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Cambridge Legal Studies

Stage 6 Year 12

Fifth Edition

Paul Milgate
Daryl Le Cornu
Tim Kelly
Kate Dally
Phil Webster

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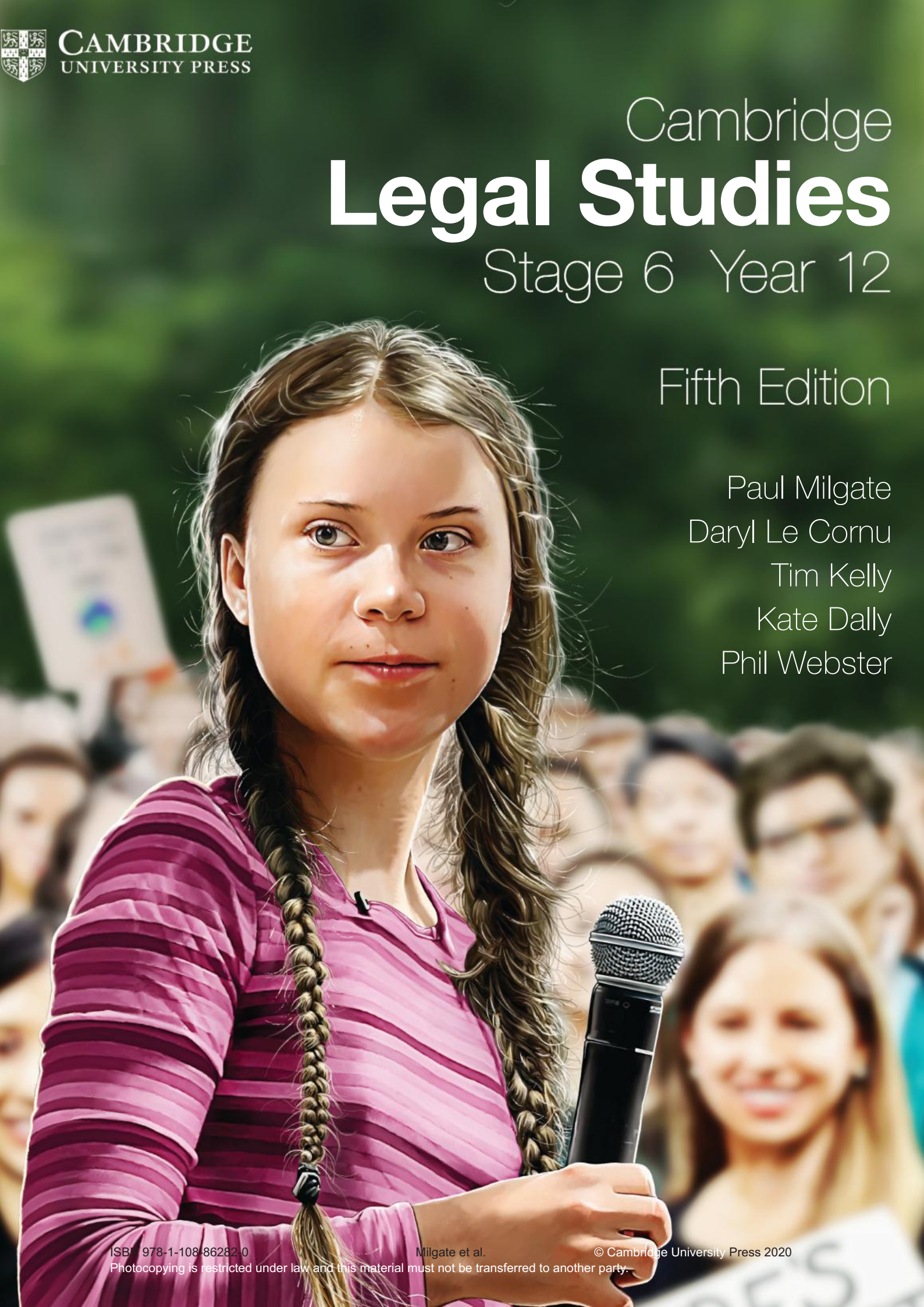

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Please be aware that this publication may contain images of Aboriginal and Torres Strait Islander people who are now deceased. Several variations of Aboriginal and Torres Strait Islander terms and spellings may also appear; no disrespect is intended. Please note that the terms 'Indigenous Australians' and 'Aboriginal and Torres Strait Islander peoples' may be used interchangeably in this publication.

Cambridge University Press acknowledges the Aboriginal and Torres Strait Islander Peoples as the traditional owners of Country throughout Australia.

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About the authors

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DipTeach, Bed, Grad Cert in Theology and Masters in Educational Leadership and is a Senior Consultant in the Directorate of the Catholic Schools Office in Lismore. He has had extensive experience in Legal Studies, having taught it since its inception, and been the principal author of the Preliminary and HSC textbooks for Edition three and four. Paul is also the author of Cambridge HSC Checkpoints Legal Studies (study guide) and has assisted over many years in the planning and running of HSC study days on the North Coast.

Dr Daryl Le Cornu

BA(Hons) DipEd PhD has many years of experience teaching Legal Studies in high schools. He has a passion for teaching about human rights, the United Nations, global governance and nuclear disarmament. Daryl has also been involved in curriculum development in New South Wales for many years. Currently, he is a History Curriculum Lecturer at the Australian Catholic University, the Education Officer for the World Citizens Association Australia and a member of the Board of ICAN Australia (International Campaign to Abolish Nuclear Weapons).

Kate Dally

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Tim Kelly

BA DipEd Dip Law obtained his BA DipEd from the University of New South Wales in 1984 and completed his Diploma in Law from the Legal Practitioners Admissions Board in 1996. He began teaching Legal Studies in 1993 at St Mary's Maitland. Since 1998 Tim has been the HSIE Coordinator at St Mary's in Casino and is currently an Education Officer for the Lismore Catholic Schools Office.

Phil Webster

BA DipEd MEd MACE is Head Teacher of HSIE at Mosman High. He has over 25 years' experience in HSIE as a teacher of Legal Studies, Society and Culture, and Business Studies, with a particular interest in the changing role of law in society. Phil is passionate about issues of human rights, indigenous affairs and justice in a rapidly changing world.

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About the cover illustrator

Jean-Michel Girard is a Québec City (Canada) based illustrator, who has been working professionally for the past thirty years for a global clientele. Although proficient in a wide variety of styles (from hyperrealism to cartoons), he has chosen to specialise in historical illustrations, being a long-time history enthusiast. Though he does not think of himself as a digital artist, he works with digital tools, transforming his computer into a genuine drawing table.

About the cover illustrations

Adored or reviled. Praised as global saviour or denounced as global pest. Classed as friend or enemy of the state. Speaker of truth or disseminator of lies. Though it may depend on where you sit on the political spectrum, one thing any mention of Julian Assange or Greta Thunberg is likely to do is provoke a reaction … and probably an opinion. Their standing on the world stage and influence on conversations around freedom of information and climate change is undeniable, transforming them into cultural icons. Their very image encapsulates an idea and a cause, sparking potential debate and discussion, and it is for this reason these controversial figures have been selected to appear on the covers.

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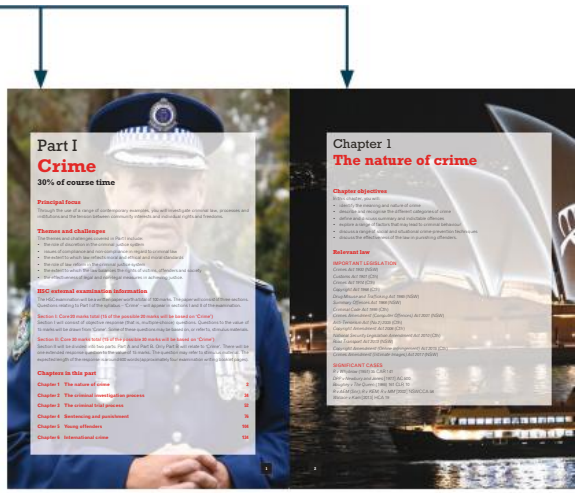
How to use this resource

Part and chapter openers

Each part and chapter of *Cambridge Legal Studies Year 12* begins with an opener that contains:

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



In Court

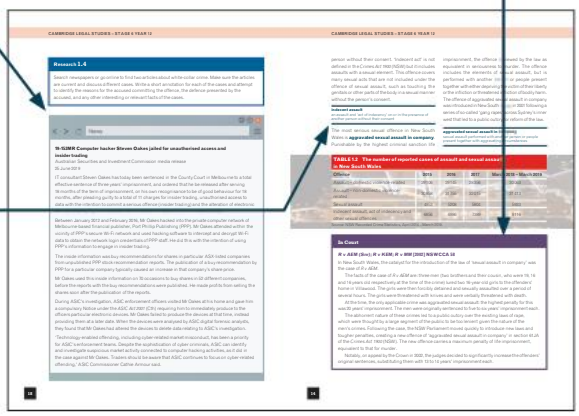
A number of relevant legal cases appear throughout the text. Each case allows you to apply your knowledge of the legal system to real-world situations. Many cases are followed by a range of questions to help you test what you've learnt.

Media articles

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

Glossary terms

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

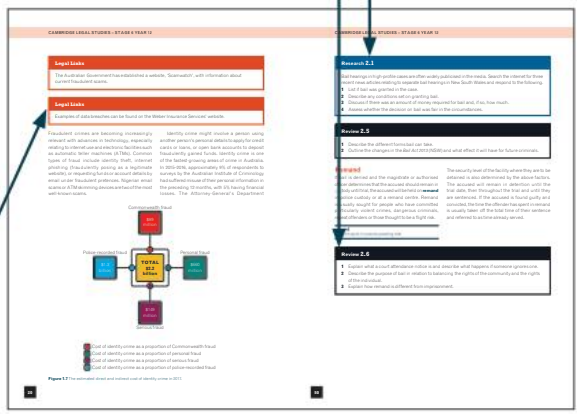


Review and research activities

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

Legal Links

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



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Legal Info

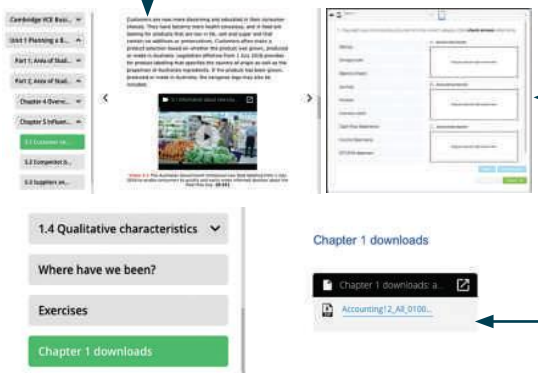
A number of relevant legal concepts are explored in order to give context to themes being explored.

Case studies

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

End-of-chapter sections

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



Video and audio

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

Interactive activities

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

Downloadable Word documents

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

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Components of Cambridge Legal Studies Year 12

The Cambridge Legal Studies Year 12 resource package consists of three components:

1 Student Book – print

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

2 Student Book – digital

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

- Downloadable **PDF textbook**
  A PDF of the print textbook, with additional digital-only content, including:
  - Chapter 13 – Option 4: Indigenous peoples.
  - Chapter 15 – Option 6: Workplace.
- Online **interactive textbook**
  An online version of the textbook has a further host of interactive features to enhance the teaching and learning experience. These include:
  - Video and audio – drag-and-drop activities – auto-marked multiple-choice quizzes – additional digital-only chapters from the PDF textbook.
  - Other extra resources on the Cambridge GO website include: – all review, research and chapter questions in electronic format – marking criteria for the extended-response questions – weblinks – additional resources.

3 Teacher Resource Package

The Teacher Resource Package contains a wide range of material to support you and your teacher with course, lesson, teaching plan, assessment and homework preparation

Statement for the Text Assessment for Learning

In "Assessment and Reporting in Legal Studies Stage 6" NESA notes that 'Assessment is an essential component of the teaching and learning cycle'. 'Assessment FOR Learning' activities provide opportunities for students to know if their current knowledge and understanding of the course work is on track. The review and research activities provide 'Assessment FOR Learning' opportunities in this text. Teachers are encouraged to discern which activities they will use with their students and the type of feedback they will provide as part of the ongoing teaching and learning cycle. This supports students to further inform the knowledge and skills they are developing throughout the course. It will also assist them to be able to respond to the 'Themes and challenges' and 'Learn to' inquiry questions in each topic.

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Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies Year 12 Fifth 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 Fifth Edition is a comprehensive resource that builds on the knowledge and skills introduced in the Year 11 course, as it thoroughly covers 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

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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, suggestion) for consideration or action

recall
present remembered ideas, facts or experiences

recommend
provide reasons in favour of

recount
retell a series of events

summarise
express the relevant details concisely

synthesise
put together various elements to make a whole

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Part I
Crime

30% of course time

Principal focus

Through the use of a range of contemporary examples, 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 moral and 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

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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.

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)

SIGNIFICANT CASES

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

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Legal oddity

In most societies, crimes are a reflection of the public morality of the time. Many punishments attempt to balance the rights of the community and those of individuals. At times, some crimes and their punishments can seem odd or unusual as they outlaw activities that are unique to a particular community or jurisdiction. The Sentencing Advisory Council of Victoria has listed a number of these oddities from Australia and around the world. A few of these include:

- it is illegal to name a pig Napoleon in France
- in San Salvador, drunk drivers can be sentenced to death
- in Thailand, it is illegal to leave your house without your underwear on.

Such 'odd' offences need to be viewed in the context of the community within which they sit to understand the meaning and nature of the crimes.

1.1 The meaning of crime

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

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

state
a government and the people it governs; a country

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

But there is no definition that tells the community what actually constitutes criminal behaviour and activity. If a person wanted to know if certain behaviour was a violation of the law, they would be none the wiser by the definitions provided. This is because a crime is any act that law-makers in a particular society have deemed to be criminal, which in itself 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 frustration for the legal system. For example, the act of murder is considered a crime throughout the world, though with varying definitions and qualifications. However, other acts, which are entirely legal in Australia, such as sex outside marriage, homosexual acts or the consumption of alcohol, are deemed crimes in 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 Prosecution), as well as any victim of the act. The criminal act is seen as an attack on the ethical and moral standards of society, so it is the responsibility of all to punish those found guilty. This is why the state (acting on behalf of society) brings criminal cases, even though it is also attempting to redress an injustice committed against a specific victim or victims.

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

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

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 some groups within our community are unhappy with these reforms and developments while others rejoice at their implementation. Criminal law is a particularly controversial area of the law because any changes will

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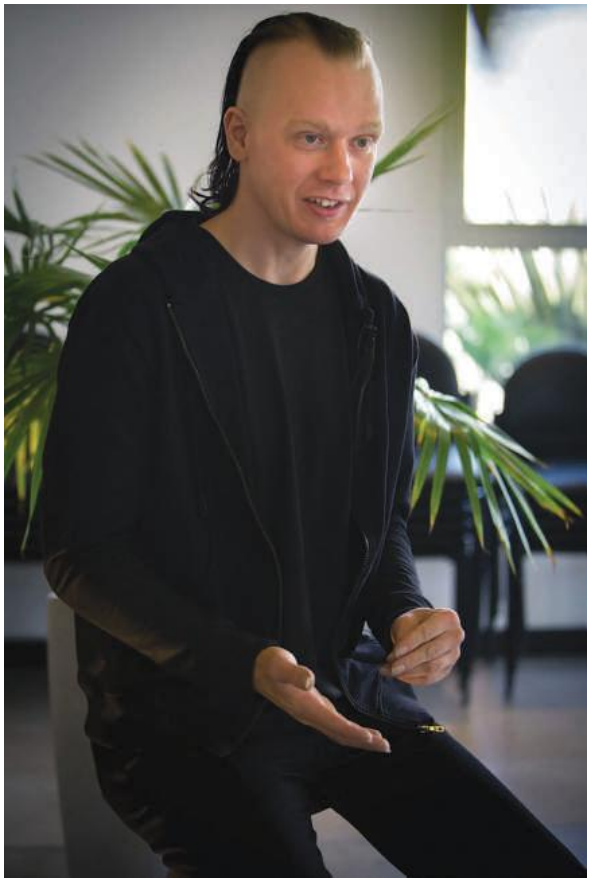

Figure 1.1 Swedish Ola Bini – who was arrested on accusations of an alleged cyber-attack and who is close to WikiLeaks founder, Julian Assange – in an interview in Quito, Ecuador, on 22 June 2019.

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 ensuring that the public have 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.

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

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

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

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

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

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

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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. 17) and the 'learn to' activities (pp. 17–19) in the syllabus as you may be tested on these in your HSC exam. You can revisit these activities a number of times to continue to build your knowledge and skills of the 'Crime' topic.

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.

Figure 1.2 Henri Van Breda sits in the dock at the Western Cape High Court in Cape Town, South Africa on 5 June 2018. Van Breda was accused of killing his two parents and brother, and maiming his sister with an axe at their luxury home in Stellenbosch on 27 January 2015.

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.

1.2 Elements of crime

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

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

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

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

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Actus reus

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

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

Mens rea

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

There is no widely accepted definition for *mens rea*. One common understanding, however, is that it is the state of mind of a defendant and their knowledge of the facts that make the conduct criminal. In other words, the defendant understood what was happening when the act was committed. Another view is to regard *mens rea* as the conscious and willing mind that was present in performing a crime. Often, if the police or Crown cannot prove that the defendant acted intentionally, fraudulently, maliciously, negligently, recklessly or willfully, the charge will not be proved. For example, when a person intentionally shoots someone, that person has probably intended to commit a criminal act and cause harm. Whether that person intended to kill or only injure the victim is something that will need to be established. Another situation is when a defendant knows what will happen if they continue certain behaviour, but recklessly carries on. For example, the shooter may have been reckless as to whether the victim might die from the injuries inflicted. In all cases, except for strict liability cases (see '1.3 Strict liability offences' on page 9), the prosecution must prove that the accused was aware (at least to some degree) that their actions would result in the likelihood of a crime being committed.

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

- **intention** – a clear, malicious or wilful intention to commit the crime. This is the highest and usually most difficult level of *mens rea* for the prosecution to prove.
- **recklessness** – an intermediate level of intent, this means that the accused was aware that their action could lead to a crime being committed, but chose to take that risk anyway. Perhaps the accused wanted to show off or was unable to make a sensible decision. In the case of recklessness the prosecution will attempt to prove that the risk was obvious to a reasonable person and although the accused knew the risk they were taking, they didn't care about the consequences.

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

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

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

After the death of Christopher Cassaniti, 18, who died at the scene of a workplace scaffolding collapse in 2019, there have been calls for the introduction of an industrial manslaughter offence for workplace deaths where there has been a gross deviation from a reasonable standard of care.

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Figure 1.3 Firemen wash away bloodstains after a security guard was shot dead in a drive-by shooting outside a popular Melbourne nightclub on 14 April 2019. The three components of *mens rea* are intention, recklessness and criminal negligence – which are all elements associated with this crime.

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.

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1.3 Strict liability offences

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

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

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 an 'honest and reasonable mistake'.

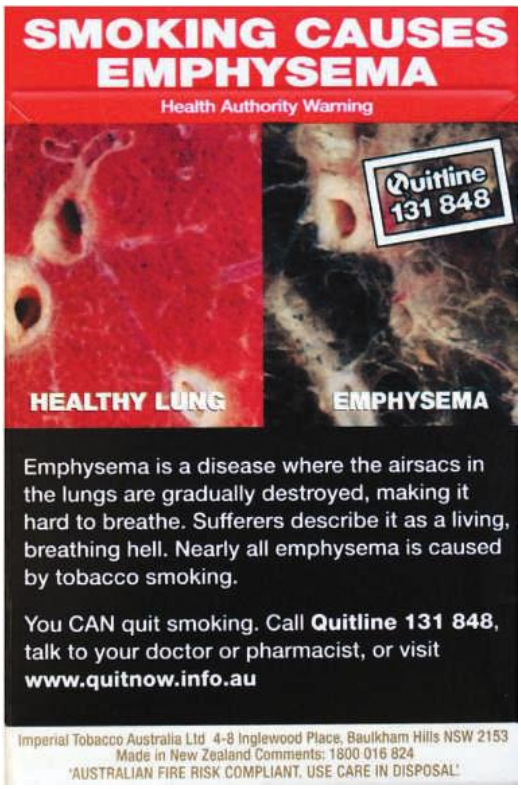

Figure 1.4 An example of a strict liability offence is selling cigarettes to people under the age of 18.

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

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

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

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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, robbery), describe the crime's *actus reus* and *mens rea*.
3 Outline two main differences between strict liability offences and other offences. Give examples of some strict liability offences.

1.5 Categories of crime

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

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.

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

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.

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trafficking
dealing or trading in something illegal, particularly drugs

Offences against the person

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

Homicide

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

homicide
the unlawful killing of a human being

Figure 1.5 Homicide is the unlawful killing of another person.

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.

murder
the deliberate killing of a person

The third of these elements is usually the hardest to prove. In *Boughey v The Queen* (1986) 161 CLR 10, a doctor strangled his wife during a sex 'game'. The court held that there was a substantial or good chance of harm, that Boughey had the knowledge and capacity to know better, and that the act constituted a 'reckless indifference to human life'. Boughey was convicted of the murder. See also *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. Television programs such as *How to Get Away with Murder*, *CSI* and *Castle* have also popularised the murder genre, giving the impression that murder is a common crime. In reality, however, the opposite is true. The murder rate per 100 000 population in New South Wales from April 2018 to March 2019 was 0.9. In contrast the domestic violence-related assaults for the same period was 382.4. According to the Australian Institute of Criminology, most murder victims are killed by a family member or friend, and up to 41% of all homicides are domestic violence-related.

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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.

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

For example, in *Burns v The Queen* [2012] HCA 35, 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' unit. The deceased had died as a result of using a prescription drug combined with the methadone provided by Burns. Subsequently, Burns was 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 but in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited 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.

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; they 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

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

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

Dangerous driving causing death

Dangerous driving occasioning death is another type of manslaughter. It occurs when a person drives in an unsafe and reckless way, such as under the influence of alcohol or a drug, or at excessive speed, and in so doing causes the death of another human being. A conviction for this crime carries a maximum

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Research 1.2

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

- 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.

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.

Assault

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

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

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

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

Sexual offences

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

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

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

Lack of consent is central to the crime of sexual assault and is defined in detail in the *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
- intimidated or coerced into the act, or
- if the accused is abusing their position of trust or authority over the victim.

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

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

Indecent assault is another type of sexual offence, where the accused commits an assault and 'act of indecency' on or in the presence of another

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

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

The most serious sexual offence in New South Wales is **aggravated sexual assault in company**. Punishable by the highest criminal sanction life imprisonment, the offence is viewed by the law as equivalent in seriousness to murder. The offence includes the elements of sexual assault, but is performed with another person or people present together with either depriving the victim of their liberty or the infliction or threatened infliction of bodily harm. The offence of aggravated sexual assault in company was introduced in New South Wales in 2001 following a series of so-called 'gang rapes' across Sydney's inner west that led to a public outcry for reform of the law.

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

TABLE 1.2 The number of reported cases of assault and sexual assault in New South Wales

Offence	2015	2016	2017	March 2018 – March 2019
Assault – domestic violence-related	29 106	29 145	28 356	30 063
Assault – non-domestic violence-related	30 858	31 755	32 015	31 413
Sexual assault	4953	5208	5804	5933
Indecent assault, act of indecency and other sexual offences	6856	6986	7389	8116

Source: NSW Recorded Crime Statistics, April 2014 – March 2019.

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.

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Legal Links

Watch the YouTube video, 'Aggravated Sexual Assault in Company', from Sydney Criminal Lawyers 2014.

Offences against the sovereign

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

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

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

Treason

Treason was a common law crime in England long before it was first codified by King Edward III in the *Statute of Treasons* in 1351. The offence was defined as acts directed against the sovereign. At that time, the sovereign was the monarch; this was later widened to include heads of state such as the Prime Minister and Governor-General. The crime of treason was imported into Australian law from the UK 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 Queen of Australia. Treason was formerly a crime punishable by death. Today, it is punishable by up to 25 years' imprisonment (New South Wales) or life imprisonment (Commonwealth).

Sedition

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

In Australia, sedition laws had fallen into disuse until 2005, when the then Commonwealth Government, under Prime Minister John Howard, introduced a range of controversial anti-terrorism laws in the *Anti-Terrorism Act (No 2) 2005* (Cth), which included a revived sedition law. The Australian laws, under 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 the *Constitution* or interfering in parliamentary elections. The offences are punishable by up to seven years' imprisonment.

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

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).

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Research 1.3

The Australian Law Reform Commission's (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 answer the following questions:

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

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

Crimes against property

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

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

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

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

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

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

TABLE 1.3 The number of reported cases of break and enter in New South Wales

Offence	2015	2016	2017	March 2018 – March 2019
Break and enter dwelling	31627	29713	27776	26045
Break and enter non-dwelling	11905	11708	10564	10091
Steal from dwelling	21465	21347	19503	18910
Steal from retail store	22077	23542	24457	25303

Source: NSW Recorded Crime Statistics April 2014 – March 2019

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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.

