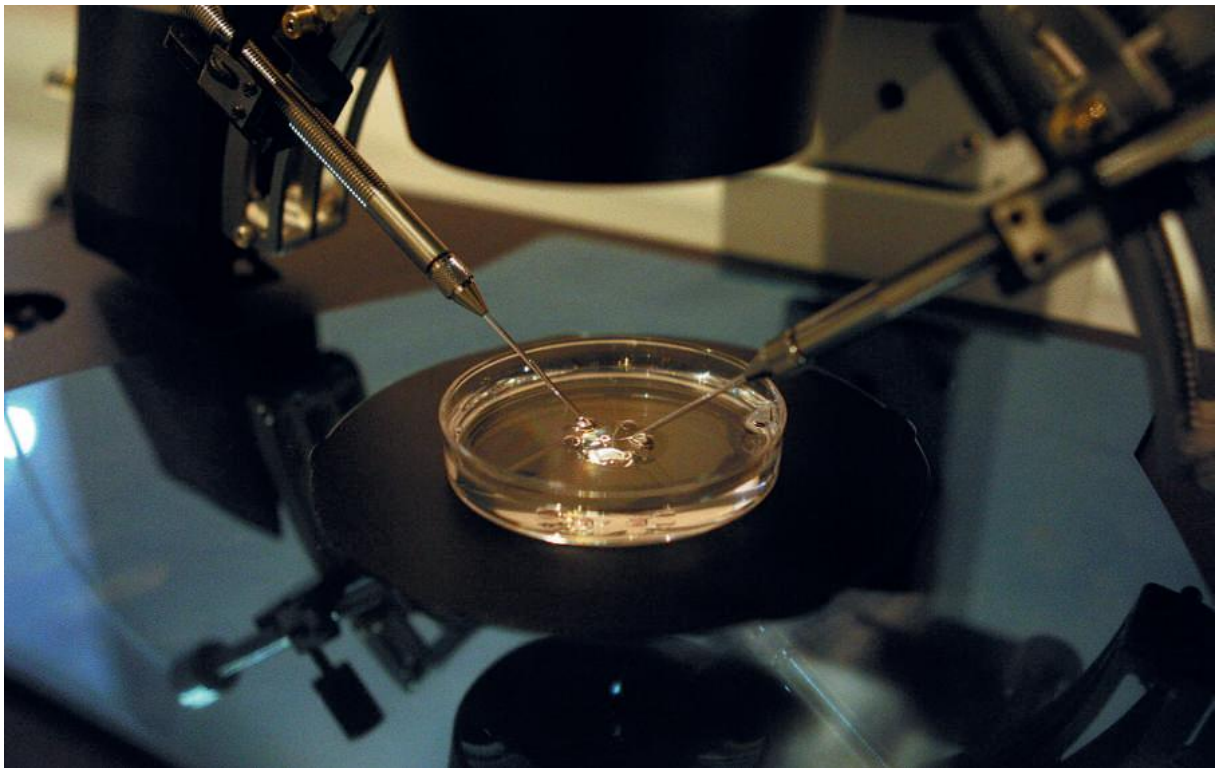


Figure 12.12 Birth technology, such as IVF treatment, has created many legal issues, from paternity and rights of inheritance to who has care of and control over the child.

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because the donor's name appeared on the child's birth certificate. The court rejected 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 (that is, 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.

In 2019, a High Court decision ruled in favour of Robert Masson's (not his real name) demand to deny his daughter, the child's mother and her partner to move to New Zealand. Masson, a sperm donor to the child born in 2007 via artificial insemination, successfully argued he was the father of the girl and therefore had the right to be involved in her upbringing.

Media

High Court rules sperm donor is daughter's legal father, stopping her moving overseas with mother

Elizabeth Byrne

ABC News

19 June 2019

A man who donated his sperm to a friend with the belief he could play a role in the child's life has won a High Court fight sparked by the mother's decision to move to New Zealand with their biological child.

The decision by the court overturns an appeal the girl's mother and her wife won and reaffirms an earlier ruling that ordered they remain in Australia and consult him on major parenting decisions.

The court heard the man, given the pseudonym Robert, initially agreed to donating his sperm to his friend, and was of the belief he would be involved in his child's life.

The girl was conceived in 2006 and in the intervening years he maintained a close relationship with her, introducing her to his extended family and volunteering at her school canteen.

Both the girl and her sister, who is not related to Robert, call him 'daddy'.

The legal fight began when the mother and her same-sex partner, given the pseudonyms Susan and Margaret, decided to move to New Zealand, a decision Robert challenged in the Family Court.

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 child to the couple when the child 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

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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 2010* (NSW), commercial surrogacy remains illegal even when carried out overseas.

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 15 principles for a national surrogacy model; the principles include:

- 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 that 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 NSW Parliament introduced new legislation in 2010 to regulate surrogacy arrangements in New South Wales. The NSW Parliament passed the *Surrogacy Act 2010* (NSW), which commenced in early 2011.

Before the commencement of the *Surrogacy Act 2010* (NSW), 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 the 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 and Young Persons (Care and Protection) Act 1998* (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 previously noted, 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 section 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

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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 1975* (Cth), 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 *Assisted Reproductive Technology Act 2007* (NSW) commenced in 2010 and regulates many ethical and social aspects of assisted reproductive technology. One of the key objectives of this Act was to prevent commercialisation of human reproduction. In June 2017, the NSW Government ordered a review of this Act to improve the information about donors and donor-conceived children kept on the Central Register.

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 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. The following are some of the other requirements of the new framework:

- 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 *Surrogacy Act 2010* (NSW) 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 up to $275 000 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 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 around the exploitation of women in poor or developing nations and concerns surrounding the welfare of any child born in such arrangements.

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The problematic nature of international surrogacy was raised in 2014 when Australian couples who had entered into a surrogacy arrangement 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 allegedly rejected by the commissioning couple who then returned to Australia with his twin sister, leaving baby Gammy with his mother in Thailand. However, in a 2016 hearing the judge cleared the family of abandoning baby Gammy 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 Australian Government Department of Immigration and Citizenship (as it was then called) in 2013 that raised numerous issues about 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. These issues include the following:

- 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 even though 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, as surrogacy, whether altruistic or commercial, is a contentious issue raising specific moral and legal issues within individual countries, that might never be resolved in one international instrument. Some countries have taken the initiative in deeming commercial surrogacy illegal. In Cambodia, an Australian nurse was jailed in August 2017 for running a surrogacy business in which Cambodian women were paid to have babies for Australian couples. In India, a bill to regulate surrogacy (the Assisted Reproductive Technology Bill 2013) is still pending in parliament. The *Assisted Reproductive Technology (Regulation) Act 2021* (India) was passed as an Act of Parliament on 20 December 2021.

Analysis 12.3

Read the article 'Should commercial surrogacy be legal in Australia?' (*The Sydney Morning Herald*, 14 May 2015) at http://cambridge.edu.au/redirect/10325.

1. Discuss whether or not commercial surrogacy should be legalised in Australia.
2. Outline the ethical and legal issues that need to be considered.
3. Visit the website of Surrogacy NSW. Outline the key legal aspects of surrogacy.

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 with 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

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even genetically connected to', and would deny the child either a male or a female parent and role model. Surrogacy Australia, on the other hand, is a not-for-profit organisation that educates and supports individuals about surrogacy and promotes ethical surrogacy options for couples.

Commercial surrogacy has become increasingly popular, particularly for women in poorer nations like India as they can earn $5000 to $7000 per child, potentially providing their own families enough money to purchase their own homes and a better life. This resulted in a growth in commercial surrogacy centres, where permitted, and it is an estimated global billion-dollar industry.

Responsiveness of the legal system

As the federal government has been slow to pass laws relating to surrogacy issues, the courts are constrained by existing legislation. There remain glaring inconsistencies in surrogacy laws between the states and territories. There are no surrogacy laws in Northern Territory, while all other states place varying restrictions on who can be involved in a surrogacy arrangement. For example, Western Australia allows surrogacy arrangements for heterosexual couples or women, while other states have no such restrictions. 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 but also in protecting the interests of children who are born into surrogacy arrangements.

Review 12.12

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.

12.6 Contemporary issue: Care and protection of children

About the issue

As previously mentioned in this chapter, federal and state legislation provides clear guidelines to parenting in a wide range of areas. Legislation passed in 2014 (the *Child Protection Legislation Amendment Act 2014* (NSW) (repealed)) focused on the safety and wellbeing of a child or young person by providing them a secure environment free from four types of harm, namely emotional abuse, neglect, physical and sexual abuse. Overall, emotional abuse (any act by a person having the care of a child that results in the child suffering any kind of significant emotional deprivation or trauma, including exposure to family violence) was the most common type of substantiated child maltreatment in Australia during 2020–2021 (Australian Institute of Health and Welfare).

In accordance with 'permanent placement principles' (s 10A), when parents are unable to fulfil their legal obligations, child protection authorities investigate adoption or 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 abuse during the pregnancy (*Child Protection Legislation*

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Amendment Act 2014 (NSW) (repealed) 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).

Consequences of parental neglect under state laws

Administered by the NSW Family and Community Services (FACS), foster care is usually temporary and involves a couple taking on the parental responsibility of caring for and controlling a child. Under the *Children and Young Persons (Care and Protection) Amendment Act 2009* (NSW) (repealed) families worked alongside FACS and with the biological parents to 'foster' the care and protection of children that needed to reside away from situations of neglect.

All states and territories, together with the federal 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) (repealed) 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 2012* (NSW). The aim of the amendments were 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' notifications made to Community Services has increased steadily and continues to grow.

A 2020–2021 report by the Australian Institute of Health and Welfare (AIHW) showed that the number of notifications has risen from 396 234 in 2017–2018 to 470 538 in 2020–2021 – an increase of 19 per cent, but a drop from the 2016–2017 figure of 531 900. Of all children where an investigation had found there was reasonable cause to believe there was, or was likely to be, abuse (known as a 'substantiation'), 81.1 per cent of the children had one substantiation, 11.4 per cent had two, and 3.9 per cent had four or more substantiations of abuse or neglect.

The report also showed that in 2021–2022 there were 55 800 children placed in out-of-home care, of whom 95 per cent had previously been in contact with the child protection system.

Legal responses

The *Family Law Act 1975* (Cth) defines 'family violence' as any action or threat of violence by one family member against another, including witnessing that action or threat, that causes fear or apprehension about personal safety.

In the situation of parents separating, there was formerly a presumption that it was in the best interests of the child for parents to share parental responsibility equally. However, the 2006 amendments to the *Family Law Act 1975* (Cth) said that this presumption does not apply if there is a risk of child abuse or family violence. Then in 2023, a further amendment completely removed the presumption of equal shared responsibilities. When deciding what parenting arrangements will be in the best interests of the child, the court now considers a number of factors, one of which is whether there is any history of family violence, abuse or neglect.

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. 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.

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The Child Protection Helpline, set up by Family & Community Services NSW, enables easy access to report any child at risk of harm. Once such a report is received, 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 any of the 22 Joint Child Protection Response teams for further assessment and investigation. Members of this team include Community Services representatives, NSW Police and representatives from NSW Health. Once the report has been made, the response team will speak to the young victim and act to protect the child if there is 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. Reporting reduces both the amount of administrative work for a caseworker and the call load on Helpline, thus allowing caseworkers to focus on assessment. The initial implementation of the Child Protection National Minimum Data Set in 2013 has served to standardise the reporting procedures on an annual basis and has enabled a more comprehensive collection of data.



Figure 12.13 People in contact with children, such as teachers and support workers, must have a certificate recognising no history of child abuse or inappropriate behaviour.

It now has child data for three areas of notification: investigation and substantiation, care and protection orders, and out-of-home care.

In 2016, the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016* (NSW) (repealed) amended the following legislation to strengthen the powers of the Office of the Children's Guardian for better protection of children:

- *Child Protection (Working with Children) Act 2012*
- *Children and Young Persons (Care and Protection) Act 1998*
- *Teaching Service Act 1980*
- *Education (School Administrative and Support Staff) Act 1987.*

Under the Working with Children Check system, people in contact with children must have a certificate that is valid for five years, recognising no history of child abuse or inappropriate behaviour. The system is administered by Service NSW and ensures all teachers, support workers and parent volunteers must have a valid Working with Children Check.

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.

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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 that 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 that support families and children in crisis; these include:

- **Child Abuse Prevention Service** – 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
- **Benevolent Society** – 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 that aims to make parenting easier by helping parents become better parents
- **Kids Helpline** – offers confidential help and online counselling and support services for young people aged between five and 25 years; these services are provided 24 hours a day, seven days a week
- **Create Foundation** – gives a voice to children in out-of-home care to help improve the child protection system.

Various local municipal councils also offer programs providing help and support for children and young people.



Figure 12.14 Survivors of clerical abuse and activists from Ending Clergy Abuse, representing victims in 25 countries on five continents, hold a vigil in Rome in September 2023.

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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.

The report *Keep Them Safe: A Shared Approach to Child Wellbeing* was from the 2008 NSW 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 protection.

The federal government has recognised child abuse and neglect as major issues. In April 2009, the National Framework for Protecting Australia's Children 2009–2020 came into effect. This is a collaboration between federal, state and territory governments, as well as relevant non-government organisations. It identifies six outcomes:

1. Children live in safe and supportive families and communities.
2. Children and families access adequate support to promote safety and intervene early.
3. Risk factors for child abuse and neglect are addressed.
4. Children who have been abused or neglected receive the support and care they need for their safety and wellbeing.
5. First Nations children are supported and safe in their families and communities.
6. Child-sexual abuse and exploitation is prevented, and survivors receive adequate support.

An increasing number of people under 18 have been placed on care and protection orders. Indeed, Australia's child protection system provided services to one in 32 children aged less than 18 years during 2020–2021. AIHW in 2022 also reported that nationally nearly 178 000 children received child protection services (investigation, care and protection orders and/or out-of-home care) during 2020–2021.

While some would argue 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 2015, 79 children who had been previously reported to Community Services as being at risk of significant 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. In 2017, 'Their Futures Matter' – a new approach to child protection and wellbeing in New South Wales – brought together all government agencies, non-government organisations and the community to deliver the right supports to vulnerable children and families.

Also in 2017, a five-year Royal Commission concluded its investigation into institutional child-sexual abuse. The focus of these hearings had been on how various institutions, such as the Catholic Church, YMCA, Salvation Army and various private educational facilities, have responded to allegations of child-sexual abuse. The Commission made 409 recommendations after hearing evidence from survivors of child-sex abuse, school administrators and other witnesses.

Review 12.13

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, step, blended and single-parent families, and the main function of the family is the care and protection of its members.
- The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) defined marriage as 'the union of two people to the exclusion of all others, voluntarily entered into for life'.
- Marriage imposes legal rights and obligations. 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.
- The *United Nations Convention on the Rights of the Child* (1989) 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 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 apprehended violence orders (AVOs), apprehended domestic violence orders (ADVOs), injunctions and criminal charges.
- A number of countries around the world have recognised same-sex marriage, with Australia doing so in December 2017.
- 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.

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 considered when determining maintenance issues.

2 Discuss the issues surrounding step and blended families. 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.

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Extended-response questions

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 in the digital version this textbook. Refer to these criteria when planning and writing your response.

1 Evaluate the effectiveness of existing legislation in protecting individuals from domestic violence.
2 Consider if practical benefits such as superannuation, tax, property rights and medical consent issues are more important than the symbolic social role of marriage.
3 Assess the weight that should be given to children's views with respect to disputes about parental responsibility.
4 Discuss the role of the media and non-government organisations in family law.
5 Identify and critically evaluate current Australian surrogacy laws. Suggest reforms that could be made in this area.

Themes and challenges for Chapter 12 – Option 3: Family

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.
- In 2021 the Family Court of Australia was merged with the Federal Circuit Court of Australia to form the Federal Circuit and Family Court of Australia. It is hoped that this will assist in clearing some of the backlog in both courts.

Issues of compliance and non-compliance

- The Family Law Council (a Commonwealth statutory authority established under section 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 Federal Circuit and Family Court of Australia. 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 Federal Circuit and 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 and ADVOs are designed to provide protection against harm, there are concerns about their effectiveness. Approximately 10 per cent 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.

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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 LGBTQIA relationships. Recent law reforms have centred on providing same-sex couples the same rights and obligations as 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 supported same-sex marriage, parliament remained hesitant to act on this issue, instead reinforcing the legal definition of marriage as being between one man and one woman. However, on 9 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) commenced. The Act changed the definition of marriage and provided for marriage equality in Australia. The right to marry in Australia is no longer determined by sex or gender.

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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 major 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 non-government organisations to assist families with conflict resolution, such as counselling and mediation.
- Changes to the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (NSW) 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

This chapter is available in the digital versions of the textbook.

GO



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Chapter 14
Option 5: Shelter

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate the legal means of securing shelter and the effectiveness of the law in achieving justice for people seeking and providing shelter.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the role of the law in encouraging cooperation and resolving conflict in regard to shelter
- issues of compliance and non-compliance
- laws relating to shelter as a reflection of changing values and ethical standards
- the role of law reform in protecting the rights of those seeking shelter
- the effectiveness of the legal and non-legal responses in achieving just outcomes in regard to the provision of shelter.

At the end of this chapter, you will find a summary of the themes and challenges relating to shelter. This 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, you will:

- identify the key legal concepts and terminology that relate to shelter
- identify the different forms and purposes of shelter
- 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 explain what role legislation plays 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 social housing and community housing
- discuss the process of purchasing property and mortgages
- 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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Formative assessment: Assessment for learning

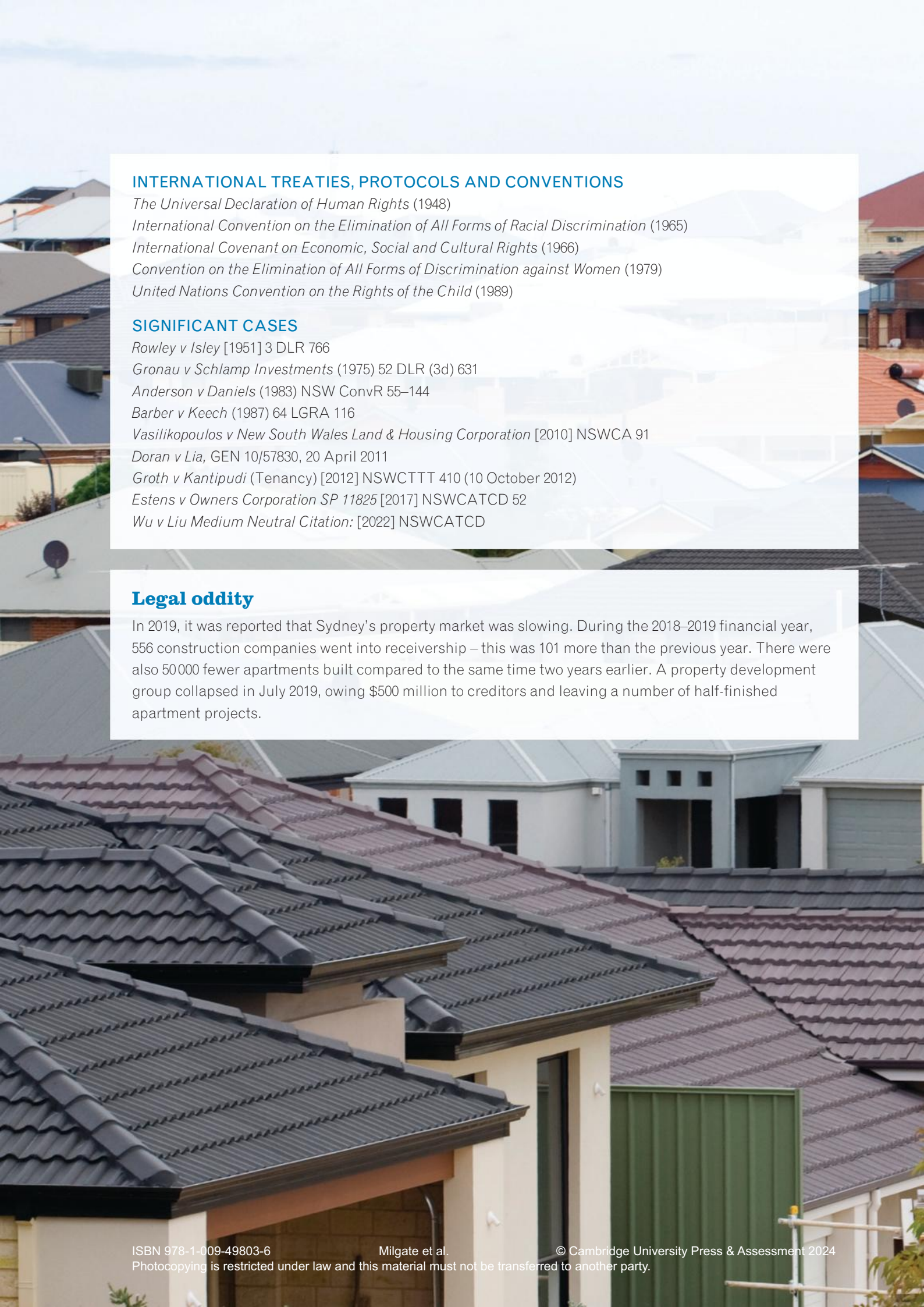
The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 31) and the 'learn to' activities (pp. 31–2) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Shelter' topic.

Relevant law

IMPORTANT LEGISLATION

Real Property Act 1900 (NSW)
Conveyancing Act 1919 (NSW)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Contracts Review Act 1980 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Fair Trading Act 1987 (NSW)
Community Land Management Act 1989 (NSW)
Home Building Act 1989 (NSW)
Swimming Pools Act 1992 (NSW)
Disability Discrimination Act 1992 (Cth)
Aged Care Act 1997 (Cth)
Retirement Villages Act 1999 (NSW)
Housing Act 2001 (NSW)
Age Discrimination Act 2004 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Competition and Consumer Act 2010 (Cth)
Residential Tenancies Act 2010 (NSW)
Boarding Houses Act 2012 (NSW)
Residential (Land Lease) Communities Act 2013 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Development Act 2015 (NSW)
Crown Land Management Act 2016 (NSW)
Conveyancing (Sale of Land) Regulation 2017 (NSW)
Retirement Villages Amendment Act 2018 (NSW)
Residential Tenancies Amendment (Review) Act 2018 (NSW)
Fair Trading Amendment (Short-term Rental Accommodation) Act 2018 (NSW)
National Housing Finance and Investment Corporation Act 2018 (Cth)
Housing Australia Act 2018 (Cth)
Real Property Amendment (Certificates of Title) Act 2021 (NSW)
Residential Tenancies Amendment (Rental Fairness) Act 2023 (NSW)

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INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

The Universal Declaration of Human Rights (1948)
International Convention on the Elimination of All Forms of Racial Discrimination (1965)
International Covenant on Economic, Social and Cultural Rights (1966)
Convention on the Elimination of All Forms of Discrimination against Women (1979)
United Nations Convention on the Rights of the Child (1989)

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 & Housing Corporation [2010] NSWCA 91
Doran v Lia, GEN 10/57830, 20 April 2011
Groth v Kantipudi (Tenancy) [2012] NSWCTTT 410 (10 October 2012)
Estens v Owners Corporation SP 11825 [2017] NSWCATCD 52
Wu v Liu Medium Neutral Citation: [2022] NSWCATCD

Legal oddity

In 2019, it was reported that Sydney's property market was slowing. During the 2018–2019 financial year, 556 construction companies went into receivership – this was 101 more than the previous year. There were also 50 000 fewer apartments built compared to the same time two years earlier. A property development group collapsed in July 2019, owing $500 million to creditors and leaving a number of half-finished apartment projects.

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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 this, 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 governments and the legal system's ability to provide justice for citizens. In light of the post-pandemic housing boom and subsequent interest rate rises, these issues have become more critical than ever as the property divide within Australian society widens further.

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 *Cambridge Dictionary* defines shelter as '(a building designed to give) protection from bad weather, danger, or attack'. 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.

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, and it is a social good. For example, people who experience homelessness are generally confronted with many disruptions to their rights, such as 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.

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 in 2024 continues to worsen with the cost of housing and rentals. This has been impacted by the rising cost of living, exacerbated by significant increases in interest rates and a lack of supply of housing in our cities and regionally. 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.

social housing affordable and secure housing provided by Housing NSW for low to moderate income earners who meet specific eligibility requirements

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 National Housing and Homelessness Agreement, which commenced on 1 July 2018 and is due to expire in 2024.

The external affairs power has been used in the past by the Commonwealth to influence or override state laws.

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Table 14.1 Main body of legislation concerning the rental or leasing of shelter and related planning matters

Legislation	Provisions
Residential Tenancies Act 2010 (NSW) *Residential Tenancies Amendment (Review) Act 2018* (NSW)	This Act outlines the main rights and responsibilities of tenants and landlords, and 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 has provided for the responsibilities of the Rental Bond Board of Australia. The review Act has updated the provisions in the 2010 Act and has given tenants greater protection. The former *Landlord and Tenant (Amendment) Act 1948* (NSW) covered the rights of a small number of 'protected tenants' in New South Wales. In 2019, the Act was repealed, and mostly incorporated into Schedule 2 of the *Residential Tenancies Act 2010* (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) (repealed)	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 NSW Government, can decide on matters pertaining to rental rebate and eligibility for public housing.
Competition and Consumer Act 2010 (Cth)	This Act was incorporated into the *Fair Trading Act 1987* (NSW) as a part of making consumer protection consistent across Australia. This Act 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 Land Management Act 2016 (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.
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.
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.

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

Torrens title
the central registration and transfer of ownership of property

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

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

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

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Table 14.1 *(Continued)*

Legislation	Provisions
Conveyancing (Sale of Land) Regulation 2017 (NSW) under the *Conveyancing Act 1919* (NSW)	These rules replaced the *Conveyancing (Sale of Land) Regulation 2017* (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. Disclosures must also be made about 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.
Strata Schemes Management Act 2015 (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.

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

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

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 Act 1999* (NSW).



Figure 14.1 People can obtain shelter by becoming a 'boarder' or 'lodger', but this type of accommodation offers little legal protection.

Review 14.1

1. Define 'shelter', using your own words.
2. Identify five reasons why obtaining shelter is vital.
3. Explain the influence of the Commonwealth's external affairs power in this area.
4. Assess why the *Residential Tenancies Act 2010* (NSW) does not apply to all tenants.

The right to shelter

As mentioned previously, the right to shelter involves more than simply acquiring housing. To conform to the concept of a human right, the housing must be considered 'adequate' and affordable, and according to the Australian Human Rights Commission, should satisfy the considerations discussed on the following page.

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Residents should be able to enjoy security of tenure. This means that the rights of the people occupying various forms of housing need to be clearly outlined. The availability of services and infrastructure is also essential, as housing that is isolated or not easily accessible can considerably affect the occupants' quality of life. Adequate housing must also be 'habitable', and it needs to be '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.

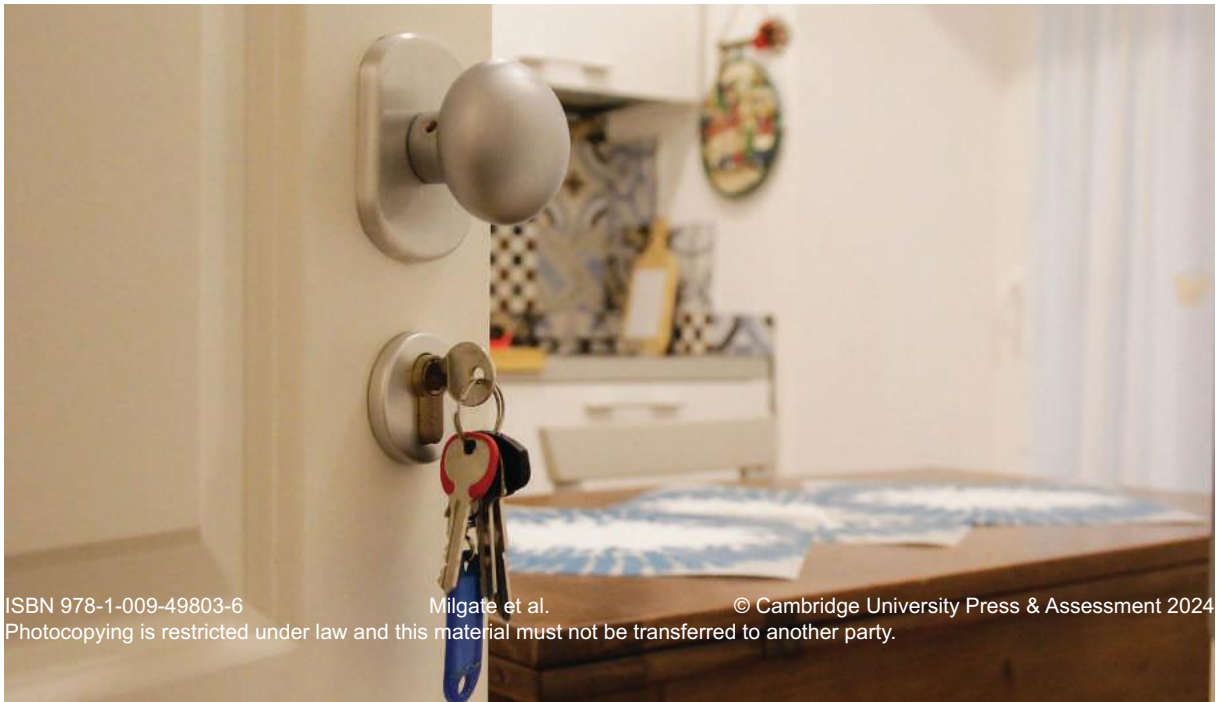
Australian law

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, the federal government can establish policy frameworks for a consistent approach to areas of concern nationally. The National Housing and Homelessness Agreement, which commenced on 1 July 2018, is such an example and is referred to later in this chapter.

Figure 14.2 There is no right to shelter within Australian domestic law, with most of the legislation clarifying people's rights and responsibilities related to various forms of housing.



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Table 14.2 Overview of the right to shelter according to international law

International treaty, protocol or convention	Provision relating to the right to shelter
The Universal Declaration of Human Rights (1948)	Article 25: '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 Convention on the Elimination of All Forms of Racial Discrimination (1965)	Article 5(e)(iii): '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.'
International Covenant on Economic, Social and Cultural Rights (1966)	Article 11: '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 Elimination of All Forms of Discrimination against Women (1979)	Article 14(2)(h): '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.'
United Nations Convention on the Rights of the Child (1989)	Article 27: ' … 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.'



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. What constitutional barriers does the Australian Government face when regulating housing and access to it?



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* (1948) 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.

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The NSW 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 through cash bonuses or exemptions from paying stamp duty taxes when purchasing a first property. In addition to this, most governments in Australia are investigating ways to alleviate 'housing affordability' problems. One method is to increase housing supply through planning powers invested in other government departments. Currently, neither of these measures seem to be addressing housing affordability or access to home ownership.

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

Governments also provide 'public housing' for people on low incomes at a rental rate much cheaper than what they would pay in the marketplace.



Figure 14.3 Hundreds turned out to Sydney Town Hall in 2023 demanding the state and federal governments do more to fix the housing crisis.

'Rental assistance' can also be made available to enable people on low incomes to rent a property in the market that they otherwise would not be able to afford. Currently, the national stock of social housing of what is available and what is planned falls significantly short of bridging the gap for the most vulnerable people in our society.

Other forms of social housing policy are developed to address the needs of people who are homeless. The NSW 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 per cent the number of young people who move from these services into long-term accommodation.

The National Housing and Homelessness Agreement 2018–2024 gives state and territory governments the responsibility to decide where and what type of services will be funded, as well as prioritising projects. Governments at both levels also deal with matters relating to social and **community housing**, such as building, allocation and refurbishment.

National Housing and Homelessness Agreement

Objectives

The objective of this Agreement is to contribute to improving access to affordable, safe and sustainable housing across the housing spectrum, including to prevent and address homelessness, and to support social and economic participation.

In addition to this, the National Housing Finance and Investment Corporation (NHFIC) was set up under the *National Housing Finance and Investment Corporation Act 2018* (the NHFIC Act). In October 2023, the NHFIC became known as Housing Australia. It acts independently of government to make loans, investments and grants to improve, directly or indirectly, housing outcomes by working collaboratively with state and territories.

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In response to the housing crisis in Australia, the federal government in 2023 established the 'Housing Australia Future Fund' to increase affordable housing supply across Australia.

Other forms of social policy are developed to address ways of building a sense of community in public housing areas and continually assess 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.

However, there is general consensus that governments of all political persuasions have failed to bridge the gap in regard to social housing. Reports by the Grattan Institute and the Australian Council of Social Service have found that up to $20 billion needs to be allocated to low-cost housing to make up for the shortfall that has developed through a lack of spending by state and federal governments. This has been further exacerbated by the once-in-a-generation property price increases evidenced across most capital cities in 2021–2022. As the housing crisis worsened in 2023, this became even more evident.

Conservative parties traditionally have introduced policies to make it easier for people to 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. This has been particularly evident in Sydney where housing affordability has worsened over the past three to five years.

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 2021 approximately 63 per cent of households were purchasing or fully owned their home, 25.8 per cent were renting privately, and 3.6 per cent were in social housing.

Historically, the 'Australian dream' was to own your own free-standing home on a traditional quarter-acre block. 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 from the 2021 Census of the types of dwellings in Australia showed that 70.3 per cent of all dwellings were separate houses, 17.3 per cent were medium density dwellings and 11.0 per cent were in high density dwellings, compared with 64.8 per cent, 19.4 per cent and 15.1 per cent in the Greater Capital Cities, respectively.

Table 14.3 Proportion of Australians by type of accommodation

Dwelling structure	2021 (%)	2016 (%)	2011 (%)	2006 (%)
Separate house	70	72.9	75.6	76.6
Semi-detached, row or terrace house, townhouse, etc.	13	12.7	9.9	9.2
Flat, unit or apartment	16	13.1	13.6	13.1
Other dwelling	1	1.3	0.9	1.1

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14.2 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 on 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, and 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.

Review 14.3

1. Outline the extent to which people have a right to housing.
2. Explain, using examples, why housing policies are needed.
3. Evaluate the policies of the New South Wales and federal governments to provide a range of homelessness action plans. Discuss what solution you think will be the most effective and why.
4. Explain why governments are increasingly recognising their responsibility to create social housing policies.

14.3 Purchasing shelter

Shelter will more than likely be the most expensive acquisition in a person's life. Decisions that are made 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 the legal process used to transfer title of ownership from one party to another

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

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 'licensed' conveyancer under the *Conveyancing Act 1919* (NSW) and the *Conveyancing (Sale of Land) Regulation 2017* (NSW). Licensed conveyancers must be covered by 'indemnity insurance' and it is illegal for anyone to carry out conveyancing work without being licensed.

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**. An unsuspecting buyer will not find matters affecting a New South Wales property when they do the required checks at NSW Land Registry Services.

The NSW Government established the Building Services Corporation within 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 later section, 'Protection for buyers'.

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Separate dwelling or shared space

Separate dwellings are homes on individual lots that do not adjoin other buildings. There is one 'title' to the property. However, 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.

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.

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 per cent 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 to consider that the law does not protect against. 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.

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

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).

There have been calls for the vendor to carry out some of the additional checks on the property, rather than responsibility for this being on the buyer. Some of the recommended checks that at present 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.

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 (discussed later in this chapter) 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 section 54A of the *Conveyancing Act 1919* (NSW).

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Figure 14.4 An auctioneer at work in Sydney in 2021 when record low interest rates saw a surge in home loan applications. When buying through an auction, the buyer will usually be competing against a number of people placing bids.

Some standard requirements contained in contracts for the sale of property include a number of disclosures that must be made by the vendor under section 52A of the *Conveyancing Act 1919* (NSW). Under section 149 of the *Environmental Planning and Assessment Act 1979* (NSW), 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.

easement
a right of someone other than the property owner to use the property for certain purposes

exchange of contracts
when the vendor and the buyer of the property exchange signed copies of the contract for sale

settlement
when final payment for the purchase of the property is made to the vendor, and the purchaser receives the title

The contract must also include a copy of the 'property certificate' that will allow the title to be searched at NSW Land Registry Services. 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 2017* (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 use the land for electricity lines or water pipes. A covenant is a restriction on a property that is part of the title, such as 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.

Also included will be information making the buyer aware of their 'cooling-off' rights (see the later section 'Protection for buyers'). 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 a critical phase of the conveyancing process. Once signed copies of the contract are exchanged, both parties are bound by the terms. It is from this point that a 10 per cent deposit of the purchase price is paid and the 'cooling-off' period applies.

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 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 will usually occur when answers to most of the buyer's searches have been satisfied. It is then the balance of the price of the property will be paid, comprising the other 90 per cent of the purchase price. NSW Land Registry Services will need to be notified about the transfer of the property to the

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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

It is important to have a secure and reliable system by which the ownership of land and transactions, such as sales, transfers, mortgages and subdivisions, are recorded. This is known as the land titling system.

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.

Crown land

More than half the land in New South Wales is made up of Crown land. According to NSW Land Registry Services, 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.

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

Many non-tidal waterways across the state also comprise Crown land, as does most tidal waterway land.

The *Crown Land Management Act 2016* (NSW) is the main piece of legislation that regulates the registering and managing of Crown land. This Act includes mechanisms for community consultation about the management of Crown land. It has also clarified and streamlined the system of tenure that exists concerning the use of Crown land.



Figure 14.5 More than half the land in New South Wales is made up of Crown land. An example of this is Hyde Park in Sydney, which was dedicated for public recreation in May 1878.

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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 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, although a small number of properties are still registered this way.

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

indefeasible title
title that has been transferred to the new owner, and will not be changed except under very limited circumstances

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.

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 even one 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 fewer and 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 NSW Government will transfer the registration of ownership to the Torrens title system.



Figure 14.6 The owner of a property must have a deed as documentary proof of their right of possession.

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' rather than 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.

The land register is central to the effectiveness of the Torrens title system. In New South Wales, this used to be managed by a government body known as Land and Property Information, which sat within the Department of Finance, Services and Innovation.

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In 2017 this responsibility was moved to NSW Land Registry Services, a private company with a 35-year concession from the state government. It manages a computerised land title register called the Integrated Titling System.

The state provides a guarantee that the register is accurate. If an administrative error occurs, and someone's rights are adversely affected, 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.

Introduction of the Torrens title system meant that, instead of a chain of documents, the landowner received a current certificate of title that showed all of the information – ownership, easements, mortgages and other relevant interests. More recently, New South Wales moved to a completely digital system for lodging land transactions. Under the *Real Property Amendment (Certificates of Title) Act 2021* (NSW), all existing paper Certificates of Title were cancelled, and new ones will no longer be issued. All titles were converted to electronic Certificates of Title. The requirement for a paper certificate was deemed unnecessary as the 'Torrens Title Register has always been and will continue to be the single source of truth as to the ownership of a person's home'. This securely stored digital register is backed up by both NSW Land Registry Services and the Office of the Registrar General and may be accessed either online or in person. The Certificate of Title reference numbers remain.

The current process of transferring Old System title to Torrens title means that 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. This means that it is more difficult to reclaim money lent in cases of foreclosure. It is also 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.



Figure 14.7 Company title as a system of registration used for documenting ownership of shared space, such as flats or townhouses, was used prior to strata title legislation in 1961.

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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 2015* (NSW) (which replaced the earlier *Strata Scheme 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 the 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, barbecue 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. Importantly, it will also contain the certificate of title numbers for each lot.

Under the *Strata Schemes Management Act 2015* (NSW), the owners of the properties make up what is referred to as the **owners' corporation**. The owner's 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:

- **Capital works 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 and repairs to roofs, gutters and driveways). All strata schemes registered in New South Wales must have a 10-year capital works 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 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

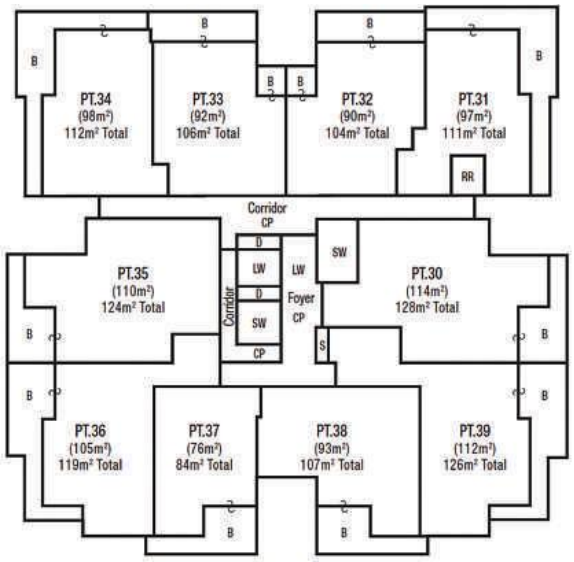


Figure 14.8 A strata plan

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the common property. It can also include the payment of insurance premiums such as building and public liability policies.

When the *Strata Schemes Management Act 2015* (NSW) and the *Strata Schemes Development Act 2015* (NSW) replaced earlier legislation, the aim was 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.

A relatively recent issue has been the matter of people offering their premises for short-term rental on platforms such as Airbnb. In the case of *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52, the owners' corporation tried to block Ms Estens from letting her unit on Airbnb when she was away. The court found that this infringed Ms Estens' rights under the *Strata Schemes Management Act 2015* (NSW). In 2018 the NSW Parliament passed the *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018*, which provided for amending the *Fair Trading Act 1987* to introduce a Code of Conduct for the short-term rental accommodation industry. It also had an amendment to the *Strata Schemes Management Act 2015*, which allowed owners' corporations to block short-term letting if the unit was not the owner's principal place of residence (so this would not have affected Ms Estens). However, neither of these changes had yet been made at the time of writing.

Community title

Community title allows for the subdivision of land so that share property can be created within conventional Torren's title.

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 Torrens title owners within that subdivision. This can include the shared use (and funding) 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 for 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.

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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.

arrears
money that is owed but has not been paid

Historically, many mortgages were fixed interest over 25 to 30 years. The benefit of this was that repayments did not change, which 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.

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 such as mortgages and personal loans. 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. 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**.

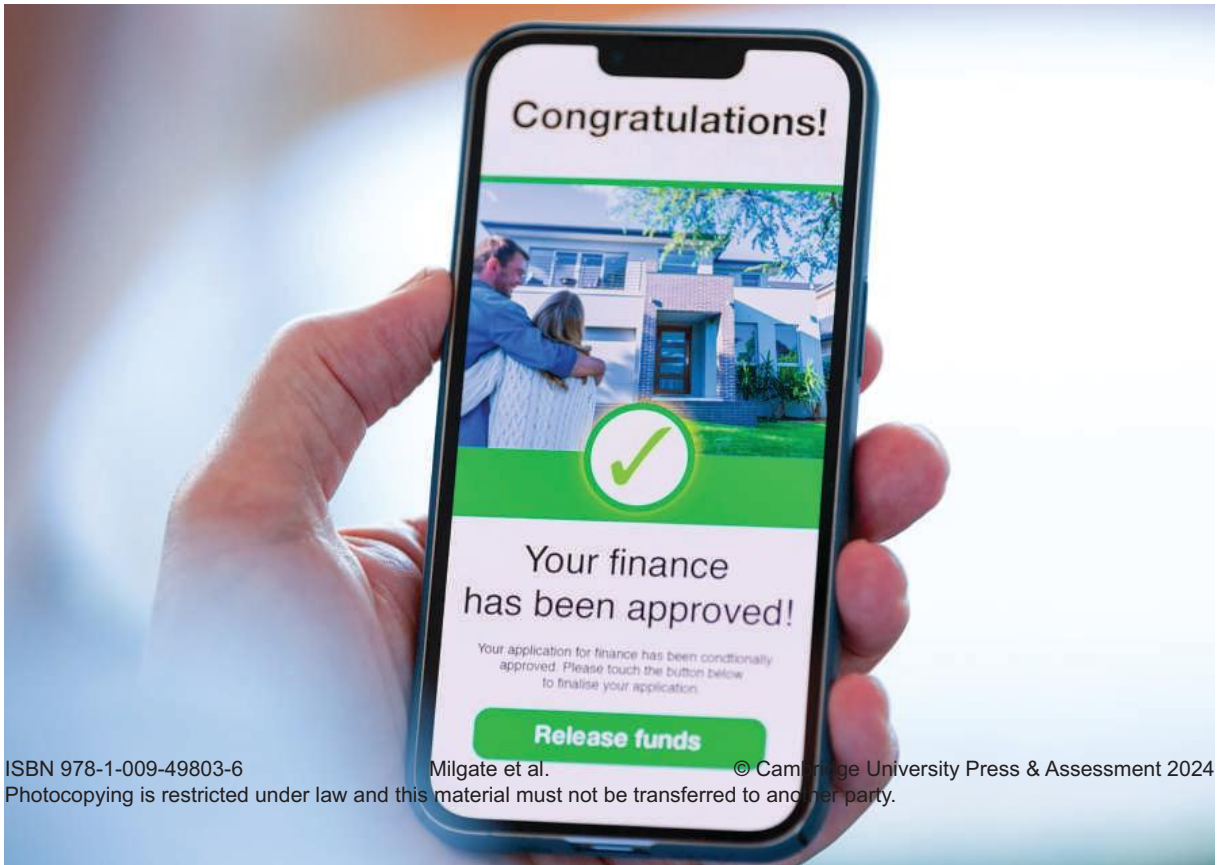
In addition to this, the second stage of consumer credit reforms that are relevant to home buyers include the banning of exit fees after 1 July 2011 and the provision of key facts that outline rights and responsibilities.

Post-COVID, interest rates on mortgages to 2023 have seen significant increases, which has ultimately impacted the amount of money able to be borrowed for home ownership.

Credit reporting

Once a person has obtained credit from a financial institution, a personal credit history is created to show their ability to meet their obligations in repaying what they owe. A credit report compiled about an individual's credit history generally includes the person's addresses, current and past

Figure 14.9 A mortgage is a type of loan where the financial institution holds the deed or ownership of the property until the buyer has fully repaid the loan.



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employment, and any information on credit applications, overdue accounts, court judgments, 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. Individuals who are refused finance to buy a home because of a problem with their credit history can contact Credit Repair Australia. Credit Repair Australia 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 privacy laws. These laws specifically deal with information collected by credit-reporting agencies and credit providers that is to be used fully or mainly for domestic, family or household purposes. Privacy laws also regulate the collection, use and disclosure of this personal information.

Under privacy laws, there are limitations on the types of information that can be held and for how long. The laws also limit who can access a person's credit file and restrict the reasons that allow a credit provider to access someone's credit report.

Review 14.5

1 Describe the purpose of a mortgage.
2 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 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

Gazumping can occur if the vendor and seller have come to a verbal agreement on the price of a property but contracts have not yet been exchanged and the 10 per cent deposit on the sale may not have been paid. During this time 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

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.

Research 14.2

The NSW Fair Trading website has information on gazumping in its section, 'Housing & property'.

1 If a prospective purchaser is gazumped, outline what refunds or compensation they are entitled to from the vendor or the agent.
2 List four things a purchaser can do to protect themselves from being gazumped.

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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 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 in the *Conveyancing Act 1919* (NSW). However, sections 66T and 66ZC identify certain cases where the cooling-off period does not apply, such as at auctions. This includes allowing the cooling-off period to be set aside if the parties agree, which is usually done to speed up the purchase.

If the purchaser wishes to withdraw from the contract during the cooling-off period they will have to pay 0.25 per cent of the purchase price, which will usually be deducted from the 10 per cent deposit already paid. This is to compensate the vendor for having the property off the market for a period.

Note that as a separate matter from the cooling-off period, the *Contracts Review Act 1980* (NSW) 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.



Figure 14.10 Once the contract for sale has been exchanged, the buyer has a five-day cooling-off period to reconsider if they wish to go ahead with the purchase. However, this cooling-off period can be set aside, which is usually done to speed up the purchase.

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.
- **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 homeowners 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 1980* (NSW), 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.

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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 earlier 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.

14.4 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.

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 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 needs a residential parking permit, who will pay for that and if there are any easements that may affect the tenancy.

residential lease an agreement between the owner of a property (landlord) and the person who is renting it (tenant)

condition report an inspection checklist of the state of the premises signed by both landlord and tenant prior to the tenant moving in

There are a number of notable areas of rights and obligations of tenants and landlords, which are discussed on the following pages.

Condition reports

A **condition report** is an inspection checklist of the state of the premises, signed by both landlord and tenant, prior to the tenant 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.

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Rates, water and electricity

Under section 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 nine 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. Regarding electricity, 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 off 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 prior to the tenant moving into the premises.

Under the *Residential Tenancies Act 2010* (NSW) money paid as a rental bond on residential property must be lodged with Renting Services in NSW Fair Trading, which holds it as security. The tenant may deposit the money directly, using the service Rental Bonds Online, or they may pay the landlord, who will then lodge it with NSW Fair Trading. 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 if the landlord is satisfied with the state of the premises. A small amount of interest may also be payable. Tenants registered with Rental Bonds Online can submit a claim, and if the landlord accepts, the payment of the bond will be refunded within two working days. If the tenant chose not to use Rental Bonds Online, 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 and give them 14 days to respond. If they do not do so, the bond money will be returned but if the landlord does respond it will be up to the tenant to apply to NCAT for a decision.

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. 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.

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Landlords also have rights. In *Wu v Liu Medium Neutral Citation:* [2022] NSWCATCD, the landlord successfully applied to receive payment for damages for breach of the lease including the withholding of bond money.

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 their 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 appropriate notice was given 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 they stay 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 NCAT to have these carried out 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'



Figure 14.11 Young tenants protest against rent increases in Sydney in 2023. Drastic increases in rent have forced many into difficult economic circumstances, as a confluence of factors have also driven up inflation and interest rates.

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written notice but, cannot increase the rent 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.

As a result of the short supply of rental properties in a lot of markets, there has been a rise or increase in rental bidding where potential tenants offer over and above what the landlord is asking. The NSW Government as a result introduced the *Residential Tenancies Amendment (Rental Fairness) Act 2023* (NSW). This means that any person including landlords and digital rental application providers are also not allowed to invite or solicit an offer for rent that is higher than the amount advertised for the property.

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 has 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. If the landlord wants to end it, they 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, in which case the money owed to the landlord would be determined.

The landlord can end the tenancy if they believe the tenant has breached the agreement. They 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 goods 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 previously outlined, 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.

In 2023, some commentators argued that Australia was not experiencing a housing crisis but a housing emergency. This has been created by a perfect storm of where there is a lack of appropriate supply of rental accommodation in many cities and regional areas with rents continuing to rise. In Sydney, house and apartment rents have risen 14.6 per cent and 24.8 per cent respectively year-on-year to July 2023. With property prices rising to historical levels, inadequate social housing has left renters more vulnerable than ever. While the protections for tenants and landlords have been made more explicit, market forces have seen the balance of power shift to landlords due to a lack of supply.

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Research 14.3

Do an internet search to complete the following tasks about tenants' rights and obligations under the *Residential Tenancies Act 2010* (NSW). You could start with the factsheets 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) essentially attempts to balance the protections afforded to both landlords and tenants. Some of the changes include the following:

- When a fixed term tenancy expires, the landlord has to give 90 days' notice to vacate under section 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 sections 88 and 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 within the specified time frame.
- If a tenant wants to sub-let, they must have the landlord's permission, but under section 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 area of security of tenure and the terms of the tenancy agreement. The Tenants' Union of NSW believes the 2010 Act 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 a later 'contemporary issue' section.

In 2017, NSW Fair Trading reviewed the *Residential Tenancies Act 2010* (NSW), and the *Residential Tenancies Amendment (Review) Act 2018* (NSW) was passed. The changes include:

- greater protection for victims of domestic violence. Tenants who need to escape a violent partner can now terminate their tenancy immediately and without penalty; victims who are tenants, or a co-tenant who is not the perpetrator, will not be held accountable for property damage that occurred during a domestic violence incident; and landlords and agents cannot list the tenant as being a victim of domestic violence as it may influence their ability to get another tenancy
- disputes over repairs and maintenance are reduced. NSW Fair Trading has new powers to resolve disputes between tenants and landlords over repairs and maintenance and property damage caused by tenants; this includes the ability to issue rectification orders
- seven minimum standards that rental properties have to meet to ensure the property is fit for inhabitation; these standards are:
  - the property is structurally sound
  - there is adequate natural or artificial lighting in each room
  - there is adequate ventilation
  - the property is supplied with electricity or gas and has adequate electricity or gas outlets for lighting, heating and appliances
  - there is adequate plumbing and drainage
  - the property is connected to a water supply service or infrastructure for the supply of hot and cold water for drinking, washing and cleaning
  - the property contains bathroom facilities, including a toilet and washing facilities, which allows the user privacy
- rent increases are limited to once every 12 months for periodic leases; this will reduce tenants' fear of retaliatory rent increases.