White-collar crime

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

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

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

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.

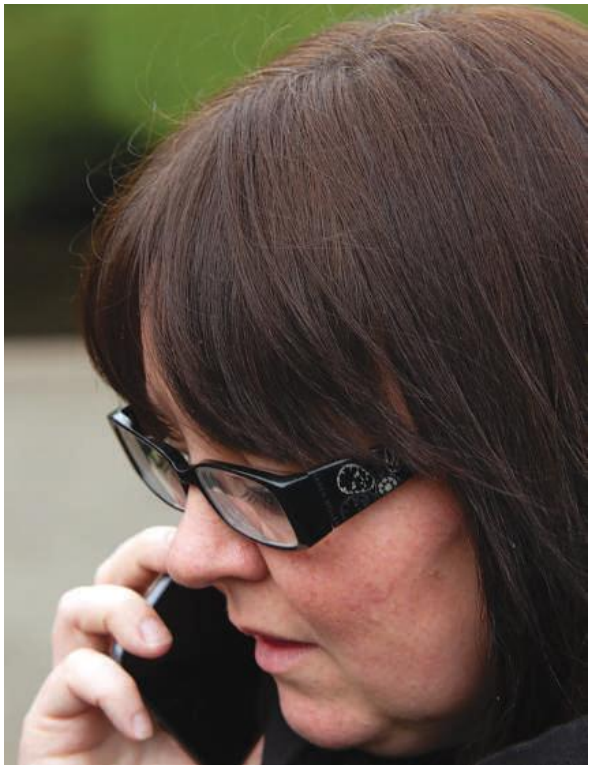

Figure 1.6 Natalie McGarry was jailed for 18 months in June 2019 by Sheriff Paul Crozier, after admitting to two charges of embezzlement. The former Scottish politician embezzled thousands of pounds from pro-independence groups, which she spent on rent, a holiday to Spain, and other lifestyle spending.

Tax evasion

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

Insider trading

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

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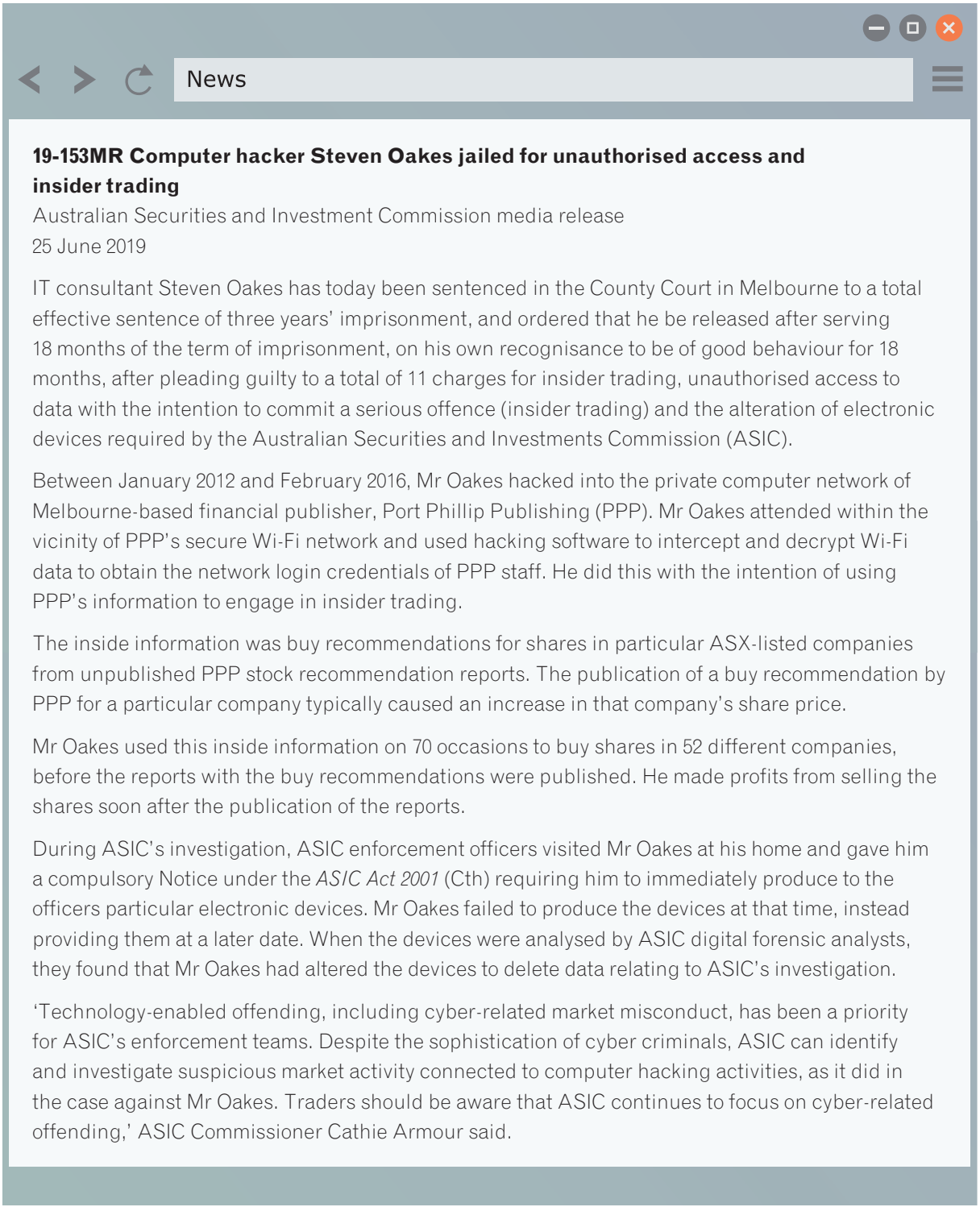
Research 1.4

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.



19-153MR Computer hacker Steven Oakes jailed for unauthorised access and insider trading

Australian Securities and Investment Commission media release
25 June 2019

IT consultant Steven Oakes has today been sentenced in the County Court in Melbourne to a total effective sentence of three years' imprisonment, and ordered that he be released after serving 18 months of the term of imprisonment, on his own recognisance to be of good behaviour for 18 months, after pleading guilty to a total of 11 charges for insider trading, unauthorised access to data with the intention to commit a serious offence (insider trading) and the alteration of electronic devices required by the Australian Securities and Investments Commission (ASIC).

Between January 2012 and February 2016, Mr Oakes hacked into the private computer network of Melbourne-based financial publisher, Port Phillip Publishing (PPP). Mr Oakes attended within the vicinity of PPP's secure Wi-Fi network and used hacking software to intercept and decrypt Wi-Fi data to obtain the network login credentials of PPP staff. He did this with the intention of using PPP's information to engage in insider trading.

The inside information was buy recommendations for shares in particular ASX-listed companies from unpublished PPP stock recommendation reports. The publication of a buy recommendation by PPP for a particular company typically caused an increase in that company's share price.

Mr Oakes used this inside information on 70 occasions to buy shares in 52 different companies, before the reports with the buy recommendations were published. He made profits from selling the shares soon after the publication of the reports.

During ASIC's investigation, ASIC enforcement officers visited Mr Oakes at his home and gave him a compulsory Notice under the *ASIC Act 2001* (Cth) requiring him to immediately produce to the officers particular electronic devices. Mr Oakes failed to produce the devices at that time, instead providing them at a later date. When the devices were analysed by ASIC digital forensic analysts, they found that Mr Oakes had altered the devices to delete data relating to ASIC's investigation.

'Technology-enabled offending, including cyber-related market misconduct, has been a priority for ASIC's enforcement teams. Despite the sophistication of cyber criminals, ASIC can identify and investigate suspicious market activity connected to computer hacking activities, as it did in the case against Mr Oakes. Traders should be aware that ASIC continues to focus on cyber-related offending,' ASIC Commissioner Cathie Armour said.

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(Continued)

In sentencing Mr Oakes, Her Honour Judge Fox said Mr Oakes was 'motivated by greed', that 'insider trading is a form of cheating; it is not a victimless crime'. Her Honour also stressed, 'if you access a secure computer network to commit a crime, you should expect to go to jail'.

The Commonwealth Director of Public Prosecutions prosecuted the matter.

BACKGROUND

The emergence of cyber-related offending is amongst the most significant concerns for financial markets and the economy at large.

ASIC continues to pursue cyber-related market offending but also encourages all entities operating in Australia's financial markets to improve their cyber resilience, to combat against these sophisticated crimes.

Given the central role that firms operating in Australia's financial markets play in our economy, the cyber resilience of these firms and participants in our financial markets is a key focus for ASIC.

ASIC's *Report 555* provides a snapshot of the cyber resilience of firms operating in Australia's financial markets. It identifies key trends from self-assessment surveys completed by financial markets firms and highlights existing good practices and areas for improvement.

ASIC uses specialist markets surveillance technologies for its supervision of markets, involving the analysis of large volumes of trading data, and real-time surveillance. These technologies enable ASIC to detect, understand and respond to misconduct such as insider trading.

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.

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.

fraud
deceitful or dishonest conduct carried out for personal gain

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Legal Links

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

Legal Links

Examples of data breaches can be found on the Weber Insurance Services' website.

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

Identity crime might involve a person using another person's personal details to apply for credit cards or loans, or open bank accounts to deposit fraudulently gained funds. Identity crime is one of the fastest-growing areas of crime in Australia. In 2015–2016, approximately 9% of respondents to surveys by the Australian Institute of Criminology had suffered misuse of their personal information in the preceding 12 months, with 5% having financial losses. The Attorney-General's Department

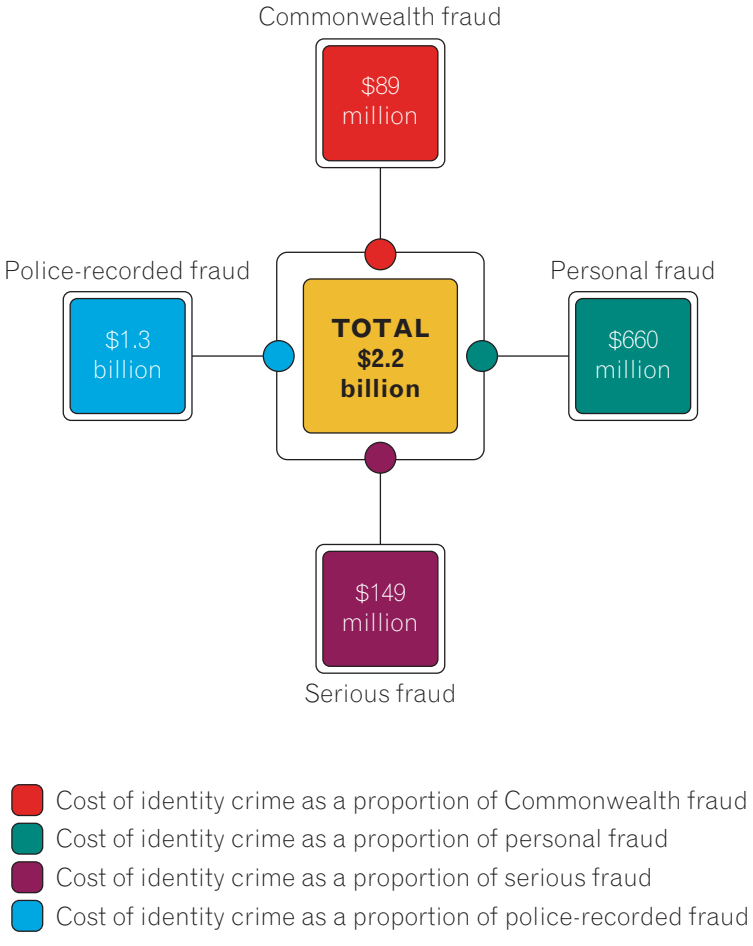

Figure 1.7 The estimated direct and indirect cost of identity crime in 2017.

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estimated that identity crime cost Australia approximately $2 billion in 2017. 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.

Drug offences

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

People have access to many different types of drugs, both legal and illegal. Legal or unrestricted drugs include paracetamol 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.

Figure 1.8 The Registrar General's Office in Sydney during the NSW Special Commission of Inquiry into the Drug 'Ice' on 7 May 2019. The inquiry investigated the nature, prevalence and impact of the drug in New South Wales.

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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 arrested in Indonesia with other members of the 'Bali Nine' drug-trafficking operation. They were put on trial in Bali and sentenced to death on 14 February 2006. Despite calls for clemency from then Prime Minister Tony Abbott, Foreign Minister Julie Bishop and tens of thousands of Australians, on 29 April 2015 Chan and Sukumaran were shot by a firing squad on the island of Nusakambangan. Malaysia also had a mandatory death penalty for anyone found guilty of carrying more than 50 grams of an illegal drug. In 2018, Australian woman Maria Exposto faced the death penalty for drug trafficking 1.5 kilograms of methamphetamine. Initially acquitted of the crime in December 2017, that finding was overturned on appeal by the prosecution: 'The only sentence under law is death by hanging', the judges found.However, after five years in jail and 18 months on death row, she won an appeal to Malaysia's highest court. Malaysia had been considering changes to its death penalty laws for certain offences. As of November 2019, Maria Exposto had been released and returned to Sydney.

Driving offences

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

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

The most common traffic offences are:

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

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

Public order offences

Public order offences relate to acts that are deemed to disturb the public order in some way, such as a disturbance in or in sight of a public area. There are a number of public order offences listed in the

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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.

Some of the most common public order offences are:

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

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

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

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

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

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

Preliminary crimes

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

Figure 1.9 A protester throws tear gas back at police officers during a demonstration in the district of Yuen Long in Hong Kong on 27 July 2019.

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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

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

Conspiracy

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

Figure 1.10 Pauline Hanson at a press conference in Brisbane on 28 March 2019. The press conference was following an undercover investigation by news organisation, Al Jazeera, which had released hidden camera footage of Hanson appearing to suggest the 1996 Port Arthur massacre, where a gunman shot and killed 35 people in Tasmania, was a government conspiracy.

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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 barbeque 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.

1.6 Summary and indictable offences

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

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

Summary offences are considered less serious offences and will usually incur lesser penalties than indictable offences, although they may still have serious consequences. They will be heard and

Figure 1.11 The Supreme Court of New South Wales.

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 was actually committed. Discuss why this might be and describe some of the possible difficulties in prosecuting an attempt or conspiracy.

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TABLE 1.4 A comparison of summary and indictable offences

Summary offence	Indictable offence
Less serious offence tried by a magistrate in the Local Court	More serious offence (such as murder or rape), tried by a judge and jury
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

sentenced in a Local Court before a magistrate and not tried in front of a jury. Penalties may range from a bond or fine to a jail sentence of up to two years, or five if a person is convicted of more than one offence. Many summary offences are listed in the *Summary Offences Act 1988* (NSW); they include regulatory offences.

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

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

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

1.7 Parties to a crime

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

- **Principal in the first degree** – this is the principal offender, or the person who actually commits the criminal act. For example, in an armed robbery this would be the person who actually pointed the weapon and took the money. The principal offender will be directly responsible for the crime being carried out and so is likely to receive the highest sentence.
- **Principal in the second degree** – this is a person who was present at the crime and assisted or encouraged the principal offender to perform the offence. For example, in the scenario above, this may be the person who

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.

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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.

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.

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.

Figure 1.12 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.

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Figure 1.13 Economic factors are one of the most substantial reasons for committing crimes in New South Wales.

Social factors

Social factors influencing a person's attitude towards crime may include their family situation or personal relationships. The social groups that people associate with will often influence a person's attitudes and views of acceptable behaviour. This 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. Poor education and lack of skills are often closely related to economic factors, with such criminals often habitually unemployed and unskilled. Even if someone is gainfully employed, menial or poorly paid jobs may

Figure 1.14 On 15 November 2014 in Brisbane, an activist mimicked front-line Ebola health workers during a protest to demand G20 action to fight the disease.

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increase their likelihood of committing an offence. In some instances, offenders may view criminal acts resulting in a financial benefit, such as larceny or robbery, as necessary.

Political factors

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

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 above play the greatest role in criminal activity.

Self-interest

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

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 do community based organisations such as Neighbourhood Watch. However, as society and crime evolve and criminals become more sophisticated, other methods of crime prevention need to be employed. Two main areas of crime prevention are situational crime prevention and social crime prevention.

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 answer the following questions:

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.

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Figure 1.15 Prime Minister Scott Morrison addressing the Australia–Israel Chamber of Commerce on 18 March 2019 in Melbourne. Grants from $50 000 to $1.5 million were provided for safety enhancements such as CCTV cameras, lighting, fencing, bollards, alarms, security systems and public address systems.

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 carparks can assist in preventing crime. More unusual tactics have included shopping centres playing classical music to deter groups of young people from congregating and causing trouble. Closed-circuit television (CCTV) cameras are another important method of crime prevention and have been installed in many retail stores and in known trouble spots throughout major cities. Although they will not always prevent crimes from being committed, people may be deterred from committing a crime when they know they are at risk of being impeded or caught. They can also provide valuable evidence in the event that an offence is committed.

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

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

Social crime prevention

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

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

The government spends millions of dollars in different areas to try to combat these social problems. For example, funding is put into educational programs in schools to raise the education levels of students deemed to be 'at risk'. Schools, TAFEs and private organisations have also formed partnerships to provide better opportunities for students who find the school setting inappropriate. Parenting

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Research 1.6

On 5 March 2019, the Australian Government announced a $328 million package to reduce violence against women and children. This is the Fourth Action Plan 2019–2022 of the National Plan to Reduce Violence against Women and their Children 2010–2022.

The package includes funding to develop Australia's first national prevention strategy to stop domestic and family violence and sexual assault, and to continue to change the attitudes and beliefs that can lead to violence. The strategy will also fund targeted prevention initiatives to reach Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities and people with disability.

The package will also assist existing services to expand their initiatives – including 1800 RESPECT, which is experiencing rapid growth – to allow more Australians to access quality support when they need it most.

The package includes further funding to improve and build on the systems responsible for keeping women and children safe, including training for health workers so they can identify and better support domestic violence victims, and the development of national standards for sexual assault responses.

Such initiatives use both situational preventative measures (for example, electronic tracking of offenders) and social preventative measures (for example, training of health and social workers) to respond to domestic violence.

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

Figure 1.16 Crowds of people protest during the 2019 'Women's Wave' march on 20 January 2019 in Sydney. The aim of the protest was in part to draw attention to violence against women.

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workshops are run for mothers and fathers who come from disadvantaged backgrounds and lack the skills to empower themselves and their children to make better life choices.

Video

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.

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.

Figure 1.17 Queensland Premier Annastacia Palaszczuk and MP Joe Kelly lay flowers during a vigil in Brisbane to remember murdered mother Hannah Clarke and her three children. Their horrific deaths once again placed the issue of domestic violence in the spotlight.

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Chapter summary

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

Multiple-choice questions

1 Selling alcohol to a minor is best described as which of the following?
   a A public order offence.
   b A strict liability offence.
   c An offence against the person.
   d An offence against the sovereign.

2 Involuntary manslaughter is best described as which of the following?
   a A person causing the death of another human being because they acted in a criminally negligent way.
   b A person taking their own life.
   c A murder reduced to manslaughter due to mitigating circumstances.
   d A person causing the death of another and they intended to do so.

3 What is larceny?
   a A white-collar crime that is on the increase.
   b Using force when stealing goods.
   c The act of breaking into a private residence to steal something.
   d The intentional taking of another person's property without their consent.

4 Writing a book calling for the violent overthrow of the government might be prosecuted as what type of offence?
   a A crime against humanity.
   b A crime against a person.
   c A crime against property.
   d A crime against the sovereign.

5 A person who helps a criminal hide out at their house might be charged as:
   a An accessory before the fact.
   b An accessory after the fact.
   c Principal in the first degree.
   d Principal in the second degree.

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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.

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 CASE

Darby v Director of Public Prosecutions [2004] NSWCA 431

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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.

For example, on 13 August 2019 a group of men chased down and performed a citizen's arrest in Sydney. The group of men armed themselves with chairs and milk crates to take on Mert Nay, a 21-year-old who had killed a woman in a unit and then had stabbed a 41-year-old woman in the back. CCTV showed Nay being confronted by a silver-haired man brandishing a chair picked up from a café. He was followed down the street by other men, holding axes, crowbars and other chairs. Nay was pinned to the ground with chairs, stools and a milk crate before police arrived to take him into custody.

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2.1 Police powers

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

Police form part of the executive arm of government and so are separate from the legislature, which makes the laws, and the courts, which make enforceable legal decisions and 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.

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

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

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

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

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

The NSW Police Force is given special legal powers under the law to enable it to carry out its duties effectively. The majority of these powers are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), but they can also be found in other legislation. Police may occasionally

Figure 2.1 Police are responsible for the prevention and detection of crime and for the maintenance of public order.

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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.

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

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

The special powers 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 be misused. For example, searching an individual's property against their wishes may be deemed necessary if there is a reasonable belief that 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.

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

The NSW Police Force also follows a specific code of behaviour, 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. 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. Two further checks on the use of police powers is the Police Integrity Commission and the NSW Ombudsman.

Figure 2.2 The majority of powers afforded to the NSW Police Force are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), but they are also in other legislation.

Increased police powers

In 2016, the NSW Government passed new laws that further restricts 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.

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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. (Extract from 'Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 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.

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.

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. 17) and the 'learn to' activities (pp. 17–19) 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.

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 42). Assess if the search powers are necessary or too broad. Explain your answer.

2.2 Reporting crime

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 – property offences such as car theft, for example. Such crimes may be reported in an attempt to recover the property or because the victims cannot claim on their insurance unless a police report is filed. Other crimes, such as domestic violence or sexual assault, more frequently go unreported. It is estimated that up to 85% of sexual assaults in Australia are not reported. This is often due to the shame and embarrassment victims feel and their

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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.

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 CCTV, rather than being in the room face-to-face with the accused, has recently been passed.

2.3 Investigating crime

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

Gathering evidence

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

charge
formal accusation of a person of committing a criminal offence

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

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

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

It is important that the evidence gathered is sufficiently relevant to the case, and is the best possible evidence available to secure a conviction in court. All evidence must be obtained in a proper and lawful manner, as required by the *Evidence Act 1995* (NSW). If it is not, it may be considered inadmissible at trial, and that may reduce the chance of conviction.

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

The types of evidence that may be gathered by police are varied, and include the oral testimony of the accused, police and witnesses, as well as physical evidence such as objects or weapons. Witness accounts will usually be recorded as statements for future reference. Documents, fingerprints, DNA samples, tape recordings, video surveillance and electronic information stored on hard drives can also be tendered as evidence in a case. The evidence may be handled by several people during the investigation, including the police who gather it initially and experts

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Figure 2.3 All evidence must be obtained in a proper and lawful manner, as required by the *Evidence Act 1995* (NSW).

who may examine it. Great care is taken to ensure that the items of evidence are handled with extreme care and not interfered with in any way.

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

Use of technology

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

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

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

Video

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

In New South Wales, police are allowed to take forensic samples such as blood or mouth swabs to test against evidence found during an investigation. A person must consent to the sample being taken – if they refuse, the police can apply to a magistrate for an order to take the sample by using reasonable force. However, there 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.

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News

Laboratory bungle ruins evidence in unsolved murder of Frankston mum

By Erin Pearson

The Sydney Morning Herald

6 August 2019

The suspected murder of a Frankston North woman, whose bloodied body was found by her five-year-old son, may never be solved after a 'laboratory bungle' ruined DNA evidence found in her home.

More than 50 people were subsequently questioned but charges have never been laid.

Coroner Simon McGregor heard that Ms O'Sullivan, who'd struggled for years with drug addiction and her mental health, may have unwittingly let the killer into her home.

Traci O'Sullivan, 42, had been living alone when she was bludgeoned and stabbed to death in the bedroom of her Timbertop Court home on 7 February 2015.

Counsel assisting, Rebecca McCourtie, told the inquest that the day Ms O'Sullivan's body was found, her young son and ex-partner, Brett Eastham, had found both security and front doors were unusually unlocked, making it likely that Ms O'Sullivan knew her attacker.

'[The boy] proceeded to run into the house and down to Ms O'Sullivan's bedroom. Brett followed. [They] entered Ms O'Sullivan's bedroom and found Ms O'Sullivan deceased,' she said.

'There was a mixture of splattered and transfer blood surrounding Ms O'Sullivan, indicating that there had been a struggle prior to her death.'

The inquest heard forensic experts later found male DNA on the mother's right ankle, inner left upper arm and clothing pocket, alongside two bedroom door handles and part of the rear fence.

In mid-2017, forensic testing found that a known associate of Ms O'Sullivan, Adam Slomczewski, 'could not be excluded' as the owner of that DNA but mistakes in the testing processes later rendered the DNA evidence unreliable.

Mr Slomczewski's brother told police that in the days after Ms O'Sullivan's death, he saw drugs in the centre console of his brother's car, which police later matched to those they found at her Frankston North home.

The 44-year-old had previously spent time behind bars and was known to purchase the drug ice and cannabis from Ms O'Sullivan.

But in late 2015, Mr Slomczewski died during a home invasion at Frankston.

'Although there is evidence to suggest that Mr Adam Slomczewski was involved, there were multiple unrelated errors in the testing processes,' Ms McCourtie said.

'Despite this investigation, no person or persons could be implicated and charged with indictable offences in connection with Ms O'Sullivan's death.'

The inquest also heard that a greenskeeper may have overheard the killing with Ms O'Sullivan's house backing onto the Peninsula Kingswood Country Golf Club.

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(Continued)

On 6 February 2015, the female greenskeeper had been working near the fence line of the two properties when she thought she heard what sounded like a dog or cat being hurt, perhaps by a snake.

At 8.30 am she proceeded to investigate, even calling out 'hello, is everything all right?' but there was no response. She later reported seeing the curtains inside the home open and close soon after.

Ms O'Sullivan had battled with her mental health and a descent into drug addiction in the years leading up to her death.

Family members said her life began to unravel around June 2010, not long after her father was moved into a nursing home.

Soon after that her relationship with her son's father soured and by August 2012 she'd begun to use ice recreationally. She then began using online dating websites.

'Ms O'Sullivan is said to have become obsessed with online dating, taking Sharleen's car out in the evening and not returning until the following morning. Her family did not know what she was doing or who she was seeing,' Ms McCourtie said.

As her mental health and drug use spiralled out of control, Ms O'Sullivan's family tried to get her help from various agencies including psychiatric wards, hospitals, counselling services and drug rehabilitation clinics.

'Every single one of them said because she is an adult she had to do it herself,' Sharleen O'Sullivan told police.

She was eventually admitted to Peninsula Health's mental health unit in 2014 but was able to continue her drug dealing from inside. Soon after she was diagnosed with drug-induced schizophrenia.

The last time anyone saw Ms O'Sullivan alive was on 5 February 2015, when she visited her mother Shirley. Ms O'Sullivan was reportedly agitated and fidgety and left the property at 4.15 pm before later being captured on CCTV visiting the IGA store just 700 metres from her home.

Mr McGregor is expected to hand down his findings later this week.

Search and seizure

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

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

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

Police may search anything in a person's 'possession or control', including, for example, a person's body, bag, clothes and possessions. Generally, police will ask for a suspect's cooperation

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Figure 2.4 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.

and ask the suspect to turn their pockets out and remove bulky clothing. Police may also 'pat down' a suspect's body to feel for any concealed items. Police can also require a person to open their mouth or shake out their hair if they have reasonable grounds to believe that the suspected object is concealed there.

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

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

In Court

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

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

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

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

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

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 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.

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Use of warrants

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

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

New South Wales police are usually required to have a valid warrant before they can enter and search any premises, residential or business, without the consent of the occupier or owner. The warrant will state the reason for the premises being searched and identify what articles are being searched for. When any premises are to be searched, the police must identify to the occupier the reason for the search and give a copy of the warrant to the occupier. Usually the occupier is present (or they can nominate a person to be present). Police may videotape the search in order to use it later in court and to guard against claims of improper procedures or the planting of evidence.

An example of a search warrant

***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.]

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An example of a search warrant (continued)

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:

a to enter the named premises
b to search for the things (if any) mentioned in this warrant
c to use any persons necessary to assist in the execution of the warrant
d to use such force as is reasonably necessary to enter the premises
e to break open any receptacle in or on the premises for the purposes of the search of the premises if it is reasonably necessary to do so
f to search any persons found in or on the premises who are reasonably suspected of having a thing mentioned in this warrant
g to arrest any persons found in or on the premises whom a police officer suspects on reasonable grounds of having committed an offence
h to seize, detain, remove from the premises or guard anything mentioned in this warrant and any other thing found by a police officer in the course of executing this warrant that the police officer believes on reasonable grounds is connected with any offence
i if the warrant is issued in relation to a child prostitution offence – to make in the premises inquiries relating to any such offence
j to disable any alarm, camera or surveillance device at the premises
k to pacify any guard dog at the premises
l to render safe any dangerous article found in or on the premises
m to operate electronic and other equipment brought to the premises or at the premises to examine a thing found at the premises
n to move a thing found at the premises to another place for examination in order to determine whether it is or contains a thing that may be seized
o to operate equipment at the premises to access data (including data held at premises other than the subject premises)
p to do anything that it is reasonably necessary to do for the purpose of preventing the loss or destruction of, or damage to, 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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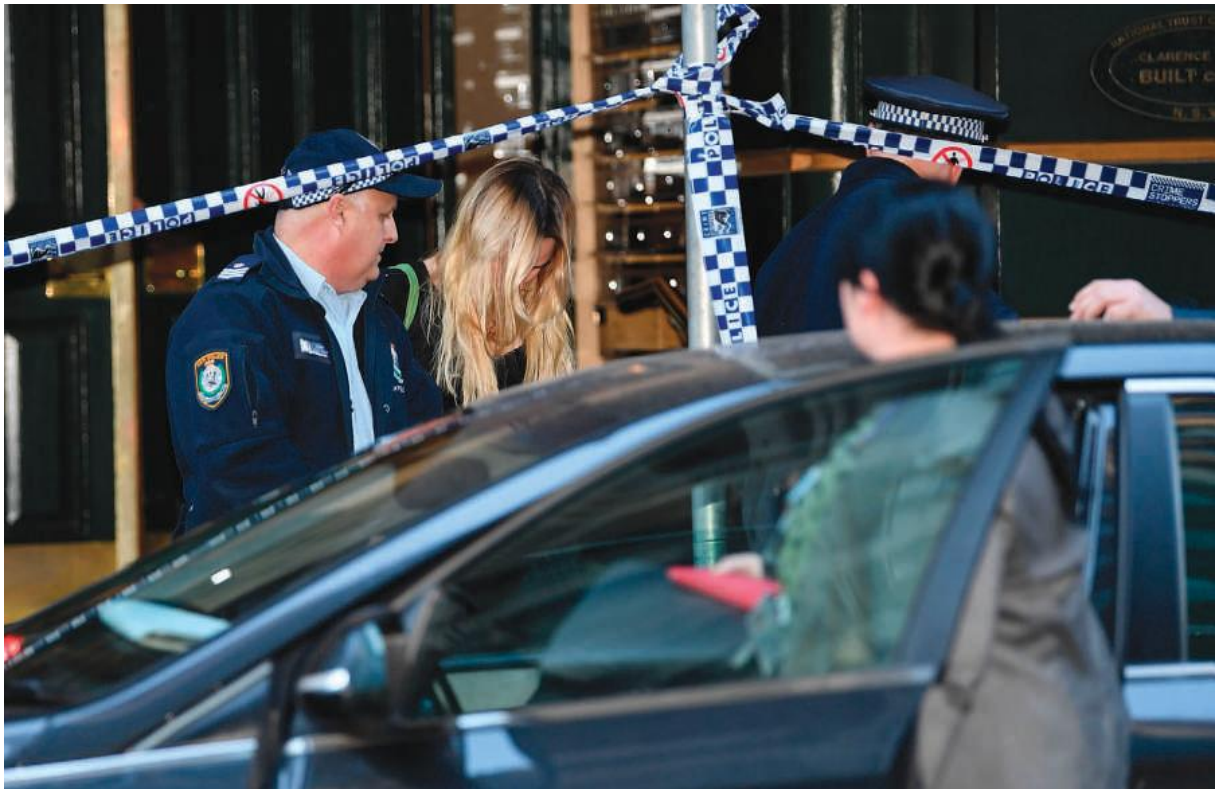

Figure 2.5 Police officers may require a person to attend a police station if they have been placed under arrest.

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

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Figure 2.6 In order for the procedure to be legal, a police officer must state to the person that they are under arrest and why they are under arrest.

should be used only as a last resort, and there is some criticism that arrests can be applied too early in the investigative process, merely as a means of furthering an investigation.

In order for the procedure to be legal, the police must state to the person that they are under arrest and why they are under arrest. By law, police are able to use whatever reasonable force is necessary 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, page 38). 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
- 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 amongst 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.

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

caution (3)
a statement issued by police to a suspect when they are detained to inform the suspect of their rights

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

Any suspect under 18 years of age has the right to have a responsible adult present with them at the interrogation. Usually this adult will be the suspect's

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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 of what occurs when a person is charged.

parent or guardian. If the suspect lies to the police about their age and says they are over 18 and the interrogation begins, the evidence they provide is admissible in court.

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

Release or charge

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

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

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.

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

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

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

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

Bail

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

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

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

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Figure 2.7 Fadi Ibrahim's lawyer, Abbas Soukie, leaving Sydney Central Local Court after Fadi Ibrahim was granted bail on 18 September 2017. Michael and Fadi Ibrahim, along with Mustapha Dib and Koder Jomaa, were arrested in Dubai in August 2017 and were extradited to Sydney to face charges including conspiracy to import a commercial quantity of a border-controlled drug, dealing in the proceeds of crime, and possession of imported tobacco.

will result in them being fined and arrested. Bail may also be in the form of **surety**, which is where someone else agrees to put up the money on behalf of the accused as an assurance that the accused will turn up at court. If the accused fails to show up, the bail money is forfeited.

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

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

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

Restrictions on granting bail for drug trafficking and serious domestic violence had been added to the *Bail Act 1978* (NSW) (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
- 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'.

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

Recent independent and parliamentary papers have heavily criticised the presumption against bail legislation. The Bureau of Crime Statistics and Research (BOCSAR) has identified that in 2018 the prison population rose by 4% to 13 798 prisoners. The increase is attributed to the growth of the number of prisoners on remand (kept in custody). A growing number of children and young adults have also been affected by the changes to bail laws, with an increasing number being remanded rather than being released on bail. The BOCSAR report found that the average daily number of young people in custody was 434 in 2009 whereas it has decreased to 284 for the 2017–2018 financial year. This still means that an alarming number of our youth are spending time in an unsavoury social environment, which could be to the detriment of their adult futures.

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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 respond to the following.

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 future criminals.

Remand

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

remand
a period spent in custody awaiting trial

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

Review 2.6

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.

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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; that can be extended, but only with court approval.
- Police must caution a detained suspect before conducting an interview.
- Everyone has the right to legal representation during a police interview.
- Interviews are videotaped and audiotaped.
- A person charged with an offence is either let go on bail or held on remand until the trial.

Multiple-choice questions

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

2 Which of the following 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 a factor in why someone may be held on remand?
   a They are a flight risk.
   b They committed a violent crime such as murder.
   c They committed a non-violent crime such as larceny.
   d They are a repeat offender who may go and commit another offence straight away.

5 How long may police hold a suspect without charge for if they do not have an extension from a judge/magistrate?
   a Six hours.
   b Eight hours.
   c 12 hours.
   d Indefinitely.

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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.

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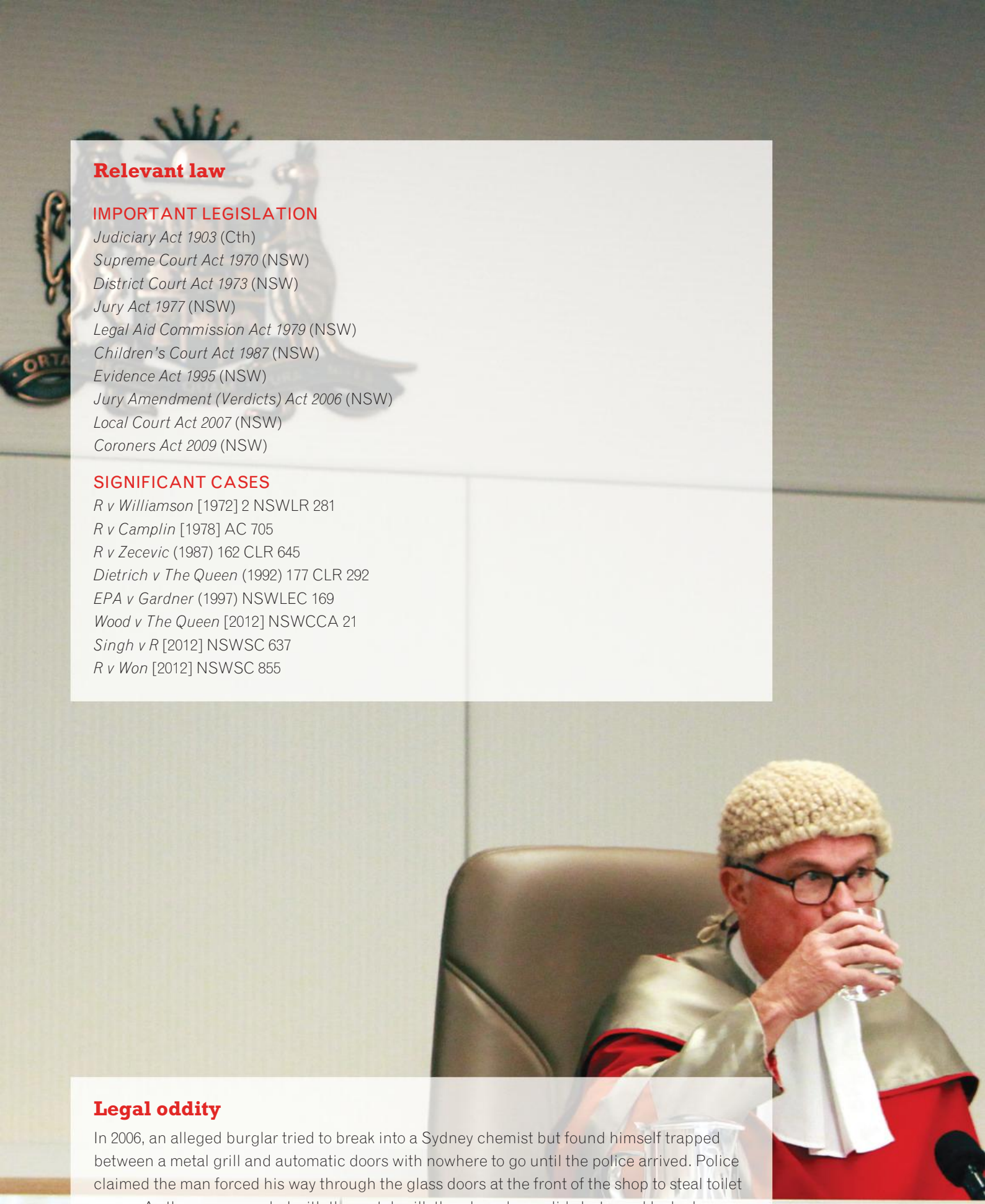
Relevant law

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)
Jury Amendment (Verdicts) Act 2006 (NSW)
Local Court Act 2007 (NSW)
Coroners Act 2009 (NSW)

SIGNIFICANT CASES

R v Williamson [1972] 2 NSWLR 281
R v Camplin [1978] AC 705
R v Zecevic (1987) 162 CLR 645
Dietrich v The Queen (1992) 177 CLR 292
EPA v Gardner (1997) NSWLEC 169
Wood v The Queen [2012] NSWCCA 21
Singh v R [2012] NSWSC 637
R v Won [2012] NSWSC 855



Legal oddity

In 2006, an alleged burglar tried to break into a Sydney chemist but found himself trapped between a metal grill and automatic doors with nowhere to go until the police arrived. Police claimed the man forced his way through the glass doors at the front of the shop to steal toilet paper. As the man grappled with the metal grill, the glass doors slid shut – and locked – behind him. While police tried to find a key-holder to the chemist, the boxed-in bandit paced back and forth, hurling insults at laughing police officers.

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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. 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

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.

Figure 3.1 The Supreme Court is the highest court in New South Wales. It has unlimited civil jurisdiction and hears the most serious criminal matters.

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

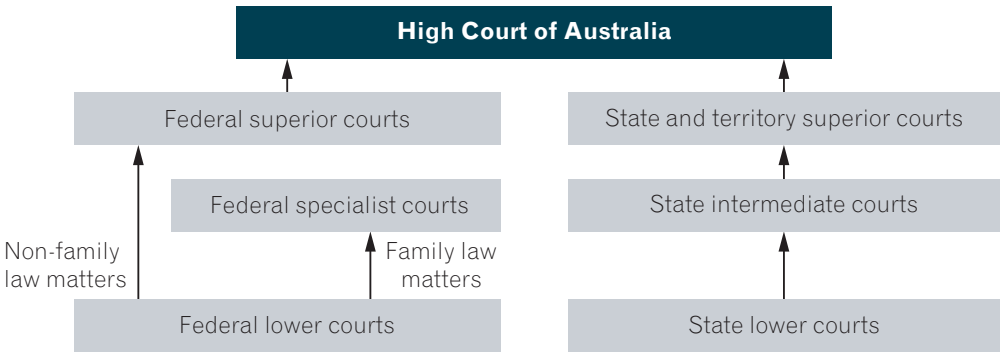

Figure 3.2 The Australian court hierarchy, including state, territory and federal courts.

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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. 17) and the 'learn to' activities (pp. 17–19) 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.

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'.

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**.

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

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

In the Australian court hierarchy, a higher court can usually review a decision of a lower court, but a lower court cannot review a decision of a higher court. For example, the Local Court of New South Wales has no appellate jurisdiction. The arrows in Figure 3.2 show the courts that can hear appeals from each of the lower courts.

State and territory courts

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

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

Each court has its own jurisdiction, or area over which it has authority to hear matters. Minor matters, such as summary offences, are dealt with 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.

Figure 3.3 The Local Court is the first point of call for most criminal matters and as such has original jurisdiction.

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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. 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 of the district court.

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

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

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.

Coroner's Court

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

The role of a **coroner** is to ascertain the deceased person's identity, and the place, date, manner and medical cause of death. Information from medical practitioners and police personnel as well as evidence from the scene is usually evidence that is relied upon.

coroner
a judicial officer appointed to investigate deaths in unusual circumstances

The Coroner's Court may investigate disappearances, deaths where a medical certificate has not been issued, or deaths that occur in unusual or suspicious circumstances, such as deaths occurring:

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

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Research 3.1

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

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

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

Coronial inquests can result in changes to the law or the introduction of new rules of 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.

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

Children's Court

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

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

Children's Court magistrates have specialised training in dealing with youth matters, and proceedings, formalities and available sentences are different from those applicable in other courts. The Youth Koori Court is an initiative of the Children's Court to divert young Aboriginal and Torres Strait Islanders between the ages of 10 and 17 from prison, 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.

Figure 3.4 The Children's Court in Broadmeadow. One of the most important characteristics of the Children's Court is that it is a closed court.

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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 it can hear appeals of decisions made by lower courts such as the Local Court and the Children's Court. The District Court sits at most large population centres in New South Wales and has jurisdiction to hear serious criminal matters, as well as civil matters up to $750 000 (or higher in some cases).

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

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

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

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

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

Court of Criminal Appeal

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

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

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

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Land and Environment Court

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

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).

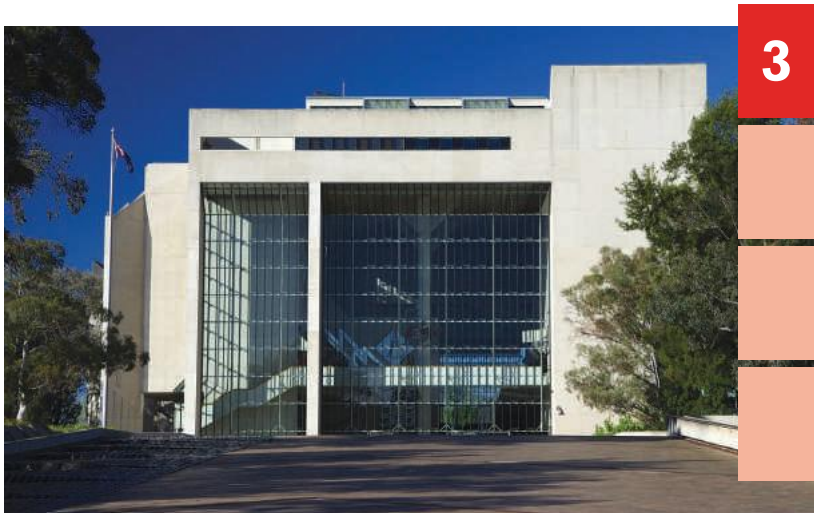

Figure 3.5 The High Court of Australia has original jurisdiction (laws and cases originally filed in the High Court) in limited Commonwealth matters.

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.

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 Australian Capital Territory 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.

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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.

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.

3.2 The adversary system

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.

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

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).

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

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 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.

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 3.6 on the next page).

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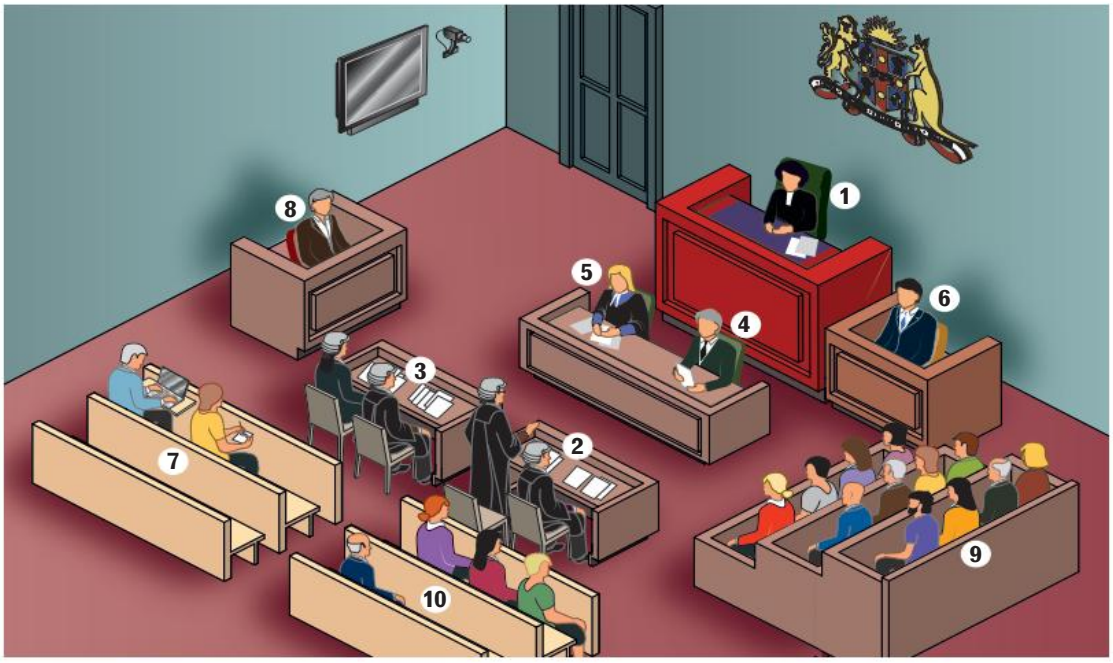

Figure 3.6 Court cases involve a number of key participants, including: 1 judge or magistrate; 2 prosecutor (for example, police prosecutor or Director of Public Prosecutions); 3 accused's barrister or solicitor; 4 judge's associate; 5 court reporter; 6 accused; 7 media; 8 witness; 9 jury; and 10 public gallery.

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. 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**.

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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.

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

Director of Public Prosecutions

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

Prosecutors employed by the DPP are barristers or solicitors and have numerous years of experience in the criminal justice system. It is their job to prosecute the case using the evidence gathered by the police. In court their role is to 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.

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

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

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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 Describe the types of cases heard by a magistrate and by a judge.

Public defenders

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

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

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

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

3.4 Pleas and charge negotiation

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

plea
a formal statement of guilt or innocence by the accused

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

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

- a 25% reduction on an imprisonment sentence where the guilty plea is entered in the Local Court before committal
- a 10% 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.

Figure 3.7 Syrian defendant, Alaa Sheikhi, stands next to an interpreter (left) and his lawyer, Ricarda Lang (right), in the courtroom during a hearing in his trial over a knife killing that sparked far-right street violence and protests in the eastern German city of Chemnitz on 22 August 2019 in Dresden, eastern Germany.

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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.

Review 3.4

1. Explain the role of the prosecution in a criminal trial.
2. Outline the similarities and differences in the roles of a magistrate and a judge.
3. Compare the roles of public prosecutors and public defenders.
4. Discuss the limitations in procedural fairness if an accused chooses to self-represent in court.

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.

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

Some of the arguments for and against charge negotiation include:

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

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.

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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, Aboriginal and Torres Strait Islander 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.

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.

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 is to prove the case against the accused

Research 3.3

Visit the Legal Aid NSW website. Read the information on the website and answer the following questions.

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.

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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.