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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 the *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 and harsh rent increases, and to give them greater privacy and security of tenure within the confines of their accommodation. As a result, New South Wales introduced the *Boarding Houses Act* in 2012, which created a compulsory register and laws governing the rights and responsibilities of occupants and proprietors.

Prior to this, boarders and lodgers had to rely on NCAT to ensure that some basic rights to shelter were 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'.

However, boarders and lodgers are still among the most vulnerable groups seeking adequate and affordable shelter, despite increased legislative protections. In March 2022, a fire at a boarding house in Newtown, Sydney, where three men lost their lives, has again shone a spotlight on the plight of people living in unsafe and run-down residences that are only ever an 'option B' for those who cannot secure other forms of shelter.

Advocates argue that the legislation is not effectively enforced, and that a licensing scheme should be introduced to adequately oversee the sector.

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 Amendment (Review) Act 2018* (NSW) has increased the protections for tenants.

14.5 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). 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:

- self-contained premises for people who can live independently

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- serviced premises (or assisted living apartments), where cleaning, meals and other services are provided
- 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. A parliamentary review was called for in this area a decade ago and the call has been ignored. The avalanche of complaints in 2017 into the retirement village industry, particularly Aveo, one of the biggest operators, has again put the spotlight on the need for a far-reaching inquiry. Investigations have uncovered a litany of questionable business practices including fee gouging, safety issues and misleading marketing promises made to some of the country's most vulnerable people.

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 of residence, security and the sale and letting of premises.

Further protections for residents of retirement villages were introduced by the *Retirement Villages Amendment Act 2018* (NSW). For example, residents now have a right to be given information about contracts and rules of conduct for retirement village operators.

Nursing homes

If an older person does not 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 that has ascertained that 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, which is partially refunded when they leave the home

accommodation charge
a daily amount payable by nursing home residents who require 'high care'

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.

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.

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 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

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Figure 14.12 An accommodation bond is a payment made by nursing home residents to secure a place, such as those run by BaptistCare.

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.

Investigations of the aged care system

The Australian Law Reform Commission investigated the aged care system in 2017 and has proposed a new benchmark for adequate staffing levels in aged care, more extensive employee screening and regulation of 'restrictive practices'. In its report, *Elder Abuse: A National Response*, it recommended strengthening protections for seniors in aged care, including a more extensive scheme for reporting and investigating alleged incidents. It suggests the federal and state governments develop a new national plan to combat elder abuse, detailing strategies and priorities for action as current processes are failing to adequately protect those people at risk of, or exposed to, harm and abuse.

In July 2019, a federal Charter of Aged Care Rights provided the same rights to all consumers, regardless of the type of Australian Government–funded aged care and services they receive.

Charter of Aged Care Rights

I have the right to:

1. safe and high-quality care and services
2. be treated with dignity and respect
3. have my identity, culture and diversity valued and supported
4. live without abuse and neglect
5. be informed about my care and services in a way I understand
6. access all information about myself, including information about my rights, care and services
7. have control over and make choices about my care, and personal and social life, including where the choices involve personal risk
8. have control over, and make decisions about, the personal aspects of my daily life, financial affairs and possessions
9. my independence
10. be listened to and understood
11. have a person of my choice, including an aged-care advocate, support me or speak on my behalf
12. complain free from reprisal, and to have my complaints dealt with fairly and promptly
13. personal privacy and to have my personal information protected
14. exercise my rights without it adversely affecting the way I am treated.

Some criticism has been made over the years as to the enforceability of this and previous charters, and the resources dedicated to ensure that aged-care providers are adhering to the charter. Aged Care Reform Now, a grassroots non-government organisation, began to further highlight the issue in the lead-up to the May 2022 federal election, in what is now recognised universally as a crisis in aged care. This led to the establishment of the Royal Commission into Aged Care Quality and Safety,

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which handed down a final report on 26 February 2021. It flagged a system under extreme stress through a lack of properly qualified staff, where the quality of care and appropriate nutrition was lacking and where government oversight had predominantly failed many older Australians. It should be noted that 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.

As a result of the Royal Commission recommendations, there is greater onus on aged care providers to ensure a proper quality of care, nutritional diets and having a registered nurse despite critical shortages of nurses. Continued regulatory oversight will be crucial to ensure providers meet their obligations post Royal Commission.

Following on from the Royal Commission, the Australian Government is working on a new Aged Care Act. It consulted with a range of stakeholders, and released a report in December 2023. It is anticipated that new laws might be seen in 2025.

The new Act will:

- Outline the rights of older Australians who are seeking and accessing aged care services.
- Create a single system entry point, with clear eligibility requirements.
- Incorporate a fair, culturally safe single assessment framework.
- Support the delivery of a range of aged care services, including new in-home care services.
- Establish new system oversight and accountability arrangements.
- Introduce a new approach to regulating aged care to increase provider accountability and encourage delivery of high quality and safe aged care services. The new approach will also strengthen enforcement powers of the aged care regulator.

Australian Government Department of Health and Aged Care website, 'A new aged care Act', 28 September 2023.

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 (Land Lease) Communities Act 2013* (NSW) for homeowners and under the *Residential Tenancies Act 2010* (NSW) for those who rent in residential parks.

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 Tenancies Act 2010* (NSW) concerning security of tenure, especially once they have signed a residential tenancy agreement.

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.

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Review 14.8

1 Outline the main findings of the Royal Commission into Aged Care. Describe what has happened as a result to improve the quality of life and care for aged care residents.
2 Summarise the differences between retirement villages and nursing homes, in terms of both the level of care and the fee structures.
3 Explain why 'squatters' have no legal property rights.

14.6 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 all people have the opportunity to acquire adequate and affordable shelter.



Figure 14.13 A tenant in Canada is having a dispute with their landlord regarding a bed bug infestation in the apartment. Most disputes usually result from a clash of rights and responsibilities between landlord and tenant.

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.

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 representation 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 were highlighted in the earlier sections,

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'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 can be the most effective and inexpensive method of resolving disputes around shelter.

Mediation and conciliation take various forms to prevent a court or tribunal from having to adjudicate in some matters. Many government agencies and tribunals use alternative dispute resolution to resolve matters quickly and efficiently (for example, the Human Rights Commission and NCAT).

NCAT cites conciliation as a method of dispute resolution when it 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.

Australian Government Department of Social Services

The Australian Government Department of Social Services took over from the former Department of Families, Housing, Community Services and Indigenous Affairs in overseeing 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 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, or via Rental Bonds Online, it is lodged with this board, which is the custodian of the money. Daily 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 this Act, builders and tradespeople must have a licence to undertake residential building work. This includes specialist tradespeople such as plumbers, electricians and air-conditioning 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.

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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 to 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.

The Council of Social Service NSW 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.

Following are some NGOs that deal with issues of shelter.

Seniors Rights Service

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 2021–2022 annual report said:

> our aged care advocates have continued to provide much needed support and advocacy services to over 5700 older people, their families and their carers in the past year ... For many older people, speaking out if something is not right with their care can be difficult especially if they feel vulnerable and do not have the support of family or friends. They may fear the consequences of speaking up for themselves. An advocate is able to empower them to do so by providing information about their rights and the standards of care and services they can expect and should receive and by helping them to uphold their rights.

Seniors Rights Service, *Annual Report 2021–2022*.

Tenants' Union of NSW

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

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.

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The media has 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 as being the subject to misleading and deceptive behaviour by some operators of boarding houses.

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 14.9

1 Outline the key roles of government organisations that deal with shelter.
2 Explain the areas in which NGOs advocate on behalf of people in various forms of shelter.

14.7 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.

Paying approximately 30 per cent of household income for housing is considered to be the benchmark – spending more than this is considered being in 'housing stress'. Some estimates put the number of Australians in housing stress 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. A 2023 survey by campaign group Everybody's Home found that four out of five people renting in Australia were in housing stress.

Home ownership rates in Australia have continued to decline as prices soar, with more people living in rentals and many owners and renters in housing stress. Ownership rates were around 70 per cent in 2009, but in 2021 were at approximately 67 per cent.

Media

The graph that shows how buying a house just got even further out of reach

Tawar Razaghi

The Sydney Morning Herald

27 October 2023

Australian property prices weren't supposed to be this high by now, as soaring mortgage repayments should have meant buyers could borrow less and spend less at auction.

Sydney house prices have risen almost back to their peak, Melbourne prices have been rising for two quarters, and prices are up in almost every other capital city in the September quarter, Domain's latest House Price Report, released on Thursday, shows.

(Continued)

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Media—Continued

Why? While population growth is often highlighted, another reason is that property buyers are increasingly purchasing with wealth made in the property market – whether their own or their parents' or grandparents' – rather than with wages.

The Bank of Mum and Dad is notoriously hard to measure, but visible on auction floors every weekend as many buyers walk away with the keys thanks to family backing.

Many receive large sums to help with purchases, including when they upgrade, while elsewhere entire homes are paid for.

The assistance comes after years of successive property booms pushed dwelling prices up faster than wages. Since 2012, average wages have risen about 30 per cent, on ABS data. Dwelling prices across the capital cities have jumped close to 90 per cent – and last year's falls were short-lived.

When bank economists predicted a property price downturn last year of about 15 per cent to 20 per cent – it was ultimately shallower – they were modelling wages and the cost of mortgage repayments. Economists have scant detail about the size of the Bank of Mum and Dad, whether cash gifts, guarantees or inheritances.

There is a growing, albeit patchwork, body of evidence that suggests how sorely outside help is needed to achieve home ownership, especially within commuting distance of the two major capitals.

Curtin University research found about nine in 10 potential first home buyers would not be able to save a deposit and/or meet mortgage repayments. A University of Sydney paper found a gift of $10,000 or more could increase the likelihood of a first home purchase by about 90 per cent.

Two in five young adults expect they will receive family help to buy their first home, another University of Sydney study found.

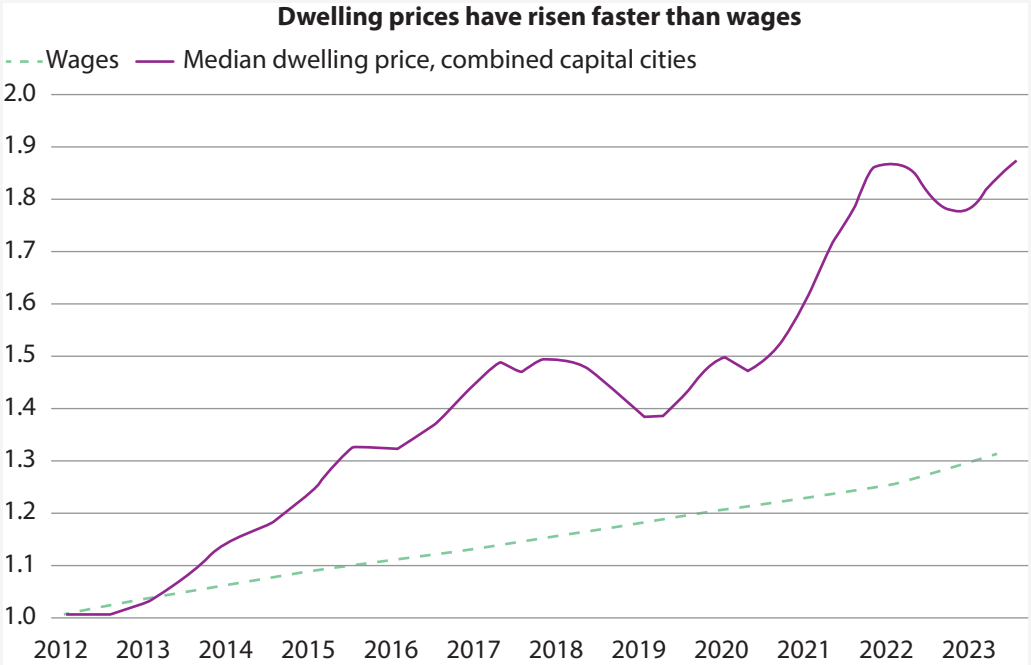


Figure 14.14 The cost of buying a home has gone up significantly more than the rise in salaries and wages.

Source: Domain, ABS

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The Productivity Commission found the total amount of wealth transfers made in 2018 was $120 billion, 90 per cent of which are inheritances.

Some long-term homeowners have been able to sell the family home, downsize to a smaller place, pay cash and pocket the difference. A quarter of residential property sales were bought in cash in 2022, noticeably in prestige suburbs.

For those without family help, the government rolled out a low-deposit scheme, although it comes with the risk of negative equity. A third of first-time buyers over the past year used the scheme.

Grattan Institute economic policy program director Brendan Coates said while much larger than expected population growth, thanks to high immigration numbers, has boosted the property market this year, the other factor was intergenerational wealth.

'People are less sensitive to interest rates if people are relying on family money to get into the market,' Coates said. 'If that's what's driving prices that's really concerning – it implies a growing divide between haves and have-nots.'

He said while there was no clear data to measure the extent, it was a factor in driving housing inequality.

'It's part of the dynamic of worsening wealth inequality in Australia. It's very hard to buy a home without family support, particularly in a major city and somewhere with access to jobs and transport.'

Analysis 14.1

Read the media article on pages 455–7 and comment on the main drivers of housing affordability today and its predicated impact on younger Australians.

Legal Links

The Numbeo website takes user-contributed data to present an interactive world map of housing price to income ratios.

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. For example, in 2016 the Housing Affordability Index in Sydney was 80, indicating poor housing affordability in that city. In 2023 it was even lower, at just over 60. Housing affordability in Australia is now among the worst in the world, burdened by some of the highest debt levels in the world, with a household debt-to-income ratio of 211 per cent according to the 2023 Dermographia International Housing Affordability global report. It ranked Sydney as number 2 for least affordable housing markets internationally, with only Hong Kong ahead of it, and several other Australian cities were included in the top 20 'least affordable' places to live.

The 13 interest rate rises by the Reserve Bank since 2022 continue to have an impact on the capacity of people who already have a home loan to service their debt, as well as reducing the amount new homeowners are able to borrow. Mortgage stress across Australia has increased. This has also impacted the amount new homeowners are able to borrow.

Housing Affordability Index a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

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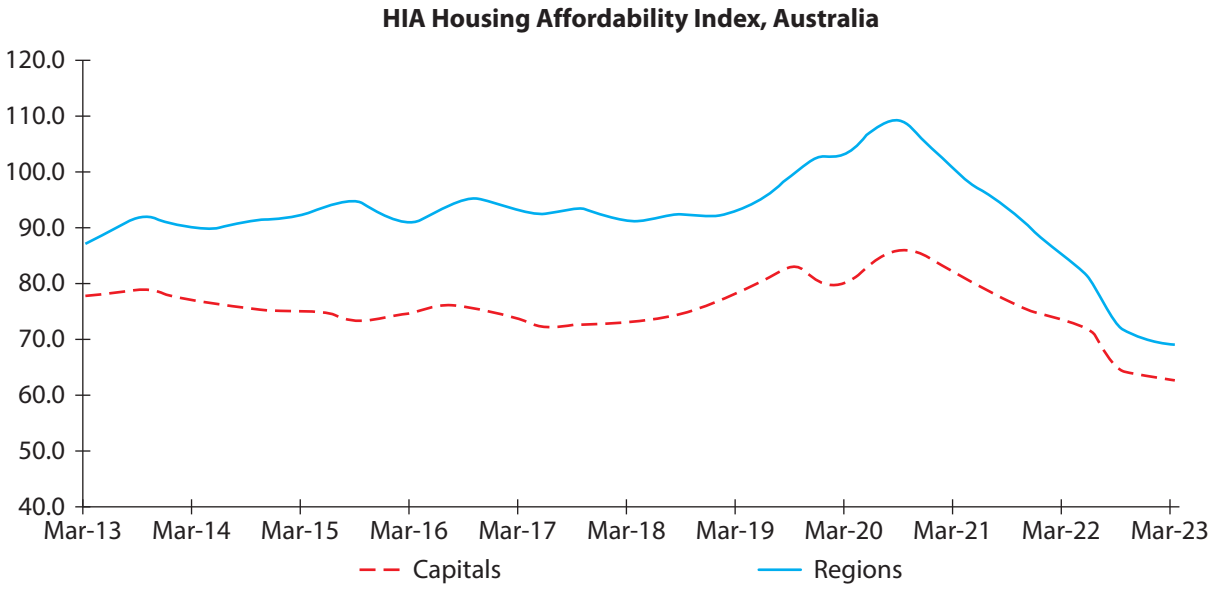


Figure 14.15 The Housing Affordability Index

Source: CoreLogic, ABS and HIA

Research 14.4

Use the internet to complete the following tasks.

1. Identify and define:
   - a housing affordability
   - b housing stress
   - c social housing.
2. Analyse the effect that the changes in property prices and interest rate changes have had on housing affordability. You could focus on either the 2017–2023 period (when interest rates were low) or the present day.

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 government and the NSW Government. 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.

As outlined earlier in this chapter, the National Housing and Homelessness Agreement 2018 was designed to improve access to affordable, safe and sustainable housing.

In the lead-up to the 2022 federal election, housing affordability became an election issue. During the election campaign, both the government and the opposition proposed policies to assist first home buyers – the Coalition with a Super Home Buyer Scheme that would allow first-home buyers to access some of their superannuation, and the Labor Party with a Help to Buy Scheme that offered government assistance. Post the 2022 election, the Labor party established the 'Housing Australia Future Fund' with an additional $10 billion for public and community housing. While this is hoping to build an additional 30 000 homes over the next five years, commentators point out that this will fall well short of what is needed due to neglect of social housing over the last 20 years.

The NSW Government's main strategy is a whole-of-government approach known as Housing 2041. This 20-year vision aims to achieve better housing outcomes in New South Wales, with a focus on supply, affordability, diversity and resilience. It will also, in partnership with the federal government, 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 improvements can be achieved with sustained government policies that aim to improve market conditions.

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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.

Some generally recognised solutions to housing affordability are:

- 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-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.

Research 14.5

Using the internet, find and read three articles related to housing affordability and stress.

Groups such as Homelessness Australia, 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 14.10

1. Explain what the Housing Affordability Index is, and what a value of under 100 means.
2. Explain what impacts the Reserve Bank increases in interest rates may have on housing affordability.
3. Critically evaluate the solutions to housing affordability and decide which you believe would be most and least effective.



Figure 14.16 In the lead-up to the 2022 federal election, housing affordability became an election issue. When campaigning in Brisbane, the then Australian Prime Minister Scott Morrison examined a model of a housing estate development.

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14.8 Contemporary issue: Discrimination

Video 14.1 NSW Fair Trading on anti-discrimination laws and property rentals (03:39)

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, First Nations 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* (NSW). 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 1977* (NSW)
- award compensation of up to $100 000 for loss or damage suffered because of the breach
- 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 bodies of federal discrimination legislation are 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.

Discrimination in the housing sector is commonplace for marginalised people within the community and

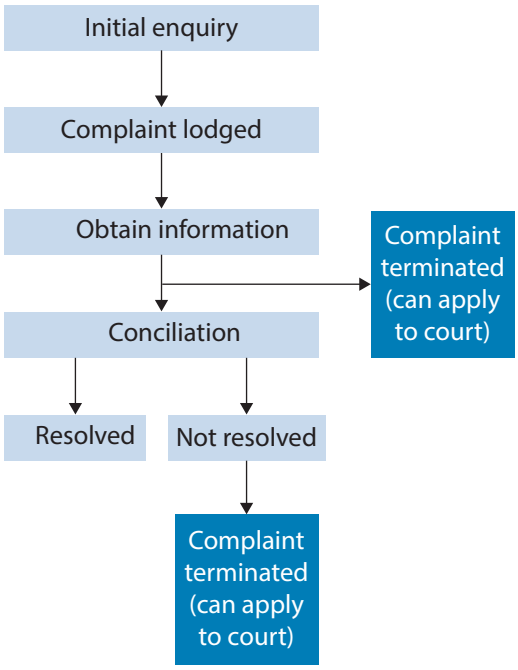


Figure 14.17 Complaints process followed by the Human Rights Commission

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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 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.

In Court



***Vasilikopoulos v New South Wales Land & 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.

Review 14.11



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 migrants often find it difficult to procure accommodation.

14.9 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 threat.

According to Homelessness Australia, the 2021 Census showed that on any given night, 122 494 people in Australia are experiencing homelessness. One in seven of these people are under the age of 12, and 23 per cent are aged between 12 and 24. One in five are Aboriginal and/or Torres Strait Islander people.

People experiencing homelessness are not necessarily living on the street – the majority are in crisis accommodation, rooming houses, insecure housing, overcrowded dwellings or couch surfing. In 2023 the number of people sleeping 'rough' has continued to increase due to multiple factors such as worsening housing affordability, increased rents and rental supply.

Another way of examining homelessness is to consider the following two categories:

- primary homelessness, which includes people who live on the streets or in deserted buildings

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- 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 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 per cent of all people categorised as being homeless are single, and without any viable support networks.

As mentioned 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 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 have 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'. Kathari's words still resonate in modern Australia today.

In 2023, the federal government collaborated with with state and territory governments to develop a National Housing and Homelessness Plan. The aim is to draw together different levels of government responsibilities in a shared vision that will help more Australians access safe and affordable housing.

Significant funds close to $2 billion have been targeted to deliver improved housing outcomes for First Nations peoples who reside in remote areas, and additional funds for social housing maintenance and new projects over a number of years, but First Nations peoples are still over-represented compared to the rest of Australia. On this indicator, the National Plan has many challenges to overcome the social and economic barriers facing First Nations peoples.

On a positive note, data released by the Productivity Commission's Report on Government Services 2022, as cited by Mission Australia, showed that at the end of June 2021, 72.5 per cent of the low-income households who were receiving Commonwealth Rent Assistance (CRA) would have suffered rental stress without the support of CRA. However, it is concerning that nearly half of those receiving CRA (45.7%) were still experiencing rental stress and were at risk of homelessness.

Non-government organisations that interface with the homeless on a daily basis provide an invaluable safety net for those most in need of shelter. Homelessness Australia is the national peak body for homelessness in Australia, and it advocates on behalf of the homelessness sector. It has a large network of organisations, which means that it can provide a unified voice on the matter of preventing and responding to homelessness.

Homelessness Australia CEO Kate Colvin said one in 10 Australians will experience homelessness in their lifetime, and First Nations people confront a homelessness rate almost 10 times that of other Australians.

'Homelessness is a growing national crisis, the harsh brunt of which is felt by First Nations people, women, children, and those exposed to climate change,' Ms Colvin said.

'The structural failures and policy gaps, especially in housing affordability and support for vulnerable people, are pushing more people into a strained system.'

Colvin K, 2023, quoted in 'Bold plan to eliminate housing crisis and homelessness within a decade', *news.com.au*, 27 October.

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Figure 14.18 A resident in a makeshift shelter for the homeless in Sydney in 2017. The number of people sleeping 'rough' has continued to increase in 2023 due to multiple factors such as worsening housing affordability, increased rents and reduced rental supply.

In a submission to the National Housing and Homelessness Plan, Homelessness Australia identified some key measures that they believe would halve homelessness in five years and fix the problem within a decade. These included 50 000 social and affordable homes built per year, an increase to Commonwealth Rent Assistance and government services to be targeted towards the prevention, rather than symptoms, of homelessness.

Other groups such as the Salvation Army, the St Vincent de Paul Society, the Wesley Mission and the many youth shelters also 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 they provide invaluable responses to government position papers from hands-on perspectives.

Review 14.12

1. Analyse and justify why the definition of homelessness includes far more than just someone living on the streets.
2. Outline the main initiatives that the NSW and federal governments are undertaking to reduce 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.

14.10 Contemporary issue: Social housing and community housing

Social housing

Social housing includes public housing and First Nations housing properties managed by Housing NSW. This is a type of secure housing that 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. Therefore, some of the exemptions 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.

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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 now apply are 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. Additional levels are also available for people with disabilities, with varying rates for the degree of disability. While this support is greatly needed, it will not cover all the costs for families occupying such housing.

Assets are also assessed under the *Housing Act 2001* (NSW). 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 obliged 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 made.

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; or 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 as follows:

- **Rentstart** – this is 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** – these 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.

The 'Housing Australia Future Fund' is another example of the role governments can play in exerting some influence on Housing Affordability. Set up in 2023, it aims to increase the supply of affordable public and social housing over a 10-year period.

The NSW Land and Housing Corporation's role is to ensure people in need in NSW communities have access to housing of the right type, at the right time and in the right locations. NSW has a social housing portfolio of 125 000 properties, and in September 2023, the NSW Social Housing Accelerator Implementation Plan aimed to add around 1500 new homes by 2028. However, this will still fall short of the need.



Figure 14.19 Housing NSW provides a number of subsidised programs to help people afford decent housing. This includes Rentstart, which is a one-off loan to assist with bond money and other costs.

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As at March 2024, the social housing applicant list in NSW was approximately 57 000 households, with many people waiting years for housing.

Nationally there is a significant lack of social housing, which has been further exacerbated by the property boom and current rental crisis. It is estimated that $20 billion is needed for low-cost housing nationally to make up for a shortfall that has occurred over the last 20 years.

Review 14.13

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.

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.

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. Policymakers 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.



Figure 14.20 Tiny houses and alternative homes are gaining approval across Australia as councils wrestle with the housing crisis.

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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 1900* (NSW)).
- 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 First Nations housing properties managed by Housing NSW. This is a type of secure housing 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 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.

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Short-answer 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 Critically evaluate the difference between needing shelter and being homeless.

Extended-response questions

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 in the digital version this textbook. Refer to these criteria when planning and writing your response.

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.

Themes and challenges for Chapter 14 – Option 5: Shelter

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) and in the *Residential Tenancies Amendment (Review) Act 2018* (NSW).
- The creation of the NSW Civil and Administrative Tribunal (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. Many government agencies and tribunals use alternative dispute resolution to resolve matters quickly and efficiently (for example, the Human Rights Commission and NCAT).

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. Further protections have been provided for in the *Residential Tenancies Amendment (Review) Act 2018* (NSW).

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- 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 residents' 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 pay out 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 2015* (NSW).

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. Increased protections around the rights to have pets and rent bidding are two further examples of the increasing recognition that more people will be renting into the future and appropriate protections will be critical.
- The Charter of Aged Care Rights 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 NSW 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 with 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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Chapter 15

Option 6: Workplace

This chapter is available in the digital versions of the textbook.

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Chapter 16
Option 7: World order

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate the effectiveness of legal and non-legal measures in promoting peace and resolving conflict between nation states.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the role of law in encouraging cooperation and resolving conflict in regard to world order
- issues of compliance and non-compliance
- the impact of changing values and ethical standards on world order
- the role of law reform in promoting and maintaining world order
- the effectiveness of legal and non-legal responses in promoting and maintaining world order.

At the end of this chapter, there is a summary of the themes and challenges relating to world order. This summary draws on key points from the chapter and links each key point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you 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, and benefits of, world order, and the threats to world order 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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Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 35) and the 'learn to' activities (pp. 35–36) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'World order' topic.

Relevant law

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Peace of Westphalia (1648)
Concert of Europe (1815)
Hague Conventions (1899, 1907)
Atlantic Charter (1941)
Charter of the United Nations (1945)
Convention on the Prevention and Punishment of the Crime of Genocide (1948)
The Universal Declaration of Human Rights (1948)
Geneva Conventions (1949)
UN Refugee Convention (1951)
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 (1968)
Anti-Ballistic Missile Treaty (1972)
Geneva Protocol (1977)
UN Convention on the Elimination of All Forms of Discrimination against Women (1979)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
UN Convention on the Rights of the Child (1989)
Treaty on European Union (Maastricht Treaty) (1992)
Comprehensive Nuclear Test Ban Treaty (1996)
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997) *('Ottawa Treaty')*
Rome Statute of the International Criminal Court (1998)
Treaty on the Prohibition of Nuclear Weapons (2017)

SIGNIFICANT CASES

Philippines v China, 2019, Permanent Court of Arbitration in The Hague

Legal oddity

As permanent members of the United Nations Security Council, the United States, Russia, China, France and the United Kingdom, along with 10 temporary members, are tasked with the responsibility of maintaining international peace and security, according to Chapter VII of the Charter of the United Nations. However, these permanent members are also the biggest arms exporters and each of them possesses nuclear weapons that represent an existential threat to all life on the planet if used. Some might think it odd that these five permanent members of the Security Council are given unchallengeable power of veto over resolutions for action by the Charter of the United Nations, while also having the potential to represent such a threat.

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16.1 The nature of world order

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

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

Liberal International Order
an academic term that describes the legal infrastructure that emerged after 1945 with the creation of the United Nations, key international treaties, multilateral cooperation, and the acceptance of common global norms such as human rights; otherwise known as the rules-based order

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

The meaning 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.

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 USSR President George Bush (Snr) and former President Mikhail Gorbachev used the phrase to define the emerging spirit of cooperation between the superpowers, which they hoped would continue.

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 last three-quarters of a century. 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.

Another term, used mainly by academics, that describes the world today is the **Liberal International Order**. This has its origins in the post-1945 settlement after World War II and was characterised by the creation of the United Nations, an array of key international treaties and institutions. When discussing this concept, politicians usually call it the rules-based order.

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 long-running Syrian Civil War demonstrated, a major upheaval in one country can have a destabilising 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, regional war sparked by miscalculation, a pandemic disease outbreak or **mass-atrocity crimes (mass atrocities)** committed by a dictatorial regime can flow on immediately and affect the rest of the world. We are all potentially vulnerable if things go terribly wrong on another part of the planet, as the COVID-19 pandemic demonstrated between 2020 and 2022.

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Figure 16.1 A doctor taking a swab test in a clinic. Rigorous testing regimes were set up in many countries to deal with the global COVID-19 pandemic from 2020 to 2022.

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.

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.

State sovereignty

State sovereignty had its origins in the *Peace of Westphalia* (1648), which is the collective name given to the two treaties concluded on 2 October 1648. 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 seventeenth 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 aforementioned *Peace of Westphalia* (1648) that came at the end of a period of religious war in Europe in which 10 million people died.

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

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 enter treaties with foreign states)

multilateralism cooperation between multiple states for mutual benefit or protection from common threats

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The next significant example was the *Concert of Europe* (1815), an agreement by the victorious powers in 1815, after the Napoleonic Wars, to prevent future wars between the states of Europe.

During the nineteenth 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, the Netherlands, in 1899 and 1907.

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 settle international disputes. This court was based in The Hague.

World War I and the League of Nations

The trend towards multilateral cooperation that had developed in the early years of the twentieth century seemed to vanish instantly upon the outbreak of war in Europe in 1914. The world became divided into two armed camps, with nations choosing to side with the Allies, led by France and Britain, or the Central Powers, led by Germany. In 1917, then 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**.

conscription compulsory enlistment in the military force of a state

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 by others; the idea is that an attack on one is an attack on all

The creation of the League of Nations was a substantial act of multilateral cooperation. The League achieved notable successes in the 1920s, but it 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.

World War II and the United Nations

In the first dark years of World War II, another blueprint for a world organisation was placed on the agenda. In August 1941, US President Franklin Delano Roosevelt and British Prime Minister Winston Churchill 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. Now known as the *Atlantic Charter* (1941), this document was an eight-point plan to bring about a peace that would be fair and enduring. However, Roosevelt 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* (1945) ('UN Charter') was signed in San Francisco by 50 nations on 26 June 1945, and on 24 October 1945 the United Nations became a legal entity.

Review 16.1

1. Explain the meaning of the term 'world order'.
2. Explain the concept of 'state sovereignty'.
3. Evaluate the proposition that the League of Nations was a positive step in the development of world order.
4. Discuss the significance of the *Atlantic Charter* (1941) in the development of a more ordered world.

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Figure 16.2 This World War II American propaganda poster was released by the US Army in 1942. The slogan of the 'United Nations' would eventually lend its name to the new international organisation formed at the end of the war.

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.

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 twentieth 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 VII of the charter were designed to deal with an aggressive attack by one state against another; that is, conventional interstate war.

In the twenty-first century, the nature of conventional war is slowly being transformed. In the Russia–Ukraine War of the 2020s, new types of weapons and technology have impacted the battlefield. Satellite communication and intelligence has proven essential and the use of drones of all types has become a feature of this conflict. However, according to retired Australian general Mick Ryan, author of the 2022 book *War Transformed*, while the pace of technological change is surging, the nature of war remains the same.

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 Defence from 1961 to 1968, luck has been the major factor in preventing a nuclear war since the 1940s.

By 2024 there were nine countries that possessed nuclear weapons: the United States, Russia, the United Kingdom, France, China, India, Pakistan, Israel and North Korea. In 2015, Iran was suspected of attempting to build nuclear weapons in violation of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), 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 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

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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 *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). However, no progress was made at the Nuclear Non-Proliferation Review Conferences, neither in May 2015 nor in August 2022. No hope of a reduction in their nuclear arsenals was offered by Russia or the United States.

The nine nuclear weapons states have continued with their nuclear modernisation programs that violate Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). There are between 12 000 and 13 000 nuclear weapons in existence. A regional war using nuclear weapons (for example, between India and Pakistan or on the Korean peninsula) would have a massive adverse impact on the environment as well as killing millions of people. Furthermore, the use of thousands of nuclear weapons in a conflict between Russia and the United States, or China and the United States, would destroy most life on Earth. Any intentional use of these weapons of mass destruction would have catastrophic consequences for which there would undoubtedly be retaliation that would lead to a global catastrophe, instantly killing billions of people and leading to a nuclear winter that would lead to global starvation.

Cyberwarfare

A cyberattack 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. A cyberattack could be launched by terrorists, criminals or states. Both China and Russia have the ability to wreak havoc on crucial infrastructure of Western countries, including Australia. However, one of the problems of a cyberattack is that it is hard to determine its origin. An enemy can strike without leaving their desks. Every day, networks are attacked and probed for weaknesses that can be exploited in a full-scale conflict.

Cyberspace is regarded 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 a hybrid warfare fought across all five domains. Military plans already exist for this purpose. More than ever the world needs a collective security approach to cyberspace. However, with such intense geopolitical rivalry it is impossible for international law to be effective.

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.

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, and this dramatically reduced the effectiveness of the United Nations in dealing with world order issues. After the Cold War, the five permanent members of the UN Security Council 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.

Today, there is talk of a second cold war between the United States and China. As a result, the world is shifting into two opposing blocs. One of these is the United States and its Western democratic allies, while the other is led by China and includes Russia and many developing countries that are dependent on China's economic support.



Figure 16.3 The Vietnam War was a Cold War conflict in which the Soviet Union supported North Vietnam, and the United States supported South Vietnam.

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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 United Nations 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**.

Civil war

A civil war is a conflict between two or more parties within one country. Prominent examples are the American Civil War (1861–1865) and the war in Lebanon in the 1980s. Both the Korean War (1950–1953) and the Vietnam War (1954–1975) 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. 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.

A more recent example is the Syrian Civil War, which started in 2011 and continued to wreak destruction for years. Sadly, as well as the opposing domestic Syrian forces involved, along with ISIS and the Kurds, this civil war was also a proxy for other nation states, such as Saudi Arabia, Iran and Turkey, and a geopolitical struggle between Russia and the United States. International law can have little impact in a situation with such intense and complex geopolitical rivalry.

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. Since 2016 the government of Myanmar has pursued policies of genocide against the Rohingya Muslim minority.

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 September 11 terrorist attacks against the United States in 2001. 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.

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, the ethnic tensions that had always existed in communist Yugoslavia were unrestrained. There were outbreaks of communal violence in Yugoslavia in the 1990s, after it was split up into Bosnia, Serbia and Croatia.

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 United Nations 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.

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

dictatorial
(of a government) having unrestricted authority or power

genocide
the deliberate extermination of a national, ethnic, racial or religious group

terrorism
acts of violence against a population, intended to cause terror and thereby influence a government

communal violence
violence and killing within communities

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

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Review 16.2

1. Identify the different types of war.
2. Discuss the extent to which international law has impacted the different types of war.
3. Account for why the effectiveness of international law varies in responding to different types of war.

Access to resources as a source of conflict

> Mankind must put an end to war before war puts an end to mankind.
>
> John F Kennedy, 1961, Address before the United Nations General Assembly.

hegemony dominance of one nation over others

When nations do not get what they want by peaceful means, they are often tempted to resort 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 twentieth 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 United Nations, and the UN Charter made war illegal except in two cases:

- self-defence (Article 51)
- UN Security Council 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**.

Competition over resources can also cause regional instability, as is the case with the Democratic Republic of the 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 it has also sought good relations with oil-rich Arab states such as Saudi Arabia and the Gulf states. One major factor in the first Gulf War (1990–1991) 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 super state with control over the vast majority of the world's oil supplies as unacceptable.

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, particularly in Africa. Also, in our region, China is clashing with its neighbours in the South China Sea by claiming ownership of the sea up to the coastlines of neighbouring countries, such as the Philippines, sparking serious confrontations.

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. Disputes over water supplies, minerals, gas and rare earth elements are all possible. These will probably be exacerbated by climate change and disruption to the global financial system.

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Food scarcity is also likely to be a cause of future conflict. This has been demonstrated by the impact of the Russian invasion of Ukraine on global supplies of wheat, which particularly impact developing countries in Africa and Asia. 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.

16.2 Responses to world order

The role of the state and state sovereignty

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 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 United Nations 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 Article 2.7 of the UN Charter:

UN Charter
Article 2.7

Nothing contained in the present Charter shall authorise 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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The last phrase of Article 2.7 (underlined) allows the UN Security Council 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

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humanitarian intervention military intervention in a state in order to stop serious human suffering and/or human rights violations

Permanent Five the five permanent members of the UN Security Council: France, the United Kingdom, China, Russia and the United States

non-government organisation (NGO) an independent, non-profit group providing a service or advocacy to a community, that often plays an important role in advocating, analysing and reporting on human rights worldwide (for example, human rights or the environment)

second priority in the Preamble, has provided a thin legal wedge that in theory allows the UN Security Council 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 UN Security Council is allowed to take action to 'restore international peace and security', according to Article 39. 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 UN Security Council-sanctioned intervention. This type of action is known as **humanitarian intervention**.



Figure 16.4 On 28 April 2022, Ukrainian President Volodymyr Zelenskyy spoke during a joint press conference with UN Secretary–General following their talks in Kyiv. The UN Secretary–General admitted that the Security Council had failed to go far enough in its efforts to 'prevent and end' Russia's war in Ukraine.

The problems with UN Security Council-sanctioned intervention in a state to stop mass-atrocity crimes include the following:

- It is very difficult to get UN Security Council agreement, especially when the interests of one of the **Permanent Five** is threatened.
- The Permanent Five members of the UN Security Council are often unwilling to undertake the intervention themselves.
- 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.
- States have a justified fear of failure, such as occurred with the US-led and UN Security Council–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.

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 UN Security Council.

While state sovereignty is the foundation upon which our global system is based, its exercise can impede the resolution of world order issues.

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.

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The United Nations has been involved in numerous missions since the 1990s, and although there were some 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 activities in conflict prevention and peace operations.

The UN Charter

The UN Charter is similar to a constitution, as it outlines the rights and obligations of the members of the United Nations.

The purposes of the United Nations – as stated in Article 1 of the UN Charter – are to:

- maintain international peace and security
- develop friendly relations among nations
- achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character
- promote respect for human rights.

Article 2 states that the United Nations 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 UN Charter, and refraining from giving assistance to any state against which the United Nations is taking preventive or enforcement action
- ensuring that states that 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 structure of the United Nations

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 United Nations. In reality, no stringent conditions have to be met for a state to join the United Nations. Today there are 193 member states.

As discussed in Chapter 8 (see page 194), the United Nations has five major organs: the UN General Assembly, the UN Security Council, the UN 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 **UN 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'.

UN trust territory

after World War I, under a League of Nations mandate (authorisation), 10 former colonies of Germany were transferred to administration by victorious colonial powers; when the UN succeeded the League, these mandates were replaced with 'UN trust territory' status with the aim of eventual self-determination; an Italian colony became the 11th trust territory after World War II

In addition to the myriad day-to-day activities of the United Nations and its agencies to promote world order, various other organisations participate in cooperative initiatives with the United Nations.



Figure 16.5 The United Nations office in New York City

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Research 16.1

Research the United Nations, including its own website, to complete the following tasks.

1. On the internet, research how many states there are in the world. Identify if all states are members of the United Nations. Discuss why or why not states are members of the United Nations.
2. Construct a table to show the six major organs of the United Nations. Draw the table with columns titled 'Origins', 'Role', 'Functions' and 'History'.
3. Examine the membership and system of voting in the UN General Assembly. Explain how the composition of the UN General Assembly and the system of voting in the UN General Assembly can be both democratic and undemocratic. (Hint: What are the populations of China and Timor-Leste and how many votes does each country have in the UN General Assembly? Also, how are the individual representatives of the various states chosen?)
4. Identify people or organisations in the United Nations that have been awarded the Nobel Peace Prize.
5. Locate the UN Treaty section on the United Nations website. Find the two most recent disarmament treaties and identify which of these treaties Australia has signed and ratified.
6. Locate the UN Secretariat (one of the United Nations' six major organs) section on the United Nations website. In this section, find the Department of Peace Operations. Identify how many peacekeeping operations there are today. Identify how many peacekeeping operations there are in the Middle East.
7. After navigating the United Nations website, describe the overall impression you have about the United Nations, its mission and its work.

These include NGOs, regional organisations (such as the European Union (EU)), 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 United Nations 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.

The UN Security Council

The UN Security Council has the main responsibility for maintaining international peace and security. There are 15 members – five permanent and 10 non-permanent, elected by the UN 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 UN Security Council 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 UN Security Council. First, it enables any of the permanent members to stop any substantive action contemplated by the UN Security Council from being taken. 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 UN Security Council 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 UN Security Council, including collective military action, arms embargos and economic sanctions.

The non-permanent members of the UN Security Council are selected according to a geographical and rotating formula.

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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 UN Security Council. This effort was successful. In October 2012 it was announced that 153 nations at the United Nations had given Australia their vote. Australia served its two-year term from 2013 to 2014. In a 2023 speech to the United Nations, Australia's Foreign Minister, Penny Wong, stated that Australia will seek a seat on the Security Council for 2029–2030.

Legal Links

For an outline of Australia's term on the UN Security Council in 2013–2014, see the Australian Government Department of Foreign Affairs and Trade's report (*Australia's Term on the UN Security Council 2013–2014: Achievements*, 18 March 2015). 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).

Peacekeeping

The term 'peacekeeping' is not found anywhere in the UN Charter. However, the founders of the United Nations had a plan for enforcement action.

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 the United Kingdom, France and Israel invaded Egypt. The United States, with Canada, sponsored a UN Security Council resolution calling for a ceasefire, which was promptly vetoed by the United Kingdom and France. The United Nations feared that if the United States and the USSR were also to become involved in the Suez Crisis, it could lead to a nuclear war. So the then Secretary-General of the United Nations, Dag Hammarskjold, moved the debate to the UN 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 UN Security Council. Also, the whole UN peacekeeping apparatus has operated out of the Secretary-General's department since 1956.

Legal Links

For a detailed history of Australian involvement in UN peacekeeping missions see the website of the Australian War Memorial: Australians and peacekeeping.

Peace Building Commission

Realising that regional situations that threaten peace and security cannot be completely dealt with by peacekeeping operations, the UN General Assembly and the UN 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. Australia will have a seat on the Peace Building Commission in 2025.

Legal Links

For information about current initiatives of the Peace Building Commission see http://cambridge.edu.au/redirect/10333.

The future possibilities for the United Nations

Proposals for a UN Emergency Peace Service

Several peace and security NGOs are currently arguing that a permanent UN Emergency Peace

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Service (UNEPS), which could intervene quickly in a crisis, should be established. The World Federation of United Nations Associations 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.

Legal Links



For information about current initiatives of the UN Emergency Peace Service see the following link: http://cambridge.edu.au/redirect/10334.

Proposal for a UN Parliamentary Assembly

convention another term for a treaty: an international agreement (or instrument) between parties who are subject to international law (states and international organisations such as the UN and its bodies)

In 2007, the Campaign for the UN Parliamentary Assembly was launched. The proposal is for the creation of a new body in the UN structure consisting of 800 to 1000 members who are democratically elected from around the world. The elections and the assembly would function in a similar way to the European Parliament. Over time, this UN Parliamentary Assembly would take on more decision-making and responsibilities and gradually evolve into a world parliament.

Such a world parliament could form the core of a democratic world federation, again based on the European Union model. In such a model, the 193 nation states would retain their sovereignty, but all would surrender a small amount of their sovereignty to create a world government. This is what happened with the creation of existing federal systems in the world, such as the federation of Australia and the United States.

This may seem like an unlikely prospect given the current state of world order, but it will be a necessity if human civilisation is to survive on this planet in the long term.

The Campaign for the UN Parliamentary Assembly is now run as part of the Democracy Without Borders organisation. Democracy Without Borders also promotes the:

- UN World Citizens Initiative
- Global Voting Platform.

Legal Links



For information about current initiatives of Democracy Without Borders see its website.

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.

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. 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 United Nations.

This requirement is stated in Article 102 of the UN Charter.

UN Charter
Article 102



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 [UN] Secretariat and published by it.

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The most significant treaties in terms of their contribution to world order are undoubtedly the ones shown in Table 16.1. To a large extent, these treaties have set the framework for international law.

Table 16.1 Most significant international documents since 1945

International document	Year created
Charter of the United Nations The founding treaty	1945
Convention on the Prevention and Punishment of the Crime of Genocide First definition and prohibition of genocide	1948
The Universal Declaration of Human Rights Defines the rights and freedoms of all human beings	1948
Geneva Conventions Legal standards for humanitarian treatment in war	1949
Convention relating to the Status of Refugees Defines refugees and their rights, as well as responsibilities of host nations	1951
Protocol to the Convention relating to the Status of Refugees Removes time and place restrictions of the Convention and establishes additional protection	1967
Treaty on the Non-Proliferation of Nuclear Weapons Treaty to prevent spread of nuclear weapons, but four key states have not signed	1968
Rome Statute of the International Criminal Court Treaty covering genocide and crimes against humanity, of war and aggression, establishing the ICC	1998
Treaty on the Prohibition of Nuclear Weapons Treaty aiming to eliminate nuclear weapons, not signed by the nuclear weapon states	2017

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



Figure 16.6 The Peace Palace in The Hague, the Netherlands, was inaugurated in 1913. The Peace Palace houses the International Court of Justice, which aims to prevent war between states by applying international law. The palace also houses the Permanent Court of Arbitration, which arbitrates many conflicts between different parties such as states, companies and other organisations.

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Courts and tribunals

International Court of Justice

As discussed in Chapter 8 (see page 199), International Court of Justice (ICJ) deals with disputes between states. The ICJ was established in 1945 (began work in 1946) as an organ of the United Nations. The ICJ is based in the Netherlands and has 15 judges, elected by the United Nations. The questions before the ICJ 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 cases:

- **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 UN General Assembly.

There are numerous treaties that confer jurisdiction on the ICJ. In theory, the court's decisions are binding, final and without appeal, except in cases where it gives an advisory opinion. In practice, however, the effectiveness of the ICJ has often been limited by the losing party's unwillingness to abide by the court's ruling, and by the reluctance of the UN Security Council to enforce the rulings.

International Criminal Court

As discussed in Chapter 6 (see page 147), *Rome Statute of the International Criminal Court* (1998) ('Rome Statute') is a treaty signed by 121 states, including Australia, that 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, crimes against humanity and crimes of aggression 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 United Nations by a separate treaty between states. It was not a product of the UN Security Council 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 UN Security Council cannot veto a state's referral of a case to the ICC.

Despite this autonomy, the ICC works closely with the United Nations. One hundred and twenty-three states are 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 UN Security Council or the ICC Prosecutor. It can be argued that this reduces the mandate and reach of the ICC 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.

Analysis 16.1

Read '20 years on, the International Criminal Court (ICC) is doing more good than its critics claim' at the following link: http://cambridge.edu.au/redirect/10335.

1. Identify the initial hopes for the new court when it was created in 2002.
2. Discuss why the initial optimism dissipated.
3. Outline the reason why the United States, Israel and Russia cannot be investigated.
4. Outline the positives about the ICC that this author sees despite its shortcomings.

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 UN Security Council in the 1990s to deal with the human rights abuses that had occurred in the Balkans and Africa, respectively.

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International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a UN Security Council 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.

International Criminal Tribunal for Rwanda

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 closed in December 2015.

Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 as a joint venture between the United Nations and the Cambodian 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 was plagued by the slow pace of its trials, lack of funding and corruption issues. Many of the ex-Khmer Rouge leaders died while awaiting trial. Since its creation in 2003 the ECCC has only brought half a dozen of the Khmer Rouge top leadership to justice. After 16 years, in September 2022, the court ceased its operations closing an important chapter in attempting to use international criminal justice to deal with the most horrendous episode of genocide since World War II.

European Court of Human Rights

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 EU) 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 December 2021 there were approximately 70 150 applications pending before it, more than half of which were lodged against Russia, Turkey, Ukraine or Romania. The court has been highly influential not only in reforming the laws of the member states but also in promoting the development of human

intergovernmental organisation
an organised group of two or more states, set up to pursue mutual interests in one or more areas

Review 16.3

1 Outline some past examples of competition over resources leading to conflict.
2 Create a table like the one below. Make notes on each of the courts and tribunals.

Court or tribunal	Role	Work	Effectiveness
ICJ			
ICC			
ICTY			
ICTR			
ECCC			
ECHR			

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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.

Intergovernmental organisations

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

Regional 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 the North Atlantic Treaty Organization (NATO).

The following are other notable examples:

- **African Union** – the African Union is modelling itself on the EU and is receiving assistance from the EU to set up its structures. The African Union currently has peacekeepers serving in Darfur under a UN mandate.
- **Commonwealth of Nations** – was created in 1949 and in 2024 comprised 56 nations, mostly former members of the British Empire. The Commonwealth represents over 2.5 billion people. The Commonwealth is linked by shared values and history and attempts to promote common goals such as conservation, democracy and education, as well as hosting the Commonwealth Games. However, there are questions over the future viability of this organisation, especially with the death of Queen Elizabeth II in 2022.
- **Association of Southeast Asian Nations (ASEAN)** – This organisation was created in 1967. Strong economic growth is now a feature of the economies in this region. By increases economic cooperation, ASEAN aims to enhance their position in international community. At its 42nd Summit in May 2023, the leaders of the member nations committed their governments to 'deepening the integration process to realise a rules-based, people-oriented, people-centred ASEAN Community.'

European Union

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 27 members unlikely. (There were 28 members, but the United Kingdom left the EU in 2021 in a move referred to as 'Brexit'.) Despite Brexit, a number of other nation states seek admission to the EU, and it is emulated by other regional organisations, including the African Union. It is a **supranational organisation**.

The EU officially began in 1993 after a long and gradual development from its origin in 1950, when it was named the European Coal and Steel Community 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, which had the aim of allowing free trade across borders. The *Treaty on European Union* (1992), 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.

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 policymakers 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.

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Europol (the European Law Enforcement Agency) is responsible for coordinating the various states' police efforts in this area.

The EU exercises a 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 and certain political crises that have afflicted the EU in recent years have led some commentators to question the EU's long-term viability in its present state.

North Atlantic Treaty Organization

NATO was established in 1949 to counter the threat from the USSR and its communist bloc of Eastern Europe. It is an alliance of 29 countries (as at 2024) 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. Between 2003 and 2021, NATO had forces deployed in Afghanistan, aiming to support the fledgling democratic government. NATO's International Security Assistance Force in Afghanistan (2001–2014) was under the authority of the UN Security Council, although it was 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, the eastwards spread of NATO has led to a backlash. Vladimir Putin has argued that NATO expansion up to its borders is a threat to Russia's security.

As part of his campaign against NATO expansion, Putin unleashed a full-scale invasion of Ukraine on 24 February 2022. This blatant act of aggression by Russia, a permanent member of the UN Security Council, on neighbouring Ukraine was seen by many as the biggest challenge to the rules-based order since the end of World War II in 1945.

Ironically, the Russian invasion has had the opposite effect to what Putin intended. Instead of weakening NATO, the invasion and the many atrocities committed by the Russian military strengthened the member countries of NATO in their determination to resist Russian aggression. In fact, the formerly neutral, neighbouring countries of Sweden and Finland (the latter shares a common border with Russia) decided to join NATO. In February 2024, Sweden and Finland were accepted as NATO members. The EU also responded to the invasion by hinting at adding Eastern European members.