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

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

3.7 Use of evidence, including witnesses

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

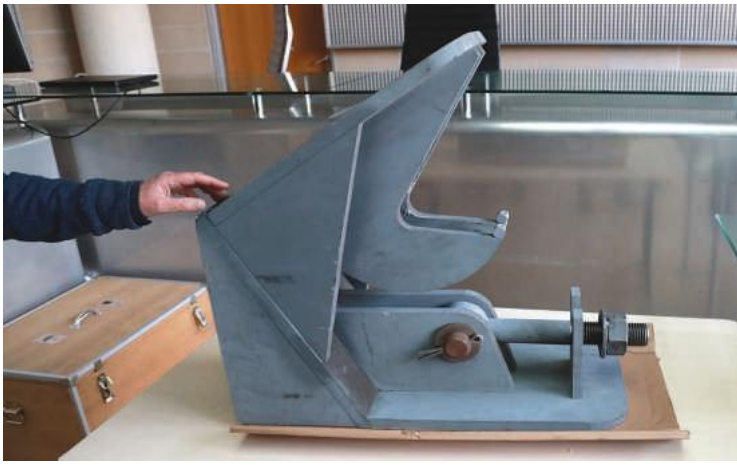

Figure 3.8 This is a heavy weather manual lock, which is pictured at the Nanterre courthouse on 12 April 2019, before the start of the trial over the 1994 sinking of the MS *Estonia* cruise ferry in the Baltic, which killed 852 people.

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

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

A witness giving evidence will be asked to take an oath to tell the truth and will be asked a series of questions, usually by both the prosecution and the defence. There are rules around the order and type of questions that a witness can be asked. The information the prosecution and the defence seek is about the witness's factual first-hand knowledge or eyewitness testimony and will often be supported

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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.

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 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 recent 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.

Figure 3.9 Gordon Wood (centre) with his legal team, Winston Terracini SC (left) and solicitor Michael Bowe (right), wait for the jury to return their verdict outside Darlinghurst Court on 19 November 2008.

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.

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

Complete defences

Complete or absolute defences are used to justify the defendant's actions and, if successfully proven, will result either in charges being dropped 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 illness or insanity is a defence that is only available where the accused can prove that they were in fact mentally incapacitated when they committed the offence. This defence relates to the *mens rea* of the accused, and requires the accused to claim that they were not criminally responsible for their actions because they could not have formed the necessary intent. The defence of insanity is very difficult to prove but enables the accused to claim that they were not aware of, or able to comprehend, the nature or consequences of their act at the time the crime was carried out. Where the defence of mental illness succeeds, the accused may be found not guilty on the grounds of insanity.

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

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

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

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

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

Legal Info

The M'Naghten test

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

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

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

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

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.

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

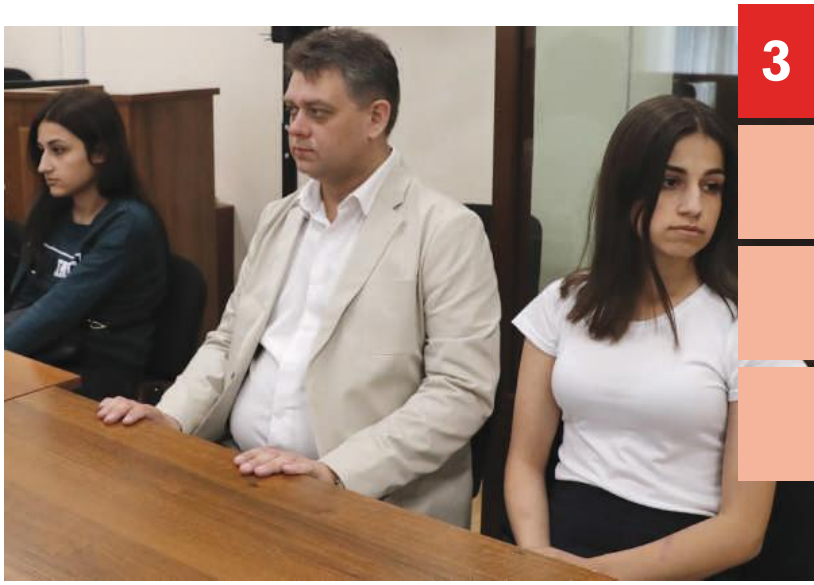

Figure 3.10 Maria (left) and Angelina (right), two of the three Khachaturyan teen sisters charged with their father's murder. Prosecutors acknowledge the violent circumstances that pushed the girls to kill their father; however, the prosecutors insist this was premeditated murder with the girls' motive being revenge. The sisters' lawyers maintain their attack was an act of self-defence against the father's physical and sexual abuse, which the investigation has confirmed the sisters were victims of since 2014.

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

Partial defences to murder

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

Provocation is the defence in which the defendant claims that their actions were a direct result of the other person's actions, which caused them to lose control and commit the offence in question. Provocation is a controversial defence because it implies that the victim has some level

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

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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* introduced limitations so that it no longer is available to people who kill their partners out of jealous rage or who take umbrage at a non-violent sexual advance. Calls for the legislative change to the crimes act gained traction influenced by two cases where the sentences handed down were considered lenient through the use of the defence.

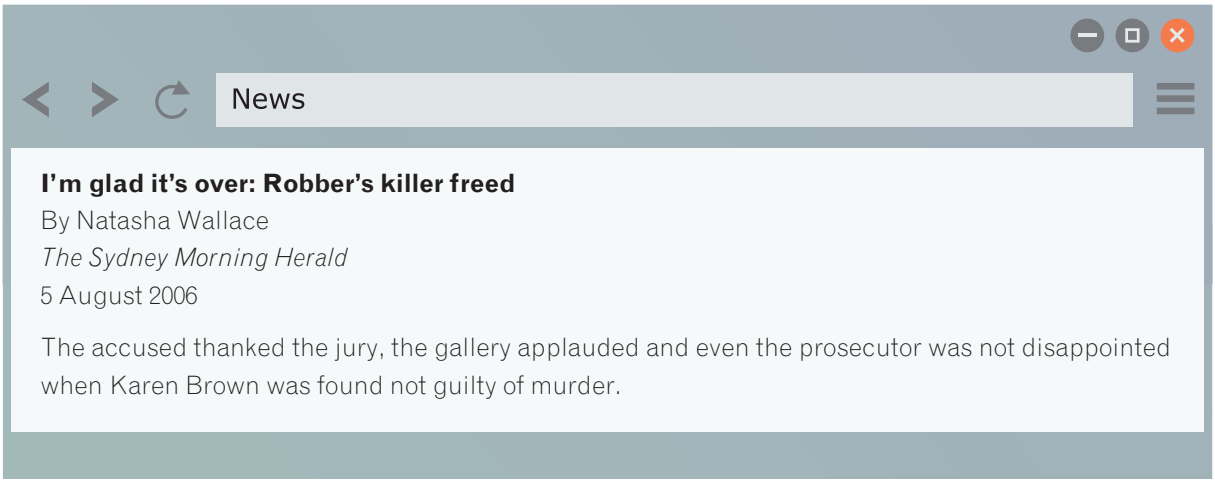
Substantial impairment of responsibility is another partial defence to murder, and can reduce a charge of murder to manslaughter. This defence is also referred to as **diminished responsibility**. The defendant must be able to prove that they suffer from a mental abnormality that caused them to act in a certain manner and carry out a crime. Such abnormalities include a low IQ or mental retardation. This defence is more widely used than the insanity plea because it is easier to prove, and the person may be completely normal in every other aspect of their mental capacity and health. Substantial impairment cannot be used as an excuse when the accused was drunk or under the influence of mind-altering drugs.

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

Legal Info

Singh v R, where a Sydney man Chamanjot Singh was sentenced to just six years in prison for repeatedly slitting his wife's throat with a box cutter after she threatened to leave him and have him deported back to India (see *Singh v R* [2012] NSWSC 637).

R v Won [2012] NSWSC 855 where the jury was asked to decide if the act of finding a spouse in bed with someone else could have induced an ordinary person in the position of Won to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm; a case that resulted in a sentence of imprisonment for seven years and six months with a non-parole period of five years.



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(Continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Figure 3.11 Security guard, Karen Brown, and her husband, George Muratore, at Liverpool Court on 23 December 2005.

3.9 The role of juries, including verdicts

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

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

Challenging jurors

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

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

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.

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

Eligibility for jury duty

Australian citizens aged 18 years or over become eligible to sit on a jury once they are on the electoral roll (enrolled to vote). It is very difficult to gain an exemption from jury duty and some people view jury duty as an inconvenience and a burden, especially when they are selected to sit on a long trial. Jurors are paid for their attendance on the jury and employers are required to give leave to their employees for jury duty. It is an important part of our justice system for an accused person to be tried by a group of their peers. Some people can ask to be exempted – those who are aged over 65 years, are pregnant or care for children full-time. There are also some groups of people who are ineligible to sit on a jury. They include people who do not speak English, emergency services workers (police, fire and ambulance), 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.

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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 and as a result it calls on a smaller cross section of the community for the accused to be judged by.

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 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.

Video

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 Act does not apply to Commonwealth offences, as unanimous verdicts for those offences are protected under section 80 of the *Australian Constitution*.

Figure 3.12 Charles 'Chase' Merritt (left) reacts as the jury recommends life without parole for the slaying of Joseph McStay and the death penalty for the slaying of McStay's wife and two sons, at the San Bernardino Justice Center in California on 24 June 2019.

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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.

Review 3.6

The Brown case outlined is a rare occurrence of the defence of automatism being successfully proven, particularly in a murder trial.

1 Outline what Brown's defence team had to establish to negate the presence of a guilty mind (*mens rea*) at the time of the offence. Outline what evidence was used to establish that Brown was not guilty of the crime she was charged with.
2 Evaluate the role of a jury in the criminal justice system.

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% of the jurors believed that it meant 'sure that the person is guilty', 22.9% believed it meant 'almost sure', 11.6% 'very likely' and 10.1% 'pretty likely'.

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

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

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

In 2008, the rate of offenders found guilty at jury trials in New South Wales was 84.7%. In 2017, this further increased to over 85% of offenders.

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Chapter summary

- Different offences will be heard in different courts in the court hierarchy.
- The Local Court deals with summary offences and less serious offences.
- The Coroner's Court decides whether a person's death is suspicious and a case can be built to prosecute a suspect.
- The Children's Court deals with crimes committed by people under the age of 18 years.
- The District Court hears serious criminal matters and appeals from lower courts.
- The Supreme Court hears the most serious cases, such as murder and gang rape.
- The High Court is the highest court in Australia.
- The DPP prosecutes cases on behalf of the 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 11:1 or 10:2 in certain circumstances.

Multiple-choice questions

1 The Coroner's Court is which of the following?
   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.

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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.

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)

SIGNIFICANT CASES

Kable v Director of Public Prosecutions (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

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Legal oddity

A judge in Fort Lupton, Colorado, has devised a unique way of reforming persistent noise polluters. Witnessing repeat offenders return to court again and again, Judge Paul Sacco realised that traditional punishments did not cut the mustard. Instead of issuing perfunctory fines, the judge subjected offenders – comprised mainly of noisy neighbours, band members and angsty teens – to numerous sessions of Barry Manilow and the soul-crushing theme song from *Barney & Friends*. Tracks performed by Joni Mitchell, Boy George, and The Platters also featured in the judge's play list. Judge Sacco even made one unsuspecting youngster listen to a track that he himself had written and performed.

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4.1 Sentencing and punishment

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

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

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

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

The sentence is the sanction imposed by the state in relation to the offender's criminal conduct. 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. For example, the 2014 murder trial of Gerard Baden-Clay saw news broadcasting teams reporting from the court as well as a full public gallery every day of the trial. However, regardless of the publicity, all sentences require careful balancing of the interests of all parties concerned. This includes the victims, the community, the state and the accused. This can be the most difficult role the judge has to perform. It is usually the discontent of the victim or the family of the victim that is conveyed through the media.

4.2 Statutory and judicial guidelines

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

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

The **maximum penalty** that an offender can receive for an offence is usually decided by parliament and listed in legislation. This can be found in the same section as the offence it relates to. No judicial officer can pass a sentence higher than the maximum penalty. Maximum penalties differ according to the seriousness of the offence. For example, 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.

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

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 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

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Figure 4.1 Judge Kathryn Quaintance at the trial of former Minneapolis police officer, Mohamed Noor.

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

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.

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

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

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

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

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

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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. 17) and the 'learn to' activities (pp. 17–19) 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.

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.

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 indigenous 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.

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.

Purposes of sentencing

Extract from section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

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.

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

Deterrence

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

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

specific deterrence
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.

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

In 1988, the Australian Law Reform Commission recommended that deterrence not be included as a sentencing objective, and that sentences should be set in relation to the seriousness of the offence committed. As a consequence, deterrence was not included as a purpose in the federal *Crimes Act 1914* (Cth), but it remains in New South Wales law. The former Director of Public Prosecutions, Nicholas Cowdery AM QC, objected strongly to the concept of deterrence in both Australian and New South Wales sentencing procedures. He believes that it is only through education and social programs that we can really deter people from committing crimes. 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 has

Figure 4.3 Former Director of Public Prosecutions, Nicholas Cowdery AM QC.

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suggested that programs such as circle sentencing, MERIT and drug courts are far more appropriate ways of deterring people from reoffending.

Retribution

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

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

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

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

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

Rehabilitation

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

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

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

Several of the purposes listed in 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

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Figure 4.4 A woman holds a sign of support as part of an Amnesty international vigil for the Bali 9 duo, Andrew Chan and Myuran Sukumaran.

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.

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.

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

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 each case to ensure that the sentence is not excessive. There will, of course, be certain offenders for whom incapacitation is more clearly justified in the interests of protecting the community – we would probably all agree that people who have committed serious violent crimes require imprisonment, for instance, and that serial drink-drivers should have their licences cancelled.

4.4 Factors affecting a sentencing decision

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

- **aggravating factors**, which are circumstances that make the offence more serious and can lead to an increased sentence

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.

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- **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. 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.

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

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 people 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.

remorse
deep regret or sorrow for one's wrongdoing

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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.

Research 4.1

Visit the New South Wales legislation website. Browse the current Acts in force and find the *Crimes (Sentencing Procedure) Act 1999* (NSW). Look at 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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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 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It allows the victim an opportunity to participate in the process by letting the court know how the crime has affected them. The statements are only permitted for serious offences involving violence (actual or threatened) or the death of or any physical harm to a person, and only if the court considers it appropriate. The statutory scheme applies in the supreme and district courts. They are presented after the offender is found guilty but before sentence is passed. The statements can influence the sentence. Two cases where the use of victim impact statements at sentence have been discussed are *R v Tuala* [2015] NSWCCA 8 and *R v Thomas* [2007] NSWCCA 269.

Victim impact statements relate to the personal harm to the victim, and can include physical and psychological harm. The statement can also include reports, such as medical reports, or diagrams or pictures (in the case of child victims). If the statement is given by the family, it will relate to the impact the act has had on them.

Figure 4.5 A victim impact statement is a voluntary statement written by the victim about the impact that the crime 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.

Statements by family members in cases of death are particularly controversial. Some commentators suggest that they are a danger, as they could lead to a court handing down different punishments according to whether the victim was more or less loved by their family. Also, family statements might remove impartiality from the judge's process, opponents say. However, victim impact statements can at least allow family members to publicly express their grief and anger. Importantly, they can be a confronting experience for the offender and so form a valuable part of the sentencing process.

4.6 Appeals

A person convicted of an offence and sentenced will have the right to appeal their case – that is, apply to a higher court for review of one or more decisions made in the lower court. The Crown also has the

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right to appeal a case where, for example, it believes the sentence is too lenient. The party appealing is known as the **appellant** or applicant. There are two types of appeals in criminal cases:

- **appeal against conviction**
- **sentence appeal**.

appellant
in an appeal case, the party who is making the appeal

appeal against conviction
an appeal where the appellant (the defendant) argues that they did not commit the offence of which they were found guilty

sentence appeal
an appeal against the severity or leniency of a sentence

In appeals against conviction, the appellant argues that they did not commit the offence of which they were found guilty. It is difficult for this type of appeal to succeed and it will usually involve an argument that there was some error in the handling and prosecution of their case – in the evidence admitted or in the instructions of the judge to the jury, for example. If successful, the appellant may be acquitted or a retrial may be ordered.

Sentence appeals, on the other hand, are appeals by the offender against the severity of their sentence, or by the prosecutor against the leniency of the sentence. Sentence appeals might be made alone or in conjunction with an appeal against conviction. The judge's options for these appeals are to set aside a sentence, vary a sentence or dismiss the appeal. A sentence might be increased or reduced – this is a risk that the appellant must consider carefully before making the appeal.

The type of appeal allowed will depend on the court the offender was tried in, and there are also various time limits and process requirements for when a person can appeal. Any person convicted or sentenced in a Local Court will have a right of appeal to the District Court under the *Crimes (Appeal and Review) Act 2001* (NSW). A person may also appeal directly to the Supreme Court if it is on a question of law, but otherwise only by seeking permission from the Supreme Court. The District Court will usually conduct a rehearing of all the evidence, usually by reading the documents from the initial hearing.

A person sentenced in the District or Supreme Court can seek permission to appeal to the Court of Criminal Appeal. The Crown might also appeal against the leniency of a sentence. An appeal against conviction or a sentence appeal to the Court of Criminal Appeal will only succeed if the person can show that there was a legal error. This can include imposing a sentence that was too severe or too lenient.

Research 4.2

One high-profile criminal appeal in New South Wales was the case of Bilal Skaf. The original offence was committed in 2000 and various appeals were heard until 2008. Leave to appeal was even sought from the High Court. Search the internet for details of the case and answer the questions below. Sources might include media articles and transcripts of the most recent cases.

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 were the sentences 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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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.

4.7 Types of penalties

There are many different penalties that a court can apply in its sentencing of an offender. The *Crimes (Sentencing Procedure) Act 1999* (NSW) lists the various penalties that can be imposed, from no conviction recorded, cautions and fines, through to imprisonment and even deportation. The type of penalty imposed will depend on how the magistrate or judge ultimately weighs all the factors discussed above, and cannot exceed the maximum penalty specified for the offence.

Caution

Before a charge is laid and a person goes to court, police have the power to issue a person with a **caution**. A caution is a formal warning and is used for certain less serious offences as a way to avoid the court system, in the hope that the offender has learnt a lesson and will not reoffend.

caution (1)
a formal warning without charge issued by police for less serious offences

For example, under the *Young Offenders Act 1997* (NSW), police can issue a formal caution to offenders between the ages of 10 and 18 years for a variety of minor offences, such as damaging property, stealing or a minor assault. A formal caution can only be issued when the offender admits to the offence in the presence of an appropriate adult. It usually involves a formal conference where the offender, police, family and support people meet and discuss the crime. It includes discussion of the offence, its implications and the reasons why it occurred. The caution is kept on police record and the offender will be told what will happen if they reoffend.

Another example in New South Wales is the Cannabis Caution Scheme, where police may issue a caution for minor offences involving cannabis if a person has no prior conviction. It does not apply to people caught supplying cannabis. It involves a warning about the health and legal consequences of cannabis use as well as information about certain counselling and support services. The NSW Bureau of Crime Statistics and Research suggests that the 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.

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

The aim of criminal infringement notices is to remove some of the burden on the criminal court system by allowing police to just issue fines for these minor offences. Although they do represent an increase in police powers, the notices are not final and offenders can choose to have the matter heard in court. The benefit to offenders is that no conviction is recorded when they accept the notice; however, if the matter goes to court and the offender is found guilty, the sentence is likely to be more severe than the notice.

Conviction or no conviction recorded

When a person is charged with an offence and declared guilty by a judge or jury, that person is considered convicted of that offence. In sentencing, the judicial officer can either record the conviction against the offender, or pass sentence with no conviction recorded.

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Figure 4.6 A criminal conviction is a serious matter and can have an important impact on a person's life.

A criminal conviction is a serious matter and can have an important impact on a person's life. A person will be required to declare their criminal convictions at various times in their life – when applying for certain jobs, seeking certain entitlements or applying for travel visas, for example.

Normally, a conviction will be recorded and an appropriate sentence imposed. For less serious offences, particularly where they involve young offenders or first-time offenders, a judicial officer might choose not to record a conviction. Alternatively, the court may decide to record the conviction, but impose no other sentence.

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.

fine
a monetary penalty imposed for infringement of a law

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 2015, under Australian federal law a penalty unit for an individual was $180. A recent reform to the on-the-spot fines system in New South Wales is called a Work and Development Order (WDO). This pilot program, which is delivered by Legal Aid NSW in collaboration with the Aboriginal Legal Service, State Debt Recovery and the Department of Police and Justice, enables people to pay their fines in ways other than with money, such as by completing community service with volunteer organisations or by participating in a rehabilitation or treatment program. WDOs are only available to people who have a mental illness or an intellectual disability, or who suffer from acute economic hardship, such as homelessness.

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

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

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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.

The laws are wide-ranging, and can allow examination of an offender's financial affairs and allow the assets to be restrained, seized and forfeited. The court might also require the offender to pay an amount assessed as the value of the proceeds (profits) of their crimes.

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

forfeited (also known as forfeiture)
the loss of rights to property or assets as a penalty for wrongdoing

These laws are especially important in relation to organised crime, where simply sentencing the offender will not be enough to deter them from reoffending, especially where the offender is still able to enjoy the benefits of their criminal acts. These proceedings are civil, not criminal, and can proceed even if the accused has not been found guilty of a crime or has been acquitted. Forfeiture of assets is difficult to relate to the traditional purposes of sentencing, but it can be claimed to involve making the offender accountable and acting as a deterrent. Particularly, it gives the law an avenue to target the primary incentive of most criminal organisations: money.

Bond

Good behaviour bonds were among the penalties abolished under the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) (now repealed). They have been replaced by Conditional Release Orders.

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.

Conditional Release Order
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

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 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. CRO's replace Non-Conviction Bonds.

Suspended sentences

A **suspended sentence** used to be available to some offenders as an alternative to imprisonment, on the condition that the offender entered into a good behaviour bond for the same period of time. However, this was removed under the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

suspended sentence
a sentence of imprisonment imposed but suspended on condition of good behaviour

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Community service orders

Community service orders were among the penalties abolished under the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW). They have been replaced by **Community Correction Orders**.

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

Community Correction Order

A Community Correction Order (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.

Community Correction Orders are a means of punishing and shaming the offender, while allowing for rehabilitation by requiring a period of time spent making amends in the community for their wrongdoing. 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 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.

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 the offender is convicted of. These will usually be served at the same time. For example, if an offender is sentenced to three years for one offence and five years for another, the total sentence of five years will usually be ordered. If the offender is in remand, the sentence will also take into account the amount of time the offender has already served (that is, if the offender has been in remand for six months and the non-parole period is five years, the offender has four years and six months left to serve before becoming eligible for parole).

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

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News

'Ruining lives without improving safety': Former AG takes aim at imprisonment rates

By Michaela Whitbourn

The Sydney Morning Herald

22 August 2019

The state's high imprisonment rate is 'ruining lives' without improving community safety and the prisoner population has increased while crime rates have done 'exactly the opposite', former NSW Attorney-General Bob Debus has said in a damning assessment of law and justice policy.

The New South Wales prison population hit a record high of 13651 in May last year, compared with fewer than 10000 five years ago, while the rates of serious crime such as murder, break and enter, and motor vehicle theft have declined over the past 20 years.

Mr Debus, who served as a minister in both the NSW Government and the federal government, said the figures would have appalled him when he was appointed the state's corrections minister in 1995.

'I recall, in all humility, our plans to keep the number below 6000, and the pageantry with which we hastened to close down several old, cold, convict-built sandstone jails across the state,' Mr Debus said in a speech to the NSW Law Society on Thursday.

'Today, of course, not only have most of those jails been reopened but new prisons have been built; and still the numbers have risen and the overcrowding persists.'

The latest figures from the Bureau of Crime Statistics and Research (BOSCAR), released in June, show the long-term growth in the prison population in NSW has stabilised at 13400 adult prisoners but has not yet dropped markedly.

BOCSAR has previously identified court delays and controversial changes to the state's bail laws in 2014, which made it harder for certain categories of alleged offenders to get bail, as contributing to the growth in the prison population.

There was a sharp drop in the number of women inmates over the past year, but the number of Aboriginal men in custody increased 2.4%, from 2991 in June last year to 3063 this year.

Mr Debus, who was NSW Attorney-General from 2000 to 2007, said 'the over-imprisonment of indigenous men, women and children [who make up 2% of the national population but 27% of the prison population] is a continuing national tragedy' and 'rates of recidivism … remain persistently over 50% and up to 75% for indigenous prisoners'.

He said there was a 'plethora of studies confirming the common-sense conclusion that prison is damaging for individuals at a psychological level, especially in the absence of rehabilitative services'.

About half of prisoners have a mental illness or cognitive impairment, 'a high proportion of the prison population is received from a very small number of socially disadvantaged postcodes', and rates of imprisonment have increased while crime rates have done 'exactly the opposite'.

'How can our society leave this personal and social damage to escalate continuously? It is ruining lives without improving the safety of the community,' Mr Debus said.

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(Continued)

He said there was 'no rational doubt' that tackling the drivers of crime through justice reinvestment policies, which direct money that would otherwise be spent on the prison system to preventive measures, would lead to a 'dramatic long-term reduction in indigenous incarceration'.

Non-government organisation JustReinvest NSW's program at Bourke, called the Maranguka justice reinvestment project, started in 2013 and is guided by the Bourke tribal council. One of the key initiatives involved local police officers helping young people to get a driver's licence.

An impact assessment, conducted by KPMG last year, found the program had contributed to a 23% drop in police-recorded domestic violent incidents in 2017 compared with the previous year, a 31% increase in Year 12 retention rates and a 38% reduction in charges across the top five juvenile offence categories.

But Mr Debus said 'the assumption that punitive policies reduce crime remains widespread in politics and undiminished in popular media' and called for bipartisan support for evidence-based policies to drive a reduction in the prison population.

Mr Debus also called for changes to the state's bail laws 'especially as they apply to the cultural circumstances of indigenous people', greater investment in targeted programs to reduce recidivism, and an increase in the Legal Aid budget in New South Wales. A complex murder trial in Sydney was delayed in July until 2020 after barristers refused to accept low legal aid rates, leaving the accused behind bars for 3.5 years before the trial starts.

Review 4.4

Read the news article, '"Ruining lives without improving safety": former AG takes aim at imprisonment rates' and complete the following activities.

1. Outline the trend of the prison population in New South Wales.
2. Discuss some of the reasons for this trend over the last decade.
3. According to the article, describe the impact imprisonment is having on people who are incarcerated.
4. Assess the extent to which the purposes of punishment (outlined earlier in the chapter) are being achieved.
5. List three types of penalties. Outline and evaluate the penalty and how it corresponds with the purposes of sentencing.
6. Evaluate the effectiveness of imprisonment as a method of sentencing in the criminal justice system.

Home detention

Home detention used to be available, following application and assessment, for certain non-violent offences. However, this was removed under the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

Intensive Correction Order

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 Orders (ICO)**. This was brought about by an amendment

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Figure 4.7 American Pastor, Andrew Craig Brunson (centre), who was charged with committing crimes, including spying for the PKK terror group and the Ferula Terrorist Organization, arrives at the address where he was put under house arrest due to his health problems, in Izmir, Turkey on 25 July 2018.

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.

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

An offender who has been sentenced to a maximum term of two years is eligible for an ICO. 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)

Figure 4.8 An ICO has strict conditions, not unlike bail conditions. One of those conditions may be the 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 program
an alternative to the traditional court system that focuses on the rehabilitation of offenders

Diversionary programs usually involve a magistrate of the Local Court adjourning a case while the offender attends some form of rehabilitation or special hearing. Sometimes called 'therapeutic justice',

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Research 4.3

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.

the programs may include education, medical or psychiatric treatment, rehabilitation or social welfare assistance. Many diversionary programs are set up to support offenders who have committed crimes due to drug and alcohol abuse. The Drug Court is one of the most important diversionary programs. Established in 1999, it was the first of its kind in Australia and aimed to rehabilitate non-violent drug-addicted offenders. Over 150 offenders a year complete its program. It emerged after growing disenchantment with the traditional criminal justice system and its effectiveness in providing long-term solutions to cycles of crime and drug abuse. It has proven a great success and attracted international renown.

The NSW Bureau of Crime Statistics and Research released a report in 2008 which assessed the effectiveness of the Drug Court. It found that those who had completed the program were less likely to be reconvicted than those sentenced to traditional penalties. Among the report's most important findings was that the Drug Court is more cost-effective than prison in reducing drug-related recidivism. Participants who completed the program were:

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

A 2014 report by the NSW Bureau of Crime Statistics and Research concluded that offenders participating in intensive judicial supervision programs (such as the MERIT program and the programs run through the Drug Courts) were less likely than those not in such programs to return positive urine analysis tests, and had a significantly greater number of periods of abstinence from drugs and alcohol.

4.8 Alternative methods of sentencing

Recent developments in the law have introduced new forms of sentencing targeting particular types of offenders. Like diversionary programs, they attempt to combat some of the issues associated with recidivism and more traditional forms of sentencing. They include **circle sentencing** and **restorative justice**.

circle sentencing
a form of sentencing for some adult indigenous offenders where sentencing is conducted in a circle made up of local community members and a magistrate

restorative justice
a form of sentencing involving a voluntary conference between the offender and the victim of the crime

Circle sentencing

Circle sentencing is an alternative court for sentencing adult indigenous Australians. It was introduced in New South Wales on a trial basis at Nowra in February 2002. The Circle Courts are designed for repeat offenders and those who have committed more serious crimes. Circle sentencing is based on indigenous customary law and more traditional indigenous forms of dispute resolution. It involves community members and a magistrate sitting in a circle to discuss the offender's crime and then tailor the most appropriate sentence for the offender. It has the full sentencing powers of a court.

Circle sentencing directly involves local indigenous people in the sentencing process. This makes it more meaningful to the offender, and also improves the confidence of the community in the criminal justice system. It also aims to improve understanding between indigenous communities and the courts and to reduce recidivism among offenders.

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Recent evaluation of circle sentencing has shown that the program's objectives are being met. However, improvements are still needed in some areas, such as participation and support services. The NSW Bureau of Crime Statistics and Research reported that indigenous offenders were no less likely to reoffend in the 15 months after circle sentencing than those sentenced in a traditional court setting. However, the NSW Government still expanded the program to more communities.

Video

Restorative justice

Restorative justice is another alternative to traditional sentencing methods. It involves bringing together the offender and the victim of the offence. It provides an opportunity for the offender to take responsibility for their actions and the impact they have had on others, while giving victims a voice and an opportunity to confront the offender and work out a way to repair the damage done. Victims are able to ask questions about the offence in an attempt to move forward and the offender has the opportunity to apologise or make amends for their act.

Restorative justice sessions can be confronting and difficult for both parties involved. They are voluntary and will usually accompany a form of traditional sentencing. One of the first Australian restorative justice models was started in Wagga Wagga in 1991, and it has since become a valuable part of the rehabilitation process. It is now an important program run by the Restorative Justice Unit of Corrective Services NSW and involves safe and private conferencing and mediation services run by a facilitator.

There are many stories of victims who have found the restorative justice program significantly helpful for recovery from a crime. The effectiveness of programs for offenders is unclear, but Australian studies based on youth conferencing initiatives have shown that a 15–20% reduction in reoffending is possible. However, it has been suggested that restorative justice programs will continue to relate mainly to minor infringements or youth justice, and that they are unlikely to expand greatly.

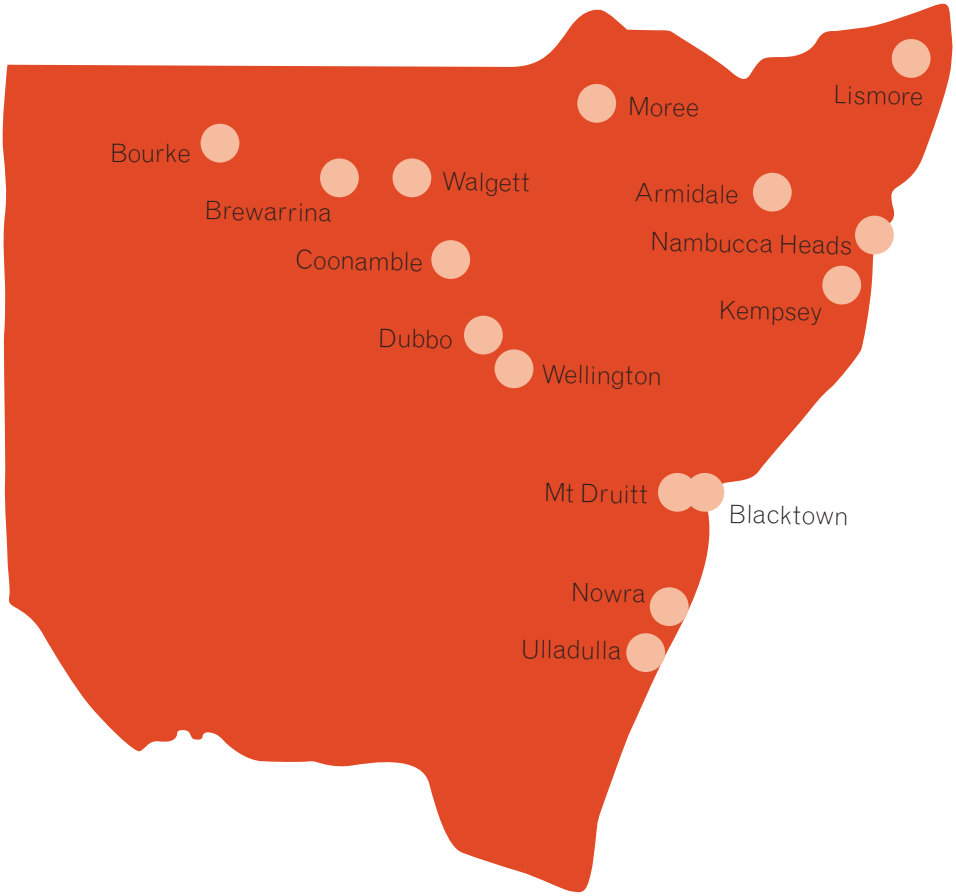

Figure 4.9 Circle sentencing programs now run in 15 locations across New South Wales.

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Review 4.5

1 Outline the differences between circle sentencing and traditional methods of sentencing.
2 Analyse and evaluate the role alternative methods of sentencing can play in the criminal justice system.
3 Outline the advantages and disadvantages that alternative methods of sentencing offer the criminal justice system.

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.

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

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.

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

Figure 4.10 The Corrective Services NSW Wildlife Care Centre at the John Morony Correctional Complex, in Windsor, is the largest of its kind in New South Wales. Here, minimum-security male offenders work to protect and conserve the unique and precious Australian wildlife.

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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.

A recent example is that of George Pell, who was convicted of child-sex offences in 2019. He was held in protective custody due to his age and his position as a Cardinal in the Catholic Church, though his conviction was subsequently overturned by the High Court in April 2020.

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.

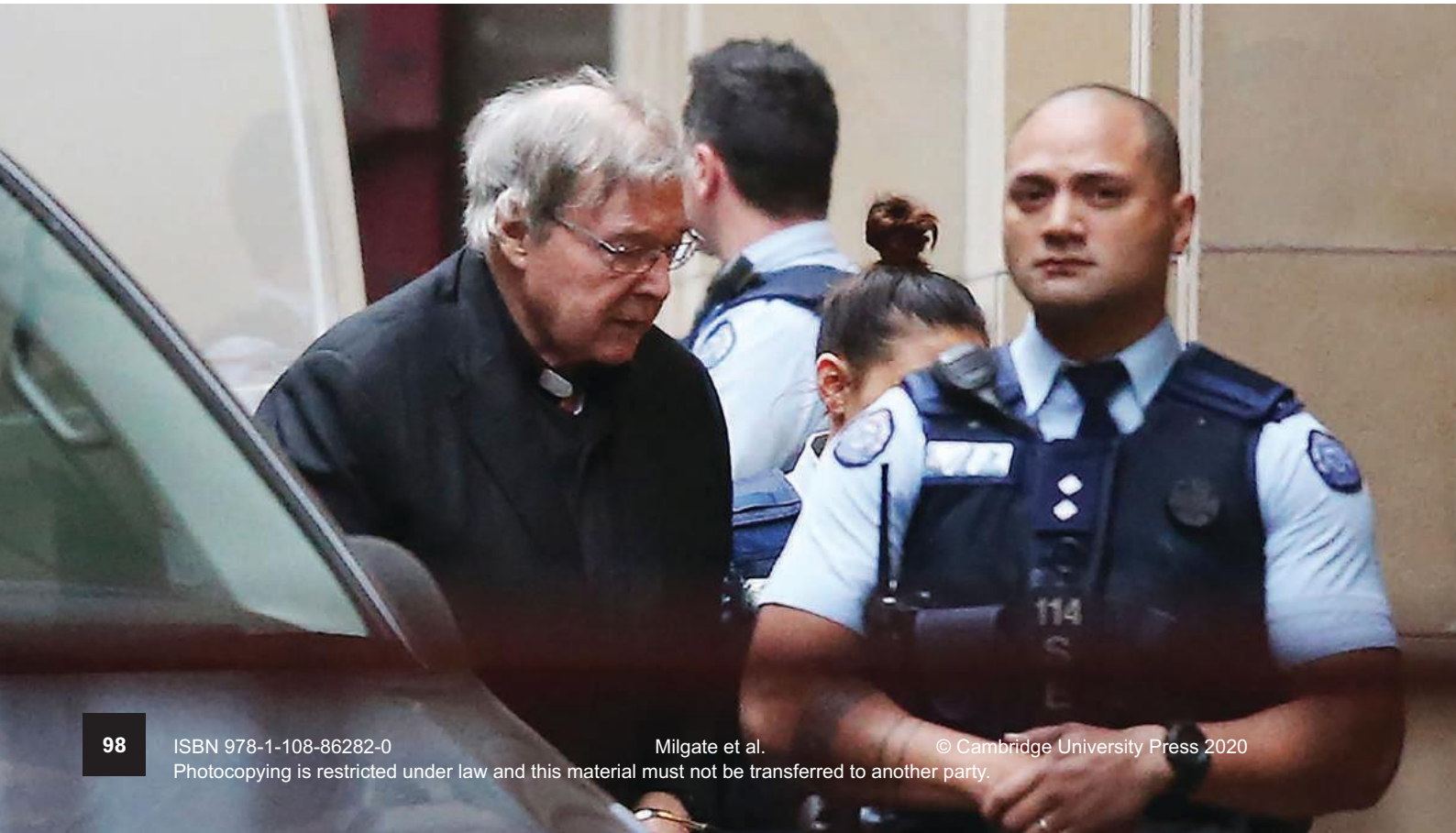
When released on parole an offender is put under the direct supervision of a parole officer. The parolee (released offender) is required to report to their parole officer as directed, and the officer will visit the parolee's residence and make inquiries in the community to ensure that the parolee is meeting the conditions of their early release. Additional conditions, such as receiving specified counselling or other treatment, may apply.

Under reforms introduced in 2017, 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 ('no body, no parole'). 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 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 now 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.

Figure 4.11 George Pell.



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Legal Info

New South Wales prisoner statistics, 2018

NSW Corrective Services oversees 38 correctional centres (10 maximum security, 16 medium security and 12 minimum security). The 2018 statistics for full-time prisoners in New South Wales correctional centres are:

- New South Wales correctional centres hold 13494 prisoners
- 7.7% of prisoners are female
- the average age of prisoners increased from 29.6 years in 2000 to 33.7 years in 2015, an increase of 13.9%. There has been an increase of 139% in the number of middle-aged (40–9 years) and older offenders (50+ years) since 2000.
- 24.5% of prisoners are Aboriginal or Torres Strait Islander peoples
- Between 2013 and 2017, the annual number of convicted offenders receiving a prison sentence rose from 9570 to 13 042, an increase of 36%.
- the average daily cost of full-time custody per prisoner is $220.68 (open custody) or $246.68 (secure custody) (https://cambridge.edu.au/redirect/8749); this equates to a cost of between $80 000–$90 000 per inmate per year.

For community-based orders:

- the daily cost for a community-based offender is $26.88
- there are 18 724 people supervised under community-based orders on any day.

Review 4.6

1. Use the New South Wales offender statistics and the NSW Bureau of Crime statistics summary report to critically evaluate the effectiveness of imprisonment as a form of sentence.
2. Identify the duty of the state to offenders in custody. Discuss how an offender under threat of violence can be protected.
3. Describe how an offender can achieve parole and the importance of parole in the criminal justice system.

Preventive and continued detention

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.

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

There are two types of 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* (1996) 189 CLR 51. However, most Australian jurisdictions have legislation enabling general powers of preventative detention in restricted circumstances.

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Figure 4.12 Australian Federal Police Assistant Commissioner, Ian McCartney (right), and New South Wales Police Assistant Commissioner, Mick Willing, address the media over an alleged plot to attack police stations, embassies and defence facilities in Sydney on 2 July 2019.

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.

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

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 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 continuing detention orders.

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 (CSOs) 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.

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Sexual offenders registration

There are both state and federal databases of offenders who have been convicted of certain sexual offences. The Australian National Child Offenders Register (ANCOR) and the New South Wales Child Protection Register are web-based systems designed to assist police with the registering and case management of those who have committed sexual offences against children.

Established under the *Child Protection (Offenders Registration) Act 2000* (NSW), a person convicted of specified violent or sexual offences against a child must register at the local police station:

1. when the person is sentenced for the offence, or
2. when the person ceases to be in government custody in relation to the offence, whichever is later.

When a sex offender is paroled they are served with a notice to inform them that they need to register. Adult offenders must register for a minimum period of eight years, and 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. At the end of 2014, there were over 10650 offenders registered nationally.

Sexual offender registries are justified by their supporters on the basis that they protect the community. However, they are sometimes contentious, as they target certain offenders long beyond the period of the sentence they have been required to serve, and deny the chance for the offender to move on in the rehabilitation process. Supporters respond by claiming that the severity of the original crime, added to the ongoing risk of reoffending, outweighs the burden that the registry requirements impose on the offender.

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 New South Wales in 2017, 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 crack down 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

Case Study

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 Gus was three years old. As an adult in Australia, he was charged with a number of drug and driving offences and was imprisoned.

It was decided that Gus 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 Gus 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. Doesn't "permanent resident" mean you're permanent?'

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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.

Figure 4.13 Participants of a rally held in Sydney on 1 September 2019. The rally was held to protest against the deportation of a Tamil family who had been living in the Queensland town of Biloela.

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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 ICOs 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.

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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.

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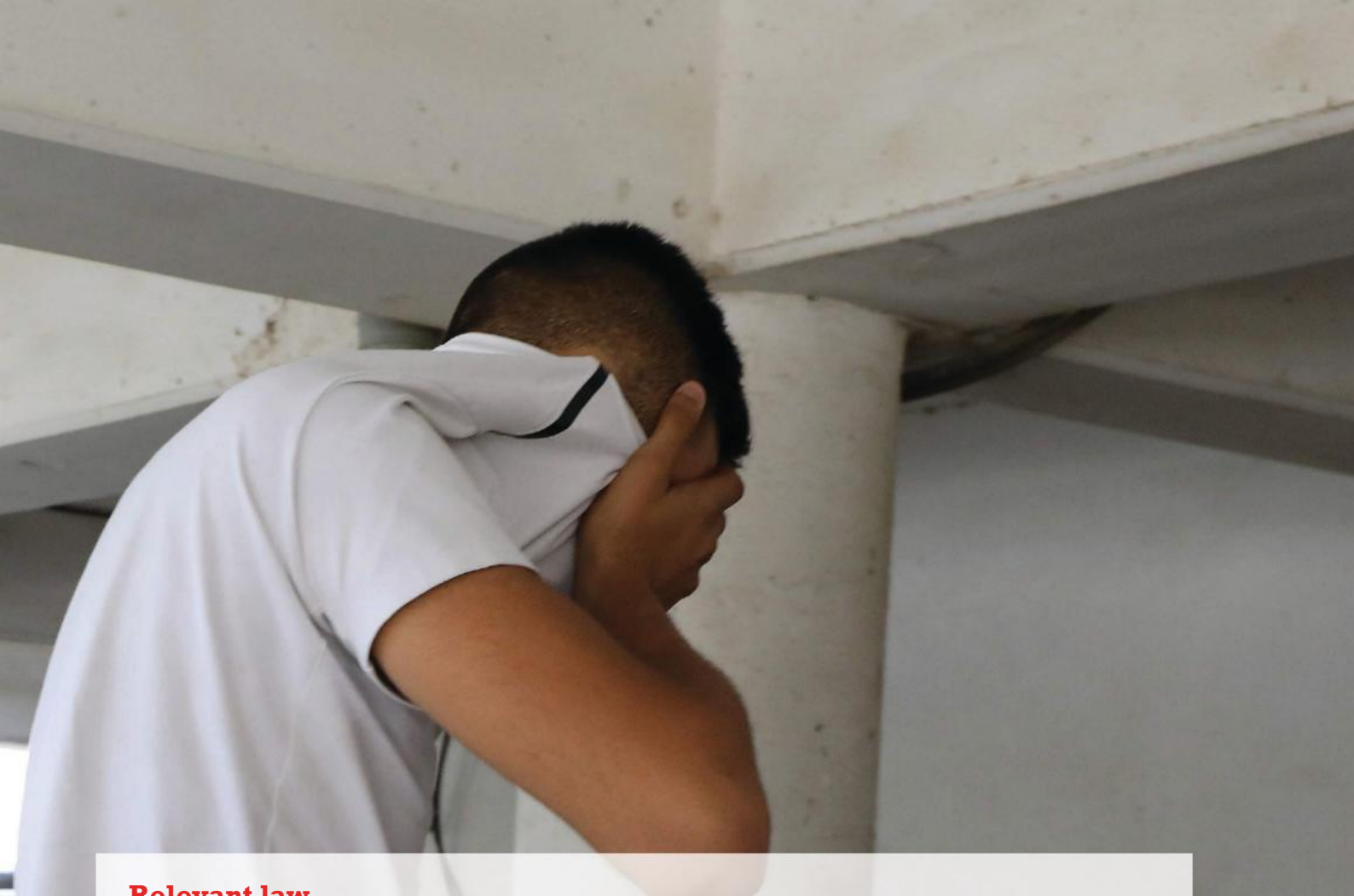

Relevant law

IMPORTANT LEGISLATION

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)
Crimes (Sentencing Procedure) Act 1999 (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 5359 young people aged 10 and over were under youth justice supervision on an average day in 2016–2017. Among those aged 10–17 years old, this equates to a rate of 20 per 10000, or one in every 500 young people.

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 younger people who commit offences and when viewed by gender these effects are particularly significant for male offenders. The offending rate for young offenders is also significantly higher than that of adult offenders.

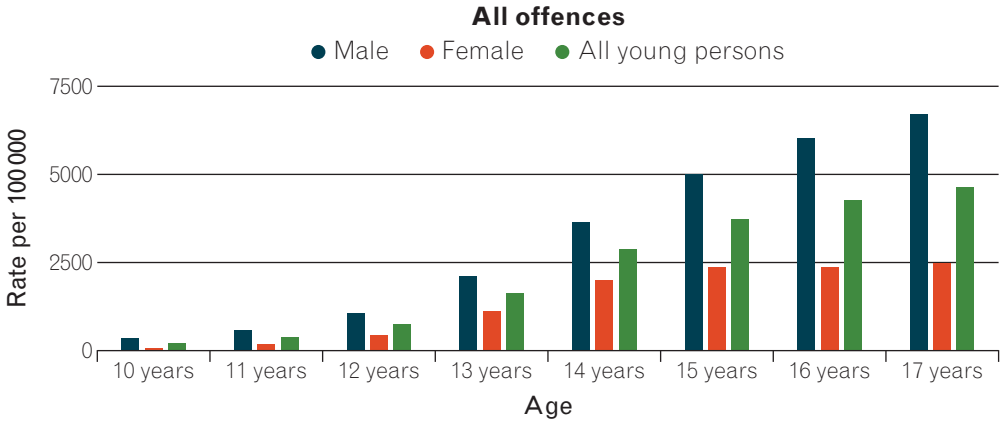

Figure 5.1 Offending rate by age and gender, January 2019.
Source: ABS.

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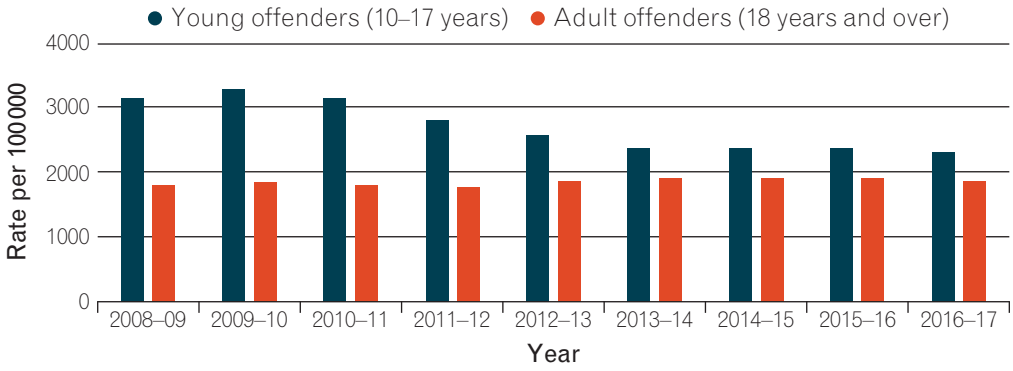

Figure 5.2 Offending rate for young offenders compared to adult offenders, by year, 2008-09 to 2016-17.
Source: ABS.