Figure 16.7 On 13 September 2023, the President of the EU Commission, Ursula von der Leyen, gave her State of the Union Address to the EU Parliament, declaring that now was 'Europe's moment to answer the call of history' and 'to build a continent ... that is united in freedom and peace', hinting at expanding the EU by adding Ukraine and Moldova.



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Review 16.4

1 Assess the importance of peacekeeping for the promotion of world order. Assess the two United Nations reform proposals – for a UN Emergency Peace Service and a UN Parliamentary Assembly – in terms of their potential to promote world order. Discuss why these proposals are given scant attention by world leaders today.
2 Explain the difference between a bilateral and a multilateral treaty.
3 Identify what factors are limiting the effectiveness of the International Criminal Court.
4 Discuss some of the ways in which regional organisations can promote international peace and security.
5 Recall the origins of the European Union.

Non-government organisations

NGOs such as Amnesty International, Human Rights Watch, World Vision, Greenpeace, Oxfam and the International Campaign to Abolish Nuclear Weapons are just a few of the tens of thousands of privately run organisations campaigning for humanitarian ideals, citizen associations and civil society organisations. One of the first NGOs was the Red Cross. (In some countries the Red Cross is known by other names, such as 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. NGOs helped to write the UN Charter and are partners with and accredited by the United Nations, and many of them collaborate with various specialised agencies in their humanitarian work on a daily basis.

In addition to these NGOs, there are NGOs that specialise in world order issues by investigating, researching, educating policymakers and the public, and lobbying leaders to take action. The International Crisis Group 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. The International Crisis Group's aim is to be an accurate source of information for governments, IGOs and NGOs that are working to respond directly to conflict situations.



Figure 16.8 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. In 2023, Australia was ranked as the 22nd most peaceful countries in the world.

The International Crisis Group also uses the media effectively, getting 14 000 mentions annually.

The International Crisis Group 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
- giving an early warning when a security situation is becoming a full crisis.

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Finally, the International Crisis Group is strongly supportive of a multilateral, rules-based approach to world order using the current structures of the United Nations and other international organisations, regional organisations and international courts. The International Crisis Group is particularly supportive of the new UN doctrine, the R2P principle, covered in the next section.

Some examples of other NGOs that specialise in world order issues are:

- Citizens for Global Solutions
- International Campaign to Abolish Nuclear Weapons
- Global Zero
- Carnegie Endowment for International Peace.

Legal Links



For the latest information about conflicts around the world, refer to CrisisWatch at the International Crisis Group's website.



Research 16.2

1. Locate the websites of five internationally operating non-government organisations (NGOs) that are concerned with world order issues.
2. Outline an issue or a crisis that each NGO focuses on.
3. Assess the role of each NGO in promoting world order.
4. Locate the organisation that produces the Global Peace Index and find out who created it, when it was created, and for what purpose.
5. Assess how the information contained in the Global Peace Index might assist to promote global stability and world order.
6. Identify five NGOs that have an active presence on social media. Identify what issues they promote.

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 section 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 NSW 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 contribution during World War I won it recognition as a state in its own right in the League of Nations, rather than

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dominion
a semi-autonomous political entity that was nominally under the sovereignty of the British Empire

simply a **dominion** of the British Empire. As a foundation member of the League, Australia played a very active role internationally. Many of its proposals were taken up by the United Nations when it was formed.

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 Minister in the Chifley Labor government (1945–1949), was elected president of the UN General Assembly in 1948.

Many other Australians have also served the United Nations 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 charged with monitoring Iraq's dismantling of its weapons facilities after the Gulf War of 1990–1991. 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 United Nations in the areas of nuclear disarmament and the new UN doctrine of the R2P (see the following section). 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 UN Security Council, held that seat throughout 2013 and 2014 and made significant contributions. Australia hopes to serve another term in 2029–2030.

On 16 October 2017, Australia was one of 15 new members elected to the Geneva-based UN Human Rights Council to serve a three-year term from 1 January 2018 until 2020. Australia's role was to work alongside the other countries on the council to promote human rights around the world.

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 been involved in 62 peacekeeping operations over 75 years. Australia is the eleventh largest

Analysis 16.2

Read 'Australia seen as soft of human rights for failing to confront uncomfortable history, expert says' at http://cambridge.edu.au/redirect/10336.

1. What criticisms does Professor Renée Jeffery level at Australia on human rights?
2. Outline how Jeffery explains why Australia has failed to condemn some the 'world's most egregious abuses'.
3. On what issues does Australia remain on the defensive?
4. Compare how Australia's response to the ethnic cleansing of the Rohingya in Myanmar differs to the United States' response.
5. Discuss why Australia has earned a reputation of being soft on human rights.
6. From your own knowledge, assess how the outcome of the Voice Referendum affected Australia's reputation on human rights.

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contributor to the UN Peacekeeping Budget. In 1999–2000, Australia played a leading role in establishing order in Timor-Leste (also called East Timor) when Indonesian-backed **militia** went on a rampage of killing there after the 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 Timor-Leste. In 2023, Australians were also serving as peacekeepers in Cyprus, the Middle East and South Sudan.

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 (1949) and the *Rome Statute of the International Criminal Court* (1998) establishing the International Criminal Court. 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* (1989), the *UN Convention on the Elimination of All Forms of Discrimination against Women* (1979) and the *UN Refugee Convention* (1951). As a temporary member of the UN Security Council, 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. 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 target the funds more easily into particular programs.

The Australian Government continues to be involved in conferences about common global problems and continues to sign up to international agreements when relevant to Australia.

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

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 them.

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. Recent examples include the global COVID-19

Review 16.5

1 Assess the role of non-government organisations in promoting world order.
2 Identify the different ways in which Australia has contributed to global affairs. Assess to what extent these contributions have been positive.
3 Discuss why Australia's intervention in Timor-Leste was significant.
4 Outline the power that section 51(xxix) of the *Australian Constitution* gives the federal government.

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pandemic, the Russian invasion of Ukraine, a massive earthquake in Morocco, and devastating floods in Libya. 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 is not 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 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.

Social media emerged as a force for even greater disruption in 2016. 'Fake news' proliferated in the US elections in 2016. Many of these fake news reports were said to be generated by Russian-influenced groups aiming to affect the election result. In the Arab Spring social media appeared to be a force for good. However, since then authoritarian leaders have been using social media to weaponise information. In addition, hate groups within nation states are also exploiting social media to pursue their divisive agendas. Today, social media has become the new battleground in propaganda wars within nations and between nation states. This trend in social media and the internet generally, along with the decline of quality journalism by the mainstream press globally, threatens to destabilise world order.

Methods of resolving disputes

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.

States can also be encouraged to improve their behaviour by the prospect of membership of world organisations.



Video 16.1 Maria Ressa says that 'without facts, you can't have truth' at the World News Media Congress in Taiwan on 28 June 2023. Maria Ressa is a journalist from the Philippines who has fought a long battle for press freedom and against abuse of power by her government. She won the Nobel Peace Prize in 2021 for her battle for press freedom and for exposing the authoritarian government of the then president Rodrigo Duterte.

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Figure 16.9 Australia's Prime Minister Anthony Albanese greets France's President Emmanuel Macron prior to their bilateral meeting at the G20 Leaders' Summit held in New Delhi, India, on 9 September 2023.

Political negotiation occurs in many multilateral forums. The biggest are these are the G7, the G20 and BRICS. Along with the multilateral commitments that come from these forums, a number of bilateral discussions occur on the sidelines of these events.

The biggest are these are:

- Group of Seven (G7): Canada, France, Germany, Italy, Japan, the United Kingdom and the United States
- Group of 20 (G20): the European and African Unions, plus 19 individual countries, including Australia
- BRICS: Brazil, Russia, India, China, South Africa, Iran, Egypt, Ethiopia, and the United Arab Emirates.

Persuasion

When disputes cannot be solved through political negotiation, the next option is the use of persuasion.

States, international organisations and transnational corporations can be persuaded to change their behaviour through the pressure of world public opinion. 'Diplomatic 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 United Nations 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 the Australian former High Court judge, Michael Kirby. The committee brought down its damning report in 2014. However, such mechanisms 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.

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:

UN Charter
Article 2(4)

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 September 11 attacks by terrorists of Al Qaeda. However, commentators, while conceding the invasion may have been legal, question whether it was wise. After a 20-year occupation of Afghanistan, the United States, NATO and Australian forces withdrew in September 2021 and relinquished control to the Taliban. Clearly, in this instance, the use of force failed to achieve the desired outcome.

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 UN Security Council. Article 42 of the UN Charter states that the UN Security Council can 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'.

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Multilateral action

When it comes to the use of force, multilateral action is always preferable. Robert McNamara, former US Secretary of Defense from 1961 to 1968, argued that the more multilateral an action is, the more legal it is under international law. The whole point on the UN Charter was to promote collective security, which meant that the member nations would stand together to maintain international peace and security. This principle holds true in all aspects of world order.

However, multilateral cooperation and UN Security Council backing does not ensure that wise decisions are taken, as was the case with the 20-year occupation of Afghanistan by the United States with the support of NATO members and Australia. Wisdom in the political leadership of influential nations is an essential ingredient of a peaceful world order.

As we witness the breaking down of the post-1945 world order, we are likely to see the world move into two rival blocks with a balance of power situation like the years leading up to World War I. For the Western world, the multilateral cooperation that comes from alliances will be important in standing up to authoritarian regimes and ensuring the survival of liberal democratic nations. Unfortunately, the collective security approach enshrined in the UN Charter is likely to become the exception rather than the norm.

Unilateral action

unilateral
undertaken mainly by one state or body

When nations seek to act mainly on their own–that is, **unilaterally**–then the outcomes are usually not so good. Also, acting unilaterally is usually only an option for the great powers that have significant economic and military clout. It is far better that the great powers demonstrate some humility and take into account advice from trusted allies, and the international community more broadly, before embarking on a course of action to deal with an issue. When the United States has acted unilaterally, as it did in the Vietnam War and in Iraq, the outcomes have been disastrous.

In 2014 and then in 2021, Russia acted unilaterally to resolve issues it had with Ukraine. By doing so it violated the UN Charter and several UN conventions plus the Geneva Conventions. In response, there has been multilateral cooperation by EU and NATO members, and Australia, in assisting Ukraine in fighting for its survival.

By far the biggest challenge for world order in recent decades is the illegal use of force by permanent members of the UN Security Council. The US-led invasion of Iraq in 2003 was illegal under international law due to the failure to get a UN Security Council Resolution, despite seeking one. The Russian annexation of Crimea in 2014 and then the full-scale invasion or Ukraine in 2021 were even more blatant violations of the UN Charter, with no attempt at seeking UN Security Council backing. China also flouts United Nations values in its persecution of the Uyghur people, its subjugation of Tibet and its willingness to use force in the South China Sea to protect its expanded maritime border, despite the 2016 International Court of Justice ruling that rejected this maritime border. This lack of respect for the United Nations demonstrated by great powers undermines the legal foundation of the international system that has lasted for around 80 years.



Review 16.6

1. Describe how traditional media has been weakened in recent years.
2. Identify examples of social media being used to cause harm.
3. Discuss why the practices of the giant internet platforms such as Facebook, X, Google and Apple may represent a threat to world order.
4. Define 'soft power' and provide an example of it being used successfully.
5. Identify one situation in which political persuasion has worked and one in which it has not worked.

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16.3 Contemporary issue: The Responsibility to Protect principle

How can we possibly do worse flying under the flag of the Responsibility to Protect than we did for centuries accepting, in effect, that state sovereignty was a licence to kill?

Gareth Evans, 2008, former President of the International Crisis Group, in an interview with *Stiftung Entwicklung und Frieden News*.

The Responsibility to Protect (R2P) doctrine in 2005 marked the highwater point for the influence of the United Nations in world order since its foundation in 1945. Sadly, over the decades since then the international community has failed to implement this doctrine to the degree envisaged by its authors.

The R2P is a powerful doctrine that was developed over several years as a response to the mass atrocity crimes in Rwanda and the former Yugoslavia in the 1990s, and then developed further by the International Committee on Intervention and State Sovereignty in 2001. Former Hawke Labor government Foreign Minister Gareth Evans played a significant role in its development. The R2P was unanimously endorsed by the UN General Assembly in 2005 and also received unanimous endorsement by the largest gathering of heads of state at the World Summit on 14–16 September.



Figure 16.10 On 6 October 2011, Gareth Evans gave a passionate speech on the Responsibility to Protect (R2P) in the wake of NATO's intervention in Syria in 2011 in which the R2P was invoked by the UN Security Council.

The R2P is in effect a pledge to protect vulnerable populations within nations states from mass atrocity crimes. This effectively overrides Article 2:7 of the UN Charter that prevents intervention in domestic affairs of a nation state. In January 2009, the UN Secretary-General released a report on implementing the R2P. In July 2009, the first UN General Assembly Debate on the R2P was held. At this debate, UN member states overwhelmingly reaffirmed the 2005 commitment, and the UN General Assembly passed a consensus resolution taking note of the Secretary-General's report.

Analysis 16.3

Scan the QR code to watch Video 16.2.

1. What impact did the Rwandan genocide have on Gareth Evans?
2. Identify the types of crimes the Responsibility to Protect (R2P) was directed at.
3. Identify what Evans is referring to when he uses the phrase 'a licence to kill'.
4. Discuss whether or not R2P should be used if it cannot be used equally against all perpetrators.

Video 16.2 A 2012 public lecture by Gareth Evans about the Responsibility to Protect (04:34)

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The Secretary-General has since released annual reports in advance of the UN General Assembly Informal Interactive Dialogue on the Responsibility to Protect. In June 2018, for the first time since 2009, the UN General Assembly held its first debate on the R2P. The UN Security Council has invoked the R2P in more than 90 resolutions since 2006.

There were high hopes for invocation of R2P in situations around the world where populations were vulnerable to being targeted by malevolent actors or even their own governments. However, approximately 20 years later the international community has lost its unified resolve to deal with mass atrocity crimes within national borders. The United Nations does not have the capacity on its own to act on this doctrine and the political world leaders are too often missing. However, if the international community in the future regains the commitment to creating the conditions for a world order that prioritises the welfare of all humans, then the R2P is ready-made for this purpose.

Legal responses

The 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 to improve their ability to do so.
- The United Nations, 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 policymakers to what needs to be achieved, by whom and when.

From the perspective of international organisations, which includes the United Nations, the R2P highlights their responsibility 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 policymakers to highlight the public's expectations of when and 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, the 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.

Analysis 16.4

Go to the website for 'United Nations Office on Genocide Prevention and the Responsibility to Protect' at the following link: http://cambridge.edu.au/redirect/10337.

1. Identify the office's partner organisations.
2. Outline the five different aspects of the Responsibility to Protect (R2P) and genocide-protection work.
3. Assess the usefulness of this website in helping you understand the role that the principle of the R2P plays in promoting world order.

Research 16.3

1. Find five media articles that contain some debate about the effectiveness of the Responsibility to Protect (R2P) principle. Start with Adom Getachew's article 'Holding ourselves responsible' (*Boston Review*, 11 September 2019).
2. Make notes about each of the articles. Identify areas of agreement and areas of debate.
3. Describe your overall assessment of the R2P principle.

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Non-legal responses

Responsibility to Protect: Engaging Civil Society

NGOs have taken up the cause of the R2P. In 2003, the World Federalist Movement Institute for Global Policy launched the 'Responsibility to Protect: Engaging Civil Society' project, with the aim of building support for the R2P doctrine. 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 'Responsibility to Protect: Engaging Civil Society' project has been involved in:

- strengthening the acceptance of the R2P by governments and international organisations
- raising awareness about the R2P and building NGOs' advocacy skills
- promoting the UN's implementation of the R2P principle
- helping NGOs to develop strategies to implement the R2P principle in country-specific situations.

International Coalition for the Responsibility to Protect

In January 2009, the 'Responsibility to Protect: Engaging Civil Society' project launched another project, the 'International Coalition for the Responsibility to Protect' project. 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 the R2P principle and to educate NGOs on how to form partnerships with other interested NGOs and how to apply the norm to specific regions.

The Global Centre for the Responsibility to Protect

The Global Centre for the R2P was established in 2008 to promote the effective implementation of the R2P principle and to provide support for governments, IGOs and NGOs that are working to prevent mass-atrocity crimes. This organisation gives accurate, up-to-date information on the relevance of the R2P principle to the world today, how the R2P principle is being invoked in various situations, and research to support those seeking to apply the R2P principle.



Figure 16.11 Protesters on the second anniversary, 1 February 2023, of the Myanmar military coup that toppled the democratically elected government shout slogans while holding pro-democracy signs and pictures of deposed leader Aung San Suu Kyi. The crowd gathered in front of the Myanmar Embassy in Bangkok, Thailand. Myanmar is a country whose people are at risk.

Research 16.4

Explore the website for The Global Centre for the Responsibility to Protect (R2P), available at https://cambridge.edu.au/redirect/10514.

Use this website to access the latest information about R2P and to gain a detailed knowledge and understanding of how the application of R2P has worked in practice in several countries. In the process of doing this, also assess the effectiveness of this website for providing information about R2P and all aspects of this organisation's work.

1 Explore three countries in detail by reading their pages found in the 'Populations at risk' dropdown menu. Discuss why the R2P was invoked and what impact that may have had.

(Continued)

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2 From other online sources, search for media articles about your three countries.
3 Search the other sections of the website to seek out information that addresses the overall effectiveness of the R2P doctrine.
4 On the website, locate the following 2020 article by Gareth Evans: 'R2P: The Dream and the Reality'. How does Gareth Evans evaluate the effectiveness of R2P 15 years after its inception?
5 Search for one or both of the following articles, and compare their assessments with Gareth Evans' views:
   - Catherine Renshaw, 'R2P: An idea whose time never comes', *The Interpreter*, Lowy Institute, 2 June 2021.
   - Dr Sarah Teitt, 'Controversies over R2P are Not Just Controversies over R2P', Australian Institute for International Affairs, 21 July 2021.
6 Search for more recent articles on the R2P principle. Have there been any further developments regarding the R2P?
7 Search for more recent articles on the R2P principle. Have there been any further developments regarding the R2P?

16.4 Contemporary issue: Regional and global situations that threaten peace and security – the invasion of Ukraine



Figure 16.12 On 19 September 2023, President of Ukraine Volodymyr Zelenskyy addressed world leaders during the UN General Assembly. President Zelenskyy urged the world's leaders to support Ukraine's peace plan and to be united to defeat the aggressor, Russia.

In September 2023, President of Ukraine President Zelenskyy gave two speeches at the United Nations: one to the General Assembly on 19 September and one to the Security Council on 20 September. These speeches highlighted the international law and global norms that underpin the post-1945 rules-based world order. They also pin pointed the aspects of the rules-based order that were being blatantly undermined by Russia's war on his country.

> The resolutions of the General Assembly have clearly recognized the fact that the only source of this war is Russia. But, this has changed nothing for Russia in the United Nations. However, these are the situations that have changed everything for the UN. We should acknowledge that the Organization finds itself in a deadlock on the issue of aggression. Humankind no longer pins its hopes on the UN when it comes to the defense of the sovereign borders of nations. World leaders are seeking new platforms and alliances that could reduce the disastrous scope of problems. Those problems that are met here, within these walls, with rhetoric, rather than real solutions, with aspirations to compromise with killers, rather than to protect lives. Life should be defended uncompromisingly to ensure successful protection.
>
> President of Ukraine Volodymyr Zelenskyy, 2023, Address at the UN Security Council meeting, 20 September.

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Zelenskyy noted in his speech on 20 September 2023 that it was 574 days since his country had been invaded by Russia, and the occupation of Ukraine and attacks on its people and environment had continued unabated and were likely to continue for much longer. He also noted that Ukraine was exercising its right to self-defence as outlined in the UN Charter.

Legal Info

The right of self-defence

UN Charter
Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security ...

The United States had itself invoked Article 51 of the UN Charter when it was attacked by terrorists on 11 September 2001. This was then backed up by the adopting of the UN Security Council Resolution 1368 (2001), which gave member nations, including the United States, the legal right to use all means to combat the terrorists. This was then invoked when the US military invaded Afghanistan in November 2001 to use force against the Al Qaeda terrorists and the Taliban regime that was hosting Al Qaeda.

The two speeches by the Ukrainian President provided both a warning to the international community and a critique of the United Nations peace and security mechanisms. The warning was that the future of the international rules-based order, created in the aftermath of World War II, and including the United Nations at its centre, was irrelevant. The reason, Zelenskyy declared, was that the UN Security Council was facilitating the aggressor and standing by as a member nation was mercilessly attacked in blatant violation of the UN Charter. As a result, Ukraine has had to seek assistance from other organisations such as individual nations, the European Union and the NATO.

Zelenskyy stated that the United Nations had failed to act on dealing with this blatant case of aggression by Russia because of the veto power in the hands of 'the aggressor'. He claimed that the veto power possessed by only a few nations was at the heart of the inequality of the UN system and that it is 'precisely this inequality that renders it ineffective now.' For this reason, the President declared, 'the years-long discussions of projects for UN reform must be translated into a viable process of UN reform'. The Ukrainian President then outlined to the Security Council a five-point proposal for reform of the UN Security Council, with the power of veto being at the top of the list so that the 'UN Charter can actually work for global peace and security'.

Zelenskyy also referred to the veto power within the United Nations.

Legal Info

The veto power

UN Charter
Article 27.3

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.

This sub-article of the UN Charter is where the veto power is buried. In effect, this sub-article requires that all five of the permanent members must vote yes to pass a Security Council Resolution. Any vote by a permanent five member against a resolution effectively nullifies that resolution. This means that it takes only one Permanent Five member to effectively stop the Security Council taking any action on a matter brought before it.

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Zelenskyy proposed that in regard to instances of mass atrocity crimes, the veto power should be suspended. However, he observed that in Russia's case it would 'not give up this stolen privilege voluntarily'. Therefore, there should be a mechanism for the UN General Assembly to 'overcome the veto' with a two-third's vote of its members.

The day before, in his speech to the General Assembly, Zelenskyy had mentioned his Ukrainian Peace Formula that was launched a year ago and argued that it could become the basis of updating the 'existing security architecture' to 'guarantee the full power of the rules-based world order'. He followed up by stating that 'for the first time on modern history, we have the chance to end the aggression on the terms of the nation which was attacked'.

The legal basis of Ukrainian sovereignty

The Ukrainian people take pride in their rich though complicated past. Since the seventeenth century, parts of the area have been under the control of Russia, with much of central Ukraine being incorporated into the Russian Empire in the late eighteenth century. When the Russian Revolution of 1917 led to the formation of the Union of Soviet Socialist Republics (USSR, or the Soviet Union), Soviet Ukraine was one of the founding republics.

Ukraine gains the status of a nation state – 1991

On 24 August 1991, the Ukrainian Parliament made a declaration of independence from the USSR, and in December a series of key events took place.

The Budapest Memorandum 1994

In 1994, Ukraine, along with other former Soviet republics Belarus and Kazakhstan, signed the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). These newly independent nations all possessed some nuclear weapons that were a part of the nuclear arsenal of the Soviet Union. Under the Budapest Memorandum on Security Assurances, signed with the United States, the United Kingdom and Russia (all nuclear powers), the former Soviet nations would transfer the nuclear weapons in their control to Russia. In return, all parties to the agreement would respect the sovereign independence and the borders of each of the three nations. They agreed that no nuclear weapons should be used against the three nations.

Table 16.2 Events of December 1991

1 December	Ukraine votes on: • a referendum to support the parliamentary declaration of August (over 92% vote 'yes') • presidential elections (all six candidates in favour of independence).
2 December	Ukraine achieves global recognition as a nation state.
7–8 December	Leaders of the republics of Russia, Ukraine and Belarus agree to: • dissolution of the Soviet Union • creation of the Commonwealth of Independent States (CIS), a looser cooperative relationship.
20 December	Ukrainian parliament makes a statement that includes the following points: • Ukraine is a nation state under international law, in control of all matters within its borders • the CIS will only have an advisory role • existing borders between Russia, Ukraine and Belarus will remain • Ukraine will meet all obligations arising from treaties made by the former Soviet Union.
20 December	USSR is formally dissolved.

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So, in effect Ukraine promised to transfer the Soviet nuclear weapons on its soil to Russia in return for Russia promising to respect the territorial integrity of Ukraine, and not to use nuclear weapons against it. This also represented another legal recognition of Ukraine's status as a nation state under international law.

The Russo-Ukrainian War 2014–?

Vladimir Putin became President of Russia in 2000. In his 2005 state of the nation address, he declared his belief that the break-up of the Soviet Union at the end of the Cold War in 1991 was 'the greatest geopolitical catastrophe of the century'. Putin came to view the successful democracies on Russia's borders as a threat to his authoritarian style of leadership and feared that a popular revolution in Russia, like those that occurred in Ukraine and in the Arab Spring, could destroy him. Putin began portraying the EU as a threat and set about using clandestine measures to destabilise several key member states. He also became much more outspoken against the United States and NATO.

Annexation of Crimea

Crimea is a peninsula in the Black Sea, connected to mainland Ukraine. In 1783 it was annexed by the Russian Empire, and in 1922 it became part of the Russian Republic within the USSR. In 1954, Soviet leader Nikita Khrushchev transferred the territory of Crimea to the Ukrainian Republic. After the formal disintegration of the USSR in 1991, Crimea remained as part of the new nation state Ukraine. From the early 1990s there was a view on the nationalist side of politics in Russia that Crimea should be returned to Russia.

In 2014, when a popular uprising in Ukraine led to the overthrow of the pro-Putin president, Viktor Yanukovych, Putin decided to use force to bring Ukraine back into Russia's orbit. In February 2014, the Russians began clandestine operations in Crimea culminating in the formal annexation of the Crimean Peninsula, and integration into Russia by the end of March 2014.

Conflict in the Donbas

Putin then supported pro-Russian uprisings in Ukraine's south-east, known as the Donbas. Ukrainian government forces fought intense battles in the region over the course of 2014 and 2015. At stake were the two heavily industrialised territories in the Donbas, known as Donetsk and Luhansk. The conflict then settled into a trench warfare along a 420-kilometre front, involving approximately 75 000 troops. Between 2014 and 2022, over 14 000 people were killed in the fighting.

Putin had hoped to capture all of the territory down to the coast of the Black Sea, but the Ukrainian forces were able to hold their ground. The conflict in the Donbas then became what the Russian military planners called a 'frozen conflict', which suited Putin because it promoted instability in Ukraine and weakened its economy.

Invasion of Ukraine

At 6 a.m. on the morning of 24 February 2022, Vladimir Putin launched a full-scale invasion of Ukraine using regular Russian armed forces consisting of about 200 000 troops. The invasion force crossed the border at a number of points as Russian missiles slammed into buildings and infrastructure in major cities across Ukraine. This was an all-out war to remove the Ukrainian government and take control of the entire country.

Putin believed that Ukraine would capitulate to Russian forces within a week. Most world leaders thought so too, but when the US government offered to evacuate the Ukrainian President Volodymyr Zelenskyy and his family, Zelenskyy was reported to have said: 'The fight is here; I need ammunition, not a ride.' Although the story was widely repeated, it may be apocryphal that he used these words. Either way, the point remains that from this moment on, Volodymyr Zelenskyy has demonstrated that he is a fighter and an inspiring leader with courage. He has spoken to many world leaders and to international bodies such as the EU Parliament and the UN General Assembly, the G7 and G20, and the US Congress, culminating in his two addresses given at the United Nations in New York in September 2023.

Many in the West came to believe that Western democracy and the international rules-based order were under threat and that Russian aggression against Ukraine must be stopped.

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Over the course of 2023, Russian forces had focused on keeping hold of the territory that they had captured in the south-east, the Donbas region and Crimea. Ukraine launched offensive operations from mid-2023 and made some gains.

By mid-2024 it was not clear how or when the Russo-Ukrainian war would end. It was apparent that Russia could not conquer all of Ukraine as Putin had wished. However, Russia could still cause catastrophic damage to Ukraine, especially if it resorts to using tactical nuclear weapons, or damaging one or more of the six nuclear reactors at Ukraine's Zaporizhzhia Nuclear Power Station. Such a nuclear disaster would be a regional and global catastrophe on a far greater scale than Chernobyl.

Legal responses

The Russian invasion of Ukraine, dating back to 2014, was a blatant breach of international law. Russia had violated Article 2(4) of the UN Charter that prohibits the use of force and the violation of territorial integrity of any independent nation. Also, Article 2(3) states that member nations are to seek to settle all international disputes using peaceful means.



Figure 16.13 Zaporizhzhya Nuclear Power Plant viewed from Nikopol on 4 September 2023. The Russians blew up the dam that supplied water for the nuclear reactor and in the process also flooded vast areas of farmland in south-eastern Ukraine. As a result, the Dnipro River dried up on 4 September 2023.

The only exception to this rule is if the Security Council invokes Chapter 7 of the United Nations for the maintenance of international peace and security. Russia has falsely claimed that it was acting in self-defence invoking Article 51 of the Charter. This has not been accepted by any experts in international law.

This act of aggression by a permanent member of the UN Security Council calls into question the whole post-1945 architecture of international security. Instead of attacking other nations, the permanent members of the UN Security Council should be upholding international peace and security. Sadly, at various times over the last 80-year history of the United Nations, each of these five permanent members has acted in ways that are contrary to the aims and values of the United Nations. What makes this situation worse is that this time the aggressor nation, Russia, has used its power of veto to prevent any action by the UN Security Council to assist Ukraine. As a result, Ukraine has had to seek out support in its fight for survival from outside the Security Council.

The UN General Assembly

Since 2014, the UN General Assembly has voted several times condemning Russia's actions and reaffirming its non-recognition of Russia's annexation of the Crimean Peninsula. On 28 February 2022, four days after the all-out Russian invasion of Ukraine, the UN General Assembly passed a resolution condemning the invasion with a vote of 141–5. However, there were 35 abstentions. Other similar resolutions were passed with similar results. A year after the invasion the UN General Assembly repeated its demand for an immediate and unconditional withdrawal from Ukrainian territory. The votes were similar with 141 voting for, seven against and 32 abstentions.

In addition, this resolution stated concern about the impact of the war on global supplies of food, energy and finance, and noted the environmental impacts and specifically the prospect of a nuclear catastrophe. It called on all member states to support the Secretary General in his efforts to address these impacts. The UN General Assembly was not prevented from voting on this issue but

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had no power to take any action in its own right. It was left to the Secretary General to address the wider impacts of the war.

Theoretically, there was a precedent for the UN General Assembly taking action on a matter when the UN Security Council refused to do so. This was Resolution 377A(V) passed in 1950 during the Korean War. However, it has chosen not to do so in this case as 20 per cent of the member states would not be supportive.

In April 2022, members in the UN General Assembly voted 93–24, with 58 abstentions, to remove Russia from the UN Human Rights Council because of allegations that its soldiers were committing war crimes in Ukraine.

International Criminal Court Investigation

The ICC was set up in 2002 to try individuals for genocide, war crimes, crimes against humanity and aggression. The ICC is running cases that relate to the Russian invasion of Ukraine. The war in Ukraine is the most documented in history and there is no shortage of evidence against Vladimir Putin. However, the crime of aggression is a crime that has not yet been prosecuted against any world leader, so there is no set way of going about it. Putin is basically guilty of 'command responsibility' for war crimes such as killing innocent civilians and kidnapping Ukrainian children.

Realistically, Vladimir Putin will not be brought before any international court in the foreseeable future. However, as international lawyer Geoffrey Robertson pointed out in an article in *The Sydney Morning Herald* on 19 March 2023, what makes this case significant is that international criminal law has advanced since the ICC was established. Also, Robertson notes that previous world leaders who faced indictments from the ICC, such as Pinochet, Milosevic, Gaddafi and Al Bashir, all fell from power and faced some sort of justice.

In the meantime, Putin's international travel will be restricted because there are 123 member states that will have a duty to hand him over to the ICC if he enters their borders.

Research 16.5

Go the following websites:

- ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova': http://cambridge.edu.au/redirect/10338
- ICPA, 'History in the making – the International Centre for the Prosecution of the Crime of Aggression Against Ukraine starts operations at Eurojust': http://cambridge.edu.au/redirect/10339
- ICJ – International Court of Justice.

1. Outline the legal basis provided for prosecuting Vladimir Putin and Lvova-Belova for crimes involving children.
2. Outline the evidence the ICPA provides for its case.
3. Research media websites to find the latest developments in the ICC prosecutions.
4. Search the ICJ website for the case against Russia in regard to Ukraine.

International Court of Justice ruling

In February 2022, Ukraine took Russia to the International Court of Justice, accusing it of invading their territory and committing grave and widespread violations of the human rights of the Ukrainian people. Russia refused to attend the first hearing on 7 March 2022. On 16 March 2022, the court ruled 13–2 that Russia must immediately suspend its military operations in Ukraine. The two dissenting judges were from Russia and China.

Non-legal responses

Other efforts by the United Nations

In the face of the paralysis of the UN Security Council, the Secretary-General António Guterres has sought to use as many other tools, mechanisms and pathways as possible. Guterres has spoken out numerous times condemning the Russian invasion and calling for Russia to withdraw and cease all hostilities. Guterres even made a personal appeal to Putin saying, 'in the name of humanity, bring your troops back to Russia'.

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Figure 16.14 UN Secretary–General António Guterres shakes hands with Ukrainian President Volodymyr Zelenskyy on the sidelines of the 78th UN General Assembly at UN Headquarters in New York City on 19 September 2023.

The Secretary-General encouraged the members of the UN Security Council to support humanitarian measures. One of these was the Black Sea Grain Initiative, in place between July 2022 to July 2023, which was important because many countries around the world are dependent on exports of grain from Ukraine.

The UN Secretary-General also met with numerous world leaders to lobby for support of UN humanitarian measures in Ukraine. Since the beginning of the war in 2014, the United Nations has operated the Ukraine Humanitarian Fund, which is one of the country-based pooled funds of the United Nations. The Fund was created to collect money from various donors, whether individuals, businesses or organisations, and have the combined funds managed and distributed to UN agencies and NGOs under the guidance of UN leadership. The funds are targeted to emergency supplies of food, water, shelter and other essential support. As of 2023, this fund has directly supported over 16 million people. The United Nations has deployed 14 000 personnel working across the worst affected areas in Ukraine.

Of course there are a number of other UN agencies that focus some of their attention on supporting Ukraine, such as UNICEF, UNESCO, WHO and the World Food Programme. By 2024, there were over 6.2 million refugees from Ukraine, with 5.8 million in Europe and over 370 000 in other countries. These refugees are supported by the UNHCR, various NGOs and the countries that have taken them in.

The International Atomic Energy Agency deserves special mention as it plays an important role of monitoring the dangerous situation at the Zaporizhzhya Nuclear Power Plant. Any attack on the reactor would be catastrophic for Ukraine and Europe, and even Russia.

In addition to the UN agencies supporting Ukraine, there are many NGOs doing emergency relief work in Ukraine, such as Médecins Sans Frontières, World Vision and Christian Disaster Response, to name just a few.

Legal Links

- For further information and resources on the work of the various UN agencies go to the following website: http://cambridge.edu.au/redirect/10340.
- For the latest statistics on Ukrainian refugees go to the following website. This information is updated daily: http://cambridge.edu.au/redirect/10341.
- For further information and resources on the work of NGOs go to the following website: http://cambridge.edu.au/redirect/10342.

Economics, trade and sanctions

The G8 expelled Russia from the group in 2014 after it began its war against Ukraine, and from this point was known as the G7. The Group of Twenty or G20 is an organisation that is designed for countries to meet and discuss issues and plans relating to the global economy. Collectively, the G20 represents two-thirds of the world's population and 85 per cent of the world's economic output and 75 per cent of world trade.

Though Russia is still a member of the G20, Vladimir Putin did not attend the September 2023 G20 Summit in India because of the ICC arrest warrant for him over war crimes in Crimea. A joint declaration on the war in Ukraine was issued at the end, which avoided directly naming Russia. Some commentators saw this as a win for Russia.

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Russia's power of veto has prevented the UN Security Council from applying economic sanctions on Russia. However, sanctions applied by the United States, the EU, and other nations can have just as much impact. Sanctions have been applied on Russia since the start of the war in 2014 and have intensified since February 2022. These sanctions cover a range of things in areas such as finance, energy, technology, defence, and the assets of the wealthy oligarchs who back Putin. Russian banks have been banned from using the financial messaging system known as SWIFT. Russia's vast foreign reserves have also been frozen. Also, according to a Yale University report on 10 October 2023, over 1000 Western companies have voluntarily shut down operations in Russia. Many companies did this at great financial cost to comply with their own corporate responsibility, while others did it due to public pressure.

Military aid

A key factor in Ukraine's survival has been the massive amounts of military aid supplied by the United States, the United Kingdom, the EU and other countries around the world, including Australia. By 2024, 47 countries were suppling military aid to Ukraine. The United States and the EU were by far the largest donors, committing over $80 billion each by 2024. However, as a share of gross domestic product, the United States is way down the list, with countries in north and eastern Europe, such as Norway, Lithuania, Denmark and Poland, topping the list. The United States and NATO military aid is supplying Ukraine with the very latest in weapons and weapons systems such as rocket and missile systems, helicopters, drones and tanks.

Analysis 16.5

Read the article 'How Much U.S. Aid Is Going to Ukraine?', which was published by the Council of Foreign Relations at http://cambridge.edu.au/redirect/10343.

1. Identify the various types of weapons provided to Ukraine.
2. What other weapons does Ukraine seek from the United States and NATO? Discuss why Ukraine argues that it needs these weapons.
3. Discuss why countries to the north and east of Europe supply the greatest percentage of aid measured in proportion to their gross domestic product.
4. In 2023, the United States announced that it would supply cluster munitions and depleted uranium artillery shells to Ukraine. Research media websites for articles arguing that these weapons breach international law. Identify the treaties involved.

The role of the media

News media

Another important factor that is critical in Ukraine's defence is the role of the Western mainstream media in seeking to report accurate information about the war. Also, Western nations supporting Ukraine have also prevented *Russia Today*, or *RT*, from being screened on television channels.

Social media

There is a vast amount of lies and disinformation on social media platforms. In March 2022, YouTube banned *RT* and other Russian government media organisations from its platform, citing its policy barring content that 'denies, minimizes or trivializes well-documented violent events' as the Russian



Figure 16.15 US President Joe Biden gives a speech at the Royal Warsaw Castle Gardens in Poland in February 2023. This was Biden's second visit to Poland in the last year, and it also included an unexpected visit to Kyiv, ahead of the one-year anniversary of the Russian attack on Ukraine.

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Figure 16.16 Sean Penn hands over his Oscar award statue to Ukrainian President Volodymyr Zelenskyy on 8 November 2022.

organisations were doing with the war. However, it is not hard to find pro-Russian content on YouTube from other sources. Furthermore, Facebook, Instagram and TikTok allow *RT* and any other pro-Russian propaganda on their platforms.

On the other hand, since the start of the 2022 invasion social media has been used effectively by Ukrainians to get their stories out to the world. President Zelenskyy himself has been exceptional in this from the first days when he made selfie videos to the nation from the heart of Kyiv when his life was in extreme danger.

Film

Films are also playing a role in the war. Actor and director Sean Penn had been in Ukraine on 24 February 2022 and was about to make a documentary about Zelenskyy when the Russian invasion started. He continued filming and in 2023 produced a documentary called *Superpower*, which began screening in cinemas in 2023. This film attempted to influence American public opinion to keep up their support for Ukraine at a time when many on the Republican side of politics were wavering in their support.

Conclusion

There is a sense that the outcome of the Russo-Ukrainian War will have a major impact on world order. Whether that impact will be positive or negative remains to be seen.

Review 16.7

1. Outline the legal issues President Zelenskyy raised in his addresses to the United Nations in September 2023.
2. Outline the sections of the UN Charter that have been violated with Russia's invasion of Ukraine.
3. State the international treaties that have been violated by Russia's invasion.
4. Describe the legal basis of Ukrainian sovereignty.
5. Assess the effectiveness of the legal responses to the Russian invasion.
6. Compare and contrast the effectiveness of the various known legal responses to the Russian invasion.

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16.5 Contemporary issue: The success of global cooperation in achieving world order – the campaign for the elimination of nuclear weapons

At the height of the Cold War there were 68 000 nuclear warheads in the world, which were enough to destroy the world many times over. According to many Cold War veteran political, diplomatic, and military personnel, the world was very lucky to survive the Cold War without a major nuclear catastrophe. The world came close to a global thermonuclear war on several occasions during the Cold War, most notably in 1962, in 1973, and twice in 1983.

International law has played a critical role in reducing the number of nuclear weapons from the Cold War high point. However, 13 000 nuclear weapons are still more than enough to destroy most life on Earth. Furthermore, according to the Bulletin of the Atomic Scientists' report, in January 2023 the world was closer to catastrophe than at any time since the beginning of the Cold War.

The question to be considered at time in history is: Can international law be used to further diminish and possibly remove this threat altogether?

Legal responses

International law has played an integral role in attempting to reduce the threat of nuclear weapons. However, international law, in the form of treaties or court decisions, is usually the result of a combination of several of the following: diplomacy, political negotiation, the threat of force, civil society activism and grassroots political action.

World federalism

One immediate response to the dropping of the atomic bombs on Hiroshima and Nagasaki in August 1945 was the rise of a grassroots movement that believed that the United Nations would be too weak to deal with a future dominated by this new weapon. Many people felt that only a world government would be capable of controlling the power of the atom. In the words of one proponent, 'the survival of mankind demands a world community, a world government and a world state'. In the years after the dropping of the bomb on Hiroshima, world federalist organisations blossomed in the United States, with a total membership of the United World Federalists being about 40 000 people and boasting 659 chapters. Yet this earliest and most ambitious legal response to nuclear weapons withered with the onset of the Cold War.

The United Nations

From its very first meeting, the United Nations attempted to deal with the threat of nuclear weapons. The First Committee of the UN General Assembly was given responsibility for 'disarmament and international security'.

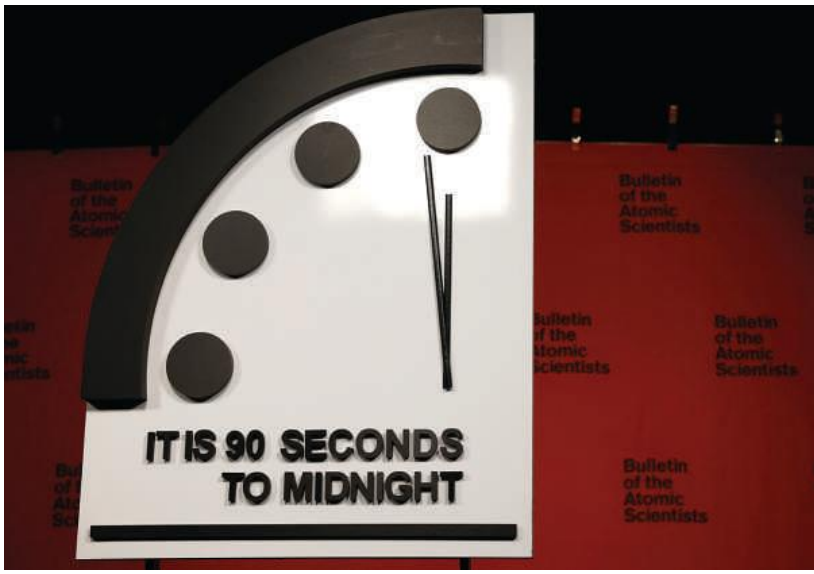


Figure 16.17 On 23 January 2024, the Bulletin of the Atomic Scientists held its annual conference in Washington DC and announced that the Doomsday Clock would remain at 90 seconds to midnight. The clock was first set on 100 seconds in 2019. The years since 2019 have been the closest to Doomsday than at any time since the Cold War.

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In 1946, the first resolution of the UN General Assembly concerned nuclear weapons. Despite being debated for six months at the United Nations, the plan failed to achieve an outcome due to the growing atmosphere of mutual suspicion between the United States and the USSR as the Cold War set in. In 1961 there was another attempt by the UN General Assembly to make progress with Resolution 1653, which declared the use of nuclear weapons to be 'contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations'. Though it passed with a majority of only one vote, it did serve to push the issue forward at the United Nations. The First Committee of the UN General Assembly has continued in operation since 1946 and meets for four or five weeks each year in October after the UN General Assembly session.

Multilateral treaties

In most cases, international law has only been effective in dealing with the nuclear issue when the nuclear weapons states has decided to use it. The United States and the USSR saw it to be in their own interests after the Cuban Missile Crisis of 1962 to try to reduce the tension between them. The result was the *Partial Test Ban Treaty*, otherwise known as the *Limited Test Ban Treaty*, which was signed by the United States, the United Kingdom and the USSR on 5 August 1963, and entered into force on 10 October 1963. The treaty prohibited nuclear explosions in the atmosphere, in outer space and under water, or in any manner to cause radioactive debris to drift out of the borders of the nation that carries out the nuclear test.

In 1968, the *Treaty on the Non-Proliferation of Nuclear Weapons* was signed in Washington, London and Moscow. In 1970 it came into force, after being ratified by enough 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. Article VI states a goal of complete disarmament.

Treaty on the Non- Proliferation of Nuclear Weapons (1968)
Article VI

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.

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 Nuclear 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. As of March 2024 there were 187 signatories and 178 ratifications, although the United States is not among the ratifications. Even though the treaty has not yet come into force, nuclear testing by the nuclear weapons states ceased in the 1990s, with Pakistan conducting the last test in 1998. However, since then North Korea has developed the atomic bomb, and carried out its first nuclear test in 2006.

The *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) has been effective in that it has prevented the spread of nuclear weapons beyond a small number of states. Without this treaty, we could possibly have up to 40 nations possessing nuclear weapons today, including Australia. However, the downside was that the three nations that did not sign it – Israel, India and Pakistan – have since developed nuclear weapons. The other problem is that the United States and the USSR vastly expanded the numbers of their nuclear weapons in the years after signing, reaching a peak in the 1980s of 68 000 weapons, in violation of Article VI of the treaty. So the treaty was successful in keeping a lid on the number of countries that possessed nuclear weapons, but totally failed to stop the growth in the number of nuclear warheads. It took bilateral treaties to reduce the total number of nuclear warheads.

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Bilateral treaties

A series of bilateral treaties between the United States and the USSR/Russia dramatically reduced the overall number of nuclear weapons. These bilateral treaties came about when an unexpected thaw in relations between the two superpowers was made possible by Mikhail Gorbachev and Ronald Reagan. This also occurred with the largest global peace movement in history, which saw millions of people around the world take to the streets to protest. Thus, grassroots action by the nuclear disarmament movement put world leaders under constant pressure to do something to eliminate the threat of nuclear weapons.

Following are some of the key bilateral initiatives that resulted in massive cuts in nuclear arsenals:

- **1986** – the United States and the USSR talks on nuclear weapons reductions at the Reykjavik Summit in October 1986.
- **1987** – arising from the 1986 talks, the Intermediate Nuclear Forces (INF) Treaty, between the United States and the USSR, prohibited the possession, production or flight-testing of ground-launched ballistic and cruise missiles. This was one of the most significant bilateral nuclear treaties and played a key role in ending the Cold War.
- **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.
- **2002** – US President Bush and Russian President Putin signed the SORT treaty. Both 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** – Former 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.

As of June 2023, the total stores held by the United States and Russia was about 11 000.

The rejection of international law and preference for the use of force

In 2000 the nuclear weapons states declared their unequivocal desire to eliminate nuclear arsenals. However, the administration of the new (now former) US President, George W. Bush, announced its intention to abandon the bilateral *Anti-Ballistic Missile Treaty* of 1972. During the eight years of the Bush presidency there was a preference for the use of force in the so-called 'war on terror'.

The Bush administration had a negative impact on the 2005 World Summit and the Review Conference of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). 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 Article VI of the treaty led to renewed efforts by anti-nuclear groups to work towards the elimination of nuclear weapons by other means. Hopes were briefly raised in 2009 with newly elected President Obama's commitment to the treaty, expressed in his support of UN Resolution 1887 (2009). However, real progress was elusive.

The 2010 Review Conference appeared to be more successful. A 64-point action plan was agreed on, but over the following years very few steps were taken in the implementation of the plan. Five years later, the 2015 Review Conference failed to agree on a final document. The 2020 Review Conference was delayed by two years, due to the COVID-19 pandemic, and again did not adopt a final document, partly because Russia blocked consensus over a number of issues that related to the war in Ukraine.

In the eyes of many national leaders, it was unfair that the majority of the nations of the world had fulfilled their obligations under the treaty and not developed nuclear weapons, while the countries

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that possessed nuclear weapons refused to get rid of them, as stipulated under Article VI of the treaty.

The United States

Former President Barack Obama was awarded the Nobel Peace Prize in 2009 for his promise to rid the world of the nuclear threat, but in his eight-year term as President, he dismantled fewer nuclear weapons in accordance with bilateral treaties with Russia than his predecessor, President George W. Bush had done. In February 2016, President Obama committed the US Government to a US$1.7 trillion modernisation program for nuclear weapons.

President Donald J. Trump's presidency was marked by repeated specific threats to use nuclear weapons against certain countries such as North Korea, Iran and Afghanistan. The US President boasted about the nuclear modernisation program. Furthermore, Trump disdained treaties and international law and displayed a preference for the use of economic sanctions, tariffs and threats of force as key instruments of US foreign policy. In August 2019, President Trump withdrew the United States from the INF Treaty with Russia. This signalled the beginning of a new nuclear arms race between the United States, Russia and China.

Other nuclear weapons states

Meanwhile, most of the other nine nuclear weapons states had also embarked on their own nuclear modernisation programs in defiance of Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968). Also, both North Korea and Russia made specific threats to use nuclear weapons on numerous occasions.

Non-nuclear states

By 2020, a majority of the other 185 nation states that did not possess nuclear weapons, and had kept in compliance with the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), began looking to the new UN treaty, the *Treaty on the Prohibition of Nuclear Weapons* (2017). This treaty came into existence due to a combination of civil society and the Red Cross (from an international humanitarian law approach), facilitated by key nation states such as Austria, Mexico and Costa Rica.

Non-legal responses

The campaign for the *Treaty on the Prohibition of Nuclear Weapons*

International Campaign to Abolish Nuclear Weapons

After the failure of the 2005 Review Conference of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), there was a feeling that something new had to be tried. In 2007 in Melbourne, a small group from the Medical Association for the Prevention of War – and others including the late Bill Williams, Tilman Ruff, Dimity Hawkins and Sue Wareham – founded a new organisation, the International Campaign to Abolish Nuclear Weapons (ICAN). This group looked to the highly successful campaign to abolish landmines, which led to the Ottawa Convention, as their model. They also decided to take the path of international humanitarian law in the tradition of the 1996 International Court of Justice case on nuclear weapons. In 2007, the parent organisation of the Medical Association for the Prevention of War, International Physicians for the Prevention of Nuclear War, launched ICAN internationally. By 2022, ICAN had 650 partner organisations across 107 countries.

Legal Links

For further information about the movement to ban nuclear weapons, including the current status of the *Treaty on the Prohibition of Nuclear Weapons* (2017), see ICAN Australia's website.

The humanitarian impact initiative

The ICAN campaign dove-tailed with the humanitarian impact initiative launched in 2011 by the International Red Cross and Red Crescent Movement with an historic resolution titled 'Working towards the elimination of nuclear weapons'. This resolution was an appeal to nation states to ensure that nuclear weapons are never used again and to create laws to prohibit their use and aim for their prohibition.

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Figure 16.18 Following a 10-year campaign, the *Treaty on the Prohibition of Nuclear Weapons* was adopted at the United Nations on 7 July 2017.
Photo source: Clare Conboy, International Campaign to Abolish Nuclear Weapons

The Red Cross organised three conferences on the Humanitarian Impact of Nuclear Weapons in Oslo (Norway), Nayarit (Mexico) and Vienna (Austria) in 2013 and 2014. At 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 new weapons or large numbers of nuclear weapons were used again. Calls were made 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. One hundred and sixty-five countries signed the 'Austrian Pledge' calling for an elimination of nuclear weapons.

The Vienna Conference

The Vienna conference in December 2014 placed on the public record all of the then-known evidence of the catastrophic impact of use of nuclear weapons.