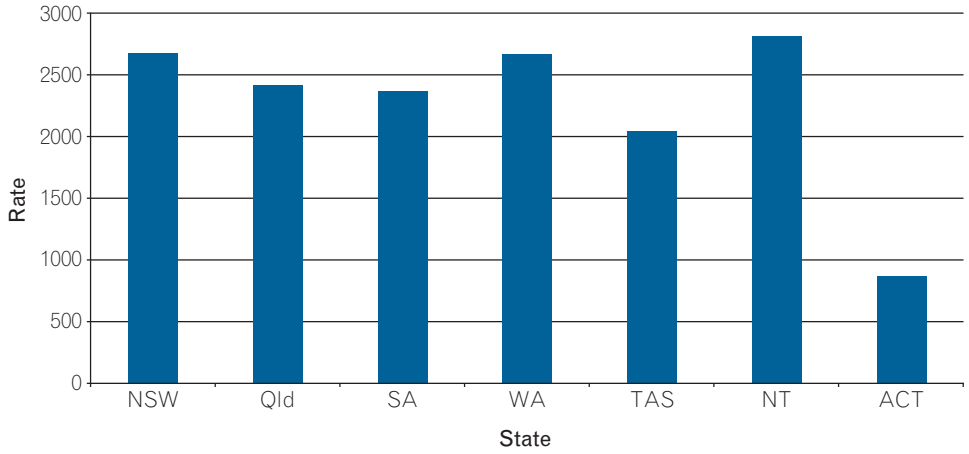

Figure 5.3 Youth offending rate – selected states and territories, 2017–2018.
Source: ABS.

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. 17) and the 'learn to' activities (pp. 17–19) 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.

Review 5.1

1 Compare the youth offending rate by age and gender, as shown in Figure 5.1.
2 Describe the trend in youth offending rates compared with the adult offending rates.
3 Explore some possible reasons for the difference in the rates.

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.

Figure 5.4 *Doli incapax* is a presumption that children are incapable of having criminal intent.

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.

doli incapax
a Latin term meaning 'incapable of wrong' (i.e. 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

Under the common law, this was a **rebuttable presumption**, which means the presumption was that the child could not have committed an offence, unless the prosecution could prove beyond reasonable doubt to the judge, or jury, that the child was capable of understanding their actions – that is, that the child knew that what they were doing was 'seriously wrong' at the time they did it, and not just 'naughty'.

rebuttable presumption
a legal presumption in favour of one party – it can be rebutted by the other party if they can show sufficient evidence to disprove it

By the end of the 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

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establishment in all countries' laws of 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. The treaty is in force in every country worldwide except Somalia and the United States.

Although Australian jurisdictions have not passed any single law that adopts the convention in its entirety, the High Court has ruled that Australian laws should, wherever possible, be understood in a manner that is consistent with the convention.

Children (under 10 years)

In New South Wales today, the *Children (Criminal Proceedings) Act 1987* (NSW) lays out the minimum age of criminal responsibility. Section 5 of the Act states that, '[i]t shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence'.

This means that, for children under 10 years old, *doli incapax* is a **conclusive presumption**. No child under the age of 10 can be found by law to have committed an offence, and this cannot be rebutted.

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

Previously, in some states the age of criminal responsibility was as low as 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 which would be considered unlawful, even if the law does not recognise their mental capacity for intention. There are occasionally calls from some sections of the community to lower the age of criminal responsibility, or even abolish it altogether. However, any reduction in the minimum age to below 10 years is extremely unlikely.

Children (10–13 years)

At what age, then, does a child become responsible for their actions? The *Children (Criminal Proceedings) Act 1987* (NSW) is silent on the responsibility of children 10 years or older. In New South Wales, the answer is still found in the common law – the rebuttable presumption of *doli incapax*. This applies to children 10–13 years old.

Once a child turns 10, they are still presumed incapable of committing a criminal offence, but this presumption is allowed to be rebutted. That is, the prosecution may be able to show that the child, at the time of the alleged offence, actually knew that their act was seriously wrong, not just 'naughty'.

The rebuttable presumption recognises that children of this age might have the mental capacity to understand the seriousness of their act, but it is up to the prosecution to prove it beyond reasonable doubt. Evidence that the prosecution might rely on could include psychiatric evidence, evidence from parents and teachers, or behaviour of and statements by the child.

As in the case of *R v LMW* [1999] NSWSC 1343 (see the 'In Court' box), the application of *doli incapax* has occasionally come under scrutiny, usually through high-profile cases relating to heinous crimes committed by children. Some of the issues surrounding this debate are highlighted by Thomas Crofts, Associate Professor at Murdoch University School of Law, in his paper '*Doli incapax*: Why Children Deserve its Protection' ((2003) 10(3) *Murdoch University Electronic Journal of Law* 26). Crofts states that:

- opponents argue that *doli incapax* should be lessened or removed because children today are better educated and the criminal law is not as harsh as it once was
- the rule can be unfair, especially to the victims of the crime
- it makes the prosecution's role in a criminal trial more difficult, as there is not always enough evidence to rebut the presumption of *doli incapax*.

However, Crofts goes on to defend the presumption of *doli incapax*. First, he states that it is consistent with the principles of international law to which Australia is a signatory. He also highlights that children develop their understanding of right and wrong at different stages of their lives and that *doli incapax*

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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.

helps to remind us of these different levels of maturity by forcing the prosecution to prove understanding on a case-by-case basis. Further, although it may slow down the prosecution, ultimately it does not stop it if there truly is proof of a guilty mind.

Young people (14–17 years)

Once a person turns 14 years, the presumption of *doli incapax* no longer applies and the offender can be found criminally responsible for their actions.

Children aged 14 and over are deemed mature enough to know when their actions are wrong and to know not to commit an offence. However, the law still continues to protect young people in a number of ways – full criminal responsibility, publicly triable in adult courts, does not occur until a person reaches 18 years of age.

Figure 5.5 This photo was taken in La Plata, Maryland, United States, on 20 March 2014. The Charles County Sheriff's office runs a teen court program to commute sentences and expunge records of minors (ages 12–17) who have committed first-time minor crimes. The jurors are also teenagers who do not know the defendant. The program is largely run by volunteers.

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Legal Info

The age of criminal responsibility in New South Wales

Age (inclusive)	Criminal responsibility
0–9 years old	Cannot be charged with a criminal offence. Children under 10 are viewed as insufficiently mature to commit criminal offences.
10–13 years	Rebuttable presumption of *doli incapax*. Presumed not capable of committing an offence, but the prosecution may prove capacity with sufficient evidence.
14–15 years	Criminally responsible for any offence committed, but no conviction can be recorded unless it is a serious offence.
16–17 years	Criminally responsible for any offence committed and a conviction may be recorded, but the case will still be heard in the Children's Court.
18 years and older	Full adult criminal responsibility, with case to be heard in adult courts.

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. If you are able to access and read the full article by Thomas Crofts, elaborate further on the contemporary issues surrounding *doli incapax*.
6. Discuss why young people are treated differently from adults in the criminal justice system. Provide examples in your answer.

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), 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.

5.3 The rights of children and young people when questioned or arrested

The rights of children and young people when dealing with law enforcement authorities vary between Australian jurisdictions. However, the law generally recognises that children and young people require some special protections when dealing with the police that are not afforded in ordinary circumstances to adults. In 1997, the Australian Law Reform Commission (ALRC) conducted an important inquiry into young people and the law, jointly with the Human Rights and Equal Opportunity Commission. The report was titled, *Seen and Heard: Young People and the Legal Process*, and examined

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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). However, national standards have not yet been implemented. The inquiry also surveyed 843 children and young people on dealings with the police: 78% of those surveyed stated that the police rarely treated young people with a sufficient degree of respect. There could be many reasons for this, and it does not necessarily mean inadequate policing. However, it was clear that there was room for improvement in the relationship between young people and police. Since the survey, a number of legislative changes have been introduced to try to add certain protections for children and young people.

As explored in Chapter 2, the main legislation outlining police powers in New South Wales is the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The Act contains a number of requirements for police in their dealings with young offenders.

Questioning of young people

Police in New South Wales have the power to approach young people and ask them questions at any time, as they do for adults. Most police powers that apply to adults (for example, powers to ask a person to 'move on' and most compulsory powers of search and seizure) apply equally to children and young offenders.

Identification, name and address

The police have a right to ask a person to identify themselves by giving their name and address. Likewise, a person can ask a police officer for their name and their police station. There are several situations, under various laws, where a person is legally required to respond and may commit an offence if they do not, for example:

- where the police officer suspects on reasonable grounds that the person can assist them in investigating an indictable offence that was committed nearby
- in a number of situations relating to vehicles and traffic
- where a person is suspected of committing an offence on a train.

However, some laws do apply to young people in particular. For example, under the *Summary Offences Act 1988* (NSW), a person can be stopped and required to provide their details if suspected of being under the age of 18 and carrying or consuming alcohol in a public place without adult supervision or reasonable excuse. If the young person cannot produce adequate identification, refuses to comply with the request or gives false details, police can impose a fine of up to $20.

Questions and right to silence

With regard to ordinary police questioning, the police may ask a person questions at any time. However, in most circumstances a person is not required to respond and may exercise their **right to silence**. A person can refuse to answer questions, even if they have been taken to a police station for questioning or arrested. This is because it may not be in their best interests to answer certain questions as their answers may later be used in evidence. For this reason, a person suspected of committing any offence should usually not answer police questions or sign any statements until they have received independent legal advice.

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

Right to support of a responsible adult

The law provides an additional level of protection for young people under the age of 18 when they are questioned by police. This is because the law assumes that young people may not be aware of their rights, may not fully understand the law or may be more vulnerable than adults in these circumstances. Under section 13 of the *Children (Criminal*

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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

Legal aid hotline for under 18s

People under the age of 18 are entitled to free legal advice from Legal Aid NSW. This can be accessed over the phone on 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.

Proceedings) Act 1987 (NSW), any information or statement a child or young person gives to police will be inadmissible as evidence in court proceedings against that person, unless:

- there is a responsible adult other than the police officer present, such as a parent, youth worker, guardian or lawyer
- the judge or magistrate otherwise decides that it should be admitted.

This is an important protection for young offenders as it means that police must ensure that there is a responsible adult present any time a person under 18 years old is questioned. If not, the police may be unable to use any information they were given as evidence. Generally, the adult should take notes and ensure that the young person gets legal advice and knows that they do not need to answer questions.

Searches

Police search powers for children and young people are largely the same as for adults, apart from strip searches. Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police can never perform a strip search on a child under 10. For a 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.

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 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.

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 and why, and inform the person of the police officer's name and station. Police may use reasonable force

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News

Police face watchdog hearing over strip-search of 16-year-old girl

By Angus Thompson

The Sydney Morning Herald

22 September 2019

Members of NSW Police are set to be grilled by the state's law enforcement watchdog over the strip-searching of a 16-year-old girl at Splendour in the Grass.

The Law Enforcement Conduct Commission (LECC) has confirmed it will investigate the 2018 incident at the music festival near Byron Bay, on the New South Wales north coast, and scrutinise the practice of strip-searching more generally during a three-day public hearing next month.

A NSW Police spokesperson said he was unaware at this stage whether or not Police Commissioner Mick Fuller would be giving evidence before the inquiry.

Police can only carry out field strip-searches if the urgency and seriousness of the situation requires it and, in the case of minors, if a parent or guardian is present, unless an immediate search is necessary to protect the person or prevent the destruction of evidence. Children under 10 cannot be strip-searched.

NSW Police data obtained by the Redfern Legal Centre showed almost 300 children were strip-searched in the field over a two-year period between the financial years 2016–2017 and 2017–2018, with the youngest person subjected to the procedure being 10 years old.

The *Herald* revealed earlier this year that NSW Police admitted in an internal document to officers breaching their strip-search powers.

In a previous statement to the *Herald*, a NSW Police spokesperson said the legislation surrounding strip-searches contained safeguards to preserve the privacy and dignity of members of the public.

'There are additional safeguards for children and vulnerable people with which police must comply; officers are trained to deal with the public in a respectful and empathetic manner,' the spokesperson said.

The hearing comes off the back of an investigation into police misusing their powers to conduct strip-searches, which LECC said arose from a number of complaints.

In a statement earlier this year, the commission said its inquiries led to other complaints being laid, including relating to the strip-searching of Aboriginal minors.

At that time, the commission said, despite the 'sensitive' nature of the allegations involving children, it 'may choose to hold public hearings if it considers them to be in the public interest'.

The hearing announcement comes two days after the closing of evidence in the coronial inquest into six drug-related deaths at New South Wales music festivals between December 2017 and

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(Continued)

January 2019. A 28-year-old woman, whose identity was protected by a court order, fought back tears during the inquest as she gave evidence that a female police officer threatened to make a strip-search 'nice and slow' at a Sydney music festival.

The festival-goer told the inquest she was left feeling 'humiliated' despite nothing illegal being found.

Greens MP, David Shoebridge, questioned Mr Fuller about the woman's evidence at a NSW parliamentary budget estimates hearing last month, prompting the police commissioner to reply that it was an 'absolute disgrace' that he be quizzed over the testimony of someone 'hidden behind the veil of anonymity'.

Mr Fuller's comments moved his lawyers to 'correct the record' as the court heard his legal team not only had the woman's name but her clean criminal history.

in arresting a young person, but the force may not be excessive, and the police officer may not assault or intimidate them. Likewise, a person cannot assault a police officer, resist arrest or use offensive language, or they may be guilty of further offences.

Support person and legal advice

The ALRC's *Seen and Heard* report, discussed earlier, recommended that upon arrest a child or young person's guardians or carers should be notified as soon as possible. This should not occur if the person's carer or guardian may be a threat to the child or young person's safety, which might be the case in some circumstances.

Under the *Law Enforcement (Powers and Responsibilities) 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.

interview friend
a parent, guardian, friend or legal representative present at the police interview of a minor; the interview friend's role is to offer support and witness that statements are made voluntarily

The police custody manager is required to assist the child or young person. At present there is no requirement to have legal representation during a police interview. The *Seen and Heard* report suggests that this should be a requirement for children and young people, and in 2002 the Supreme Court of New South Wales ruled in the case of *R v Cortez, CE, ME, IKEA & LT* (unreported, NSWSC, Dowd J, 3 October 2002) that the custody manager's duty includes informing a young person that legal aid advice is available over the phone and giving them an opportunity to ring it.

Figure 5.6 Police may use reasonable force when arresting a young person. However, the force must not be excessive, and the police officer must not assault or intimidate the young person.

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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

As with adults, people under 18 years of age in New South Wales can be detained for a maximum of four hours, or up to a further eight hours if a warrant for the extension is granted.

The *Seen and Heard* report recommended that children and young people not be detained for a period longer than two hours in all states. This is the practice at a federal level. Children may be particularly vulnerable during long periods of detention, so excessive periods are discouraged. As mentioned above, the presence of an interview friend is one mechanism that may help prevent evidence being obtained under duress or coercion during lengthy periods of interrogation.

Forensic procedures, photos and searches

Police will often require identification of suspects when arrested, including photographing them or taking fingerprints or DNA samples.

For young people 14 years or over, police may take fingerprints or photographs if it is for the purpose of identifying them. However, for children under 14 years, the police can only take photos or fingerprints if they apply to the Children's Court to do so. The child may not be held in custody while the application is being obtained, and the Children's Court will take into account the seriousness of the offence, cultural and ethnicity considerations, the 'best interests' of the child and the wishes of the child and their parent or guardian.

Figure 5.7 Police cannot take fingerprints from any suspect under 14 years old unless they have a court order allowing them to do so.

Similarly, police cannot take a DNA sample of any suspect under 18 years old unless they have a court order allowing them to do so. Children and young people cannot give this consent on their own. If the criminal matter is not proved in court (for example, if the person is acquitted), or the person is found not guilty, or the case is discontinued, the police must destroy any fingerprints, photos or DNA samples on request of the parent or guardian.

Additional comments

It is hoped that good policing has preceded the arrest of a child or young person, and that police have gathered sufficient evidence to bring them into the police station. However, this is not always the case.

In some jurisdictions, there is criticism that police may rely too heavily on powers of arrest to gather evidence or to further the interrogation of suspects, especially in the case of indigenous youth. The *United Nations Convention on the Rights of the Child* (1989) obliges countries to use arrest only as a 'last resort', as it is a negative and traumatising experience for

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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 study undertaken in 2017 by the Youth Justice Coalition, 'Policing Young People in New South Wales: A Study of the Suspect Targeting Management Plan', has published the following findings in their executive summary. It found:

- Disproportionate use against young people and Aboriginal people: Data shows the STMP disproportionately targets young people, particularly Aboriginal and Torres Strait Islander people, and has been used against children as young as 10.
- Patterns of 'oppressive policing' that may be damaging relationships between police and young people: Young people targeted on the STMP experience a pattern of repeated contact with police in confrontational circumstances such as through stop and search, move on directions and regular home visits. The STMP risks damaging relationships between young people and the police. Young people, their families or legal representatives are rarely aware of criteria used to add or remove people from the STMP. As the case studies show, young people experience the STMP as a pattern of oppressive, unjust policing.
- Increases in young people's costly contact with the criminal justice system with no observable impact on crime prevention: The STMP has the effect of increasing vulnerable young people's contact with the criminal justice system. Application of the STMP can be seen to undermine key objectives of the NSW youth criminal justice system, including diversion, rehabilitation and therapeutic justice. The research has identified several instances where Aboriginal young people on Youth Koori Court therapeutic programs have had their rehabilitation compromised by remaining on the STMP. There is no publicly available evidence that the STMP reduces youth crime.
- STMP encourages poor police practice: In some instances, the exercise of police search powers in relation to a young person on the STMP have been found unlawful by the courts. The STMP may be inadvertently diminishing police understanding of the lawful use of powers (set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA)) and thereby exposing police to reduced efficacy and civil action.
- No transparency and an absence of oversight, scrutiny or evaluation: The operation of the STMP is not transparent or accountable. Criteria for placement on the STMP are not publicly available, individuals cannot access their STMP plan and it is unclear what criteria are used by police to remove a person from the STMP.
- To further investigate the use of STMPs against young people, read the 'Policing Young People in New South Wales' study (available on the website of the Public Interest Advocacy Centre).

children and young people. The *Seen and Heard* report also recommended that, for children considered 'at risk', welfare and health services will usually be more appropriate than police to deal with the situation.

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) lays down the principle in New South Wales, with detailed provisions about when and for what purpose an arrest can be made. Section 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) also creates a presumption that children should not be arrested or detained, unless, for example, the offence was a serious or violent one, or there is a danger of further offences or violent behaviour.

Further, it could be argued the police in New South Wales and other jurisdictions should be given

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Figure 5.8 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.

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

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.

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, and discuss how they differ from the rights of adults.

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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.

5.4 Children's Court: Procedures and operation

The Children's Court of New South Wales was discussed in Chapter 3 under the topic of the court hierarchy. The Children's Court is a specialised court established in 1987 under the *Children's Court Act 1987* (NSW). It has a dual role:

- dealing with the criminal matters of children and young people under 18 years of age
- dealing with matters of care and protection of children and young people referred to it by the Department of 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, below.

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

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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 its 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
- Aboriginal children were approximately 26 times more likely to be there than non-Aboriginal children.

On a positive note, of the 7515 young people between the ages of 10 and 17 who appeared before a New South Wales criminal court, detention continues to be the principal penalty for only a very small number of cases: approximately 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.

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, psycho-social or mental health issues present in the child's situation that the court needs to consider prior to passing sentence'. The assessment report 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.

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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 mentioned above, 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. 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 5.1, below.

TABLE 5.1 Penalties that apply to children

Dismissal	The court can dismiss the charge without punishment or conviction, but may decide to issue a caution to the offender.
Conviction	For young offenders, the court can decide whether to record a conviction, but for children under 16 years old no conviction can be recorded.
Adjournment	The sentencing can be adjourned or deferred for up to 12 months to assess the child's prospects of rehabilitation, and reconsidered at that later date.
Bond	The child can be released on a good behaviour bond for up to a maximum of two years.
Youth justice	The child can be released subject to the child complying with a **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.

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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

Youth Justice centres

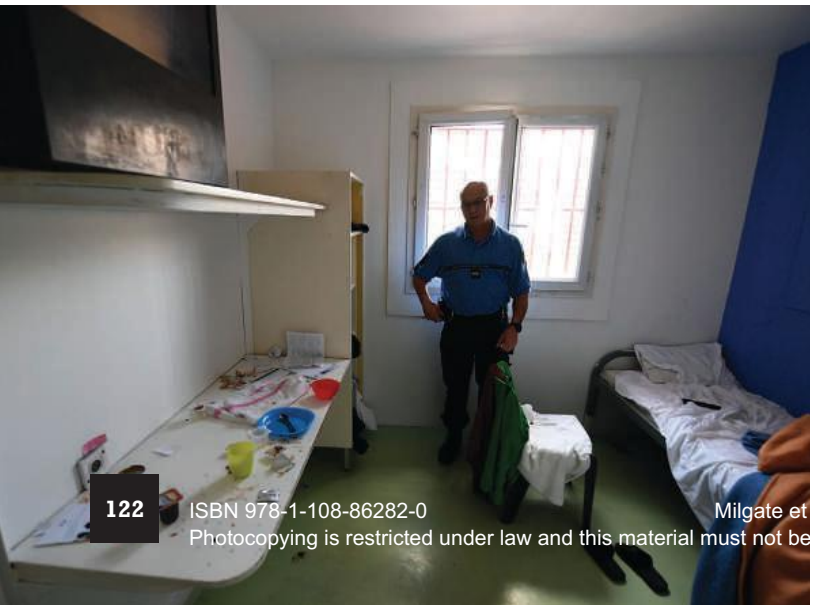
A control order is the most severe penalty available in children's criminal proceedings. It is similar to the adult penalty of imprisonment, except that the maximum time servable is two years and the young offender is not held at an adult correctional centre but at a Youth Justice centre.

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. 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.

Figure 5.9 A prison guard at a youth detention centre (Établissement Pénitentiaire pour Mineurs – EPM) in Marseille, France, on 4 March 2019.



This led to a 21.8% rise in the number of youth on remand from 2014/15 to 2018/19. 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've been to court, this amendment's provisions have added to the negative experience many young people have with the criminal justice system, reinforcing their negative perception of it. There are some young offenders who are a risk to the community, but even for them incarceration is not always the answer. Preventive and rehabilitative programs which are more resource-efficient are discussed later.

Further amendments were made to the *Bail Act 1978* (NSW) after repeated criticism from within the legal fraternity and the broader community that the 2007 amendments had fundamentally undermined the presumption of 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.

The extent to which this will influence the increasing number of young offenders in incarceration – as opposed to in appropriate

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diversionary programs – remains to be seen but indigenous youth continue to be significantly over-represented. The average daily number of youth (10–17 years) in detention in New South Wales fell by 15.7% between 2012–2013 (324) and 2016–2017 (273). In 2016–2017, the average daily detention rate for indigenous youth was 33 per 10 000 youth; compared to an average daily detention rate for non-indigenous youth of two per 10 000. The average daily detention rate of all youth was three per 10 000.

Video

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.

In Court

***R v GDP* (1991) 53 A Crim R 112**

Although now a relatively old case, *R v GDP* still outlines an important principle in child sentencing. The offender was 14 years old when he committed serious criminal damage to property with two of his friends. The damage included breaking through a window, drilling a safe, defacing cars, smashing furniture and lighting dangerous fires that in total added up to $550 000 in damage. GDP had had no prior incidents and was well regarded by his teachers. The judge in GDP's case sentenced him to a 12-month custodial sentence.

GDP appealed to the Court of Criminal Appeal, where a panel of three judges held that the sentence was manifestly excessive. In explanation, the court stated that sentencing principles for children are different from those for adults – general deterrence and retribution were not as important as they would be in the case of an adult. Rehabilitation is the primary aim with offenders as young as this. In this case a custodial sentence would have been positively damaging to GDP's rehabilitation; he was by this time commencing Year 12 and facing his HSC. The court reversed the original sentence and replaced it with a 12-month probation order.

In Court

***R v Pham & Ly* (1991) 55 A Crim R 128**

This case involved two main offenders, one just under the age of 18 at the time of the offence.

The young offenders broke into a house early in the morning, knowing the occupants were home. They bound and gagged their victims with 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.

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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.

The seriousness of the offence is a significant consideration in determining the sentence. However, unlike for adult offenders, where purposes of retribution and deterrence would be likely to increase a sentence, with children and young people the court must keep the rehabilitative focus foremost in mind.

There may, however, be exceptions to this rule where a young offender is involved in repeated offences, or where they engage in **grave adult behaviour**, which is where the offender has acted like an adult in terms of the seriousness of the offence and/or the level of premeditation involved. The court may see that person as having acted like an adult, so other sentencing objectives might come into play. For example, see the case of *R v Pham & Ly* in the second 'In Court' box on the previous page.

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

5.6 Alternatives to court

As for adult offenders, there are programs for children and young offenders that offer an alternative to the formal criminal justice process that is played out through the courts.

In New South Wales, the *Young Offenders Act 1997* (NSW) provides the main alternative program for young offenders. The Act came into force in New South Wales in 1998 and was introduced to provide various diversionary measures for young offenders and police as an alternative to traditional criminal processes and court penalties. The aim is to encourage rehabilitation, reduce rates of recidivism and reduce the burden of more minor youth offences on the court system.

The program only applies to summary offences and to indictable offences that can be tried summarily. It does not apply to serious offences, including robbery, sexual offences or any offence resulting in a person's death. The principles of the Act are that:

- where sanctions are applied, they should be as unrestrictive as possible
- children should be advised of their right to seek legal advice
- criminal proceedings are not to be started if there is an appropriate alternative for dealing with the matter.

Under the Act, children and young offenders who have committed an offence covered by the Act may proceed through a three-tiered system of diversionary processes – **warnings**, cautions and youth justice conferences.

warning
a notice given to a young offender (usually for a first minor offence) that is recorded by police but with no conditions attached; the offender must be told of the nature, purpose and effect of the warning

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

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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.

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 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

Figure 5.10 The purpose of a youth justice conference is to allow the offender to take some responsibility for their actions. This graph shows the number of referrals that led to conferences in New South Wales from 2013 to 2018.
Source: DJ/JJ Strategic Information System(SIS). Effective date 2 July 2018.

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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 indigenous young offenders it fell by 17.5%, and for non-indigenous young offenders by 16.3%.

One of the criticisms of the Act, however, is that it is not being used for a wide enough range of offences and therefore is excluding some young offenders from the benefits that conferencing offers and as a result may be perceived as a soft option. For example, the Shopfront Youth Legal Centre, in response to a 2003 review of the sentencing of young offenders carried out by the NSW Law Reform Commission, argued over 10 years ago that youth justice conferencing could be suitable for even very serious offences . It may be effective for more serious crimes because the young offender is compelled to think about the consequences of their actions, in particular the impact on the victim. Recidivism rates in Victoria, where conferencing is used for wider-ranging and more serious offences, are lower. As mentioned below, conferencing also needs to be supported by well-resourced rehabilitative programs.

Legal Info

Youth offenders

A study of youth offenders released by the NSW Bureau of Crime Statistics and Research has shown that it is unusual for youth to receive more than three police cautions or 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* 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.

Research 5.2

Research NSW Police with respect to Youth Justice conferencing and complete the following tasks (https://cambridge.edu.au/redirect/8754):

1. Explain the difference between the following terms: 'warning', 'caution' and 'youth justice conference'.
2. Describe the process and the parties involved in a youth justice conference.

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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. The report states that the:

> adverse effects of imprisonment on employment outcomes and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders.

This has not happened in New South Wales. As mentioned above, a trend has been the increasing numbers of young people in Youth Justice centres, which has predominantly come about because of amendments to the *Bail Act*. Eighty per cent of the young people on remand due to these changes do not go on to receive a custodial sentence, yet they suffer the negative effects of being incarcerated in such institutions.

Figure 5.11 Children may be particularly vulnerable during long periods of detention.

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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* has been particularly successful in diverting young people from custodial sentences. The Children's Court has the power to refer young people who appear before it to youth justice conferencing and some 50% of conference cases have been referred by the court. While this could suggest that matters might be unnecessarily referred to the Children's Court when they could be better dealt with elsewhere, youth justice conferencing remains an important alternative to incarceration.

Recent findings, however, point to conferencing needing to be supported by additional rehabilitative measures. In March 2012, the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, said:

> [T]he conference regime established under the New South Wales *Young Offenders Act 1997* (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.

Dr Weatherburn went on to say:

> One can only speculate about the reasons for this, but one possible explanation is that [youth justice conferences] do not address the underlying causes of juvenile offending (e.g. drug and alcohol use, parental neglect and abuse, poor school performance, boredom and unemployment).

The NSW Commission for Children and Young People supported this in its submission to the review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW), and argued for further reforms. It believes the current legislation does not meet the needs of children and young people for the following reasons:

- Recent research has revealed a greater understanding that the development of the frontal cortex of the brain continues until the age of 25 years. Research also suggests that when abuse and neglect are evident when the brain is undergoing such change, the adverse effects can be long term. The commission has suggested that our understanding of the meaning of criminal responsibility for children and young people may need to be reassessed.
- The report goes on to say, 'the attempt to combine the so called justice and welfare models of youth justice in the legislation has

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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 above.

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% 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% 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 5.12 The NSW Commission for Children and Young People has suggested that changes in our understanding of the impacts on adolescent brain development may require us to reassess our notions of criminal responsibility.

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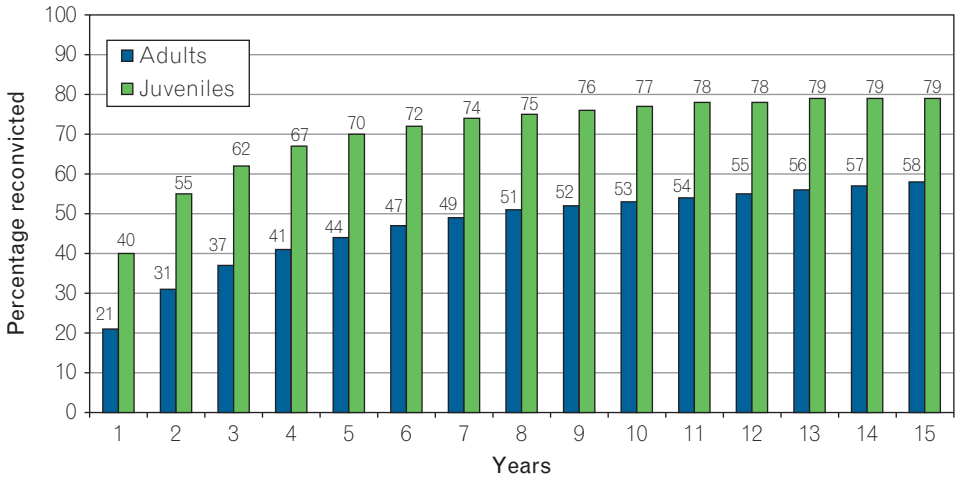

Figure 5.13 The cumulative percentage of adults and juveniles convicted in 1994 who were reconvicted each year to 2009 in New South Wales. For example, after five years 70% of juveniles and 44% of adults convicted in 1994 had re-offended. Proportionately more young people re-offend within 15 years than adults. This suggests that rehabilitation of young offenders needs to be reinforced.

Source: NSW Bureau of Crime Statistics and Research, 2012.

Review 5.7

1. Identify the impact that changes to the *Bail Act* have had in New South Wales.
2. Outline some of the changes that were made to the *Bail Act* in 2014.
3. Explain why the *Bail Act* was amended again after only being in operation for a short time.
4. 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.

Figure 5.14 Former athlete Cathy Freeman meets with young offenders during a visit to the Juniperina Juvenile Justice Centre, which is the country's only centre for female young offenders.

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News

Juvenile Justice bosses 'approved unlawful isolation', lawsuit claims

By Patrick Begley

The Sydney Morning Herald

26 August 2019

Some of the state's most senior Juvenile Justice managers signed off on the unlawful solitary confinement of a teenage boy in NSW youth custody centres, a lawsuit claims.

The case follows a scandal in which 66 young people, many of them indigenous, were forced to spend up to 22 hours a day in dark cells as part of a behavioural program abandoned in 2016.

It also sets the scene for a clash over whether detainees have 'residual liberty' while in custody, as the NSW Crown solicitor argues the term is 'not known to the law', despite Supreme Court justices applying it in recent years.

The plaintiff, Leaum Doolan, now 19, has been in and out of Juvenile Justice centres since he was 13. His lawyers, Maurice Blackburn, argue managers isolated him excessively as a punishment rather than for safety reasons, a breach of the *Children (Detention Centres) Act 1987* (NSW).

The claim, filed in the NSW Supreme Court, also alleges Mr Doolan was unnecessarily handcuffed and verbally abused by guards, who called him 'a piece of sh–' and encouraged him to kill himself.

Between 2016 and 2017, Mr Doolan was placed on a series of Detainee Risk Management Plans, first at the Reiby centre south of Sydney and then at Cobham in the city's west.

His lawyers argue these plans unnecessarily deprived him of liberty, sometimes shutting him alone in his cell for 22 hours a day for a week or more at a time. He was handcuffed during some recreation periods, making it difficult to exercise, and often forbidden to speak with classmates when allowed to attend school, the claim said.

These conditions 'had a tendency to exacerbate the pressures on the plaintiff, rather than address the underlying problems of the plaintiff, and increased the risk of misbehaviour,' Maurice Blackburn said.

The centre manager of Sydney's Cobham facility, Michael Vita, who conducted a review of the notorious Northern Territory centre Don Dale, was one of the Juvenile Justice staff who signed or otherwise approved several of the risk management plans, according to the claim.

Regional directors Steve Wilson and Denise Hanley and state-wide operations manager Kevin Harris were also named as authorisers. By law, detainees must not be confined as punishment for more than 24 hours and any segregation for safety reasons has to be as brief as possible.

Mr Doolan's lawyers argue he was subjected to a form of false imprisonment because he was deprived of residual liberty, 'the right to enjoy all civil liberties not taken away expressly or by necessary implication by the lawful terms of his imprisonment'.

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(Continued)

A defence filed by NSW Crown solicitor Karen Smith on behalf of the state government disputed a number of details alleged by Mr Doolan, while arguing his isolation periods were justified and lawful. The defence denied that centre managers or other approvers of the detention failed to consider the legislation and their duties to care for Mr Doolan.

The defence also said the term residual liberty 'is not known to the law'.

But a search of the AustLII legal database returns a number of NSW cases discussing the concept.

'A prisoner may have a right to damages for wrongful imprisonment under the principle of residual liberty,' Justice David Davies found in a 2016 case involving Corrective Services NSW.

In another 2016 Supreme Court matter, Justice Peter Hamill found 'even while the plaintiffs were lawfully in immigration detention, they enjoyed what has been described as a right to "residual liberty"'.

Last year, the independent Inspector of Custodial Services Fiona Rafter found an 'extremely problematic' program of isolation at the Cobham facility had broken the law. The report also found excessive handcuffing, again in breach of the law, was among the 'significant failings' within the system.

Figure 5.15 The notorious Don Dale Prison, Northern Territory.

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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 *Doli incapax* refers to which of the following?
   - **a** The children's court jurisdiction to hear matters pertaining to young offenders.
   - **b** The incapacity to have criminal intent.
   - **c** Mitigating factors when sentencing.
   - **d** The incapacity of young offenders to make decisions about their future in court proceedings.

2 Of the following statements, which is correct with respect to 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** Formal recorded admission by consent with potential consequences.
   - **c** An official recorded notice without conditions.
   - **d** An informal written reprimand without conditions.

4 Which of the following statements is correct with respect to the jurisdiction of the Children's Court?
   - **a** It can hear committal proceedings and minor matters against children and young people.
   - **b** It can hear committal proceedings and all but serious indictable matters against children and young people.
   - **c** It can hear serious indictable matters and committal proceedings against children and young people.
   - **d** It can hear all matters and committal proceedings against children and young people.

5 What types of penalties can young offenders receive?
   - **a** Dismissal, fine, community service order, adjournment, control order, youth justice conference, life imprisonment.
   - **b** Dismissal, fine, community service order, adjournment, home detention, control order, youth justice conference.
   - **c** Dismissal, community service order, fine, control order, youth justice conference.
   - **d** Dismissal, fine, community service order, suspended sentence, adjournment, control order, youth justice conference.

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Chapter 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.

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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 – and 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.

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 (UN). Together with such cooperation has been a growing recognition that certain actions committed within sovereign state jurisdictions may be so extreme, and so universally condemned, as to constitute a crime that ought to be universally condemned as a **crime against the international community** – genocide or crimes against humanity, for example.

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

In more recent years, with globalisation, plus increased international travel and advances in technology, crimes that were in the past committed only locally, 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.

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

'**International crime**' is a broad term that could cover any crime with international origin or consequences. There are many types of international crimes, and many international crimes have existed since before 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
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 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.

Crimes against the international community

Crimes against the international community are an entirely different class of crimes. Unlike domestic or transnational crimes, crimes against the international community are a collection of offences that are recognised by the international community as being of universal concern. They include some of the most extreme crimes possible – crimes that are deemed so serious that they are condemned by the majority of the international community and may be punishable internationally.

However, there is no fully agreed list of such crimes. Many countries will disagree about specific aspects of an offence, or about the inclusion of certain crimes, but they almost always include crimes such as **genocide**, war crimes, piracy (at sea), hijacking of aircraft and slave trading on the list of international crimes.

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

The prosecution of crimes against the international community can be controversial. Such crimes may be committed in the context of military conflict. They may be highly politically motivated, or they may have been ordered or committed by the state itself. States can sometimes be unwilling or unable to prosecute individuals for these crimes, as in some instances those responsible are still in positions of power. In other instances, the offenders have fled to a different jurisdiction in an attempt to escape prosecution.

The importance of all states condemning crimes against the international community is that the criminals may then be unable to escape prosecution simply because they are still in power or have fled the jurisdiction. Other states condemning the action may have a right to prosecute the offender under a claim of **universal jurisdiction**, where a state claims a right to prosecute a person based on the common international belief that the alleged crime is so serious that normal laws of criminal jurisdiction do not apply. Some states, such as Belgium, Spain and the United Kingdom, may be more likely to assert a claim of universal jurisdiction over such serious criminals – these cases are generally very high profile and politically controversial.

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

Figure 6.1 On 8 July 2019, International Criminal Court judges convicted Congolese rebel warlord, Bosco 'Terminator' Ntaganda, of war crimes, including directing gruesome massacres of civilians, rape and sexual slavery.

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International jurisdiction over universally condemned crimes represents a fundamental change to the traditional view of state sovereignty, and is based on the idea that some acts are so extreme and universally condemned that they can no longer be permitted under the laws of any state.

Genocide

Article 6 of the *Rome Statute of the International Court* (1998) ('Rome Statute') gives the International Criminal Court criminal jurisdiction over acts of genocide that occurred after July 2002. Genocide includes various brutal acts intended to destroy all or part of a national, ethnic, racial or religious group. The Rome Statute defines the crime of genocide as including:

- killing members of the group
- causing serious bodily or mental harm to members of the group
- deliberately inflicting on the group conditions of life calculated to bring about the group's physical destruction in whole or in part
- imposing measures to prevent births within the group
- forcibly transferring children of the group to another group.

Genocide has long been condemned by the international community as a crime so serious that the international community has a responsibility to punish it. Acts of genocide were criminalised in one of the first treaties established by the UN – the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

Genocide is extremely difficult to prove and cases involve enormous amounts of documentary evidence, forensic evidence, review of killings and military orders, testimony, expert opinions and more. It can involve accusations of the killing of vast numbers of people, from hundreds to millions. The court will need to prove beyond a reasonable doubt an intention to destroy all or part of the particular group.

There are numerous tragic examples of genocide throughout history. However, claims of genocide are often extremely controversial and in some cases vehemently opposed by the groups accused of perpetrating the crime. The most universally recognised genocide is the killing of six million European Jews in World War II, under a program of deliberate extermination that was planned and carried out by the National Socialist German Workers Party (also known as NSDAP or the Nazi Party), and led by Adolf Hitler. Scholars suggest that under the widest definition of genocide, and including the deliberate extermination of Slavs, Romani, homosexuals, the mentally ill, political opponents and Jehovah's Witnesses, the death toll was as high as 17 million people.

Prior to the establishment of the International Criminal Court in 2002, genocide, war crimes and crimes against humanity were often dealt with by the international community in specific *ad hoc* tribunals set up to prosecute particular incidents; examples are the International Criminal Tribunal for the Former Yugoslavia (ICTY), established to prosecute those most responsible for crimes committed during the breakup of the former Yugoslavia, and the International Criminal Tribunal for Rwanda (ICTR), set up to prosecute those most responsible for crimes committed during the Rwandan genocide. Since its creation, the International Criminal Court has not yet convicted any person of genocide.

Figure 6.2 In Vienna, Austria on 13 July 2019, people holding banners and photos attend a march commemorating the victims of the July 1995 Srebrenica genocide in Bosnia and Herzegovina.

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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 the definition on the next page.

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 International Criminal Court 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 are famous for their prosecution of prominent leaders of defeated Nazi Germany for crimes against humanity and war crimes

Formerly, crimes against humanity were considered as having been committed within the context of war, although the genocide convention contains no such restriction. This was because the crimes were generally considered as in addition to war crimes, but arising from the same incidents. However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has since clarified that crimes against humanity do not have to be committed within the context of an armed conflict. The current International Criminal Court definition contains no restriction to a war context.

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. 17) and the 'learn to' activities (pp. 17–19) 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.

Review 6.1

Consider the Rome Statute's definition of 'crimes against humanity' and complete the following tasks.

1. Identify some of the differences between the crime of genocide and crimes against humanity.
2. Explain some of the reasons why crimes against humanity might be easier to prosecute than the crime of genocide.
3. Article 7(2) of the Rome Statute contains extended definitions of the acts outlined previously. You can find the Rome Statute on the International Criminal Court's website. Read Article 7(2) and then describe what is meant by the terms 'extermination', 'torture' and 'forced pregnancy'.

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Crimes against humanity: Article 7 of the Rome Statute

For the purpose of the Rome Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder
- extermination
- enslavement
- deportation or forcible transfer of a population
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- torture
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law
- enforced disappearance of persons
- apartheid
- other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.

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 International Criminal Court 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.

Case Study

Prosecution of Sudanese President Omar al-Bashir

On 14 July 2008, International Criminal Court (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.

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Case Study (continued)

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.

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. If al-Bashir is unable to continue to hide behind the sovereignty of Sudan, it may be possible that indictments against him will be pursued. His current status is that of 'fugitive'.

Research 6.1

Visit the International Criminal Court's website and then 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 policy-makers increasingly have to confront offences and offenders whose origins are outside their jurisdiction.

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Figure 6.3 In Islamabad, Pakistan, on 9 May 2019, an official (left) of the Pakistani Federal Investigation Agency guides detained handcuffed Chinese nationals as they arrive at court. The men were allegedly involved in a trafficking ring that lured women from Pakistan to China using fake marriages, then forced them into prostitution.

The move to a global economy, as well as the increased volume and diversity of migration, has also led to more opportunities for transnational crime.

Some of the main types of transnational crimes include:

- **human trafficking** and people smuggling across borders
- international fraud and white-collar crime (for example, tax evasion or money laundering)
- transnational internet crimes, including data theft, internet fraud, copyright infringement and spam networks
- international terrorism, including cyber-terrorism such as disruption of infrastructure, including via electrical systems or computer networks
- creation and trafficking of child pornography
- transnational trade in illegal substances, including via international air, shipping and postal networks.

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery, usually involving recruiting, transporting or obtaining a person by force, coercion or deceptive means

It is impossible to itemise all forms of transnational crime as there may be a number of crimes and parties involved and various methods employed to commit the crime. Some crimes may cross many borders; for example, terrorism may be planned in one country, while training can occur in another, funds or materials can be sourced in another country, and the act itself is carried out in the target country. Organised crime rings can have operations across many countries and various elements of the crimes may take place at different locations.

Causes of transnational crimes might include:

- differences in socioeconomic conditions between countries; for example, human trafficking or internet fraud may originate in less advantaged countries
- the desire for prohibited goods or services, where suppliers are based in one country and consumers in another
- differences in political or ideological viewpoints (for example, international terrorism or international hacking for political or ideological reasons)
- hope that the transnational element will prevent detection (for example, international money laundering or tax evasion)
- opportunistic desire for power or financial gain.

Transnational crimes will usually be prosecuted under the law of one or another country's domestic jurisdiction. For many crimes, the elements of the crime will not be complete until the border has been crossed, so the target country will often be the enforcer, through its local legislation and law enforcement.

The nature of transnational crime can make prosecution very difficult. For example, a person in Nigeria who sends bulk spam or fraudulent emails to Australian addresses will be very difficult for Australian law enforcement authorities to track down or prosecute. Similarly, the creation and dissemination of child pornography throughout the world is a major concern – authorities in Australia and around the world find it difficult to break through the anonymity of child pornography rings that operate in many countries.

Due to the difficulties in trans-border detection and enforcement of criminal laws, many laws relating to such crimes are now underpinned by cooperation agreements between a pair or group of countries affected in some way by those crimes.

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Review 6.2

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 below.

International Criminal Court

The establishment of the **International Criminal Court (ICC)** in 2002 in The Hague, The Netherlands, was a significant development in the law of crimes against the international community. The court's establishment followed years of international negotiations and deliberations, with the treaty eventually signed at a 1968 UN conference in Rome. The **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 March 2019, there were 122 state parties to the ICC. Of those states, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and the Caribbean states, and 25 are from Western European and other states.


Video

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

The ICC was established by the international community as a permanent court and a separate international entity from the UN. It is independent of the UN and from any state other than through their influence. The ICC does, however, require a referral from the UN Security Council to prosecute certain individuals outside the court's normal jurisdiction. It consists of 18 judges, each from a different signatory country, who operate in pre-trial, trial and appeals divisions.

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 can now prosecute crimes of aggression.

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 crimes
action carried out during a time of war that violates accepted international rules of war

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, or
- the situation is referred to the ICC by the UN Security Council.

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Figure 6.4 Outside the Ministry of Justice in Khartoum, Sudan, on 19 September 2019, Sudanese protesters chant slogans during a protest asking for the extradition of ousted former president, Omar al-Bashir, to the International Criminal Court.

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 …

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Review 6.3

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.

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.

Domestic measures

Domestic responses to international crime are limited by jurisdiction. Australian law enforcement cannot operate in a foreign country, Australian courts do not have jurisdiction over crimes committed under foreign laws, and Australian parliaments cannot make laws that affect the laws of other countries. As a result, the ability of the Australian legal system to respond is inhibited unless there is cooperation with foreign countries.

There are specific circumstances where exceptions may be possible, such as where express permission has been granted for the presence of Australian law enforcement by the host country (for example, assisting in crisis relief efforts), where parliament legislates on actions of Australian residents abroad (for example, child-sex tourism laws) or where an Australian court claims jurisdiction under a rule of international law (for example, universal jurisdiction). However, many other important actions have been taken in Australia to combat international crime; these are considered below.

Crimes against the international community

The most significant recent development in Australia in terms of dealing with crimes against the international community was the signing and ratification of the Rome Statute. Australia was one of the first signatories, signing on 9 December 1998. Australia ratified the statute on 1 July 2002, which was the date the statute came into force internationally.

Prior to the introduction of the Rome Statute, Australia had legislated to criminalise a number of recognised crimes against the international community: the *War Crimes Act 1945* (Cth) and in particular the *Geneva Conventions Act 1957* (Cth), which outlawed the recognised war crimes listed in the Geneva Conventions. 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).

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.

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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. At the time of publication, there has yet to be an Australian judge appointed to the court. Under the Australian legislation, the Commonwealth Attorney-General must report annually on the operations of the ICC, and on any impact it has had on the Australian legal system. According to the report of the Attorney-General's Department for 2008–2009, there have so far been no Australian prosecutions for crimes under the Act, and the ICC has had 'no discernible impact' on Australia's legal system.

Transnational crime

The Australian Government, like many governments around the world, has moved in recent years to combat the rise of transnational crimes. The following are some of the measures in place to monitor and respond to issues of transnational crime.

Australian Federal Police

The **Australian Federal Police (AFP)** was established under the *Australian Federal Police Act 1979* (Cth) to uphold Commonwealth criminal law and to guard Australia's interests from crime in Australia and overseas. The AFP interacts with a variety of law enforcement groups at state, territory, Commonwealth and international levels.

Australian Federal Police (AFP)
Australia's Commonwealth police force, established to uphold Commonwealth criminal law and to guard Australia's interests from crime both in Australia and internationally

The role of the AFP has grown considerably in recent years with the growth in transnational crime. In addition to its many domestic duties, the AFP is also engaged in various international activities. This includes posts in more than 25 countries, deployment of Australian police for international capacity-building, monitoring and **peacekeeping**, and specialist training for international law enforcement agencies to help prevent transnational crimes at their source and encourage greater international cooperation.

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

Some of the AFP's international operations include child protection, counter-terrorism operations, stopping human trafficking and drug operations. For example, the Jakarta Regional Cooperation Team has helped Indonesian police investigate and arrest suspects in relation to the 2002 Bali bombings in Indonesia and the bombings of the Australian Embassy and the Marriott Hotel in Jakarta in 2004 and 2005, respectively. The AFP has also established the Jakarta Centre for Law Enforcement Cooperation, which aims to increase the skills of regional law enforcement to deal with transnational crime. Over 5000 participants have now completed the Jakarta Centre's programs, which include training in criminal intelligence, forensics and financial investigation.

The AFP is also continuing to develop relations with other regional bodies such as the Southeast Asian Regional Centre for Counter Terrorism in Kuala Lumpur and the International Law Enforcement Academy in Bangkok.

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

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Legal Info (continued)

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 (ACC), 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

Figure 6.5 This picture was released on 29 August 2019 by the Australian Border Force. It shows 755 kilograms of methamphetamine hidden in a shipment of frozen cowhides from Mexico. The 'crystal meth' was wrapped in aluminium foil and sandwiched among 18 pallets of hides that arrived in Sydney in a shipping container marked 'Salty Bovine Skin'.