As mentioned, the 2015 Review Conference of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) made no progress at all towards nuclear disarmament due to the intransigence of the nuclear weapons states. Nevertheless, the 165 countries that had signed the Austrian-led Humanitarian Pledge pushed on and in 2016 an Open-ended Working Group was created at the United Nations to find a way forward. On 27 October 2016, the First Committee of the UN General Assembly adopted a landmark resolution for a 'legally binding instrument to prohibit nuclear weapons leading towards their total elimination'. In 2017, there were two sessions at the United Nations in which the treaty was drafted. On 7 July 2017, the draft was accepted at the UN General Assembly by a vote of 122 to one. On 20 September 2017, the draft treaty was opened for signatures and was signed by 50 countries on that day, and three the following day. With this major goal achieved, ICAN's campaign now shifted

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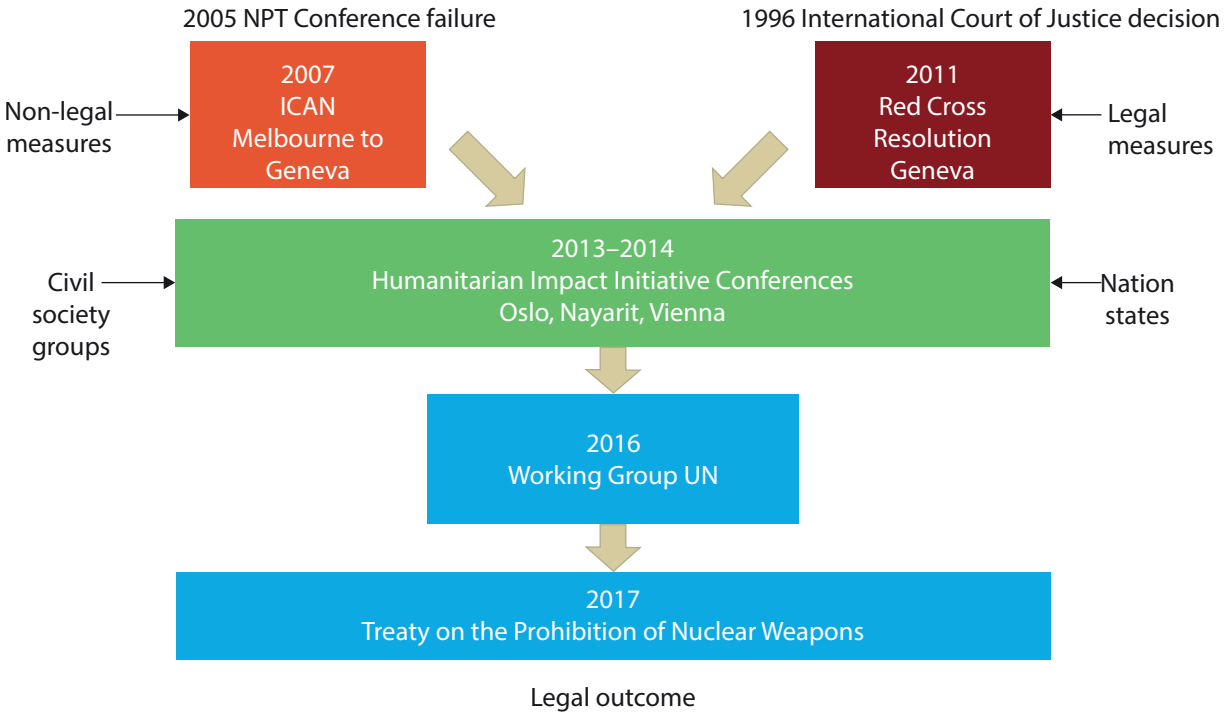


Figure 16.19 This diagram shows how the creation of the *Treaty on the Prohibition of Nuclear Weapons* (2017) was a result of the pursuit of legal and non-legal avenues between 2005 and 2017.

to persuading more countries to sign the treaty. However, despite the fact that previous Australian governments had a strong record in backing other disarmament treaties, the Coalition government resolutely opposed the treaty.

Nobel Peace Prize

The general public around the world was barely aware that a ground-breaking new treaty on nuclear weapons had been created. However, on 5 October 2017, ICAN was named as the Nobel Peace Prize recipient for 2017. The announcement of the Nobel Peace Prize increased global exposure for the *Treaty on the Prohibition of Nuclear Weapons* (2017).

The *Treaty on the Prohibition of Nuclear Weapons* (2017) coming into force in international law

The *Treaty on the Prohibition of Nuclear Weapons* (2017) does not mean that the nuclear threat to global and regional security has been eliminated. The significance of the treaty is that the legal gap for this particular weapon of mass destruction has been filled. Nuclear weapons are now banned under international law in the same way that chemical and biological weapons have been banned. The treaty



Figure 16.20 Hiroshima survivor Setsuko Thurlow and Beatrice Fihn, from the International Campaign to Abolish Nuclear Weapons, give acceptance speeches during the award ceremony of the 2017 Nobel Peace Prize in Oslo, Norway, on 10 December 2017.
Photo credit: Jo Straube, International Campaign to Abolish Nuclear Weapons

is supported by a majority of nation states and a majority of the people in the world.

The nine nuclear weapons states have fought the idea of a treaty banning nuclear weapons since the creation of ICAN in 2007. It is hoped that over

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Figure 16.21 On 10 August 2023, Melissa Parke was appointed as the new Executive Director of ICAN International based in Vienna. It is fitting that ICAN, which was born in Australia, now has an Australian head of the international organisation.
Photo credit: Mauro Palmieri

time, as more and more countries become parties to the *Treaty on the Prohibition of Nuclear Weapons* (2017), the nine nuclear weapons states will feel the pressure from global opinion, stop their nuclear modernisation programs and genuinely comply with Article VI of the treaty and place the world on the path to a future that is free of nuclear weapons.

Australia signing and ratifying the *Treaty on the Prohibition of Nuclear Weapons*

Scott Morrison's Coalition government remained steadfastly opposed to signing the *Treaty on the Prohibition of Nuclear Weapons* (2017). However, at the 2018 Labor Conference in Adelaide a resolution stating that a future Labor government would sign and ratify the *Treaty on the Prohibition of Nuclear Weapons* (2017) passed unanimously. The resolution has remained part of the Labor Party's platform. At the time of writing, 93 countries had signed the *Treaty on the Prohibition of Nuclear Weapons* (2017), and 70 had ratified the treaty to become states parties. As more countries sign and ratify the treaty, there will be more pressure for Australia to join them.

Legal Links

The ICAN report *Choosing Humanity: Why Australia Must Join the Treaty on the Prohibition of Nuclear Weapons*, available at http://cambridge.edu.au/redirect/10344, gives detailed information on the threat of nuclear weapons and all aspects of the campaign to eliminate nuclear weapons. This includes:

- what the treaty says (pp. 8ff)
- the campaign to get the treaty (pp. 18ff)
- the danger and consequences of nuclear weapons (pp. 29ff).

The ICAN report *History is Calling: Australia and the Treaty on the Prohibition of Nuclear Weapons*, available at https://cambridge.edu.au/redirect/10453, examines the following issues:

- how the treaty complements other nuclear treaties
- verification and enforcement
- impact on Australia's alliances.

Review 16.8

1 Outline the legal responses in the Cold War that attempted to reduce the threat of nuclear catastrophe.
2 Explain how a combination of legal and non-legal means were used to create the *Treaty on the Prohibition of Nuclear Weapons* (2017).

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16.6 Contemporary issue: Rules regarding the conduct of hostilities – international humanitarian law

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

International humanitarian law is 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 of international humanitarian law include the Hague Conventions (1899, 1907), the four Geneva Conventions (1949) and the Geneva Protocol (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 had its origins in the late nineteenth 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 Soldering: thousands of wounded soldiers were lying on the battlefield, dying slow and lonely deaths. Dunant 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 in 1863 and 1864. The second conference resulted in a treaty called the *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.

Legal Links

Henry Dunant's book *A Memory of Solferino* can be downloaded free as a PDF from the Red Cross website.

Today we take the rules regarding the conduct of hostilities for granted. Warfare is still horrific, and some soldiers commit atrocities in war. However, most people know the standards and rules of war. They should not 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.

Conflicts in the world today

At any time, there are always a number of conflicts occurring somewhere in the world. In recent years there have been ongoing conflicts in Afghanistan, Syria, Yemen, Myanmar, Libya and Gaza, to name just a few. However, according to the *World Economic Report* (2018), there have been a number of trends in regard to conflicts in recent years:

- The annual Global Peace Index indicates that the world is becoming less peaceful.
- More deaths in war are of civilians rather than soldiers and there are fewer interstate wars but more civil wars and terrorism.
- Violence is having a massive impact on the global economy, accounting for 12.4 per cent of global gross domestic product.
- The number of refugees and displaced people in the world now equals 1 per cent of the global population.

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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 (1949) 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 United Nation. Like the United Nations, 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 Geneva Conventions

The primary instruments governing international humanitarian law are the four Geneva Conventions (1949).

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 wounded prisoners of war, if incapable of serving, a return to their home countries; and it established the use of the white flag with a red cross as a symbol for neutral medical units.

Legal Info



The Geneva Conventions

- 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.
- All four Geneva Conventions have a common article, Article 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 countries not wanting to use the Cross or the Crescent such as Israel.)

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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.

The Hague Conventions

The Hague Conventions (1899, 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 (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 (1907) modified and expanded upon the 1899 convention, with a greater focus on naval warfare.

Customary international law

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 1945–1946, the Nuremberg Trials put top Nazi leaders on trial for war crimes and set a precedent of holding leaders accountable for their actions.



Figure 16.22 This photo was taken on 1 January 1946 at the Nuremberg war crimes trials. In the front row the Nazi defendants are Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel and Ernst Kaltenbrunner. In the back row are Karl Dönitz, Erich Raeder, Baldur von Schirach and Fritz Sauckel.

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 UN Security Council 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* (1998). After its sixtieth ratification in 2002, the treaty entered into force and the ICC came into being. This court 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.

Disregard of humanitarian law

International humanitarian law was designed to alleviate the effects of war and conflict and, where possible, to prevent conflict altogether. Where there is regional and/or geopolitical conflict, the impact of international humanitarian law is limited. The conflict in the Middle East, which started with the Hamas terrorist attack on Israel on

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7 October 2023, followed by an Israeli military attack on Gaza, is characterised by a disregard of humanitarian law.

Abu Ghraib and Guantanamo Bay

Between 2001 and 2009, the administration of former US President George Bush openly defied the Geneva Conventions in the 'war on terror'. Former 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 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 did the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), which was 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.



Figure 16.23 An emergency situation room in Israel on 14 October 2023 coordinating responses to families of civilians killed or taken hostage in a terrorist attack launched by Palestinian militant group Hamas a week earlier. Over 1000 Israeli people were killed, and thousands more wounded. In addition, over 240 soldiers and civilians were taken hostage by Hamas and moved into Gaza. In response to the attack, Israeli Prime Minister Benjamin Netanyahu issued a declaration of war, and announced an emergency wartime government.

Russian use of torture in Ukraine in 2022

On 15 June 2023, a report from the Office of the High Commissioner for Human Rights (OHCHR) claims that there was widespread and systematic use of torture by Russian military in Ukraine. The UN Special Rapporteur, Alice Jill Edwards, stated that the torture was used to extract information or to force confessions from detained Ukrainian citizens. The methods of torture used were beatings, electric shocks, death threats and mock executions. Similarity in methods used across Ukraine by the Russian forces suggests a pattern of state-endorsed torture. Also, the detention of prisoners of war and citizens in appalling conditions in Russian military facilities indicates that this was probably planned and coordinated, and known by superiors up the command chain. Torture is a crime against humanity according to the Geneva Conventions and military personnel cannot use the excuse that they were following orders.

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For all those who value the rules-based order, it is most concerning that some of the most significant violations of international humanitarian law over recent decades have been committed by two of the permanent members of the UN Security Council, the United States and Russia.



Figure 16.24 In Bucha, Ukraine, on 17 September 2023, students pay respect to their friends and relatives who were killed during the Russian invasion of Bucha in March 2022, during which many war crimes were committed. The International Criminal Court opened a field office in Kyiv to probe Russian war crimes.

Research 16.6

There are a number of organisations that give updates about the main areas of conflict in the world at the current time.

1. Research six conflicts using information from three websites.
2. Draw a table like the one below and synthesise information from the three websites.
3. To fill out the 'IHL response' column, also consult the ICRC website to see what action the ICRC is undertaking in these conflicts.

Conflict	Details	IHL response
Syria		
Myanmar		
Ukraine		
Israel–Hamas War		

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Non-legal responses

The 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.

Review 16.9

1 Identify the treaties that are at the core of international humanitarian law.
2 Identify the courts and tribunals used to enforce international humanitarian law.
3 Discuss what policies represented a real challenge to international humanitarian law.
4 Assess how the changing nature of conflict is a threat to international humanitarian law.



Figure 16.25 ICRC medical supplies arrive at Nasser Hospital in Khan Younis, southern Gaza, on 9 December 2023. The hospital was damaged by Israeli airstrikes not long after this image was taken.

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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 United Nations 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 United Nations 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 UN Security Council, and Article 51 of the UN Charter allows a state to go to war in self-defence.
- The Geneva Conventions (1949) are the most signed treaties and are universally applicable.
- The Russo-Ukrainian War represents a serious threat to the rules-based order that has existed since 1945.

Short-answer questions

1 Describe the main means to achieve world order that were put in place in the first six 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 reasons for the failure of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) to reduce the threat of nuclear weapons.
5 Evaluate the effectiveness of international responses to the Russian invasion of Ukraine.

Extended-response questions

1 Critically evaluate the effectiveness of multinational efforts to achieve world order over the past century.
2 Discuss the role of non-government organisations in limiting the harm caused by 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 Assess if pressure can be effectively applied to a state that refuses to participate in international efforts to promote world order. Outline potential strategies to encourage a state to participate in international efforts to promote world order and identify the parties that may be able to use such strategies. Justify your answers.

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Themes and challenges for Chapter 16 – Option 7: World order

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 maintaining peace and international security as well as 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 UN Security Council if all else fails.
- The International Committee of the Red Cross has encouraged all military forces to educate their personnel about international humanitarian law, particularly the Geneva Conventions (1949), and seeks to educate the community about how to alleviate the suffering of people affected by war.
- Non-government organisations 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 UN Security Council 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 (1949) and other mechanisms that regulate the conduct of hostilities will usually face international condemnation.
- Russia, a permanent member of the UN Security Council, attacked a member state of the United Nations, Ukraine, which is a blatant breach of the UN Charter.
- 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 Responsibility to Protect (R2P) and the Peace Building Commission.

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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 World War II.
- The R2P principle places the security of individuals at the centre of the international community's concern, rather than the security of states.
- The coming into force of the *Treaty on the Prohibition of Nuclear Weapons* was a landmark event in the ongoing campaign for the elimination of the nuclear threat.

The role of law reform in promoting and maintaining world order

- As the R2P principle 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 International Committee of the Red Cross continues to educate both the public and all military forces about the conventions, as well as monitor their observance.
- The *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) has proved very useful in limiting proliferation to a small number of countries. However, since the 2010 and 2015 Review Conferences, the treaty has proved to be a dead-end mechanism for reducing the nuclear threat.
- 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.
- The International Criminal Court 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.
- UN Security Council 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 UN Security Council to allow their effective operation. If the members are prepared to back them with action, UN Security Council 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.
- Non-government organisations 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 b, 3 d, 4 d, 5 a

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 c, 2 c, 3 a, 4 c, 5 d

Chapter 8
1 a, 2 a, 3 b, 4 d, 5 c













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Glossary

abolitionism
a movement in the late 1700s and early 1800s, prominently in Western Europe and North America, to end slavery worldwide, that eventually brought an end to the trans-Atlantic slave trade

acceptable quality
an implied guarantee in the Australian Consumer Law 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, which is 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 who criminal action is being taken against

acquittal
a judgment that a person is not guilty of the crime of 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 person 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
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 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 for a court to review matters on appeal from another court

Apprehended Domestic Violence Order (ADVO)
a specific type of Apprehended Violence Order issued under Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) when the perpetrator of violence is a family member

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

arrears
money that is owed but has not been paid

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

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 is 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 both in Australia and internationally

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

award
a legal agreement made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

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. Customers who come to buy the product are then offered another product to buy; thus, they have been baited by the original offer.

'better off overall' test
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

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

blended family
a couple family with at least one child who is the stepchild of one of the partners in the couple, and at least one child who is the natural or adopted child of both partners in the couple

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 of 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 alleged criminal act)

caution (1)
a formal warning without charge issued by police for less serious offences

caution (2)
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 Director of Public Prosecutions 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 First Nations 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

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

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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 by others; the idea is that an attack on one is an attack on all

colonisation
the establishment of settlement and control in a foreign territory, as in 'the British colonisation of Australia'

coming into force or entry into force
occurs after a treaty has been signed and ratified and has legal force

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
an assault where there is no actual physical harm to the person assaulted; it includes 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 Correction Order (CCO)
a penalty that can be imposed by the court involving compulsory supervised work in the community, supervision by community corrections officers and curfews

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

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 a 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

Conditional Release Order (CRO)
an order requiring an offender to accept compulsory restrictions for up to two years, during which time the offender undertakes to regularly report to and obey directions from their community corrections officer

Conference of the Parties (COP)
the decision-making body of an international convention; the first Climate Change Conference of the Parties (COP 1) was in Berlin, in 1995, and since then there has been one every year except 2020

conscription
compulsory enlistment in the military force of a state

consent
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 section 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 already served the full sentence for their offence

contract
a voluntary 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

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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 Youth Justice centre

convention
another term for a treaty; an international agreement (or instrument) between parties who are subject to international law (states and international organisations such as the United Nations and its bodies)

conveyancing
the legal process used to transfer title of ownership from one party to another

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; 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

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

de facto relationship
a relationship where the partners act as a married couple but are not legally married

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

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
an order that is made by the Federal Circuit and Family Court to signal the intended termination of a marriage

deed
documentary proof establishing ownership of a property

defendant
(violence) the person subjected to an Apprehended Violence Order

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









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

dictatorial
(of a government) having unrestricted authority or power

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

divorce order
a final divorce certificate that is proof of the dissolution of marriage

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' (that is, of criminal intent); the presumption that children under a certain age cannot be held legally responsible for their actions and so 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 certain purposes

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
development that 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
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

the Enlightenment
a European movement from the late 1600s to the early 1800s that transformed philosophy, science and politics by emphasising the superiority of reason over tradition and religion

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 section 51 of the *Australian 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 and to eliminate factors that restrict groups' equality of opportunity in the workplace

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 the property exchange signed copies of the contract for 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

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ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born to parents who are not married

exploitation
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 affect the interests of the beneficiary; in the case of real estate, real estate agents have the onus to behave honestly and ethically in the interests of the client (seller or buyer)

fine
a monetary penalty imposed for infringement of a law

fit for purpose
an implied term in the Australian Consumer Law, guaranteeing that the goods sold will do what they were designed to do

forced labour
all work or service that is exacted from any person under the menace of any penalty and for which a person has not offered themselves voluntarily

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

forensic
related to scientific methods of solving crimes, involving examining the objects or substances that are involved in the crime

forfeiture
the loss of rights to property or assets as a penalty for wrongdoing

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 international law standards 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

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 the 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 judgment
a judgment issued by the court, on the 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













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heads of power
powers listed in sections 51 and 52 of the *Australian Constitution*: the areas that the Commonwealth can legislate on

hegemony
dominance of one nation over others

holistic
taking into account all aspects; looking at the whole system rather than just specific components

homicide
the unlawful killing of another person

Housing Affordability Index
a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

human rights
rights that recognise the inherent value of each person, regardless of our background, where we live, what we look like, what we think or what we believe

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

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)

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 offence 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 eighteenth and nineteenth 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

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, conventions and protocols) or non-binding (for example, guidelines, declarations and recommendations)

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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
an organised group of two or more states, set up to pursue mutual interests in one or more areas

International Bill of Rights
combines *The Universal Declaration of Human Rights* (1948) with the Twin Covenants

International Court of Justice
the primary judicial organ of the United Nations; it has jurisdiction to hear disputes submitted by member states and issue advisory opinions

International Covenant on Economic, Social and Cultural Rights (1966)
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 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 to prosecute and try international crimes of the most serious nature; the ICC started operating in July 2002

International Criminal Police Organization (INTERPOL)
the world's largest international police organisation, established in 1923 to facilitate collaboration among police agencies 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

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

International Labour Organization
an international agency of the United Nations, 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 the 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 intending to kill

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 or not a particular leader or state accepts it

labour rights
rights at work, including the rights to safe working conditions, minimum wages and paid leave, and to join a trade union

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

laws of war
a body of laws about how war should be conducted that originated with the Geneva Convention (1864), the Hague Convention and the final four-part Geneva Conventions (1949) – it is also known as the International Humanitarian Law

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













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Liberal International Order
an academic term that describes the legal infrastructure that emerged after 1945 with the creation of the United Nations, key international treaties, multilateral cooperation, and the acceptance of common global norms such as human rights; otherwise known as the rules-based order

licensee
licence holder

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

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

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group has to matter in order to be permitted to bring an action

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

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 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) defines marriage as 'the union of two people 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 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

maximum penalty
set by parliament; 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 to reach 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 health impairment or cognitive impairment
mental or cognitive impairment at the time of the act, meaning the accused cannot have formed the *mens rea* at the time of the offence; previously known as the defence of mental illness or insanity

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

mistake
where 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; these can lead to a reduced sentence

mitigating factor
a circumstance that makes the 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

multilateral treaty
an international agreement involving three or more parties

multilateralism
cooperation between multiple states for mutual benefit or protection from common threats

murder
the deliberate killing of a person

nation
a people that share a common heritage, language or culture and sometimes a common race

nation state
an independent state where the population is all of one nationality

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

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-Aligned Movement
a group of countries formed in 1961 that did not want to take sides in the Cold War

non-government organisation (NGO)
an independent, non-profit group providing a service or advocacy to a community, that often plays an important role in advocating, analysing and reporting issues worldwide (for example, human rights or the environment)

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non-parole period
a period of imprisonment during which parole cannot be granted

nullify
to declare legally void or invalid

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 they 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, the position of an organisation or other entity that has been granted the right to speak at the UN General Assembly 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
the UN human rights office responsible for monitoring and reporting on human rights worldwide

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

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 than an organised workplace

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

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 in New South Wales, the value of one penalty unit is $110

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 five permanent 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

police prosecutor
a NSW Police Force officer trained in prosecution; usually prosecutes summary offences

pollution
environmental damage caused by the discharge or emission of solid, liquid or gaseous materials into the environment

polygamy
having more than one wife or husband at the same time

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

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

preventative 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













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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

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

protected person
(violence) the person applying for protection through an Apprehended Violence Order

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

public prosecutor
a legal practitioner employed by the Director of Public Prosecutions; usually prosecutes 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

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
force that 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

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 section 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 section 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 UN Security Council; when passed by the UN 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

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right to self-determination
the right of people to determine how they will be governed, or their political status based on territory or national grouping

right to silence
the right of a person to refuse to answer any question put to them by the police

rights
moral or legal entitlements about what a person is allowed to have

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* (1998); the international treaty that established the International Criminal Court

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

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
where 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 nations or peoples to have their own sovereign nation state with their own government

sentence appeal
an appeal against the severity or leniency of a 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

separation of powers
the division of power between the executive, the legislature and the judiciary to prevent one person or group from gaining total power

settlement
when final payment for the purchase of the property is made to the vendor, and the purchaser receives the 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 towards, including witnessing or being exposed to this type of behaviour in their work environment or culture

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 a victim to provide sexual services; it often takes the form of forced prostitution or forced labour where sexual abuse is also 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 upon 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, nation, country
a body of people occupying a definite territory and organised under one, usually independent, government

state parties
countries that have signed and ratified a treaty

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)













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step family
a couple family in which one or more children is the stepchild of the partners in the couple, and the couple has no natural or adopted children together

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

substantial impairment because of mental health impairment or cognitive impairment
defence used when the accused is suffering from a mental or cognitive impairment; this was previously known as substantial impairment of responsibility, or diminished responsibility

suffrage
the legal right to vote in a democratic election

suffragettes
members of a movement for the right of all adult women to vote that reached its peak in the early 1900s

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 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

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

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

Torrens title
the central registration and transfer of ownership of property

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 crimes
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

treaty
an agreement between two sovereign states that establishes decision-making processes to allow fair negotiations between communities

Trusteeship Council
inactive since 1994 but originally responsible for overseeing the transition of United Nations trust territories to self-government after decolonisation

Twin Covenants
the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966)

UN General Assembly
the UN organ representing all UN member states; it acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council
the UN forum of member states responsible for overseeing and making recommendations on human rights in all member states

UN Secretariat
the UN administrative body headed by the UN Secretary–General; it contains the departments and offices of the United Nations

UN Security Council
the UN organ responsible for the preservation of international peace and security; it has the power to authorise military action and other measures

UN trust territory
after World War I, under a League of Nations mandate (authorisation), 10 former colonies of Germany were transferred to administration by victorious colonial powers; when the UN succeeded the League, these mandates were replaced with 'UN trust territory' status with the aim of eventual self-determination; an Italian colony became the 11th trust territory after World War II

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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

unilateral
undertaken mainly by one state or body

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 impact the crime has had on them; heard at the time of sentencing

voluntary manslaughter
the killing of a person where the accused intended 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; breaching a warranty 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

wrongful dismissal
termination of employment that constitutes a breach of the employment contract, an award or a statute

youth justice
the area of law and policy concerned with young people and the criminal justice system

Youth Justice centre
a detention centre housing young offenders subject to control orders

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

abduction 237, 239
abolitionism 168, 170–1
abuse 85, 133, 239, 258, 395, 412, 414–15, 521
acceptable quality 272, 275
acceptance of offer 270
accessory before/after the fact 23, 69
accommodation bond/charge 449
accountability 82–3, 93, 159, 246, 267, 518
accused 5–6, 8, 46, 52
  see also mens rea
acid rain 320, 323
acquittal 67, 70–1, 73, 78, 83–4
activism 323, 509
acts/actions/actors 4–6, 26–7, 66, 99, 110–11, 130, 146, 273
actus reus 6, 8–9, 66
ad hoc tribunals 153, 157, 201, 342–5, 486–7
  versus hybrid tribunals 154
Ad Standards 285–6
adjournment 125
adjudication 398
administrative works fund 438–9
adoption 381, 385–8, 402, 409–10, 412
adultery 389
adults 121
adversary (adversarial) system 58, 72
advertising 267, 270–1, 276, 280–6, 307–8
advisory opinion 486
advocacy 27, 305, 350, 406, 452, 454, 462, 480
affinity 378
affordability 455–9
affray 20
African Union 199, 488
age 209, 403, 460
age of criminal liability 95, 131–2
age of criminal responsibility 110–13, 133
aged care 401, 448–51
Agenda 21 337
aggravated sexual assault 12
aggravated sexual assault in company 13–14, 82, 89
aggravating factors 84–5, 124
aggression 480, 489, 504–5
agreements 17, 21, 147–8, 154–5, 199, 334, 355, 366, 388, 392–3, 426, 442, 493
  see also contracts
airspace 427
alcohol programs 83
alcoholism 389
'all or nothing' defence 68
Alliance 8.7 233
Allies 177, 476
alternative dispute resolution 286, 297, 453
American Civil War 171, 477
ancestors 378
annulment 379
Anti-Discrimination Act 1977 (NSW) 209, 460
Anti-Discrimination NSW (ADNSW) 403
anti-slavery legislation/treaties 229, 256
anti-slavery movement 168
anti-terrorism laws 15, 102, 213
anti-trafficking *case study* 234
apology 85
appeals 52, 57, 88–9, 465
appellants 88–9
appellate jurisdiction 52, 55–7
Apprehended Domestic Violence Order (ADVO) 395–6
arguments 58, 64, 78
armed conflict 144, 238–9, 242, 244, 247, 517, 521
armed forces 237–8
armed robbery 15
arrears 440
arrest 32, 44, 46, 114–21, 145, 160
artificial insemination 407
assault 12, 22, 37–9, 54, 56, 73, 86, 93, 96, 116, 383, 393
assessment reports 123, 355
assets 91–2, 148, 310, 377, 392, 464
association, freedom of 32
Association of Southeast Asian Nations (ASEAN) 205, 488
asylum 183
'at risk of harm' notifications 413
Atlantic Charter (1941) 474
attacks on schools or hospitals 239
attempt [to commit an offence] 21
auction 270, 426, 433–5, 442
Australia
  'Australian dream' 431
  federal structure 352–3
  GEP initiatives and responses 362–4
  incarceration rates 93–4
  international agreements 493
  peacekeeping contribution 492–3
  roles 205–17, 491–2
  statutory obligations 158
  trafficking destination 230
  UN involvement 492, 483
  union movement 172
Australian Border Force 153
Australian Communications and Media Authority (ACMA) 307–8, 311
Australian Competition and Consumer Commission (ACCC) 271, 274, 76, 278, 282–3, 289, 292–3, 303, 305–6, 310–12
Australian Conservation Foundation v The Commonwealth (1980) 28 ALR 257 320
Australian Constitution 57, 74, 206, 207–9, 211, 217, 281, 354, 362, 377, 491
Australian Consumer Law (ACL) 272, 281, 284–5, 303
Australian Criminal Intelligence Commission (ACIC) 152
Australian Defence Force (ADF) 242, 246
Australian Federal Police (AFP) 32, 151, 156–7
Australian Financial Complaints Authority 301
Australian Government Department of Social Services 453
Australian High Tech Crime Centre (AHTCC) 153
Australian Human Rights Commission (AHRC)/Acts 209–10, 217, 403, 427, 460
Australian Institute of Health and Welfare (AIHW) 34, 413
Australian Law Reform Commission (ALRC) 15, 82, 114, 217
Australian Marriage Equality 403
Australian Medical Association (AMA) 287
Australian National Child Offenders Register 103
Australian Securities and Investment Commission (ASIC) 17, 277, 292, 299, 300–1, 304, 311
Australian Standard 302, 304
Australian Workers Union (AWU) 257
automated teller machines (ATMs) 18, 309

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automatism 67
autopsy 55
awards 255
awareness 289–90, 301
Axis Powers 168, 474

backpackers 251
bail 32, 46–7, 60, 62, 116, 125–6, 132
bait advertising 284
'bait and switch' 284
balance of probabilities 5, 33, 102
Bank of Mum and Dad 456
Banking Royal Commission 301
banking services 309
barbarism 170
bargaining power 273, 277
barristers 61
Basel Convention 335, 338, 341, 343
case study 367–9
beatings 205, 240
behaviour 17, 33, 67, 82–3, 111, 216, 368, 455
see also criminal behaviour
benchmarking 250, 267, 302–3, 358, 455, 459
bereavement 414
best interests 115, 119, 123, 331, 380–1, 384, 390 –1, 394–5, 406, 413
beyond reasonable doubt 5, 9, 36, 64, 68, 74, 110–11, 142
bias 33, 58, 72
bidding 433
bilateral agreements/treaties 154–5, 355, 388, 484, 511
bills of rights 186, 193–4, 202, 214
biodiversity 328–9, 336
biological parents 386
biometric data 311
birth technologies 407–12
blame, absolution of 71
blended families 377, 381
blood-alcohol level 20
boarders 426–7, 448, 455
bodily harm 71
bombing 475, 518
bond money 444–5
bonds 125
Boughey v The Queen (1986) 161 CLR 10 10
Bradford Corporation v Pickles [1895] AC 587 319
Bradley v The Commonwealth (1973) 128 CLR 557 332
break and enter 15–16
Brexit 488
Budapest Memorandum 1994 502
built environment 319
bullying 62
burden of proof 64, 91
Burns v The Queen (2012) 246 CLR 334 11

'buyer beware' 266, 289, 441
buyers protection 441–3

cannabis 90
capital works fund 438
captivity 224
carbon emissions 362
care 11, 100
cartels 293
'cashback' 255
causation 9
cautions 45, 90, 119, 121, 128
caveat emptor (buyer beware) 266, 289, 441
celebrants 379
censorship 205
Central Powers 169, 474
certification 286, 302–4
chain of title 436
challenge for cause 72
character grounds *case study* 104
character references 86
charge(s) 35, 45–6, 62, 66–71, 78
Charter of Rights 87, 214, 217
Charter of the United Nations (1945) 169, 193–5, 199, 474
child abuse 414–15
child labour 171
child maltreatment 412
child pornography 146–7, 224
child prostitution 224
child protection 55, 103, 151, 382, 388, 412–16
Child Sex Offences 80
child soldiers 159, 224, 237–48, 517
victims' stories *case study* 241
child support 385, 401
child trafficking 225, 411
children 28, 55, 94, 110–13, 120, 124–7, 131, 382–5, 390–1, 412–16
see also children's rights; criminal responsibility; young offenders; young people
Children (Criminal Proceedings) Act 1987 (NSW) 110–11, 113, 115, 121–5, 131, 133
Children and Young Persons (Care and Protection) Act 1998 (NSW) 382, 384, 395, 400, 409, 413
Children's Court 55, 113, 119, 121–4, 132, 400, 413
children's rights 34, 110, 114–22, 135–6
chlorofluorocarbons (CFCs) 357–8
CHOICE 296, 299, 308
chronic alcoholism 389
circle sentencing 82, 98
Civil and Administrative Tribunal Act 2013 (NSW) 294–5, 426, 452, 460

civil law 5–6, 53, 269
civil liberties 40, 425
civil proceedings 92
civil wars 477, 516
civilians 145, 516
climate change 179, 320, 323, 329, 331, 335, 349, 357–8, 360, 362, 365, 368, 478–9
closed-circuit television (CCTV) cameras 26–7, 34
Coast & Country Association of Queensland Inc v Smith [2016] QCA 242 321
codes of ethics 286
codes of practice 33, 311
coercion 5, 119, 152, 225, 275, 284, 379, 477
cognitive impairment 67, 71
cohesion 459
'cold' cases 36–9
Cold War 175, 185, 472, 475–7, 483, 509
collective rights 177
collective security 474, 476
colonial powers 178
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 274
committal proceedings 54, 60, 122
common assault 12
common law 58, 110–11, 206, 209–10, 216, 267, 319–21
common property 427, 438–9
common sense 331
Commonwealth Attorney-General's Department 152
Commonwealth bodies 4, 292
see also statutory bodies
Commonwealth law 52, 206–8, 377, 425
Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12, s 9.(The Constitution) *see Australian Constitution*
Commonwealth of Nations 199, 488
Commonwealth offences 57, 74
Commonwealth parliament 175
Commonwealth Powers (Family Law – Children) Act 1986 (NSW) 399
Commonwealth Rent Assistance (CRA) 462–3
communal violence 477
communications 146, 309, 311, 475
community 4–5, 26, 32, 126, 134–6
see also society
Community Corrections Officers (CCOs) 93, 101
community housing 430, 465









ISBN 978-1-009-49803-6

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Community Justice Centres 297, 300–1, 454
Community Land Management Act 1989 (NSW) 427
Community Legal Centres NSW 292
community services/orders 99, 125, 413
community title 427, 439
company title 437
compatibility 303–4
compensation 85, 87, 172, 279, 301, 310, 320, 401, 460
Competition and Consumer Act 2010 (Cth) 266, 272, 277, 279, 289–90, 295, 302, 304, 307–8, 311, 426
competitive advantage 324
complaints 33, 194, 197, 211, 287, 289–90, 310, 460
complaints resolution 286
complete (absolute) defences 67–70
compliance 114, 152, 227, 243, 302, 348, 356, 366, 385, 398
Comprehensive Nuclear Test Ban Treaty (1996) 510
computer offences 4, 18
computing 309
concentration camps 185
Concert of Europe (1815) 474
conciliation 297, 453
conclusive presumption 111
condition reports 443
Conditional Release Order (CRO) 92–3
conditions 272
conduct 33, 40, 82–3, 85, 273–6, 280, 297, 310, 426, 516–21
conferences 346–9
Conferences of the Parties (COPs) 338, 360–1, 365, 367
conferencing 99, 125, 128, 130, 132–3, 392
confession 21
conflict 238–9, 242, 244, 247, 475, 478–9, 517–19, 521
conflict resolution 266, 377, 432, 472
consanguinity 378
conscience 186
conscription 239, 244–6, 474
consensus 366, 473
consent 5, 12–13, 36, 42, 70, 242, 271, 367, 379, 384, 386, 429
consent orders 392
conservation 321
consideration 270
conspiracy 21, 56
constructive manslaughter 11
Consumer Affairs Forum 293
consumer confidence 303
consumer contract 277
consumer law 266–7, 279–80, 299–312
consumer profiling 311
consumer protection 4, 108, 275–6, 279–88, 307, 426
consumer remedies 296–8
consumer rights legislation 289–90
consumers 266–7, 289–98, 299–306
consumption, environmental impacts of 324–6
contemporary slavery 223–4
Continuing Detention Orders (CDOs) 102–3
contract law 272
contracts 255–6, 267–78, 301, 310, 426–7, 434–5
Contracts Review Act 1980 (NSW) 277, 289–90
control 40, 133, 285–6, 475–6, 509
control orders 125
conventional interstate war 475
convention(s) 142–3, 185, 251, 323, 327, 337, 340, 358, 363–4, 429, 484–5, 518, 519
conveyancing 285, 426–7, 432, 434, 436–7, 442
conviction 125
cooling-off period 284–5, 434, 442
COPs 21, 26, 27 348, 349
copyright infringement 4
Coroners Court 54
coronial inquests 55
corporal punishment 383–4
Corporations Act 2001 (Cth) 56, 292
correctional centres 99
corruption 160, 169, 226, 487
cost of living 25, 425
counselling 90, 100, 389, 396, 398, 414–15
counteroffers 270
Country of Origin Food Labelling Information Standard 2016 302–3
court attendance notices 46
Court of Criminal Appeal 56–7, 89
court orders 5–6, 33, 102, 119
court-based remedies 296–7
courts 5, 32–3, 52–8, 55, 57, 59, 61, 65, 122–4, 128–30, 148, 153, 200–3, 210–12, 294–6, 342–5, 452–3, 486–8
covenants 254, 426–7
COVID-19 pandemic 299, 309, 387, 472, 511
case study 298
Create Foundation 415
credit 299–301
credit cards 284
Credit Law Toolkit 300
credit laws 281
credit reporting 440–1
crime 4–22, 23, 26, 27, 35, 132, 140–7
'... does not pay' 81
investigating *see* investigation(s)
legislation 12, 33, 62, 71, 79, 80–1, 83–4, 87, 89, 90–1, 93, 96, 99–100, 102, 379, 394–5, 397
against property *see* property offences
reporting of *see* reports/reporting
crime against humanity 519
crime against the international community 140–5, 150–1, 153–5, 157–60
crime against the state 5, 9, 25
crime prevention 26–8, 33, 134
Crimes Act 1900 (NSW) 9, 11, 13–14, 18–19, 21, 42, 79–80, 91, 232, 382–3, 395
crimes against humanity 142–5, 148, 153, 171, 201, 242, 477, 505
see also courts
criminal behaviour 4, 24–5, 27
Criminal Code Act 1995 (Cth) 14–15, 140, 150, 152, 225, 230, 246
criminal courts 52–8
criminal infringement notices 90
criminal insanity 67
criminal intelligence *see* intelligence
criminal investigation process 32–48
criminal jurisdiction 142
criminal justice system 94, 110, 121, 131–6
criminal law 5–6, 58, 61
Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016 (NSW) 34
criminal liability 95, 111, 131–2
criminal matters 63
criminal negligence 6–8
criminal proceedings 64, 123
criminal responsibility, age of 110–13, 133
criminal trial 87
criminology 24
Croome v Tasmania (1997) 191 CLR 119 206
cross-border crime 146, 156–7
Crown 5, 88
Crown land 426, 435
cruelty 85, 100, 111, 389
Cuban Missile Crisis 510
culpability 11, 66
cultivation 19
cultural rights 187
culture 27, 329, 336, 380
curfews 93, 126
custody 45–6, 73, 94, 100, 132
customary law 184, 518
Customs Act 1901 (Cth) 19–20

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cybercrime 36, 146, 151–2, 309, 312
cyberwarfare 476

damage 85, 93, 321, 356
damages 6, 272, 296
dangerous driving occasioning death 12, 56
data 18, 156–7, 311
de facto relationships 377, 380–1, 392
death 10, 12, 19, 54, 56, 205, 279, 516
death penalty 19, 81
death squads 477
debt bondage 224–5
deception 152, 224–5, 251, 271, 280, 308, 521
decision making 32, 46–7, 56, 60, 84–6, 110, 343
see also verdicts
declarations 180, 346
decree absolute/nisi 390
deeds 436
defence 66–71
defendant 6, 395
democracy 174–5, 199
deportation 104, 518
deprivation 412
descendants 378
desertion 389
détente 187
detention 32, 34, 40–1, 44–6, 48, 102, 119, 121, 123, 135–6, 200, 519, 521
deterrence 79, 82, 86, 91, 93, 157
development 198, 254, 324–6, 332, 336, 347
Dietrich v The Queen (1992) 177 CLR 292 63
digital harassment 5
digital revolution 324
dignity 229
diminished responsibility 71
diplomacy 322, 473, 509
Direct Action Plan 362–3
direct marketing 303
Director of Public Prosecutions (DPP) 5, 55, 60, 64, 79, 230, 292
disability 403, 431
disadvantage 24, 27, 63, 94, 267, 273–4, 277, 284, 310, 329, 425, 431, 465, 472
discipline 287, 383
disclosure 58, 280, 427
discretionary factors 60
discretionary powers 215
discrimination 20, 172, 175, 206, 209–10, 254, 381–2, 403, 425, 429, 460–1
disinformation 213, 507
dismissal 125
displaced people 516
dispute resolution/mechanisms 27, 98, 187, 205, 255, 293–4, 310, 391, 398–400, 452–5, 464, 474, 494–6
see also conflict resolution
District Court 55–6, 59, 72, 89
diversionary services 46, 90, 96–7, 128, 130, 134–5
division of powers 207–8
divorce 377, 389–90
DNA evidence 36–9
DNA samples 32, 35–6, 38, 55, 65, 119, 121
Do Not Call Register 311
documentation 21, 35, 40, 45, 65, 113, 184, 204, 255, 269, 460, 474, 485
see also warrants
doli incapax 111–13
domestic law 308–9, 323, 428
domestic violence 5, 11, 46, 65, 100, 393–7, 401
dominion 492
doubt, beyond reasonable 5, 9, 36, 64, 68, 74, 110–11, 142
drip pricing 280
driving offences 9, 19–20, 56
drug and alcohol abuse 96, 412–13
drug courts 82, 97
drug dogs 117
drug importation 57
Drug Misuse and Trafficking Act 1985 (NSW) 19
drug 'mules' (couriers) 19
drugs/offences 9–10, 18–19, 46, 56, 91, 151, 156–7, 240
dualist systems 207, 324
due process 102
dumping 57
duress 70, 85, 119, 271, 275, 379
duty of care 100, 279–80

early intervention 28, 135–6, 396, 413
early release 100
Earth Summit 332
easements 427, 434, 437, 452
ecological footprints 326
ecologically sustainable development 327–31
e-commerce 267, 307
Economic and Social Council 195, 333
economic factors 24–5, 234
economic offences 9, 15–18
economic reform 322
economic rights 187
economic sanction 482
economic stability 472
economics 324, 506–7
economy 146, 266
ecosystems 326
Ecuador v Colombia [2008] ICJ case 343–4
education 18, 24–5, 83, 94, 112, 126, 151, 176, 183, 187, 195, 198, 200, 210, 232, 247, 267, 303, 306, 383, 395, 425, 454, 521
Elders 380, 450
electoral rolls 72
electricity 444
Electronic Funds Transfer at Point of Sale (EFTPOS) 309, 311
electronic media/services 308–9
e-marketing 267, 308, 311
embargos 482
embezzlement 16
Emergency Care and Protection Order 413
emergency relief work 506
emissions 342
emotional abuse 412
employer–employee relationship 250
employment 24–5, 172, 232, 254
endangered species trade *case study* 358
endangerment (species) 368
energy/management 327, 504
enforcement 18, 32, 121, 207–9, 336, 340–1
see also courts; law enforcement; police
Enlightenment, the 168
enumerated powers 352
environment 24, 26, 319, 320, 476
Environment Protection and Biodiversity Conservation Act 1999 (Cth) 319, 321, 323, 328, 330, 363–4
environmental disasters *case study* 325–6
environmental laws 57, 363
Environmental Planning and Assessment Act 1979 (NSW) 321, 323, 427, 434
environmental protection 57, 356, 319–69
environmental rights 179–80
envirostunt 350
EPA v Gardner LEC [1997] NSWLEC 169 356, 363
equal opportunity 58
equality 171, 174, 183, 186, 193, 254, 297, 331, 428
equity 63, 267, 275–6, 329, 361, 369
Estens v Owners Corporation SP 11825 [2017] NSWCATCD 52 439
ethics 4, 33, 286–7, 297, 320, 322–3, 366, 368
ethnic cleansing 158
ethnic intolerance 479
ethnicity 145













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European Court of Human Rights (ECHR) 201–2, 487–8
European Union (EU) 202, 349, 488–9
evidence/gathering 6, 27, 32–3, 35, 41, 46, 55–6, 58–60, 64–6, 72–3, 111, 120–1, 142, 204, 397
e-waste 324
ex aequo et bono 343
Ex parte H.V. McKay (1907) 2 CAR 1 250
exchange of contracts 434–5
exclusion clauses 272–3
execution 110, 200
executive/committee 32, 207–8, 438
executive power 215–16, 332
see also ultra vires
exit fees 440
ex-nuptial children 381, 386
expert opinion 65–6, 142
exploitation 110, 151–2, 224–6, 232, 238, 250–8, 266–7, 273, 307, 310, 382
express rights 208–9
express terms 272
extended families 377
Extended Supervision Orders (ESOs) 102–3
extermination 145
external affairs power 208, 354, 362, 425, 491
external costs (externalities) 319
extradition 154–5, 310
Extraordinary Chambers in the Courts of Cambodia (ECCC) 487

fair dealings 310
'fair go' 215–17
fair trading 277, 279, 281, 289–90, 293, 295, 302, 304, 307–8, 439
fair treatment 266–7
fair trials 32, 59, 62–3, 155, 186
fair wages 187
Fair Work Act 2009 (Cth) 255
Fair Work Commission 257
Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 (Cth) 255
Fair Work Ombudsman 252, 255
Fair Work Statement 255
fairness 33, 58, 73, 215–17, 288, 307, 311, 442, 486
see also justice
'fake news' 494
false and/or misleading information/representations 282–3, 288, 452
Families NSW 415
family 94, 126, 133, 377, 380–3, 389–401, 404–6, 413, 455–7
Family Court 377, 379, 389, 392, 402–3
family dispute resolution 391, 398
family law 377–89, 390–2, 394, 397, 398–416
Family Law Amendment Act 2023 385, 391, 399, 405
family violence 11, 389, 412–13
fault 389
fear 12, 20, 34, 215–16, 240, 413
Federal Circuit 295, 392, 398–400, 402–3
Federal Court of Australia 4, 52, 295–6, 398–400
federal courts 57, 255
Federal Government 256, 292–3, 311, 352–3, 377, 425, 431, 491–3
federal law 52, 377
federal powers 353
female vote 168
fiduciary duties 287
film 234, 508
finance 439–41, 504
financial agreements 392–3
Financial Counsellors' Association of NSW Inc. 292
financial crime 151
financial gain 146
Financial Rights Legal Centre 296, 301
fines 19–20, 81–2, 91, 115, 125–6, 148
fingerprints 35–6, 65, 119, 121
firearm discharge 96
first generation human rights 168
first home buyers 431
First Nations people 20, 33, 55, 63, 80, 93–4, 98, 108, 120, 123, 126, 175, 276, 377, 380, 396, 460, 462
see also Indigenous people; Stolen Generation
fit for purpose 272, 276, 426
flogging 110
food 200, 504
food scarcity 479
force 15, 32, 36, 135, 152, 225, 284, 361, 495–6, 509, 511–12
forced conscription 239
forced disappearance 200
forced labour 171, 224–6, 232, 251, 254, 256–7
forced marriage 224, 232
foreign law 308
forensic evidence 36, 119, 142
forensic procedures 119
forfeiture laws 92
fossil fuels 321
case study 360
foster care 386, 412
fraud 18, 57, 91, 146, 152, 225, 299, 307
free choice 250
free trade 324
freedmen 170
freedom of information laws 117
freedoms 5, 14, 83, 184, 186, 208, 213, 215–17, 254, 425
see also rights
'fruit of the poisoned tree' 65

'gang rape' 13
Gaza attack 519
Gazette 302
gazumping 441
gender 460
gender-based violence 28
gene shearing 407
general deterrence 81
genetic manipulation 407
genetic theories (crime factor) 24–5
Geneva Conventions 144, 150, 155, 168, 185–6, 201, 242, 485, 493, 496, 516–18
genocide 141–2, 145, 148, 153, 157, 185, 201, 242, 477, 487, 505, 518
gifts 283
Glasgow Climate Pact (2021) 179, 332, 338, 341, 360, 363, 365
global communication 309
global economy 146
global environmental law 323–4
global environmental protection 319–69
global financial system 478
global gross domestic product 516
global warming 323, 325, 357, 360
globalisation 324, 472
good behaviour/bonds 17, 19, 99
good root of title 436–7
goods and services 146, 267, 272, 282, 284
money given for *see* consideration
see also products
gouging 298, 449
governance 199
government 5, 28, 32, 57, 64, 132, 136, 152, 204, 216, 230, 361, 462, 453–4, 458, 493
responsible 207
see also state, the
government power 215, 377, 425
Grant v Australian Knitting Mills [1936] A.C. 562 279
grassroots action 323, 509, 511
gratuitous violence 85
grave adult behaviour 126–7
greenhouse gas emissions 363
case study 360
Greenpeace 351
grievous bodily harm 71

ISBN 978-1-009-49803-6

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Groth v Kantipudi (Tenancy) [2012] NSWCTTT 410 (10 October 2012) 444
Guantanamo Bay 519
guarantees 275–6
guardians 117–18, 121, 384
guerrilla movements 240
guideline judgment 79
guilty pleas 46–7, 62, 86
Gulf War 478

hacking 18
Hague Conferences 185
Hague Conventions 388, 474, 516, 518
harassment 5, 284, 396
harm 4, 7, 10, 12–13, 19, 56, 71, 82, 85, 87, 100, 102, 242, 279–80, 320–1, 357, 412–13, 521
Harvester case 250
hatred 85, 206
heads of power 208
health 120, 126, 198, 200, 356, 425
hearings 52, 62, 78
hegemony 478–9
Helsinki Final Act (Helsinki Accords) 187
High Court of Australia 57, 89, 206–8, 211–12
hijacking of aircraft 141
Home Building Service 453
home ownership 455–7
homelessness 94, 126, 425, 428, 430, 453, 461–3
Homelessness Australia 454, 459, 462–3
homicide 9–12
homosexuality 206, 211
honest and reasonable mistake of fact 8
honesty 311
hostilities 516–21
housing 425, 426, 428, 463–5
  'adequate' considerations 427–8, 461–2
Housing Act 2001 (NSW) 426, 464
housing affordability 425, 430–1, 453, 455–9, 461–2, 464
Housing Appeals Committee 453
housing crisis 430–1, 446, 455
Housing NSW 453
Hughes v The Queen [2015] NSWCCA 330 100
human rights 140, 168–9, 170–83, 192–5, 199–206, 248
  abuses/violations 170, 193, 195, 197, 199–201, 210, 225–35, 244, 325, 403, 505
  contemporary issues 223–58
  formal statements 183–7
  fundamental/essential 215, 425
  promoting and enforcing 192–217
Human Rights and Equal Opportunity Commission 114
human rights charters 214
Human Rights Commission 461
Human Rights Committee 202
human rights protection 237
human rights treaties 491
Human Rights Watch (HRW) 257
human shields 238
human trafficking 146, 151–2, 171, 223–35
humanitarian access denial 239
humanitarian law 185–6, 200, 204, 516–20
humanitarian work 480, 490
Hyde v Hyde & Woodmansee (1866) LR 1 P&D 130 378

identification 114–15, 119
identity 87, 310
identity crime 18, 152, 299
ideology 146, 479
illegal pollution 57
illness 279, 320
immunity 66, 157, 517
impairment 67, 71
impartiality 58, 72–3, 88
imperialism 473
implied rights 208–9
implied terms 272
imprisonment 10, 12–15, 17–18, 20, 62, 80–3, 93–5, 99, 102, 104, 110, 148, 205
inadmissible evidence 35–6, 41, 45, 65, 115
incapacitation 93, 102
incarceration 93–5, 132–3
income 299, 432, 463–4
incorporation 207
indecent assault 13, 56
indefeasible title 436
independent authorities 200–3
indictable offences 9, 22, 52, 56–7, 72, 113, 115, 122, 125
  triable summarily 22, 54, 59
  see also summary offences
Indigenous people 27, 118, 178
individuals 4, 5, 201, 254, 428, 518
Industrial Revolution 172, 250, 266, 319
industrialisation 369
industry organisations 293–4
industry-based dispute resolution 293–4
infanticide 11
information 100, 102–3, 117, 160, 195, 213, 302–3, 396, 452–3
  see also disinformation
infrastructure 146, 428, 461, 465
inhuman treatment 100, 518
injunction 4, 297
injury 85, 279, 303, 521
injustice 4, 82
inquisitorial system 58
insanity 389
insanity defence 67, 71
insider trading 16–17
instruments 334, 336–8, 346, 484–5
insurance 291, 442
intelligence 120, 151, 153, 156–7, 475
Intensive Correction Order (IOC) 96
intent/intention 7, 11, 15, 21, 67–8, 110, 112, 269–70
interdependence 267, 326–8, 472–3
interest rates 299, 425
interests (of parties) 5, 25, 78, 151, 158, 172, 197, 365, 432
intergenerational equity 329, 360
intergovernmental organisations (IGOs) 199–200, 227, 349–50, 487–90
Intergovernmental Panel on Climate Change (IPCC) 335
intermediate courts 53, 55–6
international agreements 332, 366, 493
International Bill of Rights 186, 193–4, 202
International Campaign to Abolish Nuclear Weapons (ICAN) 512, 514
International Commission for the Conservation of Atlantic Tunas (ICCAT) case study 341
International Committee of the Red Cross (ICRC) 185, 200, 204, 490, 512–13, 516–19, 521
international community 140, 146, 192–4, 199–205
international conferences 323
international conventions 340, 344, 429
International Court of Justice (ICJ) 195, 200–1, 333, 342–5, 356, 361, 486, 505
international covenants 168, 173, 180, 186–7, 192–3, 197, 202, 206, 214, 254, 429
international crime 136, 140–57, 201
International Criminal Court (ICC) 142–3, 145, 147–50, 154, 157–9, 180, 185, 201, 242, 244–5, 248, 486, 505, 518
  case study 160
international criminal justice system 159













ISBN 978-1-009-49803-6

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International Criminal Police Organization (INTERPOL) 155–6
International Crisis Group 490–1
international environmental protection 332
international fraud 146
international instruments 336–8, 484–5
international jurisdiction 310
International Labour Organization (ILO) 173, 226, 229, 233, 235, 246, 250–1, 254
international law 184–6, 199, 200, 204, 325, 331, 336, 339–40, 363, 428, 473, 477, 479, 491, 509, 511–12, 514, 516–21
International Maritime Organization 334
international treaties 206–7, 234–5, 323
internet 4, 18, 36, 146, 298–9, 308, 311–12
interrogation 32, 34, 44–5, 116–21
intervention 28, 396, 413, 480
interview friend 118–19
intimidation 25, 62, 116, 396, 521
intolerance 479
intragenerational equity 329
investigation(s) 6, 32, 38, 54–5, 58, 78, 160, 204, 287, 450–1
see also criminal investigation
invitation to treat 270
involuntary behaviour 67
involuntary manslaughter 11
isolation 100, 135
IVF (in vitro fertilisation) 407

Johannesburg 2002 347
Joint Child Protection Response (JCPR) 383
judges 56–9
judgments 4, 72, 78–9
Judicial Commission of NSW 122
judicial discretion 79
judiciary 207–8, 267
Judiciary Act 1903 (Cth) 52, 57
juries 56, 72–4
jurisdiction 9, 52, 55–7, 59, 114, 142, 146–8, 150, 308, 310, 377
jurors 58, 72, 74
jus cogens 485
justice 28, 54, 57, 63, 82, 108, 133, 157, 250, 280, 310, 425, 432, 486
Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (NSW) 62
justice system 72, 108, 133
see also youth justice system

Kable v Director of Public Prosecutions NSW (1996) 189 CLR 51 102
'Keep Them Safe' initiative 400
Kids Helpline 415
killing/maiming 239
kinship 380
'kiss and make up clause' 389
knowledge 110, 329
Korean War 477, 505
Kreet & Sampir [2011] FamCA 22 379
Kyoto Protocol (1997) 179, 338, 346, 360, 363

label information 302
labour hire firms 253, 257
labour rights 172–3, 187
laissez-faire economy 266
land ownership 426–7, 432, 435, 437
landlords 426, 443–7, 452
landlord–tenant relationship 463
larceny 15
law 5–6, 14–15, 57, 79–80, 110, 112, 159, 205–7, 395–6, 425, 432, 452, 473
Australian 110, 205–7, 229, 231, 378, 428
consumer *see* consumer law
criminal *see* criminal law
family *see* family law
global environmental threats, role regarding 356–8
hard 184, 229, 336–9, 362, 428
law-making power *see* state sovereignty
reform *see* law reform
soft 184, 336–7, 339, 362, 366, 428
unconstitutional 57, 102
see also international humanitarian law; international law; legislation; rule of law; statutes
law enforcement 40, 116, 120, 150–1, 156–7, 185, 356, 361, 363, 366
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) 32, 40–2, 44, 114–15, 118–19, 121
law reform 5, 13, 55, 71, 133, 257, 320, 355, 377, 403
League of Nations 474
leasing 443–8
legal advice 61, 64, 115, 118–19
legal aid 61, 63–4
Legal Aid NSW 63–4, 91, 116, 121, 291
legal entities 267, 474
legal personnel 59–61
legal proceedings 6, 34
legal representation 63–4, 452
legal rights 102, 121, 170, 267, 381–5, 404, 462
legal system 63, 82, 301, 306, 308–9, 311–12, 403–4, 406, 412, 416, 425
legally binding 268
legislation 135–6, 207, 209, 267, 352–3, 362, 426–7, 428
see also statutes
legislature 32, 207–8
LGBTQIA community 403
liability 8, 21, 66, 95, 111, 131–2, 140, 274, 442
Liberal International Order 472
liberty 13, 93, 183, 207, 216–17
licensing 267, 286–8, 291
life imprisonment 148
Limited Nuclear Test Ban Treaty 475, 510
litigation 295
lobbying 247, 305, 323, 400, 403, 506
Local Court 22, 53–4, 72
Local Environment Plans 432
lockdown 117–18, 135, 299, 309
locus standi 320
lodgers 426–7, 448, 455
logos 303
looting 239
lower courts 53–5

Mabo v Queensland (No 2) (1992) 175 CLR 1 211–12
Magellan cases 399
Magellan Program 390
magistrates 22, 54, 59–60, 122
maintenance 385, 390 –1, 407–8
majority view (judges) 57
'Making it Happen' priority 430
malpractice 288
mandatory product standards 302–3
mandatory reporting 305
mandatory sentencing 79–80
manpower 240
manslaughter 7–8, 11, 56, 69, 96, 112, 125
manufacture/manufacturers 172, 267, 290, 297
marginalised people 63, 454, 460–1
marital status 460
marketing 267, 280–6, 303, 307–9, 311–12
marketplaces 266–7
marriage 209, 377–80, 401–2, 404
mass marketing 267
mass media 493
mass murder 477
mass-atrocity crimes (mass atrocities) 472, 497–8
maximum penalty 14, 17, 79
maximum security centres 99

ISBN 9781009498036

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McCartney v The Queen [2009] NSWCCA 244 86
means-testing 64
media 78, 204–5, 213, 233, 248, 257, 296, 305–6, 308, 352, 400–1, 454–5, 459, 493–4
mediation 99, 297, 398, 453–4
medium security centres 100
mega conferences 346
memorandums 271
men, voting rights 174–5
mens rea 6–7, 10, 66–8, 78, 110, 112
mental capacity 110–11, 271
mental health impairment 67, 71, 94
mental illness 24, 67
MERIT 82, 97
merits testing 64, 200, 320
metaverse 156
migrants/migration 104, 146, 251–3, 291, 460
military action 195, 482
military aid 507–8
military campaigns 238
military recruitment 238
military service, forced 518
military tribunals 153
Millennium Declaration 198
minimum security centres 100
Minimum Standards for Men's Behaviour Change Program 396
minimum wage 255
case study 257
Minister for the Environment v Sharma (No 2) [2022] FCAFC 65 329
minors 110, 246, 289–90
misleading and deceptive conduct 271, 280–3, 426, 455
misrepresentation 271
mistake 68
mitigating circumstances 11, 71
mitigating factors 85–6, 124
M'Naghten test 67
modern slavery 229, 231–2, 234–5, 253, 256
money 393
money laundering 57, 91, 146, 152
monist systems 207, 324
monitoring devices 46
monogamy 378
monopoly 292
Montreal Protocol on Substances that Deplete the Ozone Layer (1987) 337, 339–40, 357–8, 363
morality 4, 82, 168
mortgages 426, 439–40, 442, 457
Motor Dealers and Repairers Act 2013 (NSW) 285, 288
'move on' 114
movement, freedom of 32
movement restrictions 126
multilateral treaties 323, 428, 484, 510
multilateralism 195, 473–4, 496
murder 10–11, 56, 71, 81, 96, 125, 145, 397
mutual dependence 327

Nairobi Conference 1982 347
'naming and shaming' 204–5, 232
nation states 331–2
National Affordable Housing Agreement 397
National Consumer Credit Protection Act 2009 (Cth) 277, 292, 295, 299–300, 440, 442
National Credit Code (and Credit Law Toolkit) 300
National Domestic Violence Order Scheme 397
National Environment Protection Council 355
National Housing and Homelessness Agreement/Plan 425, 428, 430–1, 458, 462–3
National Plan to End Violence against Women and Children 2022–2032 (National Plan) 28
National Plan to Reduce Violence against Women and their Children 2022–2032 394, 396
National Police Check 288
National Security Legislation Amendment Act 2010 (Cth) 15
National Socialist German Workers Party (NSDAP/Nazi Party) 142
see also Nuremberg Trials
nationalism 169, 177
nationhood 169
nations 192
native title 211–12
natural environment 319
necessity 68
neglect 133, 382–3, 395, 413
negligence 19–20, 56, 279–80, 320
negotiation 54, 62, 147, 255, 269, 277, 284, 365, 473, 494–5, 509
networking 406
neutrality 517, 521
New South Wales Child Protection Register 103
news media 507
no-fault divorce 390
non-compliance 303, 356
non-custodial sentence 99
non-government organisations (NGOs) 184, 200, 204, 212, 227, 233, 235, 240, 242, 247, 296, 334, 350–1, 358, 362, 365, 400, 454, 480, 490–1, 498–9, 506, 517
case study 351
non-parole period 80, 93, 100–1
non-rebuttable presumption 111
North Atlantic Treaty Organization (NATO) 488–9
not guilty pleas 22, 62, 72, 78
not-for-profit organisations 184, 465
NSW Civil and Administrative Tribunal (NCAT) 288, 294–5, 443, 448, 452–3, 460
NSW Domestic and Family Violence Prevention and Early Intervention Strategy 2017–2021 396–7
NSW Fair Trading 290–1, 300, 302, 306, 438, 444, 447, 453
NSW Gay and Lesbian Rights Lobby 403
NSW Land Registry Services 434–5
NSW Law Reform Commission 67, 130
NSW Law Society 287
NSW Ombudsman 33, 291
NSW Police Force 32, 60, 312
see also police
nuclear arms race 200, 512
nuclear energy *case study* 361
nuclear war 475–6
nuclear weapons 509–15
nuisance 320
nullify [marriages] 379
Nuremberg Trials 143, 153, 518
nursing homes 449–51

oath 65
objective factors 84
observer status 350
occupational licensing 286–8
offences 9–20, 52, 57, 85, 126, 141
see also strict liability offences; summary and indictable
offences against the sovereign 5, 9, 14–15, 25
offenders 79, 83–4, 85, 101–3, 108–9, 134
young *see* young offenders
offerers/offerees/offers 268, 270
Office of Fair Trading 312
Office of the UN High Commissioner for Human Rights (OHCHR) 195, 519
Old System title (or common law) 436
'on foot' contracts 268
online transactions 310
on-the-spot fines 19, 91
open standing 320
opinion 65–6, 486









ISBN 978-1-009-49803-6

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Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) 242
oral contracts 268–9
orders 5–6, 99, 102, 119, 121, 125, 210, 297, 390–2, 410, 413, 460
'ordinary person' 71
Organisation for Economic Cooperation and Development (OECD) 349–50
organised crime 92, 234
Organization of American States 199–200
original jurisdiction 52, 57
Our Common Future (Brundtland Report) 327
overexploitation 327
overfishing 327, 341
over-representation 33, 45, 80, 93–4, 118, 120, 130, 462, 465
owners' corporation 438
ozone depletion/destruction 358, 363, 365
  case study 357

Pacific Transnational Crime Network (PTCN) 156–7
parentage orders 410
parental neglect 413
parental responsibility 390–1, 404–6, 413
parenting orders 391
parenting plans 390–1
parenting rights 403
parents 27, 117–18, 121, 382–5, 402–3, 408–11
Paris Agreement (2016) 179, 338–9, 341, 346, 360–1, 363, 365
Paris Peace Conference 518
parliament 150, 175, 207–8, 267
parliaments 79, 215
'parol evidence rule' 269
parole 93, 100–2
partial defences (to murder) 71
parties 9, 23, 202, 268, 271
'pat down' 40
peace 199, 333, 472–4, 480, 482, 500–8, 516
Peace Building Commission (PBC) 483
peace movements 511
Peace of Westphalia (1648) 473
peace rights 180–1
peacekeeping 151, 156, 195, 477, 492–3
  versus peace enforcement 483
peers 58, 72
penalties 14, 17–19, 33, 79, 81, 90–7, 124–7, 252, 255, 301
people 46, 71, 461–2
people smuggling 225
people with a disability 63, 464
peremptory challenges 72
performance tests 302
perjury 65
Permanent Five 480, 482
person, offences against the 5, 9–13
persuasion 495
phishing 307
phone taps 32–3
photographs 65, 119, 121
physical abuse 258
piracy (at sea) 141, 485
plaintiff 5–6
plastics waste 325, 335, 358, 367–9
pleas 46–7, 54, 62, 72
  see also negotiation
police 5, 26, 32, 35, 56, 152, 156
  powers of 32–4, 40–1, 45, 117–18
  training 120–1, 134, 151–2, 156, 230
police procedures 40, 116, 134, 152
police prosecutors 60
policy 28, 118, 458
  contravention 271
  for development 254
  evidence-based 95
  housing 425, 428–9, 431, 453
  improving 121
  'three strikes and you're out' 79
political factors (crime) 25
politics 145, 168, 172, 208, 211, 323–5, 362, 494–5, 509
politics (of fear) 215–16
pollution/polluters 57, 320, 323, 325–6, 342, 360, 362
polygamy 378
possession 19, 40
post-sentence preventative detention 102
post-separation parenting programs 398
poverty 198, 226, 248, 258, 327, 336, 425, 431
power 32–4, 40–1, 44–5, 57, 117–18, 146, 193, 207–8, 215–16, 266, 273, 352–3, 362, 425, 476, 479, 491, 507
  see also superpowers
precautionary principle 330–1
precedents 61
prejudice 85, 460
preliminary offences 9, 20–1
premeditation 126–7
'pre-nups' 392–3
press-ganging 238
pressure 283
presumption(s) 46, 110–11, 121, 126, 186, 407–8
preventive measures 28, 45, 102–3, 126, 134, 160, 396
price gouging 298
price-fixing 293
prima facie 54
principle in the first/second degree 23
prior convictions 85, 127
prison 94–5, 101
privacy 115, 206, 209–11, 310, 425, 441, 455
private treaty 433–5
prizes 283
probabilities, balance of 5, 33, 102
probation 125
procedural adjustment 121
procedural fairness 288
proceeds of crime 91
product certification 302–4
product safety 279, 289, 302
products 232, 266, 267, 276, 279–80, 305–6, 310, 369
prohibited drugs 19
promises 268–9
proof 5, 8, 64, 143
proof of age 379
propaganda 507–8
property 93, 175, 392–3, 445, 464
Property (Relationships) Act 1984 (NSW) 402
property certificate 434
property offences 5, 15, 18, 34, 56, 426–7
proportional and reasonable force 70
prosecution 5–6, 60, 78, 141–3, 147, 152, 155, 157, 517
Prosecutor v Thomas Lubanga Dyilo (International Criminal Court, Trial Chamber I, Case No ICC-01/04–01/06, 14 March 2012) 244–5
prosecutors 60
  see also Director of Public Prosecutions
Protection of the Environment Operations Act 1997 (NSW) 57
protection/protective measures 4, 7, 55, 172, 216–17, 355, 377, 395, 432, 441–3, 446–8
  of children/young people *see* child protection
  of citizens 5, 41, 44
  of community 32, 83–4
  of consumers *see* consumer protection
  environmental *see* environmental protection
  legislative 14, 267, 277–8, 280–5, 432
  principle for 497–9
  US constitutional protection scope 519
  via Geneva Conventions 517
protective custody 100
protest 25

ISBN 978-1-009-49803-6 Milgate et al.
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Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000 225, 229
Protocol to the Convention relating to the Status of Refugees 485
provocation 11, 71, 85
psychological factors (crime) 24
public defenders 61
public discretion 20
public housing 426, 430
public interest 60, 277, 320, 455
public liability insurance 442
public opinion 369
public order/offences 9, 20, 32
public policy 271
public prosecutors 60
public safety 33, 134, 271
Public Warning Notice 284
publicity 11, 18, 78, 104, 204
puffery 280
punishment 4–5, 60, 78, 79–80, 81–4, 93, 356, 366, 383–4, 519
  proportionate to the crime *see* retribution
  see also penalties; sentencing
punitive measures 135–6, 366
pyramid selling 284, 308

quality 63, 267, 272, 275, 297, 302, 310
quality assurance tests 302
quality of life 384, 428
question of law/fact 57, 66
questioning 34, 45, 60, 65, 114–16, 121

race 174, 403
Racial Discrimination Act 1975 (Cth) 209–10, 460
racial intolerance 479
racism 170
rape 14, 145, 239
rates 444
ratification 192, 324
rational choice theory 26
reactionary instruments 346
real evidence 65
Real Property Act 1900 (NSW) 426, 436–7
Real Property Amendment (Certificates of Title) Act 2021 (NSW) 437
reasonable doubt 5, 9, 36, 64, 66, 68, 74, 110–11, 116, 142
reasonable force 32, 36, 44, 68, 70
reasonable grounds/suspicion 40–2, 44, 68, 115–16, 390
rebel groups 238
rebuttable presumption 110–11
Recalls Australia 289
recidivism 83, 94, 96, 98, 130, 133
recission 297
reckless conduct 7, 383
reckless indifference to human life 11
reconciliation 398
recordings 113
recordings/records 21, 35, 42, 45, 65, 69, 90–1, 119, 128, 130, 269
red cross/Red Crescent [symbols] 517
  see also International Committee of the Red Cross
Red Hand Day 247
Redfern Legal Centre 296, 301
redress 4, 289–98, 428
reduced liability 66
referral 121, 130, 147, 403, 406
referral selling 284
refugees 158, 216, 325, 479, 516
registration 286, 435–9
regulation 267, 280–8, 302, 311, 324
regulatory offences 9, 21, 32
rehabilitation 19, 46, 55, 83–4, 86, 93, 96, 100, 104, 108, 111, 124, 126, 130, 134, 242, 248
relationships 24, 267, 269, 355, 378–9, 389–404, 463, 472
release 45
  see also charge(s)
relief 200, 277
relief assistance 204
relief in equity 275–6
religion 183, 384, 479
relinquishing parent 386
remand/remand centres 48, 73, 95, 126, 132
remedies 5, 267, 272, 289–98, 311, 432
remorse 85
remote purchasing 310
remuneration 172
renewable energy 365
renewable resources 358–9, 361
rent 445–6
rental agreements 426
Rental Bond Board 453
rental market 460
rental reforms 396–7
Rentstart 464
reoffending 81, 83–5, 92, 94, 96, 99–103, 126, 131, 133
repairs 445
reparations 130
repatriation 517
reports/reporting 12, 34, 87, 123, 150–1, 194, 203, 231–2, 256, 279, 305, 440–1, 443
representation 204, 268–9, 271
  see also legal representation
residential lease agreements 443, 451
residential parks 426, 451
Residential Tenancies Act 2010 (NSW) 426, 443–4, 447–8, 451, 463–4
residual powers 208, 352, 362
resolutions 195, 197
resources 35, 132, 159–60, 234, 320, 394, 431, 478, 480
  access as conflict source 478–9
  demand for 359–61, 366, 368
  natural 320, 324, 327, 366, 368
  non-renewable 359
  scarce 157, 258, 326, 368, 465, 479
respect 130, 177, 179, 186, 248
responsibility 4–5, 23, 67, 71–2, 99, 108, 110–13, 128, 131–3, 136, 193, 390, 404–6, 413, 497–9
responsible adults 115, 121
responsible lending 442
rest 172
restorative justice 99, 133
restraint 135
retirement villages 427, 448–9, 454
retribution 81–2, 93
revenge 82
reverse onus of proof 255
revolution 474
right and wrong 111–13
rights 4–5, 8, 32, 35, 45, 59, 62–3, 72, 115, 155, 168, 172, 174, 177–9, 183, 186–7, 208, 210–11, 225–6, 254, 267, 426
  caution of 119, 121
  of children/young people *see* children's rights
  development 182–3
  enshrined 173, 217
  see also human rights; peace rights
rights abuse 33, 135–6, 170, 193, 207, 237
rights campaigns/movements 172, 182–3
rights protection 208–9, 211–12, 214, 377, 428
Rio Conference (1992) 328, 347
Rio Declaration on Environment and Development (1992) ('Rio Declaration') 179, 329–30, 337
Rio+20 Earth Summit 2012 347–8
riot 20
risk 7, 33, 48, 66, 101–4, 126, 207, 232, 302, 384, 425
risk assessment 120
robbery 15
Rome Statute of the International Court (1998) (Rome Statute) 142–3, 147–50, 155, 158–9, 207, 242, 244, 246, 485–6, 493, 518









ISBN 978-1-009-49803-6

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royal commissions 211, 301, 451
rule of law 80, 159–60, 199, 207, 248
Rules of Conduct 310
rules of evidence 58
Rules-Based Order 472
Russo-Ukrainian War (2014–?) 503–8

safeguards 63, 266
safety 20, 33, 102, 134–6, 172, 279, 297, 302, 356, 425, 455
Salvation Army 400, 462
same-sex relationships 206, 381–2, 401–4
sanction 60, 78, 130, 133, 195, 258, 332, 482, 506–7, 512
see also punishment
satellite communication 475
Save the Children report 135–6
scalping 281
scams 298, 309, 312
scamwatch 308
school settings 27, 134
search/searches 32, 35, 40–1, 115, 119
seasonal worker schemes 253
second generation human rights 168
Secretary-General 497–8, 504
security 18, 26, 99–100, 104, 183, 199, 333, 448, 474, 476, 482, 500–8
Security Council 504
sedition 14–15
Seen and Heard: Young People and the Legal Process 114, 118–19, 126
seizure 32, 35, 40–1
self-defence or necessity 68, 495, 501
self-determination 169, 177–9, 182–3, 192
self-help 289–90
self-interest (crime factor) 25
self-regulation 285, 287, 311
self-representation 63
Seniors Rights Service 454
sentence appeal 88
sentencing 47, 54, 56–7, 60, 78–9, 81, 84–6, 89, 93, 98–9, 99–104
see also punishment
sentencing hearings 62, 78
separate dwellings 433
separation 135, 389–93
separation of powers 207–8, 215
September 11 terrorist attacks 477
serious bodily harm 19–20, 56
Serious Crime Prevention Orders 33
services 46, 133–5, 225, 267, 309, 518
settlement 435
Sex Discrimination Act 1984 (Cth) 209–10, 401, 460
sex slaves 239
sex tourism 224
sexual abuse 258
sexual assault 12, 34, 37–9, 56, 73, 86, 96
sexual exploitation 152, 226
sexual intercourse 12
sexual offences 12–13, 103–4
sexual offenders registration 103–4
sexual servitude 230
sexual slavery 171, 224–5
sexual violence 239
sexuality/sex 403
shaming 93, 204–5, 232
shared care 404–6
shared spaces 433
shares/price 16–17, 437
shelter 431, 448–51, 455–65
'adequate and affordable' 425, 427, 452, 465
extent of laws concerning 425–7
nature of 425–31
obligation to provide 429–31
purchasing 432–43
right to 427–9
securing 432, 443–8
see also leasing
shoplifting 15
siblings 378
silence 45
single mothers 460
single-parent families 381
situational crime prevention 26–7
slave trading 141, 170–1
slavery 151–2, 186, 232, 485
abolition of 170–1, 223
contemporary 223–4
early international laws 171
legal and non-legal responses 229–34
sniffer dogs 40–1
social crime prevention 27
social disadvantage 94
social distancing 298
social equality 297
social factors (crime) 24, 27
social housing 425, 428, 453, 457–8, 463–5
social inclusiveness 459
social justice 250, 280, 322
social media 210, 213, 366, 494, 507–8
social order 168
social progress 472
social reform 173
social rights 187
social security 425
social skills 27
social welfare 96
society 4–5, 95, 172, 327, 425
'cashless' 299
sociocultural factors 258
socioeconomic conditions 110, 146
socio-political factors 234
soil salinity 320
solicitors 61
sovereign, offences against the 5, 9, 14–15, 25
sovereign states 192, 194
sovereignty 142, 193–4, 356–7, 361, 365, 367, 473, 484
spam 307, 311
special assistance subsidies 464
special order 297
species endangerment 368
species extinction 320, 360
specific deterrence 81
specific performance 297
sperm donors 408
squats 451
stamp duty taxes 430
standard contract for sale 426, 443
standard of care 11
standard of living 82, 183, 187, 250, 329, 359–60, 425, 428
standard of proof 5, 64
standardisation 114
standards 4, 136, 266–7, 279–80, 287–8, 302–4, 320, 363
Standards of Professional Conduct 33
standing 320
state, the 4–6, 14, 192, 201, 202, 267, 479–80, 491, 512
European model 473
interstate dispute 486
legal obligations 518
power of 352–3, 377, 479
see also offences against the sovereign
state and territory courts 52–3
state bodies 153, 290–3
state law 52, 206, 208, 230, 331, 377, 413
state parties 202
state regulation 287–8
state sovereignty 140, 158, 193–4, 201, 258, 331–2, 365, 473, 479–80
statehood 192–3
statements 35, 44, 84, 86, 88, 111, 124, 183–7, 255
state-sponsored terror 477
statute law 206, 209
Statute of the International Court of Justice (1945) 343
statutes 79–80, 267, 277–8
statutory bodies 5
stealing 16
step-parents 381
stigmatisation 238, 411, 465
Stockholm Conference 1972 346–7
Stockholm Declaration (1972) 179
Stockholm+50 2022 349
Stolen Generation 210
strata scheme 427
Strata Schemes Management Act 2015 (NSW) 427, 438–9

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strata title 438–9
strict liability offences 8, 21
strike action 172
strip searches 40, 116–18, 121
students 'at risk' 27
subjective factors 84–5
subpoena 46, 65
substantial impairment because of mental health impairment or cognitive impairment 71
substantiation 413
suffrage 174
suffragettes 168
suicide bombers/missions 239–40
Summary Offences Act 1988 (NSW) 19–20, 22, 115
summary offenses 9, 22, 52, 57, 59–60, 123, 128
summons 46
superannuation 255, 291, 392, 401
superior courts 53, 56–8
superpowers 185, 472, 476–7, 511
supervision 96, 100–1
suppliers 267, 279, 289, 297
supply chains 232, 256–7
supply of a prohibited drug 19
support 27–8, 55, 90, 104, 128, 132–3, 152, 157, 195, 229, 242, 401, 415, 427, 476
support person 118–19, 121
supranational organisation 488
Supreme Court 56, 59, 72, 89, 102–3
surety 46
surrogacy 407–12
surveillance 32, 35–6, 395
Suspect Targeting Management Plan (STMP) 120–1
suspects 34
suspended control orders 125
suspicion 41
sustainability 198, 328–30, 332, 336, 346–7, 359, 361, 366, 453
Sustainable Development Goals (SDGs) 176, 198, 233
SWIFT 507
Syrian Civil War 477

tariff 512
Tasmania v The Commonwealth (1983) 158 CLR 1 354–5
tax 401
tax evasion/fraud 16, 91, 152
tax reform 459
technical assistance 195
technological advancements 146, 240, 307, 475, 493
technology 32, 36–9, 309–11, 407–8, 518
telecommunications 146, 310–11
telemarketing 310–11
Telstra *case study* 276
tenancy (ending) 446
tenants 397, 426, 443–7, 452
Tenants NSW 292
Tenants' Union of NSW 447, 454
tenure 448, 455
terms and conditions (contracts) 268
territory bodies 153
territory law 206, 208, 230
terrorism 25, 34, 45, 96, 102, 103, 146, 213, 215–16, 273, 475, 477, 516, 518–19
testimony 6, 60, 65
testing 97, 302, 304
theft 91, 93
theory/theories 25–6
therapeutic justice 96–7
third generation human rights 168
thought 186
threats 70, 85, 95, 102, 104, 157, 356–8, 472, 480, 500–8
ticket scalping 281
title 432–3, 435–9
Tokyo trials 153
Torrens title 426, 436–7
torts 320
torture 145, 155, 186, 200, 239, 485, 518–20
'tough on crime' stance 94–5, 108, 132, 136
toxic waste 320
trade 225, 281, 293, 302, 324, 473, 506–7
trade cycle 170
Trade Practices Act 1974 (Cth) 277, 280, 284, 293
trade unions 172–3, 250–1, 256
tradition 329, 380
traffic offences 19–20, 115
trafficking 10, 19, 46, 146, 151–2, 171, 223–7, 229, 235, 239, 411
training 254
transatlantic slave trade 170
transnational crimes 141, 146–7, 151–3, 155–7, 160, 308
transparency 213, 256, 267
transportation (colonial) 110
trauma 412
treason 14
Treasury, The 292
treaties 110, 142, 144, 147, 177, 185–7, 193–4, 202–3, 206–8, 243, 270, 310–11, 323, 356, 366, 428–9, 472, 475, 479, 491, 493, 511, 517–18
Treaty on the Non-Proliferation of Nuclear Weapons (1968) 200, 361, 475–6, 485, 502, 510–12
Treaty on the Prohibition of Nuclear Weapons (2017) 181, 485, 512, 514–15
trends 123
trespassing 320
trial 46, 48, 52–63, 72, 186
tribunals 153, 157, 200–3, 210–12, 294–6, 452–3, 486–8
trust territories 178, 481–2
Trusteeship Council 194
Twin Covenants 186–7

Ukraine, invasion of 197, 489, 500–4, 506, 519–20
see also Russo-Ukrainian War
ultra vires 332
UN Charter 177, 180, 331, 356, 477–9, 481, 484, 495, 501
UN Children's Fund (UNICEF) 246–7
UN Conventions 493
UN Educational, Scientific and Cultural Organization (UNESCO) 336
UN Environment Programme (UNEP) 334–5
UN General Assembly 183, 194, 197–8, 333, 504–5, 509–10
UN Human Rights Committee 192, 194
UN Human Rights Council 194, 197
UN Refugee Convention (1951) 493
UN Secretariat 195, 333
UN Security Council 160, 195, 243, 333, 476, 480, 482, 505, 520
unconscionable conduct 273–6, 283
unconscionable contracts 273–8, 301
underpayment 251–3, 257
undue influence 275, 283
unemployment 24–5, 172, 254
unfair rules 112
unfair tactics 283
unfair terms 291
unilateral action 496
unions *see* trade unions
United Nations 140, 142, 185, 192–3, 199, 227, 235, 242, 323, 325, 333–6, 365–6, 472, 474, 480–4, 492, 498, 505–6, 509–10
human rights roles [enforcement/protection] 194–8
organs–human rights / responsibilities 194–5
conventions 110, 114, 120, 124, 156, 225, 229, 242, 323, 337, 346, 360, 363, 382, 412, 429
United Nations Declaration on the Rights of Indigenous Peoples (2007) 178
Universal Declaration of Human Rights (1948) 168, 170–6, 178, 183–6, 193–4, 201–2, 206, 214, 229, 237, 254, 429, 485













ISBN 978-1-009-49803-6

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universal human rights 168
universal jurisdiction 142, 517
universal male suffrage 168
universal suffrage 173–5
uranium *case study* 361
urine analysis tests 97
US Bill of Rights 214
use of a prohibited drug 19

values 140, 320, 322–3, 366, 368, 377, 385
verdicts 5, 46, 59, 72–4, 78
  see also juries
veterans' entitlements 401, 402
veto power 193, 476, 482, 501–2, 507
victim impact statements (VISs) 84, 86–7, 124
victimisation 237
victims 4, 13, 28, 39, 46, 71, 82, 85, 87–8, 130, 152, 204, 225
  voice of 98–9, 102–3
video recordings 35
Vienna Conference 513
Vienna Convention for the Protection of the Ozone Layer (1985) 337, 339
Vienna Declaration and Programme of Action 224
Vietnam War 477
violators 204–5
violence 11–12, 15, 20, 25, 28, 65, 85, 100, 382, 394, 396, 413, 477, 516
  see also domestic violence
virtual shopping 309
visas 104, 230, 251, 253, 257–8
Voice Referendum 175
voluntary agreements 271
voluntary manslaughter 11
voluntary recruitment 240, 242, 246
vulnerable people 85, 100, 118–19, 131, 135, 151, 157, 237, 242, 267, 298–9, 382, 430, 449–50, 461, 472, 497

wages 172, 255, 258
war 182–4, 474–5, 477, 516–18, 521
war crimes 141, 144–5, 148, 150, 153, 185, 197, 201, 240, 242, 244–5, 477, 487, 505–6, 518
  case study 159
war on terror 511
warfare 474–7, 518
warnings 90, 92, 128, 279, 284, 306
  see also caution
warranties 272, 289
warrants 33, 35, 40–3, 145, 160, 215, 310, 506
waste 324–5, 327, 335, 358, 367–9
waste reduction 367
watchdogs 117, 291, 305, 308
water shortages 479
weapon-related offences 133
weapons 85, 474–5
weapons of mass destruction 476
weights and measures laws 267
welfare 120, 390–1, 465
welfare model 108, 130, 133
wellbeing 292, 390–1
whaling 331
whistle-blowers 213
white-collar crime 16, 18, 25, 146
witness immunity 66
witnesses 6, 34–5, 55, 65–6, 378
women 63, 152
  societal place and value 226
  violence against 28, 393
women's suffrage 168, 174
Work and Development Orders 91
worker exploitation 225–6, 250–8
workers' compensation 172, 401
workforces 250
working conditions 172–3, 229, 250, 254, 256–7
working from home (WFH) 309
Working with Children Check system 414
workplace laws 255
world federalism 509
world order 472–521
World War I and II 171, 177, 474–5
wrist- and ankle-monitoring devices 46
written contracts 268–9, 271, 272
written-oral contracts 269
wrongdoer *see* defendant
wrongful conviction 36

young offenders 84, 108–9, 114–21, 126–7, 130, 131–6
  see also children
Young Offenders Act 1997 (NSW) 90, 121, 128, 130–3
young people 20, 26, 34, 55, 94, 108, 110, 114–21, 384
Youth Justice 108, 124, 125–6, 131–6
youth justice conferencing 125, 128, 130, 132–3

'zero tolerance' approach 108
zoning certificates 435

ISBN 9 8-1-009-49803-6 Milgate et al.
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Acknowledgements

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ISBN 978-1-009-49803-6

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Chapter 13 (Digital-only chapter)
Option 4: Indigenous peoples

25% of course time

Reader advice

Readers are advised that this chapter contains potentially distressing information, including references to the Stolen Generations and to deceased persons. Some material in this unit contains words, descriptions and terms that reflect views of the period in which the content was created, or the people who wrote it, but would not be considered appropriate today.

Principal focus

Through the use of contemporary examples, you will investigate the effectiveness of legal and non-legal processes in achieving justice for indigenous peoples globally.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the impact of state sovereignty in encouraging cooperation and resolving conflict in regard to indigenous peoples
- issues of compliance and non-compliance
- laws relating to indigenous peoples as a reflection of changing values and ethical standards
- the role of law reform in recognising the rights of indigenous peoples
- the effectiveness of legal and non-legal responses in achieving justice for indigenous peoples.

At the end of this chapter, there is a summary of the themes and challenges relating to Indigenous peoples. This summary draws on key points from the chapter and links each point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you 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 peoples is an effective means of protecting indigenous peoples' rights
- 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 legal structure has responded to the needs of First Nations 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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Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 29) and the 'learn to' activities (pp. 29–30) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Indigenous peoples' topic.

Relevant law

IMPORTANT LEGISLATION

Aboriginals Ordinance 1911 (Cth)
Aborigines Protection Amending Act 1915 (NSW)
Migration Act 1958 (Cth)
Constitutional Alteration (Aboriginals) Act 1967 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Native Title Act 1993 (Cth)
Northern Territory National Emergency Response Act 2007 (Cth)
Stronger Futures in the Northern Territory Act 2012 (Cth)
Aboriginal Languages Act 2017 (NSW)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Charter of the United Nations (1945)
The Universal Declaration of Human Rights (1948)
Indigenous and Tribal Populations Convention (1957)
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)
Indigenous and Tribal Peoples Convention (1989)
Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)
United Nations Declaration on the Rights of Indigenous Peoples (2007)
Glasgow Climate Change Pact (2021)

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] HCA 23
Wik Peoples v Queensland [1996] HCA 40
Delgamuukw v British Columbia [1997] 3 S.C.R. 1010
Mayagna (Sumo) Awas Tingni Community v Nicaragua (2001)
Sesana & Setlhobogwa v the Attorney-General of the Republic of Botswana [2006] BWHC 1 (52/2002)
Kaliña & Lokono Peoples v Suriname, (2015) IACTHR, Series C, No 309
Billy et al v Australia (3624/2019)
Love v Commonwealth of Australia (2020) HCA 3
R v Evans (Feb 2022)

Legal oddity

The Aboriginal flag has long been identified with Aboriginal peoples, with all of the elements having significance:

- black: Aboriginal people
- red: the earth and the ochre used in Aboriginal ceremonies
- yellow circle: the sun.

The Aboriginal flag, designed by Luritja artist Harold Thomas, was first used in July 1971 at a land rights rally on Kuarna Country, Adelaide, and since that time he, and his estate, has owned the copyright to the image. This resulted in very complex legal issues when the flag was used. In 2022 the Australian Federal Government paid $20 million for the rights to the flag so, as Ken Wyatt (the Indigenous Affairs Minister at the time) explained: 'Now that the commonwealth holds the copyright, it belongs to everyone, and no one can take it away.'

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13.1 Nature of the law and indigenous peoples

Definition of indigenous peoples

The United Nations (UN) Permanent Forum on Indigenous Issues recognises that there are indigenous peoples living in nearly every part of the world. For example, Yanomami tribes live in the Amazon jungle; Chittagong hill tribes live in Bangladesh; Canada is home to the First Nations Métis and Inuit peoples; Aboriginal and Torres Strait Islander peoples live in Australia; Ainu people live on the island of Hokkaido; Sámi people live in Northern Scandinavia and Russia; and there are hundreds of peoples indigenous to the highlands of Papua New Guinea. Indigenous peoples form an incredibly vital part of the world's cultural, historical, moral and scientific heritage.

The UN Indigenous Peoples Organisation is part of the Department of Economic and Social Affairs. It describes 'indigenous peoples' in the following statement on its home page:

> Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, indigenous peoples from around the world share common problems related to the protection of their rights as distinct peoples.

'Indigenous Peoples at the United Nations', Department of Economic and Social Affairs.



Figure 13.1 Ainu students practise traditional dance with members of the Ainu culture club 'Urespa' at Sapporo University in Sapporo. In 1869, Ainu people had their land annexed, their traditional practices like facial tattoos for the community's women were banned, and they were forced to speak Japanese and take Japanese names.

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The NGO Cultural Survival estimates that there are '476.6 million Indigenous people, belonging to 5000 different groups, in 90 countries, speaking 4000 languages'.

> 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 United States, the Mayas in Guatemala and the Aymaras in Bolivia), the Inuit and Aleutians of the circumpolar region, the Saami of northern Europe, the Aborigines and Torres Strait Islander [peoples] of Australia and the Maori of New Zealand. These, and most other indigenous peoples, have retained distinct characteristics that are clearly different from those of other segments of the national populations.
>
> 'Who are indigenous peoples?', United Nations Permanent Forum on Indigenous Issues.



Figure 13.2 A Mayan warrior from Quintana Roo, Yucatan

The term 'indigenous peoples' has been used as a blanket term for many years. Some countries tend to use other terms that mean the same thing, such as Aboriginal people, First Nations, First Peoples, tribes and ethnic groups. More specific terms are also used (for example, *adivasi* and *janajati* refer to the indigenous populations of India and Nepal, respectively).

The United Nations has not adopted an official definition of 'indigenous' because of the enormous diversity of indigenous groups worldwide. Instead, the United Nations has provided the following list of factors that may indicate that a person or people are indigenous. The people:

- self-identify as indigenous people at the individual level and are accepted by the community as indigenous
- have historical continuity with pre-colonial and/or pre-settler societies
- have strong links to territories and surrounding natural resources
- have distinct social, economic or political systems
- have 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, that an indigenous person has 'resolve to maintain and reproduce their ancestral environments as systems as distinctive peoples and communities', has a more legal 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.

Review 13.1

Outline the key characteristics of 'indigenous peoples' from across the world.

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Definition of Indigenous peoples in Australian law

There is no single criterion under Australian law to identify an individual as an Indigenous person. In the early 1980s, the then Australian Government Department of Aboriginal Affairs proposed the following definition:

> An Aboriginal or Torres Strait Islander [person] is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander [person] and is accepted as such by the community in which he [or she] lives.

Department of Aboriginal Affairs, 1981, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders*, Commonwealth of Australia, Canberra.

This definition was followed in a High Court decision (*Commonwealth v Tasmania* (1983) 158 CLR 1). Subsequent Australian judicial decisions have determined that all three of these elements do not need to be satisfied to confirm a person's Aboriginality. These decisions have stressed the inherent problems involved when a body of outsiders, as found in parliament and the courts, make decisions about the identities of Aboriginal and/or Torres Strait Islander people. Ideally, an Indigenous-led organisation would make these decisions.

colonisation the establishment of settlement and control in a foreign territory, as in 'the British colonisation of Australia'

sovereignty complete legal and political control; supreme authority

In 2003, an Australian Parliament report (*Current Issues Brief No. 10 2002–2003: Defining Aboriginality in Australia*) noted the problem of ascertaining a person's Aboriginal heritage. Note that this definition includes language that is outdated and dehumanising:

> ... two very different definitions are concurrently in use. One, predominating in legislation, defines an Aboriginal [person] as 'a person who is a member of the Aboriginal race of Australia'. The other, predominating in program administration but also used in some legislation and court judgments, defines an Aboriginal [person] as someone 'who is a member of the Aboriginal race of Australia, identifies as an Aboriginal [person] and is accepted by the Aboriginal community as an Aboriginal [person] '.

Current Issues Brief No. 10 2002–2003: Defining Aboriginality in Australia.

In 2020, in a four to three decision concerning Indigenous Australians, the High Court of Australia illustrated how changing societal values and ethics led to an interpretation of the Australian Constitution that would not have been contemplated in earlier times. See *Love v Commonwealth of Australia* on page 568.

The Australian Institute of Aboriginal and Torres Strait Islander Studies provides a guide on its website to assist people who are undertaking actions to 'prove their Aboriginality'. The guide describes tracing family histories and contacting relevant Indigenous organisations. In the Mabo decision, the test for 'Aboriginality' includes that a person:

- identifies as Indigenous
- is recognised by other Indigenous people
- has a biological descent.

Loss of indigenous peoples' rights over time

Since the beginning of the modern age, the rights of indigenous peoples worldwide have been under attack. The rapacious **colonisation** by 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 around the world.

Prior to contact with settler/colonial cultures, indigenous peoples maintained **sovereignty** over themselves and their land. In many cases, indigenous peoples had an in-depth understanding of the environment in which they lived and it was this understanding that allowed them to survive and thrive. For example, the Inuit peoples survived by

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following the migration patterns of the bowhead whale, the fur seal and the fish species of the Arctic. Desert peoples – like many First Nations peoples of Australia and the San people of the Kalahari Desert in Africa – thrived by developing a detailed knowledge of the plants, animals, sources of water and sources of shade in their territory. First Nations cultures from Australia refer to 'songlines', where travellers learn routes by memorising songs that describe the features and directions of travel. Some of this knowledge is only now being understood, appreciated and used globally. In the Australian Capital Territory, First Nations peoples are working with the fire authorities to carry out hazard-reduction burns using cultural burning practices.

Prior to colonisation, many indigenous peoples developed legal and political traditions in line with the demands of their environment. Yanomami tribes, in the remotest reaches of the Amazon, lived in a complexly communal society; First Nations peoples in Australia had their own legal systems and their own systems of crime and punishment; and Iroquoian speaking tribes, in the north-east of what is now the United States, formed intricate inter-tribal alliances and arrangements that involved the contracting of agreements and treaties and the conduct of war with and against other tribes.

To understand what kind of rights indigenous peoples have lost, we should first discuss the concept of sovereignty. 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. Throughout the twentieth century, rules about international relations have developed under, first, the League of Nations and then, since World War II, the United Nations. Article 2 of the *Charter of the United Nations* (1945) ('UN Charter') states: 'The Organization is based on the principle of the sovereign equality of all its Members'.

The UN Charter – as an underpinning doctrine of international law – has had a significant impact on the rights of indigenous peoples. Modern nation states had control over the internal affairs of their country and developed policies and laws in relation to their indigenous peoples that almost always took no account of these peoples' territorial, cultural or self-government systems.

In Australia, this meant that the false doctrine of ***terra nullius*** applied to white settlement. Since Federation, the *Australian Constitution* has provided the legal framework upon which governments could legislate about Aboriginal and Torres Strait Islander peoples' rights. Even international treaties operate in Australia only with the government's permission and only when the treaties have been signed, ratified and enacted into domestic legislation.

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

Colonisation and the 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 the indigenous peoples' pre-existing legal



Figure 13.3 An 1830 Tasmanian proclamation to Aboriginal people illustrating the supposed equality of people before the law

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codes came into conflict with the legal codes of the Europeans that were backed by sword and gun. Predictably, armed with these weapons, pride and ignorance, European settlers 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 territories 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 First Nations peoples of the ability to continue their cultural practices, and severing their cultural and spiritual connection to the land.

Ideological differences

In addition to environmental destruction and/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 and continue to be, with occasional exceptions, essentially commercially focused, mercantile, capitalist empires. Think of, for example, the industrialised United Kingdom of the nineteenth century, built on 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 led to the clash of two different systems, one based on economic priorities and the other based on a sustainable lifestyle centred on indigenous cultures.

Another example is the early contact between the Māori people of New Zealand and European settlers. The Māori people, 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 people being in a far worse bargaining position than they would have been had the British recognised their system of property ownership.



Figure 13.4 When the British bought property or land from traditional owners, they sought to assign property rights by dividing the land among individual members. This is a very different system from many ethnic peoples who favour communal living, such as the San indigenous people of the Kalahari Desert.

Similar situations have occurred in many other places – notably among the communally living Yanomami tribes in the Amazon and among the San people of the Kalahari Desert.

Remote regions

In the early history of the interaction between settler-colonial societies and indigenous peoples, those 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 can be seen as the first truly global conflict.

During World War II, enormous amounts of resources were used (such as oil and steel) to construct and operate 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 – such as vast stretches of far northern Europe, South-East Asian jungle and the islands north of Japan where native peoples lived and governed themselves autonomously – now hosted troops, armaments and, consequently, the laws and regulations of the powerful nations.

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Review 13.2

1. Outline the basic human rights that were taken from Indigenous peoples during colonisation.
2. Describe how the legal concept of sovereignty has impacted on the rights of indigenous peoples. In your answer, explain the distinction between the sovereignty of nations and the sovereignty of indigenous peoples.
3. Discuss what effect World War II had on indigenous peoples.

Legal recognition of indigenous peoples

So far in this chapter, we have looked at the various ways indigenous peoples were deprived of their sovereignty when their lands were occupied or stolen. In this section, we examine how the law has dealt with the issue of the taking of rights, and how legal recognition has changed over time. Initially, laws supported the political and ideological programs of colonising or invading cultures. However, in recent times, the law has changed to act as a form of protection for indigenous peoples against further loss of rights.

Views of the early European legal scholars

From the sixteenth to the twentieth 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. This became an extremely significant 'law' for First Nations peoples in Australia as it was the justification for the application of *terra nullius*, even though First Nations people in Australia were cultivating the land at the time.

The philosopher, John Locke, also held 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 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. However, a legal issue lay in how 'cultivation of the land' was defined.

De Vitoria also 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 needed to 'conquer' the country, or at least to enter into a **treaty** with the indigenous peoples.

treaty
an agreement between two sovereign states that establishes decision-making processes to allow fair negotiations between communities

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Two colonisation case studies

In 1768, James Cook was commissioned to lead a scientific voyage to the Pacific Ocean. Cook had the rank of lieutenant at the time, but under naval tradition, he received the courtesy title of 'Captain' while in command of a ship. Before Cook set sail, 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 he encountered, before claiming the land in the name of the King.

negotiation
discussion aimed at reaching an agreement

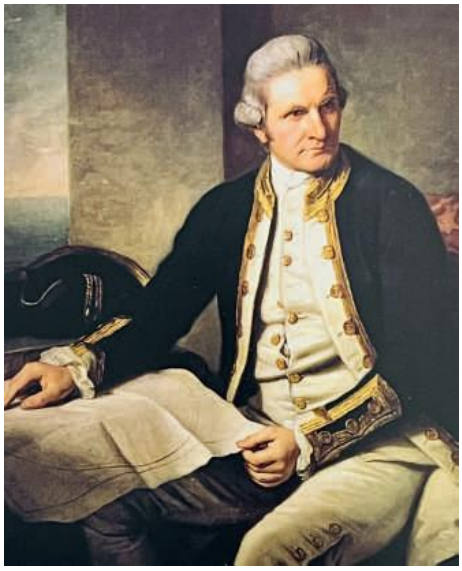
The legal distinction between 'settling' and 'conquering' a country can be seen in action by comparing the European powers' treatment of Australian and New Zealand Indigenous peoples.

New Zealand

Before reaching Australia, Cook had mapped the complete coastline of New Zealand, and had also encountered Māori people. To the European eye, the Māori society seemed organised, unlike that of the First Nations peoples in Australia. Thus, in terms of the King's instructions, Cook could not simply claim this land for Great Britain.

The initial settlement of New Zealand by Europeans after 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, 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 New Zealand Wars, which were caused by illicit land grabs made by European colonialists. Although the Māori population suffered many abuses at the hands of the Europeans, the existence of the *Treaty of Waitangi* has provided Māori people with the ability to access legal redress and compensation for these wrongs, which they have been doing since the second half of the twentieth century.



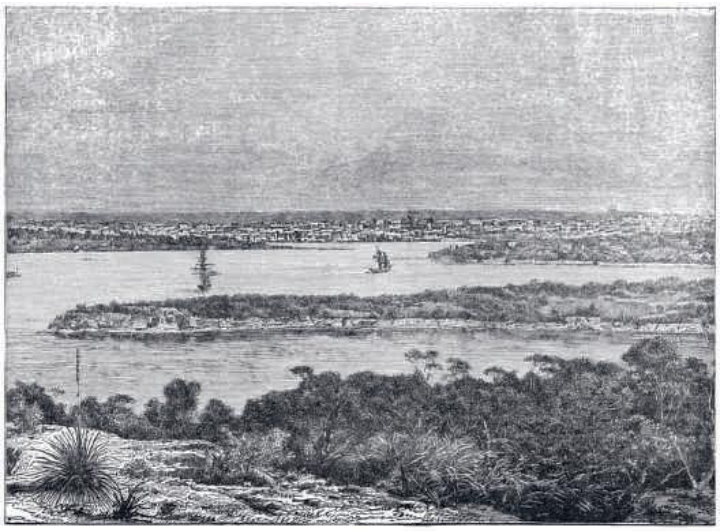


Figure 13.5 James Cook was told to negotiate with the indigenous peoples he encountered should the land, such as Sydney Harbour, be occupied.

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Compensation for breaches of the treaty has amounted to several hundred million dollars. The doctrine of *terra nullius* was not applied 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.

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 First Nations peoples in Australia at the time, 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 seasonal occupation of many First Nations peoples was part of this process. Their choice to cultivate and use the resources 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 the way First Nations peoples and the British treated the land also explains why the British failed to see the land as being cultivated. De Vattel also argued that the obligation of a land's inhabitants to cultivate the land 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 seasonal occupation of First Nations peoples was very different from the British notion of **governance** and law, leading to a false argument that First Nations people were not capable of – or at least had not enacted – self-government.

Thus, Cook did not recognise Aboriginal peoples' sovereignty over the land, 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 Aboriginal peoples. Cook's act was followed in 1788 by the settlement of Sydney Cove by Captain Arthur Phillip. Ninety years later, the British colony of modern Queensland would claim the Torres Strait Islands.

These three land claims by the British represent significant points in the history of Australia. The first land claim dispossessed Aboriginal peoples of their land. The second land claim 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 land claim dispossessed the Torres Strait Islander people 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 carried out between the colonists and Indigenous peoples.

governance
a method or system of government

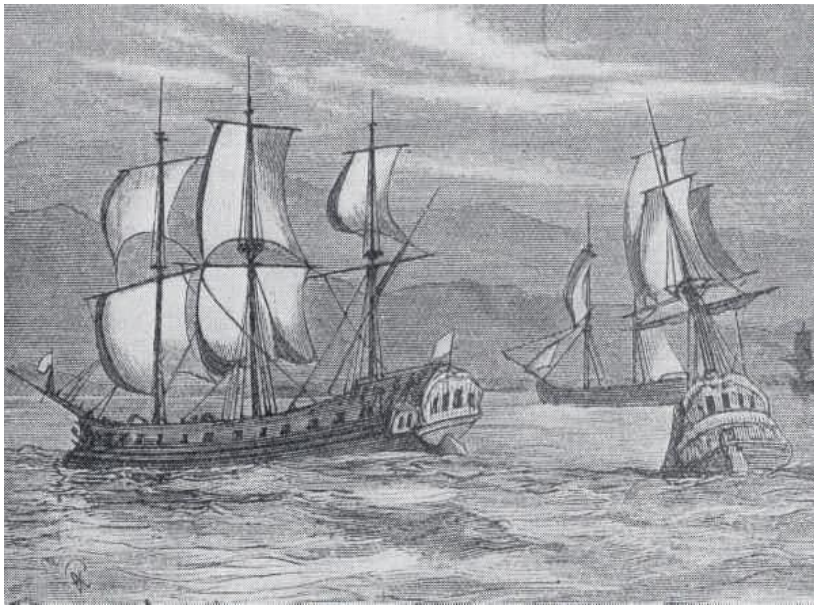


Figure 13.6 At the time of the arrival of Captain Phillip and the First Fleet, there was no uniform standard of land law in the new colony, which led to *ad hoc* land negotiations that disadvantaged Indigenous inhabitants.

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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 that determined that no one owned the land before British possession, thus establishing the false notion of *terra nullius*. This proclamation was later followed by a British Colonial Office proclamation to the same effect.

This false legal position in Australia lasted for over 100 years. But in *Mabo v Queensland* (No 2) [1992] HCA 23, the High Court finally accepted that native title existed at the time of European colonisation and as a result ruled that the doctrine used to claim the land – *terra nullius* – was a fallacy. Therefore, a First Nations legal and governance system was in place when the British arrived, even though the invading British failed to recognise the sovereignty of First Nations peoples.

Review 13.3

1 Outline the key purpose of the doctrine of *terra nullius*.
2 Discuss why the British did not recognise the Indigenous Australians as cultivators of the land.
3 Identify what has provided Māori people with the ability to access legal redress and compensation for the wrongs they have suffered at the hands of European colonisers, which Māori people have been doing since the second half of the twentieth century.

Research 13.1

1 Research claims of *terra nullius* in another country. Write a summary of your findings.
2 Conduct an online search investigating the key aspects of the 2014 book *Dark Emu* by Bruce Pascoe. What does this suggest about the claim that there were no pre-colonial agricultural practices?

In Court

***Love v Commonwealth of Australia* [2020] HCA 3**

In February 2020, the High Court of Australia – in a four to three decision – held that Indigenous people cannot be considered to be 'aliens' (see section 51 xix of the Australian Constitution 'naturalization and aliens') even if they were born overseas and do not have Australian citizenship. The case was brought by lawyers on behalf of two Aboriginal men, Brendan Thoms and Daniel Love, both who were born overseas but have Aboriginal heritage. Both men lived in Australia and – due to their criminal convictions – faced deportation to the country of their birth under the *Migration Act 1958* (Cth).

Justice James Edelman noted: 'The sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation'.

Justice Virginia Bell determined that an Indigenous person cannot be considered to be an alien because 'an Aboriginal Australian cannot be said to belong to another place'.

In his article, 'The High Court has widened the horizon on what it is to be Indigenous and belong to Australia' (*ABC News*, 15 February 2020), Wiradjuri commentator Stan Grant emphasised the High Court's *obiter dictum* that 'Indigenous Australians don't enjoy the same political sovereignty as Native American [peoples] or New Zealand Māori [people]'.

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The end of colonisation: The United Nations

During the twentieth century, many countries – through military action, political negotiation or a combination of the two – threw off the rule of the colonial powers. The initial catalyst for this process was World War I, which caused the dissolution of two 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 1931*, which granted independence to Australia, Canada, New Zealand, the Union of South Africa, Egypt, Afghanistan and Iraq. However, Great Britain maintained its rule of India and of colonies in the Caribbean, Malaysia and Africa.

After World War II, the establishment of the United Nations was the critical factor in promoting the legal recognition of indigenous peoples globally. The main organs of the United Nations (for example, the Trusteeship Council and the Economic and Social Council) have had a significant impact on the legal recognition of indigenous peoples.

After World War II, the Trusteeship Council was responsible for the gradual transference of 'trust territories' to self-government and independence. Papua New Guinea gained independence from Australia in 1975 and the Trusteeship Council suspended operations in 1994 when Palau, the last 'territory', gained independence.

The Economic and Social Council has authority over a diverse range of areas that impact indigenous peoples. International laws relating to human rights and sustainable development all came from the Economic and Social Council. Of particular significance was the establishment of the UN Permanent Forum on Indigenous Issues in 2000, which is the legal advisory body to the Economic and Social Council.

Greater detail about the responses to the needs of indigenous peoples from the United Nations will be addressed later in this chapter. The United Nations has been the major driving force in the legal recognition of indigenous peoples and in the promotion of their right to self-determination.

The importance of the right to self-determination

Self-determination is the ability of an individual, a group of individuals, or a people to govern themselves. This means they can make 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. In regard to indigenous peoples acting as a group, it is important to note that 'self determination is a collective right'. Control over one's own future is an important human right. Therefore, self-determination puts legislative power in the hands of indigenous peoples. It is for this reason that in both the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), the United Nations stresses that the right to self-determination is a fundamental right.

self-determination the right of nations or peoples to have their own sovereign nation state with their own government

In 1960, the UN General Assembly passed Resolution 1514 (the *Declaration on the Granting of Independence to Colonial Countries and Peoples*), which declared in part:

Declaration on the Granting of Independence to Colonial Countries and Peoples

1 The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights ...

2 All peoples have the right to self-determination ... they freely determine their political status and freely pursue their economic, social and cultural development

...

6 Any 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.

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Figure 13.7 Protestors in the caravan for water and life in Mexico City in 2022 included members of indigenous communities who were demanding respect for the self-determination of indigenous peoples.

Although the United Nations has declared in Article 1 of both the *International Covenant on Economic, Social and Cultural Rights* (1966) and the *International Covenant on Civil and Political Rights* (1966) that self-determination is a fundamental human right, there have been a number of political and legal factors, both practical and ideological, that 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, where the colonised people make up the majority of the population, it has been much easier for the colonised peoples to achieve self-determination.

Where the colonising people make up the majority of the population and/or those who have polices resulting in muticultural societies on the lands of First Nations peoples, 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 had and continue to have a close relationship with their land before the arrival of settler or colonial societies.

Two of the considerations in relation to indigenous groups from the United Nations are particularly pertinent in the context of self-determination: self-identification and historical continuity.

Self-identification

The principle of self-identification ensures that those who are most knowledgeable about indigenous peoples – the indigenous peoples themselves – make the identification. This principle ensures that indigenous peoples do not have 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 throughout the history of indigenous contact with settler/colonial peoples.

An assessment of historical continuity requires an understanding of the significant variation among the histories of indigenous peoples. For example, First Nations peoples of Australia have existed 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 the thirteenth century CE. Similarly, Inuit people of northern Canada and Greenland probably 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, who have traditionally lived in the flatlands of the country, for centuries.

Historical continuity

Historical continuity can be demonstrated by the continuation of cultural practices and indigenous languages, or continued traditions of food production. Deliberate or inadvertent attempts to disrupt historical continuity have been made by many colonising societies. One of the most well-known examples of an attempt to disrupt historical continuity is the collection of legislation executed by Australian state and federal governments referred to as the 'Stolen Generations' policies. These policies resulted in First Nations children being forcibly removed from the families between 1910 and 1970.

According to the Australian Institute of Health and Welfare, there were more than 27 000 Stolen Generations survivors in 2019 and they are 'more likely to be worse off than other Indigenous Australians of the same age on a range of health and socioeconomic outcomes'. The exact number of

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children removed will never be known, but these actions broke important cultural, spiritual and family ties and has had lasting intergenerational effects.

The Human Rights and Equal Opportunity Commission undertook an inquiry into the Stolen Generations and released the *Bringing Them Home* report in 1997, which led to the Australian Government's formal apology to the Stolen Generations on 13 February 2008 by then Prime Minister, Kevin Rudd.

Another example of this type of policy is the attempt of the Canadian and American governments in the nineteenth century to try to assimilate the First Nations, Inuit and Métis peoples by establishing 'residential schools' for indigenous children. Around 150 000 indigenous children were removed from their families and forced to attend these schools. This removal hindered the continuity of cultural traditions, languages and practices. At some of these residential schools and settlements, physical and sexual abuse was perpetrated against indigenous children.



Figure 13.8 Inuit people perform during the 'Every Child Matters: A Day of Action for Truth and Reconciliation' rally in Montreal, Canada, in 2023. The day commemorates the victims of the residential school system for indigenous children.

Another prominent example is the High Arctic relocation that took place in Canada in 1953 and 1955. Ninety-two Inuit people were taken from their homes and transported to the High Arctic islands, which were around 2000 kilometres north of where they had previously lived. The Inuit were taken 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.

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 Inuit's traditional methods of food collection. Although the 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.

The Canadian Government eventually felt compelled to apologise for relocating some of the Inuit peoples to the High Arctic. On 18 August 2010, in Inukjuak, Nunavik, John Duncan (a Canadian MP) apologised to the Inuit peoples:

> 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.

Duncan J, 2010, 'Apology for the Inuit High Arctic relocation', 18 August.

However, since 2010 there have been many revelations about how the Inuit and Metis peoples were treated, including stories of missing and murdered indigenous women and girls and unmarked burials associated with former residential school sites. In March 2023, the UN Special Rapporteur Cali Tzay visited Canada to examine how the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) had been implemented. Tzay published his final report in July 2023, which highlighted continued gender-based discrimination in the Indian Act, over-incarceration and problems with access to the justice system. While there has been limited progress since 2012 with 'modern treaty' negotiations, there remains protracted land disputes exacerbated by a breakdown in trust between indigenous peoples and the provincial and federal governments.

In conclusion, Tzay praised the Canadian government for the 'significant progress' since the 2012 visit, but expressed that the government

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needed to address 'deep-set, systemic and structural racism' and all provinces needed to:

- incorporate the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) and to amend all domestic laws to ensure they aligned with Canada's international obligations
- ensure that there was full transparency to support survivors and surviving families regarding the residential schools
- implement legal reforms to address the causes of over-representation of indigenous children in the child welfare system and for adults incarcerated in the prison system
- provide support for Indigenous housing, health, housing and social services.

Review 13.4

1 Define 'self-determination' in international law. Identify which international conventions enshrine self-determination.
2 Assess what the principle of 'historical continuity' establishes for indigenous peoples.

13.2 Responses to indigenous peoples

The role of state sovereignty

As discussed earlier, many indigenous peoples' sovereignty over their lands was taken away from them during the period of colonisation. Although it is a highly contestable term, 'sovereignty' can mean the absolute legal power to make and enforce laws within a certain territory. This means that, within the boundaries of a **state**, **nation state**, **nation** or **country**, the government of that state can exclude laws made by all other states. Thus, there is often a conflict of interest between a sovereign state and an indigenous community living within that state.

state, nation and country
a body of people occupying a definite territory and organised under one, usually independent, government

nation state
an independent state where the population is all of one nationality

Even though the importance of the right to self-determination is now recognised, self-determination raises issues relating to a state's territorial integrity and the integrity of a state's sovereignty. The state provides administration and services (such as hospitals and roads), as well as a legal system that rarely encompasses traditional laws. The state also has a global presence, such as a seat at the UN General Assembly. Thus, while there may be a culturally distinct group of people living within a colonial state's borders, they cannot form their own sovereign state because of the governance of the colonial state. For this reason, the concept of self-determination for indigenous peoples has been limited by colonial states, despite the continued resistance of Indigenous peoples and their unwavering goal of recognised sovereignty and self-determination.

First Nations peoples in Australia

In Australia, the autonomy granted to First Nations peoples has waxed and waned since the 1970s, when many First Nations 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 First Nations communities over funding priorities. However, there was a perception that ATSIC's effectiveness was limited by funding concerns. The Howard Government later passed the *Northern Territory National Emergency Response Act 2007* (Cth) (NTER Act). The NTER Act was criticised because it took away autonomy, and therefore the limited level of self-determination that had been available, from First Nations communities.

ATSIC was abolished in 2005, and the NTER Act was repealed in 2012 and replaced by the *Stronger Futures in the Northern Territory Act 2012* (Cth). One of the aims of the NTER Act was to tackle suspected child abuse in communities,

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but not one person was convicted. The 'Stronger Futures' legislation has a focus on increasing school attendance, promoting employment, placing a blanket ban on sexually violent materials, reducing alcohol abuse, and housing and land reforms. On this point, it is important to acknowledge that these types of disparities in First Nations communities stem from various complex factors, including socio-cultural forces like racism and colonial dispossession. Amnesty International has criticised the Stronger Futures legislation as it states it continues the 'racially discriminatory' elements of the NTER Act.

In 2017, the 'Uluru Statement from the Heart' called for the establishment of a First Nations Voice to Parliament, which would be a body of First Nations traditional owners that would advise the Australian Parliament on policies affecting Aboriginal and Torres Strait Islander peoples. The Uluru Statement also proposed that the Voice be enshrined in the *Australian Constitution*, thus giving First Nations peoples a constitutional guarantee that they will have a say in their own affairs.

In October 2023, the Federal parliament held a referendum on whether a 'Voice to Parliament' should be added to the Constitution. The final result was a definitive 'no' to the proposed change: the referendum is discussed in more detail later in this chapter.

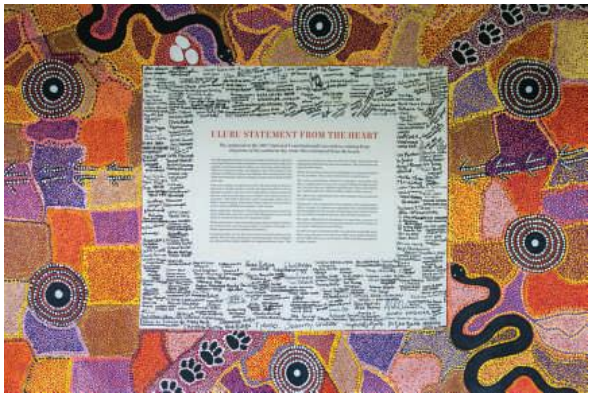


Figure 13.9 The 2017 'Uluru Statement from the Heart' called for a First Nations voice in the *Australian Constitution*, with a process of 'agreement making' and 'truth telling' between governments and Aboriginal and Torres Strait Islander peoples.

Case Study

Changes in societal values

It is interesting how such changes in Australian societal values and ethics have led to some changes that, while appearing minor, are of great significance.

In Australia's national anthem one word has been changed: 'For we are young and free' has become 'For we are one and free'. The ramifications of this is that now 'Advance Australia Fair' acknowledges Australia's proud First Nations cultures.

The regular use of 'Welcome to Country' and 'Acknowledgment of Country' at a multitude of events is another step to recognising and respecting First Nations peoples.

This shift is also evident when TV news, current affairs and sporting events include the name of the traditional land in their reporting. The map of Indigenous Australia can be found at http://cambridge.edu.au/redirect/10326.

The Sámi people in Scandinavia

In Norway, Sweden and Finland, Sámi parliaments have been established to represent the indigenous populations of these countries. However, the effectiveness and powers of these parliaments vary dramatically.

In Norway – home to the largest Sámi population and a country where, until World War II, the Sámi people were subjected to a century-long assimilation policy – the parliament has responsibility for the preservation of the Sámi language and culture. Members of the Norwegian Sámi parliament are elected via a ballot of the Sámi population. Control of the Finnmark Estate – a large area of land in the northernmost part of Norway where the Sámi population is concentrated – is shared between the Norwegian Sámi Parliament and the Finnmark Council.

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The Sámi Parliament in Norway 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 more limited powers. Although the members of the parliament are elected in much the same way as the members of the Norwegian Sámi Parliament, the Swedish Sámi Parliament's budget is much smaller and it functions simply to advise the Swedish Government. The Swedish Sámi Parliament has no 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 Government is *obliged* to consult with the Finnish Sámi 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.

The people of North Sentinel Island

Under international law, North Sentinel Island is part of the sovereign nation of India. North Sentinel lies several hundred kilometres off the east coast of mainland India. The island is believed to have up to 100 inhabitants who still maintain a hunter-gatherer lifestyle. The Indian Government actively maintains the island's isolation to protect North Sentinel Islanders, who may be one of the last indigenous peoples to have had no contact with the outside world. It is illegal to visit North Sentinel Island and the Indian navy actively protects the island from visitors.

In November 2018, John Chau illegally went to North Sentinel Island on a missionary visit to try to convert the islanders to Christianity. He attempted to contact the islanders over a period of a few days. His journal entries (available online) are fascinating reading. One day, Chau ventured towards the island and never returned. It is not clear how Chau died, but the fishermen who took Chau to the island claim they saw Sentinelese people dragging Chau's body on the beach and burying it.

For the purposes of this course, the main point is that under every country's law, murder is a crime. Every sovereign nation has laws that make murder one of the most serious crimes. John Chau was murdered, yet India has exercised its sovereign authority by not taking any action against the Sentinelese. In fact, the only people arrested have been the five fishermen who illegally transported Chau to the island.

North American First Nations peoples

In North America, the Canadian Department of Indian and Northern Affairs introduced self-government for First Nations peoples in 1995. This policy crucially recognised that the form of self-government should vary according to the needs of each indigenous group.

The role of the United Nations

The United Nations was established after the chaos and devastation of World War II. In its early years, the United Nations developed a series of conventions, charters and declarations to safeguard the rights of first peoples as a whole – as in *The Universal Declaration of Human Rights* (1948) – and the rights of a group of individuals who had difficulty accessing their human rights. For example, the United Nations has attempted to protect the rights of children (*United Nations Convention on the Rights of the Child* (1989)), women (*Convention on the Elimination of All Forms of Discrimination against Women* (1979)) and refugees (*Convention relating to the Status of Refugees* (1951)). However, it was not until 2007 that the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) was adopted by the UN General Assembly.

Permanent Forum on Indigenous Issues

The United Nations established the Permanent Forum on Indigenous Issues in 2000. The UN Permanent Forum on Indigenous Issues:

- provides expert advice and recommendations on indigenous issues to the Economic and Social Council and to UN programs, funds and agencies through this council
- raises awareness and promotes the integration and coordination of activities related to indigenous issues within the UN system

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- prepares and disseminates information on indigenous issues
- promotes respect for, and full application of, the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) and follows up the effectiveness of this declaration.

The UN Permanent Forum on Indigenous Issues meeting in April 2023 in New York had a theme of 'Indigenous Peoples, human health, planetary and territorial health and climate change: a rights-based approach'.

Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism on the Rights of Indigenous Peoples aims to promote, protect and fulfil the rights of indigenous peoples as outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007). Its central function is to provide thematic expertise on the rights of indigenous peoples to the UN Human Rights Council, the main human rights body of the United Nations.

Special Rapporteur on the rights of indigenous peoples

The Special Rapporteur on the rights of indigenous peoples, besides reporting on the human rights situation of indigenous peoples, promotes good practice and supports the implementation of government programs to protect indigenous peoples, communicates breaches of human rights of indigenous peoples and recommends solutions and undertakes follow up on these cases. The aim is to encourage nations to comply by promoting solutions rather than highlighting breaches, especially since there are extremely limited 'enforcement mechanisms available'.

In 2009, the Ecuadorian Government invited the Special Rapporteur to provide specialist and technical advice to assist in drafting legislation in 'harmonizing indigenous and ordinary jurisdictions'.

In 2017, the Special Rapporteur made the following statement to the UN Human Rights Council concerning Australia's treatment of its First Nations peoples:

> ... the policies of the government do not duly respect the rights to self-determination and effective participation; contribute to the failure to deliver on the targets in the areas of health, education and employment; and fuel the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islander [people].

Tauli-Corpuz V, 2017, 'Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia', 8 August.

The next Special Rapporteur to hold the office, José Francisco Calí Tzay, also reported on the treatment and human rights violations of the Inuit and Metis peoples in late 2023 following his visit in March 2023 (see details earlier in this chapter).



Figure 13.10 Attendees listen during the 22nd session of the Permanent Forum on Indigenous Issues, focusing on 'Indigenous Peoples, human health, planetary and territorial health and climate change: a rights-based approach' at the UN Headquarters in New York City in 2023.

The role of international instruments

Before analysing the key international instruments relating to indigenous peoples, it is important to understand the nature of the binding obligations these instruments create. Some international laws are **soft law** and some are **hard law**.

soft law international statements, such as declarations, that do not create legal obligations upon states but do create moral pressure to act in accordance with them

hard law conventions and treaties that under international law create legally binding obligations

Soft international laws have no legally binding components and are designed to raise awareness of important issues and be morally persuasive.

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International laws that have binding obligations and have enforcement mechanisms embedded in them are considered to be hard law. It is important to acknowledge that the nature of this enforcement is in stark contrast to the enforcement of domestic laws. The enforcement mechanisms of international laws are aimed at encouraging compliance rather than being punitive in nature. This is due to sovereignty. As is discussed later in this chapter, nations have the right to ratify international laws, choose whether to apply them domestically or to comply with international laws. Nations can even refuse to go to the International Court of Justice if they breach international laws.

The most significant hard and soft international laws affecting indigenous peoples are outlined over the following pages.

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (1948), 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 ('soft' law). However, it was the precursor to a number of treaties that are legally binding.

In the text of *The Universal Declaration of Human Rights* (1948), you will notice that nearly every article links to the issues confronting indigenous peoples, but since the declaration is 'soft' law it cannot be used in a strict legal sense in regards 'enforcement'. The following 'hard' law instruments provide theoretical protections for indigenous peoples, but the extent to which they have effectively done this depends on the political will of each sovereign state.

Indigenous and Tribal Populations Convention (International Labour Organization Convention 107)

In the *Indigenous and Tribal Populations Convention* (1957) ('Convention 107'), the International Labour Organization recognised, for the first time in the area of international law, that the issues facing the indigenous peoples of the world are distinct. The International Labour Organization 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 does not recognise a right to self-determination, many indigenous groups have argued it should be ignored or repealed. The International Labour Organization 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 the *Indigenous and Tribal Peoples Convention* (1989) ('Convention 169'). At present, Convention 169 is in force in 18 countries.

If there is a breach of Convention 169, the International Labour Organization Conference Committee can follow a 'process of dialogue' to resolve the issue. While technically, the 'process to dialogue' is the initial stage of the 'enforcement mechanism' of the convention, it is purely aimed at negotiating a settlement that protects the rights of indigenous peoples.

Wide swathes of indigenous peoples' rights have been protected within the articles of the convention (the convention is 'hard law'). The most important are the reiteration of the principle



Figure 13.11 The 'process of dialogue' to resolve disputes under the *Indigenous and Tribal Peoples Convention* (1989)

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that indigenous peoples have the right to enjoy all of the rights enumerated in *The Universal Declaration of Human Rights* (1948); 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.

If this is not successful, then an International Labour Organization 'Commission of Inquiry' can be established. In 2018, the Myanmar Government was subject to this over its use of indigenous people in forced labour. This resulted in a 'Memorandum of Understanding' between the International Labour Organization and the Myanmar Government to eliminate all forms of forced labour.

Again, it is critical that the distinction be made between the enforcement of domestic laws (think of the Supreme Court's powers of punishment that aim to punish and deter) and the enforcement of international law, which focuses on encouraging compliance.

International Bill of Human Rights

The 'International Bill of Human Rights' is the name given to the fundamental UN human rights instruments. They are also sometimes referred to as the Twin Covenants:

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 Article 1 that recognises the right of self-determination:

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 protect the rights of the individual, not the rights of groups. Indigenous peoples can try to redress wrongs by making a submission to the Committee for the Elimination of All Forms of Racial Discrimination and to the Human Rights Committee. These committees then bring these concerns to the attention of the nations involved.

United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) relates to self-determination, cultural integrity (the right and the practicalities of preserving a distinct culture), and to land and resource rights. Articles 3 and 4 of the declaration adopt the principle of self-determination for indigenous peoples. Article 4 states that indigenous peoples have the right to self-government in matters relating to their internal and local affairs. Importantly, Article 4 also states that indigenous peoples have the right to be provided with the means with which to finance this autonomous governance.

However, this declaration 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 relation to the Sámi parliaments in Scandinavia.

The *United Nations Declaration on 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

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subsequently signed the declaration, with the federal Australian government doing so in 2009.

The UN agreements help to limit the power of sovereign states. Even non-binding agreements – such as the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) – help to create behavioural norms that establish guidelines by which states can be judged (for example, how to judge a state's actions towards indigenous peoples). In this way, the UN agreements can influence the actions of states.

Glasgow Climate Pact 2021

At the Conference of the Parties for the Climate Change Convention held in Glasgow in 2021, indigenous peoples were, for the first time, included in working groups to ensure their experience and knowledge was used 'to voice solutions and humanize the impacts of climate change'.

The Local Communities and Indigenous Peoples Platform for 2022–2024 will provide the expertise of indigenous peoples, local communities and their diverse knowledge systems to contribute to the solutions to climate change that could disproportionately impact on indigenous peoples. More information concerning this initiative can be found at United Nations Climate Change: Local Communities and Indigenous People Platform.

The global COVID-19 pandemic generated unique problems for indigenous peoples. Prior to the pandemic, the UN Department of Economic and Social Affairs for Indigenous Peoples noted that Indigenous people, 'experience poor access to healthcare, significantly higher rates of communicable and noncommunicable diseases, lack of access to essential services, sanitation, and other key preventive measures, such as clean water, soap, disinfectant … '.

The arrival of COVID-19 exacerbated these issues as indigenous peoples had higher rates of underlying health issues and socio-economic marginalisation, had less access to specialised health services and were far more likely to live in multi-generational households, while a lack of information about preventative measures in indigenous languages contributed to slow vaccine take ups and the spread of misinformation. Numerous publications from UN agencies highlighted this issue: see http://cambridge.edu.au/redirect/10327.

Review 13.5

1 Outline the powers of the two UN bodies created to address indigenous issues.
2 Explain why the International Labour Organization instrument the *Indigenous and Tribal Populations Convention* (1957) ('Convention 107') was revised and renamed the *Indigenous and Tribal Peoples Convention* (1989) ('Convention 169').
3 Discuss how state sovereignty impacts indigenous peoples' power to seek self-determination and land rights.
4 Explain the difference between 'hard' and 'soft' international law in regard to protecting the rights of indigenous peoples.

Research 13.2

As a class, investigate the United Nation's 'Indigenous Peoples at the UN' web page at http://cambridge.edu.au/redirect/10328.

The role of courts

The courts offer an important avenue for indigenous peoples to attempt to regain rights they have lost. The key judicial organ of the United Nations is the International Court of Justice (ICJ). However, as only states can be parties to a case before the ICJ, and then only when when the parties to a dispute have consented to the court's jurisdiction, it is not an avenue that indigenous peoples can use to attain justice.

The legal concept of sovereignty means that indigenous peoples have no legal standing to go to the ICJ. The state they are deemed to be a part of has that right, but since it is that very entity that indigenous peoples usually have the dispute with, it is obvious that the ICJ is not the forum to achieve justice for indigenous peoples. Other UN agencies and national and international courts offer more appropriate avenues.

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Several enforcement mechanisms that have been established through the United Nations to protect human rights in general can be applied to indigenous peoples. The Committee on Economic, Social and Cultural Rights specifically investigates breaches of *International Covenant on Economic, Social and Cultural Rights* (1966) and it requires nations to write reports about that country's records on economic, social and cultural rights, which may cover indigenous issues. The committee can release 'concluding observations' highlighting areas of concern and make recommendations to address problems. While these are not typical enforcement mechanisms, they can be quite persuasive in the international arena in promoting reform.

The cases in the 'In Court' boxes following illustrate indigenous peoples taking legal action within their own nations or to regional court systems to gain justice.

In Court



***Sesana & Setlhobogwa v the Attorney General of the Republic of Botswana* (2006) BWHC 1 (52/2002)**

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') have lived in the area for hundreds, if not thousands, of years, the Botswana Government stated that the continued habitation of the central Kalahari Desert 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 Botswana Government was not motivated by a desire to protect the environment; rather, the government wanted to clear the land for tourism and diamond mining.



Figure 13.12 Indigenous people of the Kalahari, Botswana

In the case heard before the Botswana High Court, 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 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 that the Botswana Government did have the constitutional power to terminate services but the San people were being illegally deprived of their land.

Despite this court decision, the Botswana Government has been slow to permit the San people back into the Kalahari Desert, thereby attracting criticism from the United Nations. 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 return to court to clarify the court's decision in the Sesana case. On 12 February 2013, there was a formal UN Human Rights Council session to find a resolution. The Botswana Government claimed that the Sesana decision only applied to the original applicants named in that case (189 individuals) – all other San people have been denied access to the Kalahari Desert. And, contrary to the original court order, no San people have been given hunting permits in the reserve, which makes the subsistence hunting lifestyle of the San impossible. This is one of the longest ongoing cases for indigenous peoples worldwide.

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In Court

***Guerin v The Queen* (1984) 2 S.C.R. 335**

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. For example, 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 a way that interferes with the cultural rights of indigenous peoples.

In Court

***Kaliña & Lokono Peoples v Suriname* (2015) IACHR, Series C, No 309**

The nation of Suriname is on the north-eastern Atlantic coast of South America. In 2015, the Inter-American Court of Human Rights found that the Suriname Government did not recognise the Kaliña and Lokono peoples' rights to collective property, political rights and judicial protection. These rights are all guaranteed under the *American Convention on Human Rights* (1969). Kaliña and Lokono land had regularly been taken by the Suriname Government for bauxite mining, logging and nature reserves. The indigenous peoples had no legal remedy under Surinamese law to redress this injustice.

The court also noted the Suriname Government's non-compliance with other similar cases. A 2015 review of the Suriname Government by the UN Committee on the Elimination of Racial Discrimination prompted the UN Special Rapporteur to note, 'this lack of compliance constitutes a prolonged condition of international illegality'.



Figure 13.13 Flag of the indigenous peoples of French Guiana, with the Lokono and Kaliña peoples represented

In its final ruling, the court stated that the Suriname Government had the responsibility to 'ensure the right of the indigenous peoples to control and to own their territory without any type of outside interference by third parties; and ensure the right of the indigenous and tribal peoples to control and to use their territory and natural resources'.

The court ruled that extensive reparations were needed to allow the Kaliña and Lokono peoples to have effective mechanisms to determine their own development and evolution as a people. The court ruling contained three main elements:

- The Kaliña and Lokono peoples must be given title to their land within three years.
- Formal processes must be put in place so that the serious damage done to the land by the bauxite mining can be rehabilitated.
- The Suriname Government must implement a series of 'guarantees of non-repetition'.

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The role of intergovernmental organisations

There is a substantial number of intergovernmental organisations (IGOs; see page 199) around the world. An IGO is an organisation composed primarily of sovereign states, or of other intergovernmental organisations. An IGO is usually established by a treaty or another international agreement. Examples of IGOs are the United Nations, the World Bank and the European Union. While many IGOs take into account the rights of indigenous peoples, only a few IGOs play a pivotal role in the issues that affect indigenous peoples.

These IGOs include the following:

- **International Labour Organization** is a UN agency that has a mandate to advance social justice and promote fair work standards. The International Labour Organization was one of the first institutions to enshrine the rights of indigenous peoples in international law.
- **UN Human Rights Council** aims to promote and protect human rights around the world and can investigate any breaches, including those involving the 'rights of racial and ethnic minorities'.
- **International Centre for the Study of the Preservation and Restoration of Cultural Property** is mainly focused on the conservation and restoration of cultural heritage in every region of the world.

In Court



***Billy et al v Australia* (3624/2019)**

Masig Island in the Torres Strait is home to indigenous peoples who claim that Australia has breached its obligations under the *International Covenant on Civil and Political Rights* (1966) to protect their culture (Article 1) and their rights to family and life (Article 6). The case was heard by the UN Human Rights Committee under its jurisdiction to investigate breaches of human rights.

On average, Masig Island lies less than 10 feet above sea level; the islanders claim that Australia's failure to reduce greenhouse gas emissions has contributed to climate change, which threatens their homes and culture. Burial grounds are being inundated by ocean surges and water supplies are becoming brackish due to rising tides. The islanders requested $20 million from the Australian Government to build a sea wall.

Sophie Marjanac, a lawyer from ClientEarth, an non-government organisation representing the islanders, noted that 'If indigenous people are disposed of their homelands, then they can't continue to practise their culture'.

It is important to note that the United Nations does not have the power to force Australia to take action (due to the legal concept of sovereignty), but it is hoped that the case will highlight the plight of such people and pressure nations to take action.

On 23 September 2022, the UN Human Rights Committee found that although Australia was planning the construction of new sea walls, this was not sufficient to prevent the effects of climate change from violating the Islanders' 'rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home'. One of the factors the committee took into account was the connection with traditional lands, and the 'dependence of their cultural integrity on the health of their surrounding ecosystems'.

The Committee asked Australia to compensate the Islanders and engage in meaningful consultation before taking measures to secure their safe existence. In March 2023, the Australian Government submitted a response, in which it acknowledged the finding and outlined steps being taken to address the situation.

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The role of non-government organisations

The various state and federal governments and international intergovernmental organisations are not the only organisations that can influence 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 the following:

- **Native Planet** – this NGO is dedicated to the self-empowerment of indigenous peoples and to the preservation of world ethnic cultures. It aims to enable indigenous peoples to 'speak' to a global audience about issues they confront. Like all NGOs, Native Planet uses the media to place pressure on governments and organisations to protect the rights of indigenous peoples.
- **Indigenous People's Network** – the Indigenous People's Network sums up its mission in one word: 'sovereignty'. Clearly here sovereignty is used in a vastly different context to the one that applies under the UN Charter. This NGO focuses on indigenous peoples having sovereignty over the way they live their life on their land. The Indigenous People's Network is mainly concerned with the issues of health, culture, knowledge, solidarity and land. This NGO documents abuse cases and presses for conflict resolution; it also uses rapid communication systems to highlight its concerns and educate the community.
- **Cultural Survival** – this NGO's home page clearly outlines its mission: 'Cultural Survival works toward a future that respects and honors [sic] indigenous peoples' inherent rights and dynamic cultures, deeply and richly interwoven in lands, languages, spiritual traditions, and artistic expression, rooted in self-determination and self-governance.' Cultural Survival uses advocacy to pressure governments and corporations and has 'consultative status' with the United Nations.



Figure 13.14 Non-government organisations (NGOs) carry out valuable work in indigenous communities. In Thailand, NGO New Life Center helps disadvantaged girls and young women. The girls who are admitted to the Center often come from broken homes or impoverished villages, or are in danger of being drawn into or even sold into the sex trade.

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.

NGOs 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 NGOs are less restrictive of communities' autonomy.

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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. The media also plays a key role in framing public discussion and influencing public perception of indigenous peoples. The manner in which a news story is reported can be just as important as the facts that are being told. The traditional media and social media are powerful influencers in the world. The media has the potential to not only shape popular opinion but also to determine it. NGOs often use the media to place pressure on governments and organisations.

For example, the NGO Cultural Survival began a campaign to end racist media portrayals of indigenous peoples. This was prompted by a range of events, including the President of Botswana declaring that the San are like 'Stone Age creatures' who 'must change or otherwise, like the dodo, they will perish'. Roy Sesana, a San and prominent member of the First People of the Kalahari, says, 'we are not primitive. We live differently from you, but we do not live exactly like our grandparents did; nor do you.'



Figure 13.15 Roy Sesana, a San with the First People of the Kalahari, speaks about the plight of his people at a press conference 30 September 2004 in London. Sesana spoke about the Botswana government's eviction of his people from their ancestral lands in the Central Kalahari Game Reserve and the struggle to return home.

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 began broadcasting in 1992; other indigenous broadcasters include Māori Television, NRK Sápmi and Taiwan Indigenous Television. In 2008, the World Indigenous Television Broadcasters Network was formed to develop collaboration between indigenous broadcasters. Australian Indigenous media includes National Indigenous Television (NITV), *The Koori Mail* newspaper and the SBS current affairs program, *Living Black*.

Review 13.6

1. Explain why the International Court of Justice is of limited use to indigenous peoples. Compare this with the effectiveness of other courts in different jurisdictions.
2. Evaluate the effectiveness of the Botswana High Court in its attempt to protect the San people in the case of *Sesana & Setlhobogwa v the Attorney General of the Republic of Botswana* [2006].
3. Compare these two cases: *Sesana & Setlhobogwa v the Attorney General of the Republic of Botswana* [2006] and *Kaliña & Lokono Peoples v Suriname* (2015).
4. Outline the ways in which non-government organisations support indigenous peoples.

Research 13.3

1. Visit the website of the non-government organisation Cultural Survival and explore their latest campaigns.
2. Watch some YouTube clips about North Sentinelese people.
3. Write a report about the effectiveness of the NGO Cultural Survival in achieving justice for indigenous peoples.

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Australia's federal structure

The federated nature of Australia's government means that legislative power is distributed by the *Australian Constitution* (s 51) between the federal government and the governments of the states and territories. Sovereignty is, to some degree, shared with members of the electorate, who have the ability to change the government at elections.

The *Australian 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 Aboriginal and Torres Strait Islander peoples.

At Federation, the most significant sections of the *Australian Constitution* were sections 51(xxvi) and 127:

- **Section 51(xxvi)** – '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 the people of any race, other than the Aboriginal people in any state, for whom it is necessary to make special laws.'

  This meant that while the federal government had the authority to make laws about any 'race' of people (this is the legal justification for the White Australia Policy), it did not have power over Aboriginal and Torres Strait Islander peoples. This authority remained with each state/territory. Consequently, the laws regarding First Nations peoples varied dramatically from state to state. This section of the *Australian Constitution* is sometimes referred to as the 'race power'.
- **Section 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.'

Four key Australian Government responses to First Nations peoples

The 1967 referendum

In the 1960s, the general public grew increasingly aware of the plight of First Nations peoples and activists campaigned determinedly for change. On 27 May 1967, a federal referendum was held to decide whether the two references in the *Australian Constitution* (ss 51(xxvi), 127) that discriminated against First Nations peoples should be removed. Because First Nations peoples were exempt from these sections of the *Australian Constitution*, the federal government was not able to amend legislation to improve the situation. The removal of sections 51(xxvi) and 127 of the *Australian Constitution* also had great symbolic importance. It meant there was now no legislative difference between First Nations peoples and non-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 per cent of people supporting the amendment. The changes were brought into effect on 10 August 1967 by the *Constitutional Alteration (Aboriginals) Act 1967* (Cth). While the day-to-day lives of First Nations peoples were largely unchanged, the successful referendum was seen as a significant step towards recognition. However, the *Constitutional Alteration (Aboriginals) Act 1967* (Cth) fell short of both providing substantive equality and meeting First Nations aspirations. Indeed, the *Australian Constitution* still permits the parliament to enact laws that discriminate based on a person's race.

The Stolen Generations

It is estimated that approximately 100 000 First Nations 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, and children are still removed from their families and taken into the welfare system at disproportional rates. Most of these children were placed in government or church-run missions and institutions, while others were adopted or placed into the care of white families. Assimilation policies, and those enforcing them, assumed that the children would be better cared for living in dormitories on missions and reserves. But for most First Nations children the loss of their culture and identity caused profound harm. It is even more traumatic when considered within the context of First Nations cultural traditions and kinship ties.

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The removal of First Nations children from their families because of their race and culture was allowed under a range of laws that were passed by the respective parliaments of various governments throughout Australia. The *Aboriginals Protection Act 1869* (Vic), for example, gave the Aborigines Protection Board lawful authority over the care and control of any First Nations child or child of 'mixed race', if it was determined to be in the best interests of that child. The *Aborigines Protection Amending Act 1915* (NSW) established the Board of Protection of Aborigines, which had the power to assume full control and custody of any child of any First Nations person. The *Northern Territory Aboriginals 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 First Nations people. All of these Acts are now 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 the report, *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'. The report is available in libraries and on the Australian Human Rights Commission's website (see http://cambridge.edu.au/redirect/10329).

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

If you research the 'Closing the Gap dashboard', it becomes very evident that large numbers of First Nations people face disadvantage across a range of areas. Consequently, governments of recent years have introduced and supported legislation that attempts to resolve some of these issues. One of the most notorious is the Howard government's *Northern Territory National Emergency Response Act 2007* (Cth) (repealed), commonly referred to as 'the Intervention', which was able to be passed when the government suspended the *Racial Discrimination Act 1975* (Cth). With no warning, and no consultation with Aboriginal communities, this Act introduced measures such as additional police officers in First Nations communities, restrictions on alcohol, and the provisioning of welfare payments to parents based on their child's school attendance. Township land leases were compulsorily acquired by the Commonwealth over Aboriginal-owned land for a period of five years, with the permit system administered by Aboriginal land councils to control access to Aboriginal land revoked.

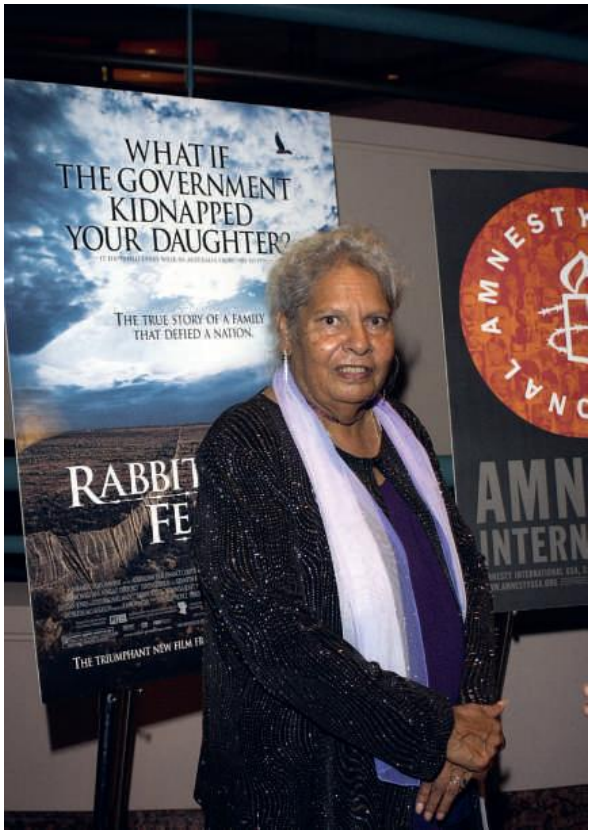


Figure 13.16 Doris Pilkington Garimara, born Nugi Garimara, who wrote the book the film is based on, at a screening for *Rabbit-Proof Fence* in Los Angeles. Her mother Molly Craig, a Martu woman, was one of the three women on whom the story was based.

Video 13.1 In 2008, then Prime Minister Kevin Rudd delivered a national apology to the Stolen Generations. (02:14)

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The changes were a response to *Little Children Are Sacred*, a report commissioned by the Northern Territory Government to assess child-sex abuse in First Nations communities.

> As in many earlier reports, the authors pointed to a range of complex social issues – including poverty, overcrowded housing, lack of educational and employment opportunities, and alcohol and substance abuse. They also emphasised the need for community-driven solutions.
>
> Perche D, 2017, 'Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention', The Conversation, 25 June.

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 First Nations leaders, the Northern Territory Government and the Australian Human Rights Commission all expressed criticism of the program, stating concern that it demonstrates further discrimination against First Nations peoples. Action groups such as 'Stop the NT Intervention' work hard to show the true damage and statistics associated with the government initiative. The legislation did receive bipartisan support in federal parliament.

The Voice Referendum

As discussed earlier in this chapter, in May 2017 the 'Uluru Statement from the Heart' called for a constitutional voice to finally acknowledge that 'Aboriginal people have an antiquity, cultural and spiritual connection to this land that no other Australian can have'.

Research 13.4

1. There are diverse views on the outcome of the Voice referendum. Search on the internet to find key arguments for and against.
2. Investigate online the purpose of the Healing Foundation in regard to the Stolen Generations.

REFERENDUM 2023 – Proposed change to the Australian Constitution

Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

(i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;

(ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;

(iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its the composition, functions, powers and procedures.

This proposal did not meet the requirements of a 'majority of people in a majority of states' (s128) with 60.41 per cent of the Australian people voting 'No'. In fact, the Australian Capital Territory was the only jurisdiction that voted 'Yes' across Australia.

The ramifications of this result for First Nations peoples is that their planned input into Federal Government legislative decisions is no longer possible via 'The Voice'.

Review 13.7

Identify the recognition given to First Nations peoples in the 1967 referendum.

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13.3 Contemporary issue: Loss of cultural rights including language

Indigenous peoples' cultural and language rights are clearly protected by Article 27 of the *International Covenant on Civil and Political Rights* (1966).

***International Covenant on Civil and Political Rights* (1966)**
Article 27
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Under international law, breaches of this article fall under the jurisdiction of the UN Human Rights Committee. The committee has ruled several times on this. Traditional subsistence and economic activities – such as Sámi reindeer herding, Māori fisheries (for example, the *Mahuika v New Zealand* case) and Aymara grazing and raising llamas and alpacas (for example, the *Poma v Peru* case) – all constitute valid cultural practices of indigenous peoples. The Masig Island case (covered earlier in this chapter) is another example of an indigenous people attempting to protect and preserve their cultural identity.

Language is more than just a method of communicating: it links people to their history, and forms a basis for people's 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 a culture to thrive. This is recognised by the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

***United Nations Declaration on the Rights of Indigenous Peoples* (2007)**
Article 13

1 Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures.

2 States shall take effective measures to ensure this right is protected, [including through interpretation] in political, legal and administrative proceedings.

Indigenous peoples' language rights are also guaranteed under the *Indigenous and Tribal Peoples Convention* (No. 169) of the International Labour Organization.

***Indigenous and Tribal Peoples Convention*, 1989 (No. 169) (1966)**
Article 28

1 Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2 Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3 Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

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How effective has this provision been? As noted by Moira Paz from the Center for International Security and Cooperation, 'During all its years of operation, the UNHRC has never once found an Article 27 breach in relation to language violations'.

According to the UN, 90 per cent of all indigenous languages are at risk of being lost within 100 years. The period between 2022 and 2032 is the International Decade of Indigenous Languages (UNESCO), with its aim being to build a global community for the preservation, revitalisation and support of indigenous languages worldwide. It is important to note that Australia has introduced some significant initiatives to support Indigenous languages (for example, the *Australian Human Rights Commission Act 1986* (Cth) and the *Aboriginal Languages Act 2017* (NSW)).

First Nations peoples of Australia

When we talk about First Nations peoples of Australia, it is important to remember that we are not talking about one unitary people but rather an enormous number of cultures, traditions, histories and languages. Sadly, the long history of violence inflicted on First Nations peoples at the hands of European settlers, combined with the devastating effect of the diseases the colonists brought with them, have had a destructive effect on Indigenous languages. Even more significantly, the forced separation of young language learners from their best language teachers (parents, grandparents and Elders) as a result of the Stolen Generations has meant that many First Nations peoples have lost contact with their native languages and, therefore, with the culture and history of their ancestors. Only now are government programs attempting to preserve Indigenous languages. Charles Darwin University has created a digital archive, the 'Living Archive of Indigenous Languages', which can be accessed online.

Article 27 of the *International Covenant on Civil and Political Rights* (1966) (quoted on the previous page) is a key international provision as it is a specific binding commitment. Australia's obligations under the International Covenant on Civil and Political Rights are enshrined in domestic legislation through the *Australian Human Rights Commission Act 1986* (Cth).

In New South Wales, the *Aboriginal Languages Act 2017* (NSW) was the first time Australian legislation acknowledged the significance of First Languages. This Act, which came into operation on 5 March 2020, seeks to 'reawaken, grow, nurture, promote [and] raise awareness of Aboriginal languages'. As part of the Act, an Aboriginal Languages Trust was created. This Aboriginal-led government agency supports local language activities.

Legal Links

The preservation of Indigenous Australian languages is a vital part of ensuring Indigenous Australian cultures are remembered and passed on to future generations. Search online for the article, 'Australia tries to halt loss of Aboriginal languages' (*The Courier Mail*, 25 October 2010). This article outlines the ways people are trying to preserve Indigenous Australian languages.

The Sámi people in Norway

Many indigenous communities around the world have faced similar challenges. The languages of the Sámi people in Norway were threatened by a long, concerted linguistic assimilation policy (the 'Norwegianisation policy'), which lasted until the outbreak of World War II. The Sámi language was prohibited from being used in public schools and churches, and Sámi culture was denigrated as inferior. Additionally, Sámi people were prevented from claiming agricultural land unless they could prove they spoke Norwegian. 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 to not 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 the education of Sámi people, was established.

From the second half of the twentieth century, the Sámi language has gradually attracted more support from the Norwegian Government. One of the most important indicators of this support was the inclusion in the Norwegian Constitution of Article 110a, which states that, '[i]t is the responsibility of the authorities of the State to create conditions enabling the Sámi people to preserve and develop its language, culture and way of life'.

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Another significant moment was the official apology to the Sámi people made by King Harald V of Norway 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.

King Harald V, Opening of the Sámediggi (Sámi Assembly), 1997.

Today, in Sweden, Sámi children have the opportunity to attend, up to the ninth grade, one of six public educational facilities that offer the Sámi language.

Research 13.5

1. Research another country with a range of indigenous languages (for example, Canada) and explain the extent to which these languages are surviving today.
2. Investigate the role of the Māori Language Commission in New Zealand.
3. Outline how Australia has adopted measures to protect Aboriginal languages.
4. Investigate other indigenous cultural rights that have suffered; for example, social arrangements and spiritual beliefs.
5. Watch the YouTube video of Tasmanian Fanny Smith speaking in language in 1903, available at https://cambridge.edu.au/redirect/10454.

13.4 Contemporary issue: Land rights

The initial seizure of indigenous lands by colonising nations has resulted – decades or centuries later – in indigenous peoples taking legal actions to regain rights to their traditional lands.

First Nations peoples of Australia

When the British settlers first arrived in Port Jackson in 1788, they did not sign any sort of treaty with the First Nations inhabitants of the area. Although the reasons for this are unclear, one possibility is that the British settlers' views of what constituted government was based on their own experiences, and so they mistakenly believed that First Nations peoples did not have any form of organisation. Self-interest may also have been involved. 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, and falsely, established the notion of *terra nullius*. This concept was developed further by Australian courts in the early decades of the nineteenth century. *Terra nullius* – which can be translated as 'empty [*nullius*] land [*terra*]' – derives from the ideas of de Vattel and Grotius discussed earlier in this chapter. A series of cases heard in Sydney courts in the 1820s and 1830s relied on the idea of *terra nullius* to establish the principle that the First Nations peoples of Australia were not subject to English law unless they interacted with the settlers. Interestingly, this was because the Indigenous inhabitants were thought (accurately) to be governed by their own legal systems.

Later, *terra nullius* was used to justify provisions whereby First Nations peoples could not sell, transfer or acquire land, except when granted it by the Crown. It was not until 1971 that formal land rights litigation by an First Nations 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 Yolngu people in Arnhem who sued the mining company, 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 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) HCA 23.

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In Court



***Mabo v Queensland* (No 2) [1992] HCA 23**

Facts

Eddie Koiki Mabo was a Torres Strait Islander man. He and four other Torres Strait Islander people, who lived on Murray Island, took the state of Queensland to court seeking a declaration on whether they had native title over Murray Island. 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 First Nations peoples have sovereign power over their lands? If so, was the doctrine of *terra nullius*, which had been used to settle the country, incorrectly applied? Specifically, was there a form of Indigenous ownership of the land that meant the Torres Strait Islander people of Murray Island 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 Islander people commenced legal proceedings against the state of Queensland, the High Court of Australia brought down its judgment. The full court of seven High Court justices 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. The justices also ruled that the use of the doctrine of *terra nullius* by the British to claim sovereignty of Australia was a 'legal fiction' 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 of the justices did agree, and no appeal exists for a decision of the High Court, the case was won by Eddie Mabo.

Since the Mabo decision, the process of reforming Indigenous land rights has had many landmarks. One of these was the *Native Title Act 1993* (Cth), which was passed by the federal parliament one year after the High Court's Mabo decision. Whereas the Mabo decision acknowledged the existence of native title for First Nations peoples, and that the doctrine of *terra nullius* had not extinguished that title, it was not until the introduction of the *Native Title Act 1993* (Cth) 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, as determined by the traditional laws and customs (customary law) observed by the original inhabitants of that land. Another landmark occurred in 2018, when Australia's first treaty Bill was legislated in the Victorian Parliament. This legislation formally committed the state to liaise with the First Nations peoples of the lands within Victoria's borders.

In Court



***Wik Peoples v Queensland* [1996] HCA 40**

The Wik people of Cape York in Queensland used the landmark Mabo decision (*Mabo v Queensland* (No 2) [1992] HCA 23) as a precedent for claiming native title over land that had been leased by the Queensland Government for pastoral use. The point of law that was considered was whether the state government's pastoral lease extinguished native title. The matter was heard by the full court of the High Court of Australia and a decision was brought down in 1996, four-and-a-half years after

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the Mabo decision. Four justices decided that the existence of a pastoral lease did not necessarily extinguish native title for the parcel of land being contested; three justices were of the opinion that it did. However, as it was a majority decision, the Wik people narrowly won their native title claim.

The *Wik Peoples v Queensland* (1996) HCA 40 decision means that, in some cases, the native title rights of First Nations peoples can coexist with the rights bestowed on pastoralists by pastoral leases. On the other hand, the decision also means that native title does not override the rights of pastoralists to use the land granted to them under the pastoral lease.

The legal issue now is to decide how the two will coexist and what form of compensation will apply, if any, for the original owners.



Figure 13.17 An Aboriginal dancer of the Wik tribe performs outside the Parliament House in Canberra in 1998. Two years earlier, the Wik people had narrowly won a native title claim over land that had been leased by the Queensland Government for pastoral use.

For a native title claim to be recognisable under Australian law, there must be a continuous acknowledgement and observance of the First Nations clan'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.

By 2019, the *Native Title Act 1993* (Cth) has been in force for 26 years. During this time, there have been more than 301 native title determinations. Of these determinations, native title has been found to exist in its entirety in 96 cases. The other determinations have found native title to partly exist or to not exist at all for the relevant area.

Research 13.6

1. Explain the effect the landmark decision of *Mabo v Queensland* (No 2) (1992) HCA 23 had on all First Nations peoples in Australia.
2. Research the *Native Title Act 1993* (Cth). Explain how this Act protects First Nations peoples and their native title claims.
3. Outline the reasons why the Wik people challenged the pastoral leases in Queensland (in *Wik Peoples v Queensland* (1996) HCA 40). Was this challenge evidence of a growing awareness by First Nations peoples of how to use the Australian legal system to obtain justice? Use evidence to justify your answer.
4. Who was Vincent Lingiari? Why is he considered to be one of the first campaigners for land rights in Australia? You can hear his story in the Paul Kelly and Kev Carmody song, 'From Little Things Big Things Grow'.

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Canada's First Nations people

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 decision 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.



Figure 13.18 The 1995 introduction of self-government for First Nations people in Canada led to the negotiation and renegotiation of treaties. These negotiations recognised that the right to use and occupy the land held by indigenous peoples could be updated to modern uses.

Review 13.8

Compare and contrast the differences between Australian and Canadian native title law.

The Mapuche people in Argentina and Chile

The experience of the Mapuche people living in the southern most parts of South America is very different from that of First Nations peoples in Australia. Unlike the European colonisers of Australia, who did not acquire the land through treaty, Spanish colonists actually did contract an agreement with the Mapuche people. The *Treaty of Quillian* was primarily the result of the Spanish not being able to defeat the Mapuche people in battle. This treaty (the forerunner of many subsequent treaties) meant that, unique among the indigenous peoples of South America, the Mapuche people 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 people. By 1885, Argentina and Chile had taken the Mapuche people's land, over 100 000 Mapuche had been killed, their farming land had been redistributed to Argentinean and Chilean farmers, and many Mapuche children had been stolen to be servants for settler families. Attempts to suppress Mapuche culture continue to the present day, 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 people – as well as the destruction of their territory by large resource companies – has meant that the Mapuche people have resorted to destroying buildings, fields and other facilities. This has led to the Chilean Government using antiterrorist legislation against the Mapuche people. This situation continues despite United Nations requests for the two parties to negotiate a settlement.

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Analysis 13.1

Read the article 'In Chile, the Mapuche are battling for their land' (by Alberto Barba Pardal, *Equal Times*, 29 June 2018) at http://cambridge.edu.au/redirect/10330. Assess whether it was reasonable for the Mapuche people to resort to destroying buildings, fields and other facilities after the persistent refusal of the Chilean Government to grant land rights.

Research 13.7

In New Zealand, land has also been acquired by treaty (the *Treaty of Waitangi* (1840)). Research the effect of the *Treaty of Waitangi* on the land rights of Māori people.

13.5 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, mining and logging companies have destroyed traditional lands and sacred sites.

***International Covenant on Civil and Political Rights* (1966)**
Article 1.2
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.

As noted earlier in this chapter, the legal concept of sovereignty means that such articles generally refer to the people of a sovereign state and not, generally, to the indigenous peoples living within the state's borders. However, in other jurisdictions, indigenous peoples have been able to successfully protect their legal rights to natural resources. Such developments reflect the changing values and ethical standards of the international community.

Indigenous peoples of Nicaragua

In Court

***Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001)**

Nicaragua had granted a right for a company to log 62000 hectares of the communal land of the Awas Tingni community without any real consultation or compensation. The Inter-American Court of Human Rights found the Awas Tingni community had a clear right to not only their land but also to the resources contained in the land. The court held that these rights of ownership are held by the community in their collective capacity and according to their own customary law, values and customs.

This case is of extreme importance as it was the first time the Inter-American Court of Human Rights had issued a judgment in favour of the rights of indigenous peoples to their ancestral land. It became the precedent for defending indigenous rights in Latin America.

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Indigenous peoples of Papua

Near the vertiginous heights of Mount Jayawijaya – the highest mountain in Papua (formerly known as Irian Jaya) and also the highest mountain in Oceania – is the world's largest goldmine. Mount Jayawijaya's summit, Puncak Jaya, is a place of cultural and spiritual significance for the indigenous peoples of Papua. Instead of being a place of spiritual and traditional focus, the mine, Grasberg, has become a focal point for armed resistance to Indonesian colonisation of Papua by the Free Papua Movement. Resistance by this group has cost the mining companies tens of millions of dollars, with many Papuan and Indonesian lives lost. Papuan resistance has taken place against a background of enormous profits being made by the mine (approximately a revenue of $6.4 billion). The Free Papua Movement argues that the indigenous peoples of Papua are not receiving sufficient compensation for the theft of land and destruction of their environment. There is also the violation of human rights by Indonesian security forces with the killing, kidnapping and torture of many indigenous Papuan people.



Figure 13.19 Free Papua activists hold placards during a protest in 2021. One sign mentions concerns surrounding the activities by Freeport, the owner of the Grasberg mine.

First Nations peoples of Australia

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 First Nations peoples, who are the traditional owners of Country.

When the Australian mining industry first boomed in the 1960s, it had very poor relations with First Nations communities – there was no recognition of traditional owners, widespread racism, exploitation and ignorance. First Nations workers, if employed (which they usually were not), were paid far less than their European counterparts, and First Nations communities were denied any share of the profits that came from the minerals being dug out of their land.

However, in recent times – since the Mabo decision, and particularly since the Wik decision and the *Native Title Act 1993* (Cth) – mining companies have begun to change their behaviour regarding Indigenous communities and traditional landowners. For example, mining companies now pay royalties to communities, offer training and employment opportunities to First Nations peoples, and involve communities in land-use decisions. The fragile nature of this situation was highlighted by Rio Tinto's destruction of the Jukkan Gorge in 2020, which has destroyed sacred sites (rock shelters) of the Puutu Kunti Kurrama and Pinikura (PKKP) people, who had continuously occupied the land for 46 000 years. An October 2021 parliamentary inquiry stated the destruction of the Jukkan Gorge for mining purposes was, 'not just a loss for the PKKP peoples, but … a loss for the nation, and the world, as a whole'.

However, different companies have different standards, and some remote First Nations communities are vulnerable to economic downturn. Any change in prevailing economic conditions could devastate these communities – it is likely that self-determined or co-designed legislation offers the only hope for the long-term economic stability of these First Nations communities.

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Research 13.8

1 Evaluate the current protection for rights to natural resources. Suggest law reform initiatives for the government to better protect these rights for First Nations peoples.
2 Compare and contrast the relationship between mine operators and First Nations peoples. Examine the nature of the land, usage and damage, and the implications of these for future generations.

13.6 Contemporary issue: Intellectual property rights

A people's cultural and spiritual identity can be expressed in a range of artistic forms, including narrative, dance, music, textiles and artwork. While these artistic forms embody a particular culture, members of other cultures may also appreciate the art for a variety of reasons, and this gives the works value on the open market.

The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) explicitly recognises indigenous peoples' intellectual property rights over traditional cultural expressions.



Figure 13.20 A man makes the traditional moon kite, locally known as 'Wau Bulan', at Kelantan, Malaysia. The *United Nations Declaration on the Rights of Indigenous Peoples* (2027) explicitly recognises indigenous peoples' intellectual property rights over traditional cultural expressions.

***United Nations Declaration on the Rights of Indigenous Peoples* (2007) 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, 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 been many international conferences and declarations relating to indigenous intellectual property rights, such as the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous*

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Peoples (1993) ('Mataatua Declaration'). The *Mataatua Declaration* is soft law, but it does clearly highlight the issues and concerns of indigenous peoples regarding intellectual and cultural property rights.

***Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* (1993)**

Preamble

... that the first beneficiaries of indigenous knowledge (culture and intellectual property rights) must be the direct indigenous descendants of such knowledge.

As with all intellectual property, international copyright and patent laws offer some level of protection of the artists' rights. Also, the World Intellectual Property Organization has made particular reference to traditional knowledge and traditional cultural expressions.

Exploitation of artists

In recent years, the work of First Nations artists has become very popular. Paintings by artists such as Emily Kame Kngwarreye, an Anmatyerr woman, Clifford Possum Tjapaltjarri, an Anmatyerr man, and Rover Thomas, an Wangkajunga and Kukatja man, have become renowned throughout the world and have been sold for prices in excess of one million dollars.

However, as the prices fetched by paintings by First Nations artists grow ever higher, the issues start to increase for the artists themselves. First Nations artists, who are often marginalised because of their age, remote location and language differences, have been preyed upon by 'carpetbaggers'. Carpetbaggers are people who exploit these artists by offering trivial cash payments, cars (that turn out to be wrecks), food and other items for art that they then on sell for a much greater amount of money, keeping the profits. Emily Kame Kngwarreye was besieged at the end of her life by carpetbaggers.

Investigations by media organisations throughout the 2000s led in 2007 to a Senate inquiry into the exploitation of First Nations artists. Recommendations from this inquiry have led to increased government funding for community art centres, which act as disinterested collectives for First Nations artists, and the shutting out of private dealers from the market. Although some fear that these policies will lead to the oversupply and devaluation of First Nations art, this may be the only way to prevent non-Indigenous people exploiting First Nations artists.

Case Study

Brett Evans and Mornington Island Art

Mornington Island Art is an art centre located in Queensland and run by the Mirndiyan Gununa Aboriginal Corporation.

In 2020, Brett Evans, chief executive of the Corporation, and also manager of the art centre, was charged with using his position dishonestly to benefit himself. Part of his role involved negotiating with galleries and art purchasers, and then passing the income (less gallery commissions) back to the artists and the art centre.

However, on multiple occasions he simply kept the money for himself – specifically, the sale of 169 paintings by artist Mirdidingkingathi Juwarnda (Sally Gabori) as well as seven works by other artists to a value of $425 378.20. Evans provided corporation invoices and certificates of authenticity, leading buyers to believe the sales were legitimate.

In February 2022, after pleading guilty to the charges, Evans was sentenced by Mt Isa District Court to four years and six months of jail. In addition, he was ordered to pay $425 378.20 in reparations.

You can read more about this case in *The Monthly* article, 'Art heist: The landmark conviction of an Aboriginal art centre's manager' at http://cambridge.edu.au/redirect/10331.

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Legal Links

The Arts Law Centre of Australia offers the 'Artists in the Black' service, which provides legal assistance and advice 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 that copy the style of the famous Western Desert school may be passed off as belonging to this school. These counterfeiters not only make unearned profits from the reputation of First Nations artists, but also damage the value of First Nations artists' paintings. It is now publicly acknowledged that much of the Aboriginal and Torres Strait Islander 'art' that is sold in tourist destinations is produced in Asia – the 'artists' have no cultural connection at all with Country.

One method of addressing this is by using a trademark. 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. An example of this is North American and Canadian sports teams using mascots or names that refer to indigenous culture, such as the professional baseball team the Cleveland Indians, with its logo 'Chief Wahoo'. This team name was changed in 2021 to the Cleveland Guardians.

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.



Figure 13.21 This carving of a Māori Tiki Pou Statue with a bone carved fish hook necklace is actually a plastic mass-produced tourist necklace souvenir.



Figure 13.22 A theme float at the Carnival of Dusseldorf in 2023 deals with the social topic of cultural appropriation.

Review 13.9

1 Identify and outline three forms of intellectual property rights held by indigenous peoples.
2 Define the term 'carpetbaggers'.
3 The *Mataatua Declaration* is soft law. Discuss what this means. Describe how the World Intellectual Property Organization could protect indigenous peoples' intellectual property rights.

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Chapter summary

- The United Nations has not adopted an official definition of 'indigenous peoples' due to the enormous diversity in indigenous groups worldwide, but it gives a list of factors to consider when thinking about indigenous groups.
- Colonisation by European powers took away land from many indigenous peoples. Examples include First Nations peoples of Australia, who had access to their lands removed and lost their ability to practise culture, and the indigenous people of South America, where land theft disrupted their food supply and caused inter-tribal conflict.
- Ideological differences have led to conflict and injustice for indigenous peoples. For example, the Māori's communal property ownership system 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 peoples) were not affected by colonisation but had their rights removed later in the twentieth 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. The 1992 Mabo decision found that *terra nullius* in relation to Australia was a 'fallacy'.
- 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* (1960) and is prominently included in other UN declarations and covenants.
- The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) was only adopted in 2007 by the UN General Assembly.
- Deliberate or inadvertent attempts to disrupt historical continuity have been made by many settler-colonial societies. For example, the Australian Government's 'Stolen Generations' policy, and the High Arctic relocation in Canada.
- There is often a conflict of interest between a sovereign state and an indigenous community living 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 Government introduced self-government for First Nations people in 1995.
- Indigenous peoples can use the courts to regain some of the rights that were taken from them. Examples include the Mabo and Wik decisions in Australia, *Sesana & Setlhobogwa v the Attorney-General* of the Republic of Botswana [2006] BWHC 1 (52/2002) 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 had their languages compromised/extinguished by assimilatory policies and, therefore, have lost contact with the culture and history of their ancestors. Sometimes this was a result of deliberate government policy, such as the Stolen Generations policy or the 'Norwegianisation' policy. Now there are government programs attempting to preserve indigenous languages.
- Many indigenous peoples have taken legal action to regain the right to their traditional lands; for example, First Nations people in Canada, Mapuche people in Argentina and Chile, Sámi people in Sweden and Māori people in New Zealand. In Australia, the Mabo decision (1992) led to the introduction of the *Native Title Act 1993* (Cth), which was followed by the Wik decision (1996).

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- 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, Indonesia, and mines built on the ancestral lands of First Nations people in Australia. A contrast is the San people of the Kalahari Desert, Botswana, who reached a profit-sharing agreement with a pharmaceutical company.
- The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) explicitly recognises indigenous peoples' right to intellectual property over traditional cultural expressions. Some issues are exploitation of indigenous artists, counterfeiting of indigenous work and cultural appropriation.

Short-answer questions

1 How does the United Nations describe 'indigenous peoples'?
2 Identify the three key events in the history of the Australian Government's response to the needs of First Nations peoples.
3 In what year did the Canadian Government introduce self-government for First Nations people?
4 Describe an example of a settler society attempting (deliberately or inadvertently) to disrupt historical continuity.
5 Discuss why there is often a conflict of interest between a sovereign state and an indigenous community living within that state.

Extended-response questions

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 in the digital version this textbook. Refer to these criteria when planning and writing your response.

1 Explain the issues with formal recognition of indigenous sovereignty of First Nations people who are living within an existing state. In your answer, explain the ramifications of this when taking action in the International Court of Justice.
2 Outline how international law has been reformed to better protect the rights of indigenous peoples. In your answer, include a discussion on the impact of non-government organisations.
3 Explain the significance of changing values and ethical standards regarding laws relating to indigenous peoples.
4 Explain how the law has attempted to encourage cooperation and resolve conflict in regard to land rights and rights over natural resources.

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Themes and challenges for Chapter 13 – Option 4: Indigenous peoples

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. Within certain jurisdictions legally binding Court decisions can resolve conflicts, but this is not the case at the International Court of Justice.
- The United Nations has created an extensive framework specifically designed to improve education, provide expertise and make recommendations that promotes improving outcomes for indigenous peoples. 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 First Nations peoples.
- International mediation in the form of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) places an emphasis on protecting the rights and liberties of indigenous peoples.

Issues of compliance and non-compliance

- Treaties and conventions (hard law) are specifically designed to encourage states to comply using 'enforcement mechanisms' that are not punitive in nature.
- The push for self-determination of indigenous peoples is supported by the Declaration on the *Granting of Independence to Colonial Countries and Peoples* (1960). The United Nations believes that self-determination is a fundamental right for indigenous peoples and the UN Human Rights Commission is the key organisation that attempts to ensure nations comply with their international obligations regarding indigenous peoples.
- Both the *International Covenant on Economic, Social and Cultural Rights* (1966) and the *International Covenant on Civil and Political Rights* (1966) say that self-determination is a fundamental human right and nations can be held to account for not complying with this.
- The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) was subject to delay due to the non-compliance of Australia and Canada.
- Unlike the two international covenants, the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) is soft international law, not hard international law. The states that have signed it are morally bound, but not legally bound.
- Due to national sovereignty, enforcement mechanisms internationally have a focus on encouraging compliance rather than being punitive in nature.

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Laws relating to indigenous peoples as a reflection of changing values and ethical standards

- Pre-twentieth-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. This 'value' was abolished by the Mabo decision and reflected vastly different ethical standards between periods of time.
- Even in the twentieth 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 First Nations 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 the United States, 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 US air base. In Canada, the High Arctic relocation saw Inuit families transported to islands far north of where they had previously lived.
- The late twentieth and early twenty-first centuries have seen governments making attempts to redress the wrongs of the past due to a different political consciousness regarding the rights of indigenous peoples evidenced by the following:
  - 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).
  - A number of governments have made formal apologies to indigenous peoples, such as the 1997 apology for the Norwegianisation policy in Norway, the 2008 apology to the Stolen Generations in Australia and the 2010 apology for the High Arctic relocation in Canada.

The role of law reform in protecting the rights of indigenous peoples

- When social values and attitudes change, the law must reform to reflect community standards or it will become obsolete.
- The inclusion of articles in international law specifically relating to the legal status of indigenous peoples, their land and intellectual property rights are indicative of laws evolving to reflect changing social expectations and the work of non-government organisations.
- In Australia, the *Mabo v Queensland* (No 2) [1992] HCA 23 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 (the work of non-government organisations) 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 that 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.

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Chapter 15 (Digital-only chapter)
Option 6: Workplace

25% of course time

Principal focus

Through the use of contemporary examples, you will investigate legal rights and responsibilities and the effectiveness of the law in achieving justice in the workplace.

Themes and challenges

The themes and challenges to be incorporated throughout this option include:

- the role of the law in encouraging cooperation and resolving conflict in the workplace
- issues of compliance and non-compliance
- laws relating to the workplace as a reflection of changing values and ethical standards
- the role of law reform in recognising rights and enforcing responsibilities in the workplace
- the effectiveness of legal and non-legal responses in achieving justice in the workplace.

At the end of this chapter, there is a summary of the themes and challenges relating to the workplace. This summary draws on key points from the text and links each key point to the themes and challenges. This summary is designed to help you revise for the examination.

Chapter objectives

In this chapter, you will:

- identify the increasing need for workplace law
- outline where workplace regulations come from
- describe the rights and responsibilities that employees and employers have in the workplace
- examine workplace law and the legal framework behind it
- evaluate the effectiveness of dispute-resolution processes
- assess the 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.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to address the 'themes and challenges' (p. 33) and the 'learn to' activities (pp. 33–4) in the syllabus as you may be tested on these in your HSC exam. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the 'Workplace' topic.

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Relevant law

IMPORTANT LEGISLATION

Employers Liability Act 1897 (NSW)
Industrial Arbitration Act 1901 (NSW)
Factories and Shops Act 1912 (NSW)
Industrial Arbitration Act 1912 (NSW)
Industrial Arbitration (Amendment) Act 1926 (NSW)
Industrial Arbitration (Amendment) Act 1932 (NSW)
Workers' Compensation (Dust Diseases) Act 1942 (NSW)
Long Service Leave Act 1955 (NSW)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Employment Protection Act 1982 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 (NSW)
Workers Compensation Act 1987 (NSW)
Industrial Relations Act 1988 (Cth)
Disability Discrimination Act 1992 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Industrial Relations Act 1996 (NSW)
Workplace Relations Act 1996 (Cth)
Workplace Injury Management and Workers Compensation Act 1998 (NSW)
Corporations Law Amendment (Employee Entitlements) Act 2000 (Cth)
Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000 (NSW)
Age Discrimination Act 2004 (Cth)
James Hardie (Civil Penalty Compensation Release) Act 2005 (NSW)
Independent Contractors Act 2006 (Cth)
Industrial Relations (Commonwealth Powers) Act 2009 (NSW)
Fair Work Act 2009 (Cth)
Paid Parental Leave Act 2010 (Cth)
Competition and Consumer Act 2010 (Cth)
Sex and Age Discrimination Legislation Amendment Act 2011 (Cth)
Work Health and Safety Act 2011 (Cth)
Fair Entitlements Guarantee Act 2012 (Cth)
Workplace Gender Equality Act 2012 (Cth)
Government Sector Employment Act 2013 (NSW)
Fair Work Amendment Act 2015 (Cth)
State Insurance and Care Governance Act 2015 (NSW)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

International Convention on the Elimination of All Forms of Racial Discrimination (1965)
Convention on the Elimination of All Forms of Discrimination against Women (1979)

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SIGNIFICANT CASES

Ex parte HV 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
Maternity Leave Test Case (1979) 218 CAR 120
Termination, Change & Redundancy Case (1984) 8 IR 34
Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd (2000) 175 ALR 173
Hollis v Vabu Pty Ltd [2001] HCA 44
Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209
Family Provisions Test Case [2005] AIRC 692
Russell v Trustees of the Roman Catholic Church [2007] NSWSC 104
Equal Remuneration Case (2012)
Rich v PricewaterhouseCoopers (2014)
Fair Work Ombudsman v Theravanish Investments Pty Ltd [2014] FCCA
Commonwealth Bank of Australia v Barker [2014] HCA 32
Pernod Ricard Winemakers Pty Ltd [2015] FWCA 2923
Oze-Igiehon v Rasier Operations BV [2016] WADC 174
Diego Franco v Deliveroo Australia Pty Ltd [2021] FWA 2818
Suzie Cheikho v Insurance Australia Group Services Limited [2023] FWC 1792

Legal oddity

A woman injured herself falling from the second step of a stepladder, provided by her employer, while putting blankets on a shelf at eye level. She made a claim for damages, which was dismissed by the magistrate and went to the ACT Supreme Court. There were two expert witnesses, a physiotherapist and a consultant engineer, but only the engineer saw the stepladder in question. He found it to be structurally sound, and concluded that the woman had probably reached beyond the ladder's base of support. The court found that the employer had not breached a duty of care by failing to provide instructions for the use of such a commonplace item as a stepladder.

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15.1 The nature of workplace law

The changing nature of workplace law over time

The main focus 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 ongoing employer–employee relationship. The person doing the work in such a situation is usually called an **independent contractor**.

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 century, employment law has been amended to reflect the changing nature and specific demands of the Australian workplace.

Before the Industrial Revolution (which started in the late eighteenth century in Britain), there was little need for strong employment regulations. This is because most people either worked on the land (farming) or produced clothing, household goods and/or food for their own use. A family could sell any excess products or use them to barter for things that they could not produce. They 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.

Early employment law

In Britain, law relating to employment from medieval times to the eighteenth century was limited, due to the nature and type of employment available. Employment law that did exist favoured the rich and influential members of society, who were more concerned with making profits than with the needs of their workers.

Guilds of craftsmen or merchants were associations of people in a particular trade. The guilds' purpose was primarily to ensure that products were of good quality. Guilds also regulated labour conditions, 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.

The Industrial Revolution

The **Industrial Revolution** that took place in Britain during the late eighteenth and early nineteenth 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 and moved to urban places as new technology allowed for mass production in factories, creating work opportunities.

With the increased use of machines, employees became specialised or skilled in only a few aspects of the production of an item. Clothing factories used machines to make goods 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 what was left as profit.

The shifting nature of employment in Britain during this time also resulted in changes in labour laws. Factory owners (who were usually wealthy

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

guild
a medieval association of craftsmen or merchants

Industrial Revolution
the rapid development of industry in the eighteenth and nineteenth centuries, characterised by changes in manufacturing, agriculture and transport

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trade union
an organisation of workers created to preserve and further their rights and interests

men with parliamentary influence) influenced laws to maintain their profits and to protect their interests and growing economic power. One British statute, the *Combination Act 1799*, stated that being a member of a **trade union** was grounds for imprisonment. Some early union leaders were hanged for 'sedition' (treason), accused of encouraging people to 'rise up against and overthrow the lawful government'. After much parliamentary debate, trade unions were legalised in 1832, with the passing of the *Reform Act 1832* by the British Parliament.

Review 15.1

1. Outline why there was little need for employment law before the Industrial Revolution.
2. Outline the social and economic conditions experienced by most people in feudal England.
3. Describe what a guild was and who belonged to these organisations. Outline the activities carried out by guilds.
4. Explain how wealthy and powerful people used the law to their advantage at the expense of workers. Identify the advantages wealthy and powerful people obtained.
5. Explain how the nature of employment changed during the Industrial Revolution.

Laissez-faire economy and state intervention

freedom of contract
the freedom of individuals to bargain the terms of their own contracts, without regulation by the state

***laissez-faire* economy**
an economic system in which the state refrains from interfering with markets by regulation or other means

Employment in the nineteenth century was based on the concept of **freedom of contract**, which is an individual's freedom to negotiate the terms of the contracts they enter, without government restrictions. This idea is the foundation of the ***laissez-faire* economy**, which regards government intervention in economic activity, including employment, as inappropriate.

The concept of freedom of contract 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. In the nineteenth century, workers had very few rights as there were often more candidates for jobs than available positions. An employer could simply sack a worker they regarded as troublesome and hire someone else.

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, and limited the ability of employees to move to other places of work. Worker collectives had effectively been banned, so working conditions were poor and people worked long hours. Factories were often badly ventilated and 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.



Figure 15.1 The foundation of the *laissez-faire* economy is based on the idea of people being allowed to bargain freely and the parties involved having equal bargaining power. In reality, this is not true.

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These substandard working conditions, especially for children, were highlighted in the newspapers by writers such as Charles Dickens (who had worked in a factory as a child). The public outrage created by these articles led to state intervention in workplace relations. In 1819, an Act was passed that prohibited the employment of children under nine years old, and limited children's working hours to 12 hours a day. Further legislation expanded these protections: laws were introduced that prohibited night work, limited children's employment in underground mines, required ventilation and working equipment in the mines, raised the minimum age for working in textile factories to 10, and eventually (in 1901), limited the employment of women too soon after they had given birth.

Trade unions

A trade union is an association of wage earners that tries 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 two Acts that outlawed unions: the *Combination Act 1799* and the *Combination Act 1800*. The 1800 Act was repealed in 1824, largely due to the lobbying efforts of the reformer Francis Place. A third Combination Act was passed in 1825. The 1825 Act allowed trade unions to form but placed severe restrictions on their activities. Union members could meet to discuss wages and conditions, but 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 early 1870s, when the *Trade Union Act 1871* was passed, granting trade unions legal status for the first time in England.

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

Figure 15.2 The 1825 Combination Act allowed trade unions to form but placed severe restrictions on their activities, including punishing industrial action. Nowadays, industrial actions, such as strikes, are considered the norm, as this picket line of striking consultants and junior doctors outside the University College Hospital in London in 2023 shows.



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Industrial relations in Australia

During the colonisation of Australia, the concepts of guilds and trade unions were brought to this country; as the Australian economy grew, so did the agitation of worker collectives for better conditions.

Australian craftsmen and other groups of workers began to organise themselves into trade unions in the early nineteenth century. The first significant union campaign in Australia was by stonemasons – in Sydney in 1855 and Melbourne in 1856 – who wanted an eight-hour working day (at the time, it was common for workers to work for up to 14 hours a day). In a world first, the eight-hour day was achieved – although it did not apply to all trades.

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

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

During the Australian gold rush in the 1850s, many workers left their employers to seek gold. At the same time, Australia experienced an influx of immigrants hoping to make their fortunes. The subsequent increased demand for goods and services meant that industries could not meet supply unless employers were willing to pay higher wages. Employers also had to 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 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (repealed). 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 was the result of the High Court's decision in *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. In this case, the High Court decided 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 Commonwealth 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 that was created by the *Fair Work Act 2009* (Cth). The FWO provides information about rights and obligations, unfair practices and enforcing workplace laws. The FWO also 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, approves agreements, regulates industrial action, makes and changes awards, determines the minimum wage and working conditions for workers in Australia, and hears complaints about bullying and unfair dismissals. If conciliation at the FWC fails to resolve disputes about unfair dismissals and terminations, then the Federal Court or the Fair Work Division of the Federal Circuit Court can hear these matters. The Fair Work Division of the Federal Circuit Court uses more informal and efficient procedures than the Federal Court, allowing it to hear matters more quickly.

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**.

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Figure 15.3 The 'gig economy' is an environment in which workers sign up for short-term roles as independent contractors. But these workers often lack the protections provided under the Fair Work Act.

Both types of contracts are legally binding, and both contract types may be in written or oral form. However, a written contract is more easily enforced because it is easier to prove the existence of a particular term of the contract.

The 'gig economy' is an environment in which workers sign-up for short-term roles as independent contractors. Recently, Uber and Airtasker apps have created opportunities to earn money, but they lack the protection of the Australian *Fair Work Act 2009* (Cth). The FWO carried out a two-year investigation (which concluded in 2019) into the working conditions of Uber drivers and found them to be independent contractors. This is contrary to some overseas legal outcomes and seems to be an evolving situation. In a court case in 2021, a Deliveroo driver was found to have been unfairly dismissed and classified as an employee in a ruling by FWA. In 2017, Uber drivers in Australia undertook legal action to contest the definition of their employment status as this affected the conditions of their employment. In early June 2019, the Fair Work Ombudsman concluded that drivers working through Uber are not employees but independent contractors. The union movement and gig workers were not happy with this decision and, as this sector grows, it is recommended that students keep up to date with this situation and laws around the gig economy.

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 they have the contract with, and there is no ongoing legal relationship between the two once the work has been completed. In some professions, 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 completed under the direction of, the employer. This contract type imposes certain duties on each party and provides each with certain rights.

A contract of employment may be for a fixed term or may be 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 a contract of service between two parties exists (rather than a contract for services) depends 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 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

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taxes and must charge fees that will take account of their future retirement needs.

casual employment employment 'as needed', on an irregular basis, with no set schedule or guarantee of ongoing employment; generally paid at an hourly rate

vicarious liability legal liability of an employer for the wrongful act of another

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 value from the work done by employees, and so should also bear the risk of employees' behaviour at work.

In Australia, temporary positions (part-time jobs) are becoming more common. Businesses also contract independent workers (freelancers) for short-term engagements. Freelance workers are independent and have to find their own employment. Freelancers do not have the same rights to award wages and unfair dismissal protection that regular employees enjoy. Nor do they get paid holiday leave or sick leave.

Technology is one of the reasons that temporary positions are becoming more common. Smart phone apps enable buyers and sellers (or hirers and service providers) to directly connect. When a worker agrees to provide services on a platform (such as through Uber or Airtasker), the contract they enter determines their rights, subject only to the unfair contract terms provisions in the Australian Consumer Law, which is Schedule 2 of the *Competition and Consumer Act 2010* (Cth), and in the *Independent Contractors Act 2006* (Cth), which permits review of unfair or harsh contract terms.

Being fully aware of the pay rates, payment terms and job security issues requires reading a contract carefully, which may not happen when workers can enter a contract by clicking 'agree' on a screen. Contract law favours the person who decides what terms to put into the contract. It is extremely unlikely that Uber drivers have negotiated fair terms for themselves. Ensuring that workers in the digital or gig economy are not exploited requires specific regulation to ensure workers receive minimum rates of pay and are protected from capricious termination of their contracts.

COVID-19 has had an effect on, and continues to influence, all forms of work, including the gig economy. As many people found their working conditions changing due to workplace restrictions and greater opportunities to work from home, it has become very important that all employees, employers and contractors understand their rights and responsibilities with these changes.

In Court



***Hollis v Vabu Pty Ltd* [2001] HCA 44**

Mr Hollis was injured when he was 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. The business contracted 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 the business. Vabu set the pay rates and there was no room for negotiation. However, the couriers had to provide their own bicycles and bear the expense of maintaining them. The couriers received no annual leave or sick leave, were taxed as independent contractors, and had contributions towards Vabu's insurance deducted from their pay.

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The High Court decided that the couriers were employees rather than independent contractors. Therefore, Vabu was vicariously liable for the negligence of the courier who ran into Mr Hollis. The judgment was based on all the facts of the relationship between the business and the couriers, 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. 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 to do the job.

Review 15.2

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 Identify the factors taken into account when determining if an individual is employed under a 'contract for service' or a 'contract of service'. In your answer, refer to *Hollis v Vabu Pty Ltd* [2001] HCA 44.
3 Define 'vicarious liability'.
4 Explain whether or not an employer should be vicariously liable for an employee's actions.
5 Discuss how COVID-19 has changed the nature of work. Use examples to illustrate your answer.

Terms of a contract of employment

All contracts of employment contain express and implied terms.

Express terms

Express terms are terms that were specifically stated and agreed to by both parties at the time the contract was made, either in writing or orally. Express terms in an employment contract 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 the position is full-time, part-time or casual employment
- the hours of work
- where the work is to be done
- leave provisions.

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.

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. Implied 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 thought of it.

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; a term can be implied by custom or law, or because of the presumed intentions of the parties

There are criteria for when a term can be implied under common law. The term:

- must be reasonable and fair
- must be necessary to ensure that the contract works effectively

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- must be so obvious that it 'goes without saying'
- must be capable of being expressed clearly
- must not contradict any express term of the contract.

In Australia, courts have decided that terms implied by common law in an 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 will occur.



Figure 15.4 All contracts of employment contain express and implied terms.

In Court

***Oze-Igiehon v Rasier Operations BV* [2016] WADC 174**

Perth Uber driver Mike Oze-Igiehon sued Uber in the District Court of Western Australia in December 2016 for damages of $500 000 after Uber deactivated his driver account, thus terminating his contract. Uber argued that it had a right to terminate the contract with no notice because of multiple safety-related complaints made by passengers. Mr Oze-Igiehon's case was dismissed.

Mr Oze-Igiehon did not have a lawyer and represented himself against the Silicon Valley–based Uber and the Dutch-based Uber holding company, Rasier Operations. Rasier was represented by three lawyers in the District Court. Mr Oze-Igiehon accused the company of imposing one-sided contracts on drivers, taking no responsibility for their safety and training, and exploiting them while ignoring Australian workplace laws.

Had Mr Oze-Igiehon been an employee of Uber, he would have been able to bring an unfair dismissal claim to the Fair Work Commission (FWC). This is a relatively quick and cheap process, and Uber would need to show that it had a valid reason for dismissing him and that it followed fair procedures. However, only employees can go to the FWC.

The gig economy has allowed companies such as Uber to sidestep the FWC's protections by engaging workers in ways other than traditional employment. Uber considers its drivers to be 'partners' or 'microentrepreneurs' who can decide how much money they want to make and when they want to work.

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Industrial relations in New South Wales

The New South Wales industrial relations system was established by the *Industrial Arbitration Act 1901* (NSW). The NSW 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 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 of the *Niland Report*). Following the *Niland Report's* recommendations, the commission was replaced by the NSW Industrial Relations Commission (IRC) and a separate Industrial Court. Unlike the federal industrial system, the state system does not separate the NSW IRC's judicial and administrative functions. Another important change was the introduction of individual workplace enterprise agreements.

The NSW IRC'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.

Duties of employers

Employers have the following duties:

- Employers have a 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.
- Employers have a duty to provide a safe working environment. 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.
- Employers have a 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 in the contract about payment.

Review 15.3



1. Define 'freedom of contract' and outline the assumption on which this doctrine is based. Assess whether or not this assumption is correct.
2. Outline some of the circumstances that led to greater workplace regulation by the state in Britain in the nineteenth century.
3. Discuss why workers might want to form a trade union rather than negotiate their own contracts of employment.
4. Explain why colonial Australia already had an industrial relations system.
5. Describe how the conciliation and arbitration process has changed in Australia.

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Duties of employees

Employees have the following duties:

- Employees have a duty to obey lawful directions given by the employer.
- Employees have a duty to exercise reasonable care in carrying out the work and to meet certain standards in their work.
- Employees have a 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), not to 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, in 2014, the High Court of Australia 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 by closing his work email account, the bank had breached its implied duty to maintain trust and confidence in him. Barker also argued that the bank had failed to inform him of redeployment opportunities within the bank. Although Barker was initially awarded damages, the bank appealed and the decision was overturned. This decision means that those employees who are faced with redundancy and who are denied redeployment opportunities cannot sue their employer for damages because of the employer's breach of 'implied duty of trust and confidence'. However, the decision does not mean that employees and employers are free to not 'trust' or to 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.



Figure 15.5 In 2014, in a case involving the Commonwealth Bank, the High Court of Australia found that contracts of employment do not automatically include a 'mutual duty of trust and confidence'.

Review 15.4

1. Define 'express terms' and 'implied terms'.
2. Identify the rights of employers and employees that come from implied terms. Discuss if these rights and responsibilities should be implied or written into employment contracts.
3. Should employees have an automatic right to redeployment and be allowed to sue their employer if this does not happen? Justify your answer.

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Awards, agreements and statutory conditions

Industrial awards

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, that sets out the minimum terms and conditions for employees in a particular industry or occupation, or who are employed by particular employers.

By 1920 in Australia, there were 96 federal awards in force. Also, all of the states, as well as the Commonwealth, had adopted systems of conciliation and arbitration. The AIRC, which eventually replaced 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. However, disputes taking place within a state were governed by state awards. This meant that businesses operating in more than one state had to apply different awards and systems. In 1996, Victoria became the first state to refer its industrial powers to the Commonwealth.

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



Figure 15.6 The 1907 Harvester case is regarded as a momentous judgment that paved the way for workers' entitlement to earning a basic living wage for their work.

In Court

***Ex parte HV McKay* (1907) 2 CAR 1 ('Harvester case')**

The federal Australian Act the *Excise Tariff 1906* (Cth) was designed to provide better pay to workers and created an excise tax on locally made machinery, which could be waived if a manufacturer's workers were paid 'fair and reasonable' wages.

McKay, a Melbourne manufacturer and owner of the Harvester Company, applied to the Commonwealth Court of Conciliation and Arbitration to waive the excise tax. McKay's company was not known for treating its employees fairly and reasonably, and the unions for the workers 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'. Justice Higgins heard evidence about 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 judgment that paved the way for workers' entitlement to earning a basic living wage for their work.

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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

constitutional corporation a corporation to which section 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)

The Victorian Government 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'; 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. The fewer the number of matters that can be contained in an award, the weaker is the 'safety net' provided by the award.

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 for three years to those already covered by them. 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)**.

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 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.

Agreements

Federal statutory framework

The main features of the *Fair Work Act 2009* (Cth) are:

- a legislative safety net of 10 National Employment Standards
- 'modern awards'
- clear enterprise bargaining arrangements
- improved mechanisms to protect industrial rights, including protection against discrimination and unfair dismissal
- the creation of national industrial relations organisations: the FWC and the FWO.

National Employment Standards

The 10 National Employment Standards are set out in the *Fair Work Act 2009* (Cth). They set minimum standards for employees' pay and conditions. All awards, agreements and contracts of full-time



Review 15.5

1. Outline the role played by industrial relations commissions.
2. Explain why the Harvester decision is significant to Australian workplace law.
3. Define 'industrial awards' and identify their purpose.
4. Describe the reforms made to the industrial relations system since 2006.

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employment (38 hours of work a week or as otherwise stated in the contract) between employers and employees in the national industrial system must meet these minimum standards. The standards include maximum hours of work, flexible working arrangements for parents, leave entitlements (such as sick leave, parental leave and annual leave) and termination and redundancy pay. The standards also include a requirement that employers must give a 'Fair Work Information Statement' to all new employees. The statement contains information about the National Employment Standards, modern awards, individual flexibility arrangements, termination of employment and the role of the FWC.

The National Employment Standards 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 worker for a substantial period of time, the employee may be entitled to long service leave and parental leave, and the right to request more flexible work arrangements.

Modern awards

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 'modernising' previous awards involved updating them to reflect current work environments, and in many cases their coverage was broadened. Modern awards can be made and varied by the FWC. The awards that applied before the *Fair Work Act 2009* (Cth) was enacted were replaced by modern awards.

Modern awards can contain terms setting out employees' minimum pay (including overtime and penalty rates), annual wage or salary, leave and leave loading, superannuation, redundancy, consultation procedures 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 the modernisation of an award, an application to increase it to previous levels can be made to the FWC by the employee or by their union. The FWC can make a take-home pay order 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 in pay.

Modern awards generally cover employees in jobs that have historically been covered by awards. For example, the employment 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 being covered by modern awards.

Modern awards are reviewed by the FWC every four years, and minimum wage provisions are reviewed annually.

Research 15.1

Use the internet to research the Fair Work Commission's role in creating fair workplaces through the National Workplace Relations System, including 'aspects of a fair workplace' and the internal resolution of disputes.

Enterprise agreements under the *Fair Work Act 2009* (Cth)

Enterprise agreements may include a broader range of matters than modern awards. Like awards, agreements must provide entitlements at least as favourable as the National Employment Standards (for example, a minimum four weeks' paid leave per year).

An enterprise agreement between an employer and their employees must be approved by a majority of employees (working at the enterprise(s)) 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 on the agreement. A ballot is then held to approve the agreement.

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greenfields agreement
an agreement created to cover prospective employees of a new enterprise

'better off overall' test
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

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 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
a business or company

An enterprise agreement, made with or without union involvement, may apply to workers in a specific workplace (single-enterprise) or at an industry level (multi-enterprise). 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 must be endorsed by each employer and by the relevant trade union(s).

Once the agreement has been approved by the parties, it is then submitted to the FWC. The agreement must meet certain conditions to be approved by the FWC such as:

- 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 **'better off overall' test**: each employee covered will be better off overall than they would be under the relevant modern award.

The *Fair Work Amendment Act 2015* (Cth) amended the *Fair Work Act 2009* (Cth) to:

- reform greenfields agreements to apply good faith bargaining rules to negotiations
- provide that a request for extended unpaid parental leave cannot be refused unless the employer has given the employee a reasonable opportunity to discuss the request
- provide that an application for a protected action ballot can only be made once bargaining for a proposed enterprise agreement has commenced.

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 considered to be 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 nationwide or within a state. In 2009, enterprise agreements replaced all existing individual and collective workplace agreements.

The *Fair Work Act 2009* (Cth) 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 (the agreement is made between the employer and a union before individuals are 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.

Originally, in the early 1990s, the law provided that an enterprise agreement could not be less advantageous to the employees working under it

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than the relevant award would be. The *Fair Work Act 2009* (Cth) replaced this 'no disadvantage' test with the 'better off overall' test in assessing enterprise agreements.

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'. Employers must notify their employees of their right to be represented in the bargaining process, and employees can choose who represents them. Employees who are union members are automatically 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 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**.

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

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.

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.

Media

Australia's minimum wage jumps by 8.6 per cent, award workers get 5.75 per cent pay boost

Gareth Hutchens and Stephanie Chalmers

ABC News

2 June 2023

Australia's minimum wage will increase by 8.6 per cent, and award workers will get a 5.75 per cent pay boost, in a Fair Work Commission (FWC) decision.

The new national minimum wage will be $23.23 per hour, and $882.80 per week, based on a 38-hour week.

But that increase in the minimum wage comes with an important technicality.

The FWC said it was confident the hourly pay increases would only make a 'modest' contribution to wages growth in 2023–24 and 'will not cause or contribute to any wage-price spiral.'

'We acknowledge that this increase will not maintain the real value of modern award minimum wages, nor reverse the reduction in real value that has occurred over recent years,' the commission said.

The boost to the wage rates will begin in the first full pay period on, or after, July 1.

Significantly for the minimum wage, the FWC said it would end the alignment between the national minimum wage rate and the C14 classification wage rate in modern awards, arguing that the C14 rate was too low and no longer constituted a proper minimum wage safety net.

(Continued)

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Media—Continued

Instead, it would realign the national minimum wage with the slightly higher C13 classification wage rate in modern awards, and after that, it would lift the C13 wage rate by 5.75 per cent.

That means the national minimum wage will lift by 8.65 per cent from July 1, compared to last year's lower-aligned minimum wage rate.

However, the FWC has framed that increase in the minimum wage as only being a 5.75 per cent increase, because that's the size of the increase that will occur for the slightly higher C13 classification award rate that the minimum wage will now be aligned with.

The current minimum wage is $21.38 per hour, but the new minimum wage will be $23.23 per hour, which represents an increase of $1.85 an hour (+8.65 per cent).

The Albanese government had supported the idea of lifting the minimum wage to match inflation, so the real wages of Australia's low-paid workers didn't go backwards.

Headline inflation, as measured by the consumer price index (CPI), was running at 7 per cent in the March quarter.

'The 5.75 per cent increase to awards is the biggest in history and will help 2.7 million workers,' Treasurer Jim Chalmers said on Friday.



Analysis 15.1

Read the media article on pages 619–20.

1. What concerns are there around pay rises?
2. Do you think these concerns are reason to limit minimum wage rises? Justify your answer.



Review 15.6

1. Compare collective agreements and individual agreements.
2. Compare an agreement and an award.
3. Define the 'better off overall' test and discuss why this criterion is needed.
4. Discuss the impacts of employees and employers being able to work out their own employment agreements.

State statutory framework (New South Wales)

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 section 9B of the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) – the *Industrial Relations Act 1996* (NSW) 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 relating to state and local governments (as employers). Section 9A of the *Industrial Relations Act 1996* (NSW)

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Figure 15.7 The level of workplace surveillance, which is an employer's use of technology such as cameras, computers and tracking devices to monitor employees, must comply with relevant state legislation.

declares that the NSW Government and local governments in New South Wales are not national system employers. Therefore, 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 NSW IRC continues to have jurisdiction in relation to the employment terms and conditions of state and local government employees. For the NSW IRC to approve an enterprise agreement for these employees, requirements similar to those contained in the *Fair Work Act 2009* (Cth) operate: a majority of employees must vote for the agreement and the agreement must comply with relevant state legislation (for example, laws relating to workplace health and safety, anti-discrimination and **workplace surveillance**).

Enterprise agreements for employees of state and local government in New South Wales must also pass the 'no net detriment' test, which is similar to the 'better off overall' test. Employees must not be disadvantaged by being employed under an enterprise agreement, rather than under the state or federal awards that would otherwise apply. This means that an agreement cannot be made that removes or reduces award conditions (for example, an agreement that provides lower pay or fewer annual leave days than are provided by the relevant award). The NSW IRC must also ensure that the parties understand the effect of the agreement and that no duress was involved in signing it.

workplace surveillance
an employer's use of technology such as cameras, computers and tracking devices to monitor employees

Review 15.7

1. Describe the changes made to the industrial statutory framework under the *Fair Work Act 2009* (Cth).
2. Identify the legislative powers that were retained by New South Wales after the NSW Government referred its industrial powers to the Commonwealth.
3. Compare the aims of the 'better off overall' test and the 'no net detriment' test. Assess if it is necessary to have both these tests.

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15.2 Regulation of the workplace

Industrial relations: State and federal framework

Commonwealth and state powers

Section 51(xxxv) of the *Australian Constitution* gives the Commonwealth Government the power to make laws about the '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 a 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 NSW Parliament the power to make laws for the 'peace, welfare and good government' of the state. Therefore, the NSW Government has the power to pass legislation that aims to improve the welfare of employees and employers (such as awards) and that establishes procedures for the resolution of industrial disputes.

industrial relations the relationship between employers, employees, the government and trade unions

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

As both federal and state governments can create law in the same area, conflicts sometimes occur. If conflict does occur, federal laws prevail (*Australian Constitution* s 109). This situation has created confusion, and some employers have found it difficult to determine which award or agreement applies 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 to be part of state jurisdiction in order to remove some of the cost, inefficiencies and inconsistencies of having 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 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 impact everyone in the community.

The NSW IRC and Fair Work Australia were established to help resolve industrial 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 2009* (Cth) 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 may lock out their employees (keep them from entering their workplace) until they agree to certain terms. Employers 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.

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When employers and employees enter into negotiations to create a new enterprise agreement, they can engage in protected industrial action such as lock outs and work bans. Protected industrial action is lawful and can be taken when an existing agreement has expired; when 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) ss 410, 411).

The FWC can stop unprotected action. Action is unprotected if the bargaining period has been suspended, if the action does not comply with FWC orders, or if the action 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) ss 418, 419). The Minister for Employment can also terminate protected industrial action on the grounds that it threatens people's safety or harms the economy. For example, in 2017 the NSW IRC and the Minister for Transport ordered striking bus drivers in Sydney to return to work.

The FWC acts to ensure that the bargaining process complies with industrial laws. To start a claim in support of a new enterprise agreement after an existing agreement has expired, employees must first obtain an order from the FWC allowing them to proceed. A protected action ballot must be held to endorse industrial action.

Disputes under modern awards and enterprise agreements are to be resolved according to the dispute resolution procedures contained in the award or agreement.

Media



Have Australia's right to strike laws gone too far?

Stephen Long

ABC News

21 March 2017

The new Australian Council of Trade Unions (ACTU) leader Sally McManus' remarks that she doesn't have a problem with people breaking 'unjust laws' provoked inevitable outrage.

Business groups and conservative politicians from the Prime Minister down condemned her views, while the Opposition Leader also distanced himself and the Labor Party from the new ACTU secretary.

Part of the context of Ms McManus' comment was her view that the right to strike in Australia was far too restrictive.

'It shouldn't be so hard for workers in our country to be able to take industrial action when they need to,' she told Leigh Sales on ABC's *7.30*.

Given this, it's surprising there's been so little analysis on where Australia's laws on industrial action sit compared to international norms.

And on that score, Ms McManus has a point.

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Media—Continued

Under international law, the right to strike is recognised as a fundamental human right.

The United Nations (UN) declared 'strike action to be a right' and 'one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests' from its early days soon after World War II.

The restrictions Australia has placed on that right place us at odds with international conventions – a point made repeatedly by the UN agency that oversees labour standards, the International Labour Organization (ILO).

'It's absolutely straightforward,' said Professor Andrew Stewart of Adelaide University – one of the nation's foremost experts on labour law.

'The ILO for the past 20 to 30 years has told governments of both political persuasions that we are in breach of international labour standards.'

Australia is regularly warned by the ILO our laws are out of step.

Just as regularly, that advice is quietly ignored – by Labor and Coalition governments.

And that's just part of the story: Australia's laws against industrial action are not only in breach of international law, they are without peer among advanced economies with a tradition of civil liberty in oppressing the right to strike.

'Not only are we flagrantly in breach but our laws are also so restrictive on the right to strike that they are way out of step with the laws of just about every other developed country,' Professor Stewart said.

How does Australia stack up against the rest of the world?

Few realise it, but the United Kingdom and even the United States afford more liberty to workers to take industrial action.

How do Australia's laws breach international standards? Fundamentally.

'The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests,' the ILO's committee of experts wrote in a key statement in 1983.

'These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.'

That's a world away from Australia's laws.

Political strikes a complete no-no

International human rights and labour conventions support a general right to strike, with exceptions, for example, to maintain essential services.

In contrast, in Australia, industrial action is generally unlawful.

Workers have only limited rights to take 'protected' industrial action free from threat of fines, monetary damages or dismissal.

The legal and administrative hoops workers and unions have to jump through before pursuing industrial action in Australia are onerous.

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Industrial action can only take place during a defined enterprise bargaining period in pursuit of a new collective agreement.

A union has to apply to the industrial tribunal for a protected action order, which can only be granted if the union demonstrates the union and its members have been genuinely trying to reach agreement.

A secret ballot conducted by the Australian Electoral Commission has to be conducted in advance of any action, and at least 50% of the workers being asked to take the action have to vote in favour.

Unions have to specify in the ballot what form the industrial action may take and give the employer three days' notice before pursuing any action, during which time the employer is free to apply to a tribunal or court to have the strike quashed.

There are also severe limits on what workers can strike for that are at odds with international law.

In Australia, 'political' strikes are a complete no-no.

Stopping work in support of, or in protest against, laws that directly impact on workers' rights or living standards is completely unlawful.

Not so under international conventions.

The ILO has found strikes in pursuit of higher minimum wage, or a change in economic policy to decrease prices and unemployment, 'are legitimate and within the normal field of activity of trade union organisations', while banning a general strike protesting against the social and labour consequences of the government's economic policy is 'a serious violation of freedom of association'.

Sympathy strikes outlawed

Pursuing a common claim across an industry in Australia is unlawful 'pattern bargaining'; under international labour standards, it is perfectly acceptable, as are strikes in pursuit of industry-wide claims for higher wages or better conditions.

Sympathy strikes in Australia are completely outlawed – under secondary boycotts laws, unions and workers who engage in sympathy strikes are exposed to huge potential penalties and damages claims.

Yet, under international law, sympathy strikes are permitted, provided the original strike is lawful.

Basic principle of the right to strike:

- it is a right that workers and their organisations are entitled to enjoy
- the Committee on Freedom of Association has reduced the number of categories who may be deprived of this right
- it has linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers
- it states the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.

Source: International Labour Office

Equally at odds with international law are the restrictions in Australia on what kinds of conditions and safeguards workers can pursue through collective bargaining.

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Media—Continued

Workers here can't negotiate for their own job security.

Bans or restrictions on the use of casual labour and contract labour in enterprise agreements are unlawful, as are 'non-employment issues' such as environmental concerns or requirements for corporate social responsibility.

Where the balance best lies between Australia's highly restrictive approach to industrial action and the ILO's view of it as a fundamental right is a matter for legitimate debate.

Strikes dogged Australia in the 1970s and 1980s, although strike action was formally illegal. The shift to enterprise bargaining, combined with a very limited and codified right to strike, has helped to beat the scourge of inflation that used to dog the economy, as strong unions won pay rises through strike action that flowed on through the workforce – although globalisation and cheap imports from overseas have played at least as a big a role.

Days lost to industrial action have dwindled, and more productive workplaces may be another benefit – although there is no correlation between tougher laws against unions and strikes and higher productivity overall.

But have the laws gone too far?

Wages are stagnating, with the lowest wages growth in the history of the current index undermining consumption and economic growth.

Leaving aside the argument the right to strike is a fundamental human right, there may be an economic case for making it easier for workers to take industrial action in pursuit of higher pay and better conditions.

One thing is certain – there is a new broom at the ACTU, and it will be pursuing sweeping reforms.

Analysis 15.2

Read the media article on pages 623–26.

1. Identify the type of industrial action that is illegal in Australia.
2. Outline how laws in Australia are contrary to international labour standards.
3. Describe the right to industrial action in Australia compared to that in other countries.
4. Discuss whether Australia's industrial action laws have gone too far.
5. Although this article is dated, the matters it refers to have not changed much in the years following its publishing. Conduct an online search to see what remains the same and what changes have occurred.

Review 15.8

1. Describe Australia's system of workplace law as it arose under the *Australian Constitution*.
2. Outline the purpose of industrial action for employees.
3. Identify the type of industrial action that is protected under the *Fair Work Act 2009* (Cth).
4. Explain why the Fair Work Commission will stop a protected action or an unprotected action.

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Negotiations between employers and employees

'Workplace bargaining' is the negotiation between employees and employers about the type of work and working conditions. When all employees within the workplace are united on a workplace issue, they can negotiate with their employer from a position of strength and so are 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 usually presents a contract of employment – to be signed by both parties – that specifies working hours, pay rates, leave entitlements and other work conditions. 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 National Employment Standards.

Employees who are not covered by either a modern award or an enterprise agreement may make agreements that vary the operation of the National Employment Standards about a limited number of matters. These matters are:

- the average hours of work
- the cashing out or taking of paid annual leave
- the substitution of public holidays
- getting extra annual leave in exchange for forgoing an equivalent amount of pay
- getting extra personal leave or 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

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

Industrial disputes can arise over issues such as working conditions, pay and entitlements, and discrimination. Mechanisms used to resolve disputes include **mediation** and other consensual forms of resolution. If disputes cannot be resolved, the matter moves 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 (under the New South Wales legislation, businesses that employ fewer than 20 people are exempt from this requirement).

Dispute resolution processes aim to help disputing parties come to a peaceful and mutually 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.

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. In contrast, mediation involves both parties being encouraged to put forward their claims and concerns, suggest solutions, and discuss proposed terms and conditions. This allows the parties to play a key role in, and be an integral part of, the dispute-settling process – rather than be observers. Moreover, 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 actively participated in making. 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.

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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 as the parties should be able to come to a mutual solution

Consensual forms of dispute resolution are less costly to all the parties. Some of the costs associated with the supervision and enforcement of parties' obligations are also reduced, as parties are more likely to comply with an agreement that they negotiated.

Under the *Fair Work Act 2009* (Cth), when a dispute first arises, parties are to follow the dispute resolution procedures as outlined in their award or agreement. The initial discussion should usually be between the employer and employees within the workplace.

Bodies that may be involved if a dispute cannot be resolved include:

- the Fair Work Commission
- the Fair Work Ombudsman
- the New South Wales Industrial Relations Commission.

Some of these bodies have both judicial and administrative functions. They will be looked at in the next section.

Review 15.9

Explain why there is an emphasis on consensual forms of dispute resolution rather than arbitration.



Figure 15.8 Rugby player Israel Folau before his conciliation meeting with Rugby Australia at the Fair Work Commission in 2019. The Fair Work Commission is an independent body that has a wide range of powers related to industrial matters.

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 who do not comply will face legal consequences. Courts provide certainty by establishing legal principles and clarifying legal questions. Courts also identify and resolve 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.

Fair Work Commission

The FWC is the federal industrial relations tribunal, and has a wide range of judicial and administrative powers. It can resolve disputes including those arising in the course of enterprise bargaining and industrial action as well as adjudicating matters involving breaches of the law.

Parties to a dispute may take the matter to the FWC. The role of the FWC is in each case determined by the dispute resolution procedures in the relevant agreement or award. Generally, a FWC representative first discusses the issues in dispute with both parties and encourages them to come to a consensual agreement through mediation or conciliation; the representative may also make a recommendation. The FWC can also assist with disputes arising under the general protections provisions of the *Fair Work Act 2009* (Cth) and with disputes arising during a bargaining process.

Federal Court and Federal Circuit Court

The Industrial Relations Court of Australia was established in 1993 as a superior court that was equal in status to the Federal Court and the Family Court. The *Workplace Relations Act 1996* (Cth) transferred the jurisdiction of the Industrial Relations Court to the Federal Court of Australia. The Industrial Relations Court continued to exist as a court administered by the Federal Court until 2006.

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The *Fair Work Act 2009* (Cth) created a Fair Work Division of the Federal Magistrates Court (now called the 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 the FWC to cease the action, the employer may take the matter directly to the Federal Circuit Court.

The *Fair Work Act 2009* (Cth) also provides for certain matters to be heard as small claims matters (not more than $100 000) in the Federal Circuit Court (*Fair Work Act 2009* (Cth) 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 the court can investigate a matter as it sees fit. This 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 NSW IRC. It has the same status as the Supreme Court of New South Wales, and it has an appellate jurisdiction (that is, it can hear appeals of decisions of lower courts on industrial matters). The Industrial Court is the only court that can arbitrate industrial disputes. The types of matters the Industrial Court hears include:

- unfair contracts claims
- offences under the *Industrial Relations Act 1996* (NSW)
- breaches of awards and agreements, including underpayment of entitlements
- superannuation appeals
- unfair dismissal claims
- criminal prosecution of workplace health and safety offences under the *Work Health and Safety Act 2011* (NSW).

Government organisations

NSW Industrial Relations Commission

The NSW IRC investigates alleged breaches of state industrial legislation, awards and enterprise agreements. First, the NSW IRC orders a compulsory conference between the parties, then conciliation. The NSW IRC only uses arbitration to deal with an industrial dispute if conciliation is unsuccessful. The NSW IRC's orders are binding.

The role of the NSW IRC is not limited to hearing disputes. It also establishes employment conditions and wages by making industrial awards and approves enterprise agreements for employees in the state system.

In its administrative role, the NSW 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 NSW 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 NSW 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.



Research 15.2

Go to the website of the New South Wales Industrial Relations Commission (NSW IRC), and answer the following questions.

1. Identify the role and function of the NSW IRC.
2. Investigate at least one of the NSW IRC's recent decisions (follow the Decisions link to NSW Caselaw). Write a summary about who was involved, why they were involved and the outcome.

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Fair Work Commission

The judicial functions of the FWC (discussed on page 628) are just one part of its broader role of overseeing the federal industrial relations system. The FWC also 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 'better off overall' 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.



Review 15.10

1 Briefly outline the role of courts and tribunals in governing industrial relations.
2 Explain the judicial role of the Fair Work Commission and the New South Wales Industrial Relations Commission and how they act to protect employee entitlements.

Fair Work Ombudsman

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 *Fair Work Act 2009* (Cth), awards, agreements and orders. The FWO does this by providing education, advice and assistance to employees, employers, **outworkers** and registered organisations of employees and of employers. The FWO publishes information about 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.

The FWO has jurisdiction to deal with complaints about pay and entitlements, employers breaching the law, and discrimination. The person making the complaint must be covered by the national system. The FWO is supported by Fair Work Inspectors who investigate complaints by fact-finding, then assisting with voluntary resolution and then, where necessary, proceeding to a full investigation and mediation. If an investigation reveals that a party has broken the law, an 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 FWO may decide 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 FWO are not criminal investigations, and evidence presented by the FWO to the DPP cannot be used in any criminal action. The DPP would have to undertake its own criminal investigations before bringing a criminal action.

The FWO can represent employees or outworkers in proceedings before a court or the FWC.

Legal Links



Search online for media releases about current workplace investigations by Fair Work Inspectors.



Research 15.3

Go to the 'Minimum wages' page of the Fair Work Ombudsman's (FWO) website (https://cambridge.edu.au/redirect/10515), then complete the following tasks and summarise your findings.

1 Investigate the national minimum wage orders.
2 Investigate how the FWO can help all employees and particularly young employees starting work for the first time.



Review 15.11

Create a table like the one below and summarise the powers and functions of the various federal and state bodies that can help parties to settle industrial disputes.

Body	Powers	Functions and role

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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 (for example, the Electrical Trades Union). Other unions represent a broad range of employees within diverse workplaces. For example, the Construction, Forestry, Mining and Energy Union represents people working in the building, timber, mining and energy production industries. The Australian Workers Union was formed to represent the interests of shearers and miners, but later expanded into manufacturing and today also covers employees in aviation, food processing and retail areas.

Unions may act together in pursuit of a common goal. The *NSW State Wage Case of 2009* (NSWIRComm 120) is one example. In this case, Unions NSW applied to the NSW 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.

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 on the government to reform legislation and policy. The ACTU continues to:

- lobby for better parental leave for both fathers and mothers
- prioritise superannuation and ensure that employee contributions go to funds that have low fees, are non-profit and deliver good returns
- campaign for increased protection for overseas workers employed under temporary work visas (457 visas).



Figure 15.9 President of the Australian Council of Trade Unions (ACTU) Michele O'Neil at a protest in Melbourne in 2019. The ACTU has been influential in campaigns to further the rights of workers within Australia.

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 and Master Builders Australia.

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 than an organised workplace

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

Non-government organisations

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

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these issues. Some NGOs may undertake political campaigns to pressure the government.

An NGO may have been established by a 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

The Australian Human Rights Commission is an independent statutory organisation established in 1986 to act as a human rights 'watchdog'. It administers federal anti-discrimination statutes – the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *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 Australian Human Rights Commission 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 non-government organisations

Safe Work Australia is an independent statutory body that promotes safer workplaces and better workplace health and safety.

The Human Rights Council of Australia is a private organisation that monitors and publicises the performance of governments as well as providing 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 is a United Nations agency that encourages member nations to undertake common action to protect workers' rights around the world. It drafts and oversees international labour standards and promotes compliance with these standards.

Legal Links

For more information about the work of Safe Work Australia, visit the organisation's website.

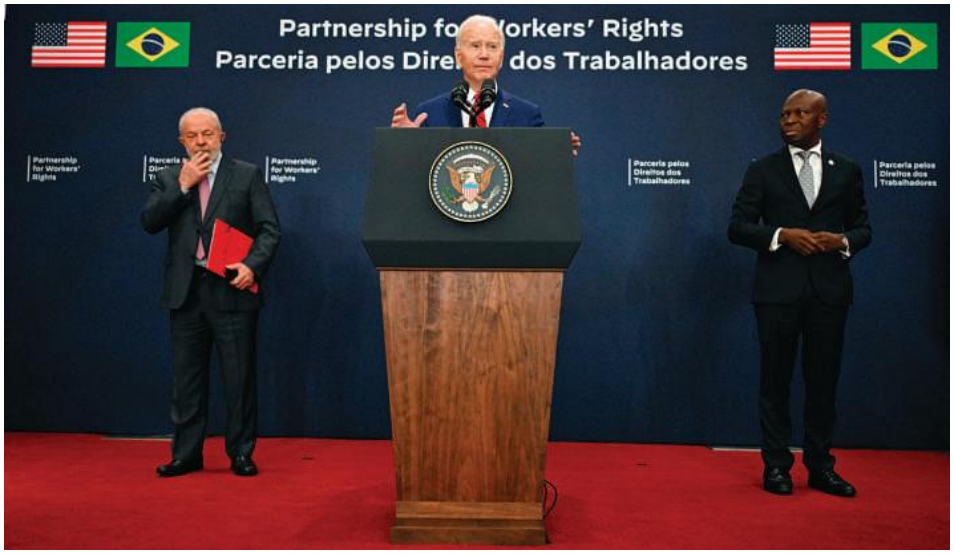


Figure 15.10 US President Joe Biden (centre), with International Labor Organization Director General Gilbert Houngbo (right), at a launch for the Partnership for Workers' Rights in 2023.

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The internet

The use of the internet as a method of communication and a source of information means 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 about their hours of work and workplace conditions, and have used the information as the basis for test cases. The NSW IRC and the FWC have also effectively used the internet to inform employees and employers about their rights and obligations under workplace law, and to provide additional support services.

However, use of the internet within the workplace has 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 do not monitor email and internet traffic, they may be at risk. In the case of **sexual harassment**, if an employer has not taken reasonable steps to prevent offensive material being distributed online, they may be liable for sexual harassment. A second issue is the growing number of employers who regularly check employees' and prospective employees' social media, and how this information can influence the employee–employer relationship.

Employees using the internet at work for private correspondence and web browsing may not be aware that their activity might 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.

The use of online communication for purposes related to trade union aims has been addressed in at least one Federal Court case. In *Australian Municipal, Administrative, Clerical & 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.



Figure 15.11 The use of the internet within the workplace has given rise to various issues, including the extent to which an employer can and should be allowed to monitor employees' internet use.

sexual harassment unwelcome and uninvited behaviour of a sexual nature, which is likely to intimidate, humiliate or offend the person it is directed towards, including witnessing or being exposed to this type of behaviour in their work environment or culture

Review 15.12

1. Briefly outline the roles played by government organisations, unions, industry groups and non-government organisations in industrial relations.
2. Discuss the role the media can play in employee relations.
3. Discuss whether employers should be able to monitor their employees' social media activities.
4. Evaluate if employers have the right to penalise employees for what they publish on the internet.

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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 National Employment Standards 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 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.

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 when employees retire, they have adequate funds to support them. The scheme relies on employers contributing sums equivalent to a percentage of an employee's annual salary to a fund where the money is preserved (that is, it cannot be touched by either the employer or the employee) until the employee retires and reaches 'preservation age' (this is determined by the employee's year of birth). An employee can make personal contributions to their superannuation fund; these contributions can be accessed before retirement but would be subject to tax in this case.

15.3 Contemporary issue: Discrimination

About the issue

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

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 International Labour Organization 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 International Labour Organization's Constitution states that its general intention is to eradicate working conditions that 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.

Legal responses

The *Anti-Discrimination Act 1977* (NSW) initially prohibited discrimination only on the grounds of race, gender and marital status. Over subsequent years, additional grounds have been added and the Act has been modified. Although the *Anti-Discrimination Act 1977* (NSW) has successfully changed community attitudes and behaviour, the NSW IRC still argued that the Act needed to be extended to include new grounds for discrimination in order to remain relevant and up to date. One change has been the prohibition of discrimination against an individual who is the carer of another person (for example, a child, an adult with a disability or a member of their immediate family). Another area of law reform is the removal of age barriers.

However, while it is illegal to sexually harass a volunteer during their voluntary work, volunteers may not enjoy the same protection under the *Anti-Discrimination Act 1977* (NSW) as they are not

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Table 15.1 Discrimination laws

Title of Act	Act year	Jurisdiction
Racial Discrimination Act	1975	Commonwealth
Anti-Discrimination Act	1977	NSW
Sex Discrimination Act	1984	Commonwealth
Australian Human Rights Commission Act	1986	Commonwealth
Disability Discrimination Act	1992	Commonwealth
Industrial Relations Act	1996	NSW
Age Discrimination Act	2004	Commonwealth
Fair Work Act	2009	Commonwealth
Workplace Gender Equality Act	2012	Commonwealth

considered to be 'paid employees'. This area needs to be reviewed.

Discrimination is illegal in New South Wales under the state and federal Acts listed in Table 15.1. The Acts cover the different grounds on which people are discriminated against. In the workplace, employers must treat all employees, and anyone applying for a job, fairly – that is, on the basis of their individual merit, skills and suitability for the job, not on the basis of irrelevant personal characteristics.

Unfortunately, the Acts in Table 15.1 do not make discrimination illegal. Rather, they provide that workplaces must develop appropriate programs to ensure the absence of discrimination and to take positive steps to promote equal employment opportunities 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.

In 2021, after claims of ongoing harassment in Parliament House, the Human Rights Commission was tasked with carrying out an inquiry into this issue. The Australian Human Rights Commission launched its findings in the *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* on 30 November 2021, which found many issues around the treatment of female employees.

On 8 February 2022, a joint Statement of Acknowledgment was delivered in the Australian Parliament by the Prime Minister and reiterated by the Leader of the Opposition. This statement acknowledged an unacceptable history of workplace bullying, sexual harassment and sexual assault in Commonwealth Parliamentary Workplaces.

The report and statement can be found on the Australian Human Rights Commission website.

In 2021, the Religious Discrimination Bill was debated in federal parliament, and ultimately withdrawn – the key sticking point being a clause allowing religious schools to discriminate against staff members on religious grounds if the school has a written policy on its religious position.

Let's look more closely at 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 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 LGBTQIA. The *Anti-Discrimination Act 1977* (NSW) also makes it illegal to discriminate against someone because they have a relative or associate who is gay, lesbian or bisexual.

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Figure 15.12 It is illegal to discriminate on the basis of age and to force an employee to retire because of their age.

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 because they are 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 due to the nature of the employment; for example, judges and aircraft pilots.

Equal employment opportunity

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 employment opportunity legislation was 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). Part 9A of the *Anti-Discrimination Act 1977* (NSW) (which dealt with equal opportunity in government employment) was repealed by the *Government Sector Employment Act 2013* (NSW). The *Equal Opportunity for Women in the Workplace Act 1999* (Cth) was renamed the *Workplace Gender Equality Act 2012* (Cth) by the *Equal Opportunity for Women in the Workplace Amendment Act 2012* (Cth). The *Workplace Gender Equality Act 2012* (Cth) includes all employees in the workplace. This Act specifically focuses on equal remuneration for women and men, and aims to improve women's ability to participate in the workplace. This Act also recognises that the caring responsibilities of both men and women are central to gender equality 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.

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 lower than men. In 2013, the gender pay gap was 17.1 per cent, with men earning an average of $1532 per week and women earning an average of $1270. In 2014, the gender pay gap worsened. The average wage for men was $1587 per week and the average wage for women was $1289; this is a pay gap of 18.1 per cent.

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In November 2023, women earned an average of $1744.80 per week and men earned an average of $1982.80 per week (figures sourced from the *Australia's Gender Pay Gap Statistics* report, published by the Australian Government's Workplace Gender Equality Agency, November 2023).

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 that society considers to be 'male'. However, gender pay inequity is also found within the same industry. In February 2024, the Workplace Gender Equality Agency's report found that the highest gender pay gap could be found in Construction (31.8%) and Financial and Insurance Services (26.1%). The gender pay gap was the smallest in Accommodation and Food Services (1.9%).

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 per cent, but that women in 2015 were paid on average 18.8 per cent 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. In a 2021 report, the ANZ Bank reported that the female participation rate was at 58.5 per cent, but that wage disparities still existed. It is recommended that students access the latest discussion paper to see the most current data.

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 and the Federation of Ethnic Communities' Councils of Australia are examples. Each seeks to represent the interests of disadvantaged people and



Figure 15.13 Speakers stand in front of a banner saying 'Close the wage gap' at an Equal Pay Day demonstration in Berlin in 2023. 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.

modify government policy to support social justice issues. National Disability Services, the peak body for non-profit organisations that provide services to people with a disability 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.

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.

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Later Australia became a party to several United Nations conventions, including the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965). As such, Australia was obliged to create domestic legislation in line with these conventions.

Legislatures have responded to a number of recommendations that have 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 childcare 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 2009* (Cth) (s 65) and enterprise agreements. Under the National Employment Standards and other work arrangements, employees can negotiate with their employer for 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 Pricewaterhouse Coopers* (2014)), Christina Rich claimed that the 'boys' club culture' that existed within the accounting firm PricewaterhouseCoopers limited her promotional prospects, undervalued her work and openly discriminated against women. Ms Rich and PricewaterhouseCoopers 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 per cent of working women and 16 per cent 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 2004* (Cth) to create an Age Discrimination Commissioner, and the *Sex Discrimination Act 1984* (Cth) to strengthen the rights of employees in the areas of family responsibilities and 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* [2014] FCCA (2 April 2014), a worker who had been terminated from his employment because he had reached the age of 65 successfully sued his employer.

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Review 15.13

1 Define 'discrimination'.
2 There are many types of discrimination. Describe the different forms of discrimination. Outline how the law protects employees from discrimination.
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 Identify some forms of sexual harassment. Evaluate why it remains a major issue within the workplace.

15.4 Contemporary issue: Safety

About the issue

A safe workplace includes safe equipment, safe work systems and appropriate training. 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 is very different from what is safe on a naval destroyer carrying nuclear weapons.

Safety in the workplace is critically important. According to Safe Work Australia, in ten years (2013–2022), 1885 people died at work in Australia (see Table 15.2), with the greatest number being from vehicle incidents: in 2022, this represented 42 per cent of fatalities.



Figure 15.14 Transport workers stage a protest at Sydney Airport in 2019 to highlight low wages, lack of full-time secure jobs and safety issues that workers face. When workers are injured, there is an enormous loss of production and profit, as well as the financial and emotional cost for the employee.

When considering serious injuries at work, preliminary data from 2021–2022 shows over 127 800 accepted workers' compensation claims that involved at least one week absence from work. As can be seen in Table 15.3 on the following page, there has been a marginal overall increase (3000 or 2.4 per cent) since 2011–2012 to 2020–2021 there has been a marginal increase (2.4 per cent) in the number of serious claims, although Safe Work Australia notes that if account is taken of changes in hours worked, the frequency of claims had fallen 9.9 per cent in 2020–2021.

Table 15.2 Deaths resulting from work-related traumatic injury

Year	Number of worker fatalities
2013	201
2014	197
2015	212
2016	187
2017	190
2018	144
2019	191
2020	196
2021	172
2022	195

Source: Safe Work Australia Interactive data, Work-related fatalities (https://data.safeworkaustralia.gov.au/interactive-data/topic/work-related-fatalities)

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Table 15.3 Serious injuries at work: accepted workers' compensation claims that involved a week or more off work

Year	Number of claims
2011–2012	124 756
2012–2013	116 265
2013–2014	109 938
2014–2015	107 224
2015–2016	103 162
2016–2017	104 961
2017–2018	107 962
2018–2019	114 835
2019–2020	119 361
2020–2021	129 143
2021–2022 (p)	127 756

NOTES: 2021–2022 data is preliminary, subject to revision as further claims are finalised. In addition, the ABS has noted that the COVID-19 pandemic's impact on economic activity may have affected the number of work-related injuries.

Source: Safe Work Australia Interactive data, Workers' compensation (https://data.safeworkaustralia.gov.au/interactive-data/topic/workers-compensation)

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

For employers, when workers are injured, there is an enormous loss of production and profit; for workers, there is the financial cost of medical treatment and lost wages and the emotional 'costs' associated with a serious illness or injury; and for governments and communities, there are additional costs to the health and welfare system, and losses to skills and productivity. Safe Work Australia's *Our Data. Your Stories.* report for 2023 stated that without work-related injuries and illnesses, the Australian economy would be, on average, $28.6 billion larger each year.

One issue of growing concern is the increase in workers' compensation claims that are related to stress and mental health. Safe Work Australia's 2023 *Our Data. Your Stories.* report showed that showed that 9.2 per cent of all serious workers' compensation claims were for metal health conditions. This was up from 6.5 per cent in 2011–2012.

The most effective means of reducing the number of workplace deaths, injuries and illnesses is through the cooperation of governments, unions and employer associations. Although, it has been argued that a greater willingness to impose statutory **regulation** on businesses is needed.

Legal responses

The legal system has responded to workplace safety concerns through legislative reforms and through the development of the common law duty of care in relation to employer negligence.

Common law duty of care

Employee rights concerning safety are also protected under the common law. Employers have an implied duty of care to their employees to safeguard their health and safety. A breach of an employer's duty of care that results in an employee being injured in the course of performing their duties amounts to the tort of negligence. An employer is negligent if they fail 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 under the common law are enforceable. 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.

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).

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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 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 the employer is not liable for loss suffered. In such cases, the court needs to look at other 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) (repealed). This was replaced by the *Work Health and Safety Act 2011* (Cth). This Act contains general requirements that must be met in all places of work in New South Wales. The Act covers employees, contractors and self-employed people.

There is also associated legislation with other legal requirements about work health and safety. The legislation may be specific to an occupation, such as the *Health Practitioner Regulation National Law* (NSW). Such associated legislation 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 an 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

The statutes providing for compensation to be paid by the employer for a worker's injury or death include:

- *Workers Compensation Act 1987* (NSW)
- *Workplace Injury Management and Workers Compensation Act 1998* (NSW)
- *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (NSW)
- *Workers' Compensation (Dust Diseases) Act 1942* (NSW).

Provisions for workers' compensation apply to 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 premiums paid by an employer

In Court



***Paris v Stepney Borough Council* [1951] AC 367**

In this United Kingdom 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. Mr Paris was hammering at a rusty bolt when a shard of rust flew off and lodged in his good eye, resulting in Mr Paris becoming totally blind.

The court decided that the potential seriousness of the harm to Mr 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. Therefore, the duty owed by the employer to the individual employee must take into account the employee's circumstances.

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cover the costs of the compensation provided to an employee if they are hurt or become ill because of their job. The act set up WorkCover NSW as a statutory body to administer the scheme and also investigate and monitor work health and safety issues. Under the *State Insurance and Care Governance Act 2015* (NSW), WorkCover NSW was abolished, in order to separate insurance from workplace safety investigation. Three new entities were created, with one of these, icare, taking over the provision of workplace injury insurance. All employers are required to take out an icare policy if their annual payroll is $7500 or more. All employers must assist an injured employee to manage their injury and support the injured employee when they return to work.

codification
the spelling out of obligations in legislation

Development of statutory duties

Workplace safety in New South Wales was originally covered by individual Acts that only applied to specific industries. These included the following:

- *Employers Liability Act 1897* (NSW) – this Act gave 'workmen' who were injured in specific work situations, or who were injured 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; it excluded the services industries.

In the early 1970s, Lord Robens was tasked with inquiring into work health and safety 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 advised that workers and management should work together to meet and improve the work health and safety standards prescribed in legislation. The report also advised giving workers greater responsibility for their own safety and making employers subject to statutory duties to consult with employees about work health and safety measures. These recommendations formed the basis for legislative reform in the area of workplace safety in both the United Kingdom and in Australia.

Within a decade of the publication of the Robens Report, workplace safety in New South Wales was also scrutinised. In 1981, the NSW Government established a Commission of Inquiry into Work Health and Safety, chaired by NSW Industrial Magistrate 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 duties and rights for employers and employees. In addition, the Williams Report stated that there had to be greater cooperation between employers and employees to improve workplace safety. The report introduced the notion of individual workplace safety committees. More importantly, the report recognised that workplace safety was the responsibility not just of the employer but of everyone within the workplace.

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 NSW Parliament passed the *Occupational Health and Safety Act 1983* (NSW) (now repealed), 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) (repealed).

The *Occupational Health and Safety Act 2000* (NSW) (repealed) introduced employees' obligations to take reasonable care of 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 *Work Health and Safety Act 2011* (Cth) created 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 *Work Health and Safety Act 2011* (Cth) makes it mandatory for individuals and employers to consult

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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 to participate in decisions about appropriate measures to be taken. Failure to consult can result in fines of $28 000 per individual or $140 000 for a body corporate.

The committee can investigate any matter that may be a risk to health and safety in the workplace. A work health and safety entry permit holder has the legal authority to enter a workplace to investigate a suspected contravention of the *Work Health and Safety Act 2011* (Cth). These permit holders 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 $70 000 (individual) or $350 000 (body corporate) (see s 193). Inspectors from SafeWork NSW, one of the bodies that replaced WorkCover in 2015, can also visit workplaces and are authorised to investigate a wide range of safety related activities. Inspectors' 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 work health and safety campaign 'Speak Up' aims to educate employees about health and safety issues; to better inform workers about their rights, the role of the union in representing them and the role of work health and safety representatives; and to 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 work health and safety and workers' compensation throughout Australia. It advises the government about work health and safety issues. Safe Work Australia drafted the Model Work Health and Safety Act in an attempt to 'harmonise' work, health and safety legislation in Australia. To date, not all states and territories have enacted the Act, and work health and safety legislation remains within both federal and state jurisdictions.

Responsiveness of the legal system

The introduction of reforms to work health and safety 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 work health and safety laws to satisfy the community's expectations that businesses and individuals responsible for causing injuries and or deaths in the workplace will be prosecuted and that these prosecutions will act as a deterrent. In response to these expectations, the *Work Health and Safety Act 2011* (Cth) sets out a wide variety of penalties that include corporate and individual fines, terms of imprisonment, and an 'adverse publicity order' that 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 that perhaps works as a deterrent.



Video 15.1 The role of a SafeWork inspector (02:57)

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, on the importance of self-regulation and the need to change workplace culture to one that accepts that safety in the workplace is everyone's responsibility has been perhaps the greatest achievement of the *Work Health and Safety Act 2011* (Cth).

However, sometimes the legal response is inadequate in protecting victims and their rights. While the legal system has acted to make companies more accountable for damages to employees in the course of their employment, in New South Wales there have been very few prosecutions for

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safety breaches. There have also been very few prosecutions that have resulted in the maximum penalties being imposed: $1 500 000 (individuals) and $15 million (companies) (see s 31).

Also, while other states (such as Queensland and the Australian Capital Territory) have introduced industrial manslaughter laws to use against grossly negligent employers, New South Wales is yet to go down this road. However, in October 2023 the New South Wales Government announced it would introduce an industrial manslaughter offence within the *Work Health and Safety Act 2011* (NSW) (WHS Act), with the intention of introducing a bill to parliament in the first half of 2024. This would not change employer safety requirements, but the importance of taking a proactive approach to safety would be emphasised by the significant penalties that could follow a workplace death.

Further information about prosecutions can be found at the SafeWork NSW website.

In response to the increasing number of asbestos victims, court claims and growing public pressure, the NSW Government enacted the *James Hardie (Civil Penalty Compensation Release) Act 2005* (NSW). The Act required Hardie to establish a compensation fund that 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. The Act also included provisions to stop Hardie from restructuring its operations to distance itself from its manufacturing and mining divisions, thereby avoiding liability for the sickness of its previous employees.

Unfortunately, the *James Hardie (Civil Penalty Compensation Release) Act 2005* (NSW) failed to properly protect victims' rights. James 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 per cent of its operating cash flow into the ACIF to fund future compensation pay-outs to asbestos victims. To date, James Hardie has contributed $1.055 billion to the ACIF. Current compensation claims now exceed $2 billion. Despite intense media coverage, legal battles and government intervention, the ACIF has been unable to adequately compensate asbestos victims.

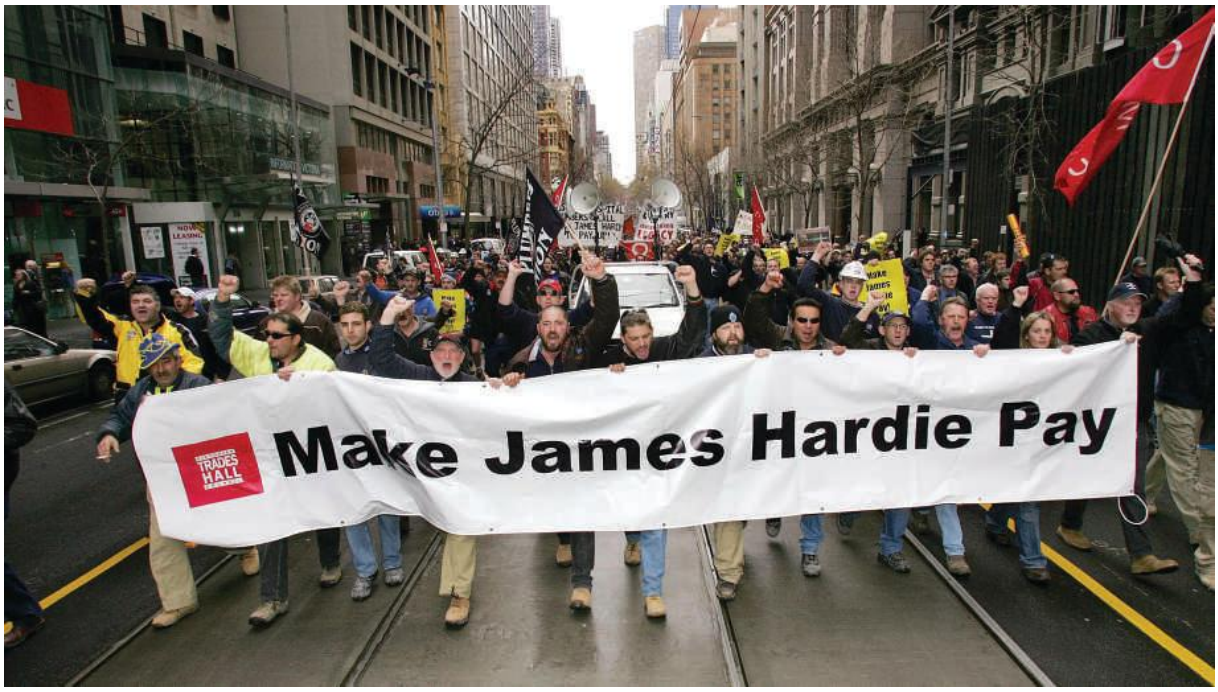


Figure 15.15 A Melbourne protest on 15 September 2004 calling for James Hardie Industries to honour its responsibilities towards victims who contracted asbestos-related diseases.

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Case Study



COVID-19 and workplace health and safety

With the onslaught of COVID-19 in early 2020, ongoing restrictions around social distancing meant that more people started working from home. While this had become the trend in some industries and job types, it now became a matter of necessity for most, except those considered to be essential workers. This had an impact on the workplace health and safety of employees as they became responsible for their own working space, and health, safety and wellbeing in this home office space. Many workers did not have the correct ergonomic furniture to deal with the demands of their work, and this has meant an increase in back issues and repetitive strain injuries.

In September 2021, the Productivity Commission Australia released a research paper titled *Working from home*. It set out the trends in this area, but also highlighted the problems that can arise and the responsibilities of employers towards employees who work from home.

The report highlighted key risks of musculoskeletal damage arising from inappropriate workstation furniture or, sometimes, being less mobile; as well as mental ill-health issues arising from social isolation (because of a reduction in face-to-face contact with co-workers) and blurred lines between work and leisure. However, at this point in time, there is limited data on working from home health problems. The report sets out some things that can be done to reduce these issues with an emphasis on collaboration between employer and employee. The paper did also call for government action, stating 'governments need to monitor regulations to ensure they are safe and fair as well as flexible and efficient, and continue to reflect the reality of many people's daily work'.

Many employees have continued to work from home even with the diminished threat of COVID-19. government organisations such as Comcare and Safe Work Australia have published guides for employers and employees so that they can be aware of, and respond to, their workplace, health and safety responsibilities in these situations.

Review 15.14



1. Describe, in detail, what is meant by safety in the workplace. Use examples to illustrate your answer.
2. Outline 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.
6. During the COVID-19 pandemic many people began working from home, and numbers are still higher than in pre-pandemic times.
   a. Discuss the issues that arise from this trend.
   b. Identify the legal and non-legal solutions that can be used to address these issues.

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15.5 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. Termination can occur in a number of ways, including:

- 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 their contract of employment and could be sued by the employer.

'Constructive dismissal' is when a worker resigns because conditions at work leave them no alternative but to do so. Such conditions may include the employer's conduct. 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

Retirement

A person retires when they voluntarily leave a job, usually due to their age or health issues. The Australian Government has started to encourage individuals to continue working by removing the statutory retirement age for many areas of employment. However, some areas of employment still have mandatory retirement ages; for example, judges (70 years of age) and aircraft pilots (65 years of age). Many Australians 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 investigate a dismissal, it must take into account whether the employer had a valid reason that was related to the employee's ability or behaviour, including work health and safety 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 called 'summary dismissal' or 'instant dismissal'. Under common law, an employer can summarily dismiss an employee for any of the following reasons:

- 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 before the employee can be dismissed varies according to the usual practice of the employer, and the seriousness of the conduct.

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Figure 15.16 If a dismissal is harsh, unjust or unreasonable, the employee can file a claim of unfair dismissal with the Fair Work Commission.

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 employee. The counselling should include an explanation of what is expected of the employee, and assistance in the form of retraining or additional training.

Under section 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 has 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 NSW 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 the dismissal of an employee on the following grounds:

- the employee was temporarily absent from work due to certain illnesses or injuries
- the employee is a member of a trade union or participates in union activities
- the employee is not a member of a trade union
- the employee acts as, or is seeking office as, an employee representative
- the employee has filed a complaint or action against their employer that alleges the employer has violated the law
- the employee's race, gender, sexual orientation, age, disability, marital status, carer's responsibilities, pregnancy, religion, political opinion or nation of origin
- the employee is absent from work due to being on parental or maternity leave
- the employee is temporarily absent from work for the purpose of voluntary emergency service.

If a private conference between an employer and employee, initiated by the FWC, is unsuccessful in resolving the matter, the employee can apply to the FWO or the Federal Court.

In Court

***Suzie Cheikho v Insurance Australia Group Services Limited* [2023] FWC 1792**

Suzie Cheikho, who had been working from home, appealed to the FWO stating that she had been unfairly dismissed by the insurance company by whom she was employed. The FWO upheld the termination of employment, but in the coverage of the case it was reported that the employer had closely (and remotely) monitored the employee's work rate, including how many keystrokes she made an hour. It did raise questions about employer and employee responsibilities. It also raised issues about the media's coverage of the case and the worker's ability to find future work.

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Retrenchment

retrenchment the loss of a job because there is no longer a job for the employee to do

Retrenchment occurs when an employee loses their job because there is no longer a job for that employee to do. Redundancy is a major area of dispute, as the real reason for the loss of jobs in an economic downturn may be employers' need to reduce costs. 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 when 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. As a result, unions agitated strongly for both the state and federal governments to establish some means to protect workers' entitlements.

Today, when a company is facing bankruptcy, employee entitlements are one of the first obligations that must be protected. Employees who lost their jobs before 2012 as a result of their employers' bankruptcy may apply to the General Employee Entitlement and Redundancy Scheme for basic entitlements (such as unpaid wages, annual leave and long service leave) and up to 16 weeks' redundancy pay. Workers who have lost their jobs after 2012 due to their employers entering into liquidation or bankruptcy must apply to the Fair Entitlements Guarantee. This guarantee was created under the *Fair Entitlements Guarantee Act 2012* (Cth) and provides a 'safety net' scheme for workers who have been made redundant and establishes maximum entitlements for these workers. Under the guarantee, workers are entitled to up to 13 weeks of unpaid leave, 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.

Under the *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth), it is illegal for companies to alter corporate structures, their accounts or their procedures in a way that allows the company to avoid paying their workers' entitlements.

In 1984, the AIRC handed down a decision about redundancy. This decision is referred to as the *Termination, Change & Redundancy Case* (1984) 8 IR 34. Employers who have 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. The AIRC also decided 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 to look for another job. Employees who are over 45 years old and who have worked for the employer for two or more years can be given one week's extra notice on top of the four weeks' retrenchment notice. Providing 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 of unpaid employment entitlements. If the disputes cannot be resolved, the worker can apply to recover 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 the employee's 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. 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.

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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 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 legal system 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 for 'operational reasons'. The *Fair Work Act 2009* (Cth) abolished these provisions and introduced 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.



Figure 15.17 Under WorkChoices, people working in a business employing fewer than 100 employees could be dismissed for no reason. But the *Fair Work Act 2009* (Cth) introduced safeguards for employees of small businesses.

Review 15.15

1. List and explain the various ways in which employment can be terminated. Identify which of these ways are considered to be voluntary.
2. Under common law, an employer has the power to dismiss an employee. Outline the procedure that an employer must follow when dismissing a worker. List the grounds for dismissal.
3. Discuss whether or not an employer should have the right to summarily dismiss an employee.
4. Do you think employers should be able to remotely monitor employees who do not work in the office? If so, describe how employers should go about monitoring employees work.
5. Outline how the *Fair Entitlements Guarantee Act 2012* (Cth) protects the rights of redundant employees and assess if this is adequate protection.
6. Go to the Fair Work Commission's website and find a registered agreement from two separate industries. Compare and contrast the two agreements.

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15.6 Contemporary issue: Leave

About the issue

Leave is a fundamental right of employees and information regarding this can be found within the International Labour Organization's conventions and within United Nations treaties. Minimum leave entitlements are included in all 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, including compassionate and carer's 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 a voluntary emergency management activity, such as service with a firefighting or rescue organisation, and for jury service
- **parental (maternity, paternity and adoption) and family leave**.
- **family and domestic violence leave** – time off work for employees experiencing family and domestic violence.

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 National Employment Standards, 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.



Figure 15.18 Minimum leave entitlements are included in all modern awards and enterprise agreements and are protected under both state and federal legislation. For example, under the National Employment Standards, employees are entitled to four weeks' paid 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 before completing 10 years' service. If the employee leaves their job before taking long service leave, they receive payment for the untaken leave.

Parental leave

The National Employment Standards contains minimum parental leave provisions; this includes same-sex couples. Parental leave can be taken for up to 52 weeks (unpaid) by either parent.

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The AIRC's decision in the *Maternity Leave Test Case* (1979) 218 CAR 120 of 1979 established the right of employed mothers 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 was 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's decision in the *Family Provisions Test Case* [2005] AIRC 692 established the right of workers 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 National Employment Standards 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 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 scheme (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 $719.30 per week (as of February 2019). 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 scheme entitlement, the unused part may be transferred to another person (usually the other parent) if they meet the eligibility requirements. The PPL scheme also covers the self-employed, contractors and casual employees.

The federal government has further amended the *Paid Parental Leave Act 2010* (Cth) to clarify several issues, including paid parental leave in the case of a stillbirth or a 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 called 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 their families' economic instability after the birth of a child. The International Labour Organization's Convention 183 and the United Nations' *Convention on the Elimination of All Forms of Discrimination against Women* (1979) also promoted paid leave to help women return to the workforce after having children. 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. The ACTU had been arguing for these inclusions for many years. Industry groups had opposed elements of the ACTU case; these groups argued that the financial burden of childbirth should be with the government rather than with businesses. Industry groups also argued that it is the lack of appropriate and affordable childcare facilities, rather than a lack of paid time off work, that is the real cause of women not returning to work.

An award clause was introduced giving employees the right to ask their employers to extend the

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one year's unpaid parental leave for another 12 months or be able to return to work part-time. However, employers can refuse to extend unpaid parental leave on 'reasonable' grounds. These grounds include cost, lack of adequate replacement staff during the leave period, the effect of the leave on 'efficiency' and the effect of the leave 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 are responsible 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 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. 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 International Labour Organization's *Maternity Protection Convention* (2000), which recommended 14 weeks' paid maternity leave. The government argued that paid maternity leave should be decided on an individual basis by the employee and the employer.

From 1 July 2023, eligible employees who are the carer of a newborn or newly adopted child can receive up to 20 weeks' Parental Leave Pay, paid at the national minimum wage.

The World Health Organization recommends a minimum of 16 weeks' paid parental leave; the International Labour Organization now encourages governments to provide 18 weeks. Australia still lags behind other OECD countries. France (16–26 weeks), Germany (14 weeks) and Norway (18 weeks) provide maternity leave that is paid at 100 per cent of the employee's wage. In contrast, the rate payable in Australia is the current federal minimum weekly wage or approximately 41 per cent of the average weekly wage. As a Legal Studies student, you should keep up to date with changes in this area.

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' paid 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 then return to their previous jobs or comparable ones (see the following link: https://cambridge.edu.au/redirect/10332).



Review 15.16

1. Describe the different forms of leave.
2. Explain why leave became an important issue.
3. Discuss why the government should support working parents.
4. Evaluate whether or not employers should be expected to contribute to the Paid Parental Leave scheme.

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Chapter summary

- Workplace law regulates the relationship between employees and employers. The law ensures that workers' rights are protected and that both employees and employers comply with their obligations.
- Labour laws began to develop during the Industrial Revolution in Britain where government intervention in employment began to replace *laissez-faire* economic policies. These policies 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. Broad 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 an employee that 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 the employer's lawful directions.
- 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 Fair Work Commission (FWC) and the NSW Industrial Relations Commission (IRC) hear disputes and resolve issues through a process of negotiation and conciliation to achieve a consensual solution. These bodies also set working conditions and wages and approve enterprise agreements.
- The Fair Work Ombudsman (FWO) can investigate and enforce the *Fair Work Act 2009* (Cth), awards and agreements. The FWO also provides education, advice and assistance.
- The National Employment Standards 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 who are injured at work.
- Termination of employment can occur in a number of ways, including:
  - resignation
  - retirement
  - dismissal
  - retrenchment.
- Section 772 of the *Fair Work Act 2009* (Cth) prohibits the dismissal of an employee on certain grounds. Unlawful termination, or dismissal that is harsh, unjust or unreasonable, may be taken to the FWC.
- Protection for redundant employees is provided in both federal and state legislation.
- Minimum leave entitlements are included in all modern awards and enterprise agreements and are protected under both state and federal legislation.
- The types of leave available include:
  - annual leave
  - long service leave
  - personal leave
  - community service leave
  - parental (maternity and paternity), family and adoption leave.

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Short-answer questions

1 Discuss the reasons for the preference for consensual forms of dispute resolution rather than arbitration.
2 Compare the advantages of being employed under a contract of service rather than 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

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 in the digital version this textbook. Refer to these criteria when planning and writing your response.

1 With reference to parental leave, assess to what extent legislative changes have responded to changes in society.
2 Discuss the tension that exists between the rights of employees and the needs of Australian businesses. Evaluate how governments have addressed these competing concerns.
3 Discuss the role of trade unions and their relevance in today's workplace.
4 Explain 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, with reference to technology.

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Themes and challenges for Chapter 15 – Option 6: Workplace

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 that aim to minimise conflict within the workplace and to encourage 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 legislation emphasises employees' duty to take reasonable care for the health and safety of others in their workplace, and to participate in maintaining a safe work environment by being representatives on work health and safety 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 that must be followed before taking a matter further. It is only when discussions break down that the dispute will go to arbitration.
- The FWO can investigate complaints within the workplace and can make orders to resolve the conflict.
- The FWC and the NSW IRC have a judicial role in settling disputes. The Federal Court and the Federal Circuit 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 fines.
- To remove ambiguity and to ensure enforceability, the rights and duties of employees and employers have been clearly defined in legislation. The penalties that can be imposed for any breaches of the law are also clearly defined. For example, under the Part 5 of the *Work Health and Safety Act 2011* (Cth), an employer has a duty to consult with employees to enable them to contribute to the making of decisions affecting their health, safety and welfare at work. Employers who fail to do this face heavy fines.
- Mutual obligations and employees' active involvement in maintaining safety at work have been shown to increase compliance with work health and safety legislation.
- Inspectors under the *Work Health and Safety Act 2011* (Cth) have broad powers to enter workplaces, conduct investigations and collect evidence. Non-compliance may result in heavy fines for individuals and for the company.

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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 work health and safety laws concluded in 2010. The model laws created uniform work health and safety laws in all Australian jurisdictions. The process of review and public comment – including the publication of discussion papers and the establishment of reference groups – aimed to provide all interested parties with the opportunity to have a voice in the drafting of the laws, and to ensure that existing work health and safety laws are not undermined. During this process, the Australian Council of Trade Unions (ACTU) expressed concerns about the model laws.
- Various employer groups, including the Business Council of Australia, have criticised 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.

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 conflict with current attitudes are less likely to be effective. Individuals may engage in civil disobedience, may openly oppose 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. Legislators are 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 necessary to protect the entire community. For example, laws that make discrimination illegal protect the rights of all employees.
- The General Employee Entitlement and Redundancy Scheme was established to protect workers' entitlements in the event that their employer becomes bankrupt. This has been replaced by the Fair Entitlements Guarantee.
- The protection of individual rights regarding 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 have children.
- Well-drafted legislation clearly sets out the rights and duties of employees and employers and provides a dispute-resolution process.
- Work, health and safety laws recognise that a safe workplace is the responsibility of both employees and employers.

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The effectiveness of legal and non-legal responses in achieving justice in the workplace

- Employers' associations and 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 act to influence policy and industrial laws in the promotion of the rights of particular groups.
- Non-government organisations (NGOs) include social welfare groups such as the Salvation Army. NGOs, for example, help individuals to 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 complaints of discrimination. If the complaint cannot be resolved, the matter may go to court. While the Australian Human Rights 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 to support a complainant's case.
- The internet and easy access to computers and smart devices have encouraged organisations to create websites that educate and inform employees and employers about their rights and obligations.
- The International Labour Organization encourages member nations to undertake common action in the protection of workers' rights around the world.
- Numerous independent organisations and NGOs are involved in investigating and researching issues relating to discrimination, pay inequities and substandard conditions (for example, for outworkers). These organisations may make recommendations to government or provide policy advice to relevant government departments. However, the power of these organisations is limited. How effective they are in changing government policy is difficult to determine.

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