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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.

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 (ICAC), the New South Wales Crime Commission, the Police Integrity Commission and divisions within the NSW Police Force. Intelligence sharing and cooperation and coordination between national, state and territory bodies are essential in combating transnational crime.

International measures

There have been many international measures aimed at tackling international crime. These measures can be generally divided into the following categories:

- cooperation among governments through international treaties and international organisations targeted at specific types of international crime
- international courts and tribunals to deal with enforcement of international law
- cooperation and intelligence sharing between national and sub-national agencies to tackle problems of trans-border crime.

Crimes against the international community

Most of the international efforts aimed at preventing or prosecuting crimes against the international community have been discussed above. Governments have showed continuing commitment and close cooperation in their development of international treaties such as the Geneva Conventions and the Rome Statute. 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

Review 6.4

1. Describe the domestic regime in Australia applying to crimes against the international community.
2. Outline some of the domestic measures available to Australia to combat transnational crime.
3. Evaluate the effectiveness of using domestic measures alone in dealing with international crime.

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Legal Links

TRIAL (Track Impunity Always) is an independent Swiss association that works for justice against the perpetrators, accomplices and instigators of genocide, war crimes and crimes against humanity. It occasionally appears before courts, including the ICC, on behalf of victims. Its website tracks the progress of cases involving crimes against the international community.

Legal Info

International Criminal Court investigations

Situations that are under investigation by the ICC, as of July 2018, are:

- Democratic Republic of the Congo (June 2004)
- Uganda (July 2004)
- Darfur, Sudan (June 2005)
- Central African Republic (two situations: May 2007 and May 2014)
- Kenya (March 2010)
- Libya (March 2011)
- Côte d'Ivoire (October 2011)
- Mali (January 2013)
- Georgia (January 2016)
- Burundi (October 2017).

Research 6.2

On the ICC's website and on the internet generally, research one of the situations listed in the 'Legal Info' box, above, 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.

Figure 6.6 Hakeem al-Araibi shot to international fame when he was arrested while on honeymoon in Thailand in 2018 and was threatened with extradition to Bahrain.

with the Nuremberg trials and the Tokyo trials, which prosecuted crimes against humanity and war crimes relating to World War II. More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 by the UN Security Council to investigate and prosecute individuals for war crimes, crimes against humanity and genocide committed during the Yugoslav conflict in the 1990s.

The International Criminal Tribunal for Rwanda (ICTR) was established in 1994, also as a Security Council *ad hoc* court to prosecute those most responsible for crimes committed during the Rwandan genocide from April to June of that year. Following this, two hybrid international courts were established for the conflicts in Sierra Leone and Cambodia. Hybrid courts are distinct from *ad hoc* tribunals in that while they both focus on international crimes, the hybrid tribunals are established by agreement between the government in question and the UN, whereas the *ad hoc* tribunals are imposed upon a government.

The world's first non-conflict specific tribunal was established in 2002 in the form of the ICC. It has launched investigations and prosecutions into a number of more recent events. To date, a number of state parties have requested investigations into internal matters and one matter has been referred to the court by the UN Security Council.

Extradition treaties

One of the most important tools in fighting international crime is **extradition** treaties. Extradition is the process whereby one country surrenders a suspect or convicted criminal to another country to face criminal charges or sentencing. For example, if a person commits murder in another country and flees to Australia before they are caught, they might be extradited back to the original country. It is relevant to all types of crimes, including international crimes.

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

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.

bilateral agreements
an agreement between two countries

However, a few international agreements, including the Rome Statute and the Geneva Conventions, also have their own specific extradition arrangements. For example, Australia has received three extradition requests from the ICTY against people residing in Australia who are accused of committing war crimes.

In Australia, extradition is governed by the *Extradition Act 1988* (Cth). The Act sets out the criteria for extradition to be granted. It must be determined that the accused has a case to answer on

Review 6.5

Read the article, 'Croatia to appeal to High Court over Dragan Vasiljković extradition' and complete the following tasks.

1. Identify the types of crimes Vasiljković is accused of and the international situation within which they allegedly occurred.
2. Explain the nature of the extradition request and identify the main issue that Australian courts have raised.
3. Outline the court process that Vasiljković's case has progressed through.
4. Assess and describe how the Vasiliković case highlights the complexity involved in prosecuting individuals for the commission of war crimes or crimes against humanity, particularly when more than one jurisdiction is involved.

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News

Croatia to appeal to High Court over Dragan Vasiljković extradition

By Angus Hohenboken

The Australian

12 February 2010

The High Court has granted the Croatian Government special leave to appeal a full Federal Court decision preventing the extradition of Serbian paramilitary leader 'Captain Dragan' to Croatia to face questioning over his alleged involvement in war crimes.

The Croatian Government argues the decision has wide implications for Australia's ability to pursue the alleged perpetrators of international crimes. In its application, the Croatian Government said that the Federal Court was wrong to conclude that Mr Vasiljković, an Australian citizen, could not receive a fair trial in Croatia because of his political beliefs.

Under section 7c of Australia's *Extradition Act 1988* (Cth), an accused person can be exempted from extradition if, on surrender to the extradition country, 'the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of race, religion, nationality or political opinions'.

The full Federal Court found in its September judgment that Croatia's courts had allowed [the country's] own soldiers to rely upon their service in the Croatian armed forces during the Balkans' 'homeland war' to mitigate sentences in criminal matters, but [that] Serbian soldiers had not received the same consideration.

The Federal Court concluded that, if convicted, Mr Vasiljković might be incarcerated for a longer period than a Croatian counterpart, largely as a consequence of his political beliefs.

The Croatian Government will argue that the Federal Court wrongly concluded that Mr Vasiljković might receive a longer sentence if convicted because of his political beliefs, and that the mitigating factor applied to Croatian soldiers was irrelevant to Mr Vasiljković.

Mr Vasiljković was the commander of a paramilitary unit known as the Red Berets during the ethnic conflict in the Balkans between 1991 and 1993.

The republic of Croatia wishes to question Mr Vasiljković in relation to allegations against him including that he directed his troops to commit the war crime of torture and committed the war crime of torture during his time in Srpska Krajina, a Serbian-dominated part of Croatia, until 1993.

He has vigorously denied the claims.

Last February, a Federal Court judge dismissed a challenge by Vasiljković against a magistrate's finding that he was eligible for surrender to the Republic of Croatia.

But in September, a full bench of the court allowed Mr Vasiljković' s appeal, and he was released from Sydney's Parklea prison after almost four years in custody.

Update: Mr 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.

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the evidence and that the accused will receive a fair trial in the state to which they are being returned. It must also be shown that the offence is a crime in both Australia and the target country.

Extradition is an extremely important method of combating international crime as it ensures that an offender cannot simply flee the jurisdiction where the offence was committed in order to escape prosecution for their crime. Australia is obliged under the Rome Statute to fulfil its obligations in regard to war criminals that may be living in our jurisdiction. The case of Dragan Vasiljkovic (discussed in the media article on the previous page) illustrates some of the issues that may arise under an extradition request and how Australia fulfilled its obligations having ratified the Rome Statute.

Transnational crimes

There is a long list of international organisations and international treaties that aim to combat transnational crimes, either in general or in relation to specific crimes. Some specific examples of these are provided below.

International Criminal Police Organization

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 intelligence agencies around the world

At any given time, the organisation is engaged in numerous operations, investigating and providing advice to states' law enforcement agencies on transnational crimes. For example, some of its current operations include targeting organised crime in Asia and Eurasia, international counterfeiting and money laundering, trafficking in arms and drugs, and international terrorism.

There has recently been some movement towards developing a 'global police force', as advocated by INTERPOL in cooperation with the UN, to improve the skills of police peacekeepers and the sharing of communications networks and criminal data. One result of sharing resources and developing common standards might be an increase in the ability to track the movement of criminals around the world.

Research 6.3

INTERPOL's website contains detailed information 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

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Figure 6.7 The *United Nations Convention against Transnational Organized Crime* at the United Nations Office in Vienna, Austria, on 15 October 2018.

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.

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.

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, who realised that strong relationships were needed between Australia and its Pacific neighbours if it were to combat the problem of transnational crime. The network's headquarters are now at the Pacific Transnational Crime Coordination Centre (PTCCC) in Apia, Samoa.

The PTCN, with the AFP, has created a regional network of transnational crime units in Pacific states with a focus on combating cross-border criminal activity such as drugs and arms smuggling or money laundering. It manages, coordinates and enhances law enforcement intelligence and data across the region. Pacific countries have been identified as particularly vulnerable to the threats of transnational crime, especially from organised crime groups. They may also have fewer resources to tackle law enforcement or to detect and prosecute such crimes, and the PTCN provides technical assistance, training and resource sharing and helps to strengthen the rule of law in Pacific countries. The PTCCC was opened in 2008 to coordinate and analyse criminal intelligence data in the Pacific region. It acts as a 'one-stop' agency for the flow of information for the Transnational Coordination Units (TCUs) set up around the region.

The PTCN has been successful in the region. For example, in 2004 it discovered and dismantled a methamphetamine laboratory in Suva, Fiji – the largest in the southern hemisphere. The laboratory posed serious environmental and physical danger to local communities, and the drugs could have been intended for markets in Australia and New Zealand,

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Figure 6.8 On 7 June 2019 in Abidjan, Ivory Coast, policemen from the Anti-transnational Organised Crime Unit stand guard next to confiscated weapons, banknotes and ivory items after a drug-trafficking network was dismantled.

Europe and the United States. Recently, there have been some high-profile arrests of Pacific regional figures engaged in various immigration, financial fraud and money-laundering activities.

6.3 The effectiveness of measures dealing with international crime

Some of the most significant measures used to combat international crime were described above. However, due to the complex and difficult nature of transnational crimes, the effectiveness of those measures is not always as great as we would hope.

Transnational crime

In transnational crime, there are often complex organised criminal groups at work using sophisticated measures to avoid detection. Authorities around the world have to combat a number of crimes, including identity fraud, internet crime, paedophilia rings and the trafficking and smuggling of people and contraband. Some states may lack the skills, training and resources to combat such crimes or may be unable to do so due to political unrest or high levels of state corruption. Such states may become targets or breeding grounds for transnational crime affecting other states, making it very difficult to combat the problem.

The main areas for efforts against transnational crime to address include:

- the extent of international cooperation between states – the provision of adequate resources and the effectiveness of coordination among international agencies, including the exchange of information
- the level of compliance among weaker or poorer states – states where the rule of law may be weak become targets by organised crime groups.

To be successful, states will require cooperation and the sharing of skills, resources, funding and intelligence on an unprecedented scale. To date, some important measures, both domestic and international, have been put in place to cope with transnational crime and they have had some success. However, as with domestic crime, transnational crimes are unlikely to disappear any time soon and, as the world changes, an increased effort will be needed to tackle the issues they present.

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Crimes against the international community

Clearly the most significant development in combating crimes against the international community has been the establishment of the ICC, which followed numerous specific *ad hoc* tribunals set up to cope with crimes committed in specific situations, such as Rwanda and Yugoslavia.

Generally, *ad hoc* war crimes tribunals have been reactive and extremely resource-inefficient if the number of prosecutions is a measure of performance. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has had more success than any other such body, having indicted close to 260 people, with all but one of these cases having being dealt with. This is a victory for international justice, but the cost has run to billions of dollars. Eventually *ad hoc* war crimes tribunals will run their course as matters are resolved or remain unprosecuted and the ICC is used to prosecute more recent offences.

A permanent court such as the ICC is symbolically very powerful, and sends a message to leaders or other criminals that they can no longer hide behind immunity in their own state when they have committed appalling acts. Also, the threat of later prosecution may act as a deterrent, stopping rogue leaders using any such tactics. It also offers enormous support to victims of the crimes by attempting to bring to justice those responsible for these atrocities. The ability of the ICC to deal with these issues is, however, questionable.

The tribunals and the ICC have not been without criticism. In particular, the courts are established to deal with these atrocities after they have been committed, and there is valid criticism that international law and the international community have been too slow to stop these atrocities before they occur, or even while they are occurring. Short of intervention by the UN Security Council, which has been rare, there is also no international force or police that can capture such offenders, especially when they remain inside their own state.

This is particularly evident, for example, in the conflict in Darfur, Sudan, where charges by the ICC were not laid against President al-Bashir until 2008, five years after the atrocities began, and ultimately 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.

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 over 122 member states, it lacks some of the world's most important and influential countries. These include some of the world's major powers (such as the United States, China and India), as well as some very influential countries (such as Pakistan, Vietnam and Indonesia).

Most objecting states claim that joining the ICC would violate their state sovereignty. As discussed above, one of the biggest advantages of the court is that it can act independently of state jurisdictions where they are unwilling or unable to do so. However, critics claim that in many cases states fear subjecting themselves to investigation of their own affairs – India over Kashmir, or China over Tibet or Xinjiang, for example. Nevertheless, the ICC only has jurisdiction

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Figure 6.9 In the International Criminal Court in The Hague on 1 December 2014, war crimes suspect, Thomas Lubanga of the Democratic Republic of Congo, awaits the judges' verdict on the appeal of his conviction for using child soldiers in a conflict in the Congo in 2002–2003.

for crimes committed after its establishment, and it still has jurisdiction over any individuals from non-member states who commit crimes against or in the territory of a member state. Supporters of the court argue that the danger of crimes against the international community occurring again without independent oversight or responsibility ought to outweigh the national interests of state parties.

In 2012, the ICC successfully prosecuted its first case. Congolese warlord, Thomas Lubanga Dyilo, was found guilty of war crimes (see the media article on the next page).

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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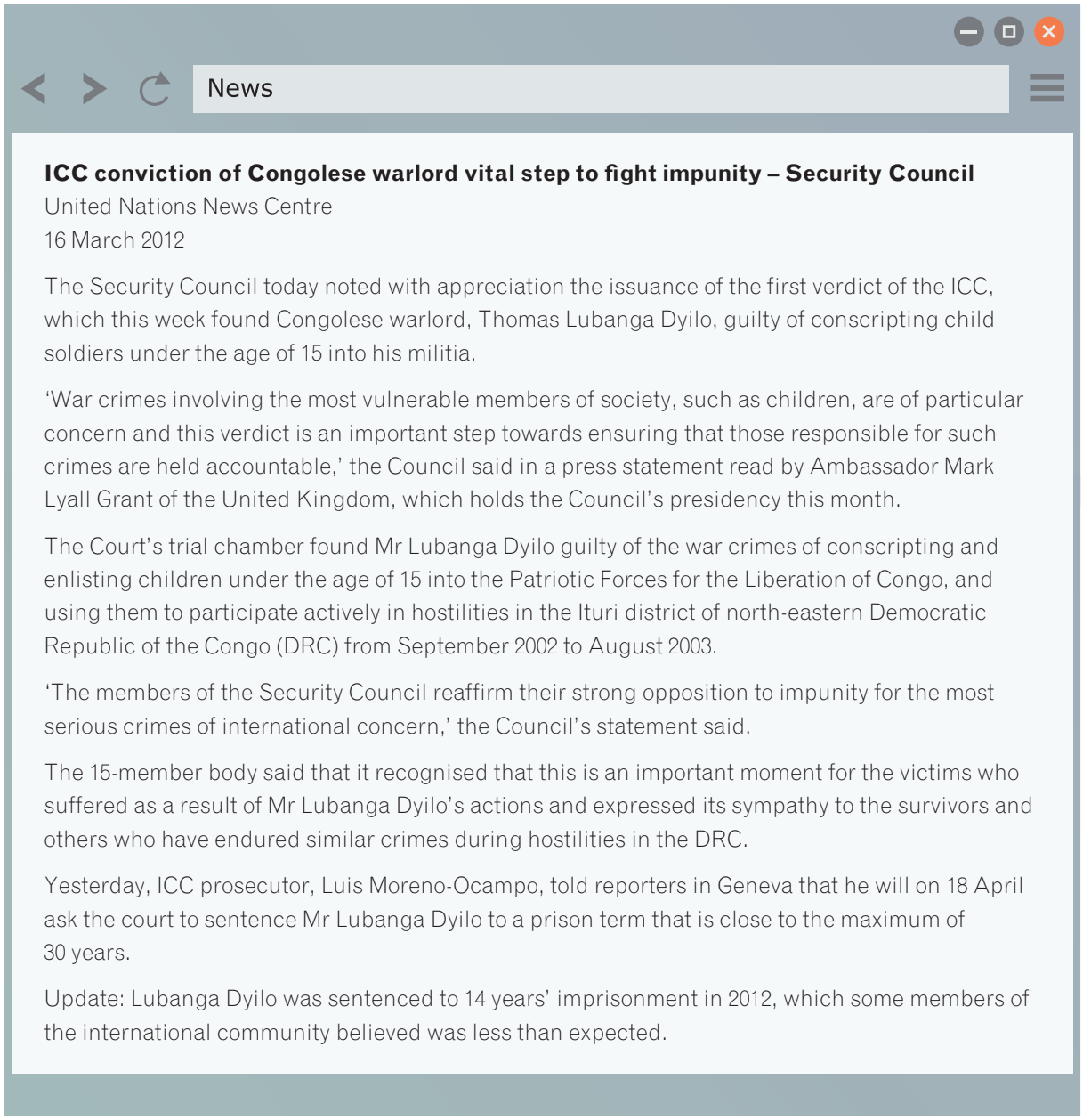

ICC conviction of Congolese warlord vital step to fight impunity – Security Council
United Nations News Centre
16 March 2012

The Security Council today noted with appreciation the issuance of the first verdict of the ICC, which this week found Congolese warlord, Thomas Lubanga Dyilo, guilty of conscripting child soldiers under the age of 15 into his militia.

'War crimes involving the most vulnerable members of society, such as children, are of particular concern and this verdict is an important step towards ensuring that those responsible for such crimes are held accountable,' the Council said in a press statement read by Ambassador Mark Lyall Grant of the United Kingdom, which holds the Council's presidency this month.

The Court's trial chamber found Mr Lubanga Dyilo guilty of the war crimes of conscripting and enlisting children under the age of 15 into the Patriotic Forces for the Liberation of Congo, and using them to participate actively in hostilities in the Ituri district of north-eastern Democratic Republic of the Congo (DRC) from September 2002 to August 2003.

'The members of the Security Council reaffirm their strong opposition to impunity for the most serious crimes of international concern,' the Council's statement said.

The 15-member body said that it recognised that this is an important moment for the victims who suffered as a result of Mr Lubanga Dyilo's actions and expressed its sympathy to the survivors and others who have endured similar crimes during hostilities in the DRC.

Yesterday, ICC prosecutor, Luis Moreno-Ocampo, told reporters in Geneva that he will on 18 April ask the court to sentence Mr Lubanga Dyilo to a prison term that is close to the maximum of 30 years.

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

Legal Info

Investigations by the ICC

At the start of 2018, the ICC was investigating numerous cases in 11 situations. 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, 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.

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Chapter summary

- International crime includes transnational crimes and crimes against the international community.
- Crimes against the international community include genocide, crimes against humanity and war crimes. These crimes are punishable internationally.
- Transnational crimes are crimes that occur across international borders, in their origin or effect.
- The main development in dealing with crimes against the international community is the establishment of the ICC in The Hague, The Netherlands.
- Extradition is an agreement between states that allows transfer of suspects and prisoners between states for trial or sentencing.
- There has been a growth in the federal and state agencies responding to the threat of transnational crime.
- Greater coordination of international agencies and sharing of resources are considered essential in combating transnational crimes regionally and internationally.
- Greater state agreement and support, as well as improved methods of enforcement, are required to effectively prevent crimes against the international community.

Multiple-choice questions

1 Which of the following contains an example of both a transnational crime and a crime against the international community?
- **a** Genocide and war crimes.
- **b** Drug trafficking and human trafficking.
- **c** Murder and money laundering.
- **d** Genocide and human trafficking.

2 Genocide is most accurately defined as acts that have the intention of destroying all or part of:
- **a** A political, ethnic, racial or religious group.
- **b** A national, social, ethnic or religious group.
- **c** A national, ethnic, racial or religious group.
- **d** A political, ethnic, social or religious group.

3 Which of these statements is the most correct explanation of the complementary jurisdiction of the ICC?
- **a** It allows member states' courts to investigate crimes against the international community.
- **b** It allows regional courts to investigate and prosecute crimes against the international community.
- **c** It allows member states' courts to investigate and prosecute crimes against the international community.
- **d** None of the above.

4 The *Extradition Act 1988* (Cth) ratifies a number of international treaty agreements entered into by the federal government. Which of the following statements best reflects the criteria used by the federal government when deciding whether or not to return an offender to another state?
- **a** The offence is criminal in both states and the accused will receive a fair trial.
- **b** The accused has a case to answer on the evidence, the accused will receive a fair trial in the country to which they are being sent, and the offence is criminal in at least one of the states.
- **c** The accused has a case to answer on the evidence, the accused will receive a fair trial in the country to which they are being sent, and the offence is criminal in both states.
- **d** The accused has a case to answer on the evidence, the accused will meet bail conditions, and the offence is criminal in at least one of the states.

5 Which of the following has *not* been attributed as a cause of the growth in transnational crimes?
- **a** Better communication.
- **b** Growth of technology.
- **c** Ease of movement between jurisdictions.
- **d** Lack of cooperation between law enforcement agencies.

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Themes and challenges for Part I – Crime

The role of discretion in the criminal justice system

- Discretion acknowledges that the law can be a blunt instrument in delivering justice. It allows individual circumstances to be taken into account when applying the law. It is considered important if the criminal justice system is to balance the rights of the community with the rights of individuals – the accused and victims – and if it is to address the tension between these competing interests. Discretion can also be used in a biased or corrupt way undermining justice.
- Discretion is a part of most steps in the criminal justice system.
- There are many people in authority who have discretionary power in the exercising of their roles. Police have discretionary powers of arrest in certain matters and they also have discretion in the exercising of their powers when carrying out their duties. References to course material can be used here and critiqued.
- The Director of Public Prosecutions (DPP) has discretion with respect to what matters it will prosecute. It examines if there is enough evidence and if it is in the public interest to prosecute.
- Magistrates and judges have discretion in matters pertaining to bail, rules of evidence and procedure as well as in sentencing matters. They also have discretion in matters on appeal.
- Reference to these areas, and more, and an evaluation of the course content are essential.

Issues of compliance and non-compliance in regard to criminal law

- The majority of individuals within a society obey the law most of the time. Individuals also enjoy the freedoms and protection a well-organised and, at times, well-regulated society gives. It is partly for this reason that the majority complies with the law. The law can also enforce compliance and sanction violations on behalf of society where individuals do not comply.
- Some of the reasons why people do not comply with the law include greed, self-interest, thrill, peer pressure, addiction, mental illness, political need or necessity. There is no set pattern and the specific reason for an individual's non-compliance may vary.
- Issues that could also be critiqued could include ways in which the criminal justice system tries to ensure greater compliance through:
  - crime prevention (situational and social)
  - more effective investigation of crime
  - the purposes of punishment to reduce criminal behaviour (the lack of success with high rates of recidivism)
  - emphasis on rehabilitative initiative with young offenders (such as youth justice conferencing)
  - measures to combat transnational crime.

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.

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The role of law reform in the criminal justice system

Any example where the law changes is law reform. There are many examples already contained in the previous chapters. Agencies of law reform such as law reform commissions, parliaments, courts and other non-legal measures can be examined here with examples of how they have reformed the law. Some examples of law reform in the criminal justice system include:

- laws of sexual assault
- majority verdicts in juries
- guidelines in charge negotiation, alternative methods of sentencing such as circle sentencing, and restorative justice
- youth justice conferencing or other alternatives for young offenders
- alternatives to full-time imprisonment such as periodic detention, home detention or community service orders
- international crime – the ICC, INTERPOL or initiatives of the AFP
- failure of the existing law to deal effectively with sexual assault matters (low reporting and conviction rates)
- rehabilitation, rates of recidivism – refer to the prison system
- gathering of evidence – DNA, surveillance, remote witness facilities and transcript evidence; balancing police powers with the rights of the individual; and reliability and the process of such evidence contributing to delays in the court system.

The extent to which the law balances the rights of victims, offenders and society

- This picks up on part of the principal focus of the topic: the 'tension between community interests and individual rights and freedoms'. In many instances society's needs may outweigh the rights of individuals in light of, for example, anti-terrorism legislation or restriction in bail laws, where individual civil liberties have been eroded in the name of protection of the community. The law and order debate that has been ongoing in some areas has gained the upper hand in the balancing act that is the tension mentioned above.
- Areas that could be critiqued include police powers against the rights of suspects, or the criminal trial procedures that aim to balance the rights of victims, offenders and society. The right to a fair trial, supported by strict rules of evidence and procedure, is fundamental to the criminal justice system and this balancing act. The criteria used by judges when sentencing are also features of this balance and ongoing tension. This balance is further reflected in the decision to grant bail, charge negotiations negotiated by the DPP and the ability of the international criminal justice system to bring offenders of mass atrocities to justice. These are just some of the areas to be addressed in respect to this theme.

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

Through the use of 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

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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*.

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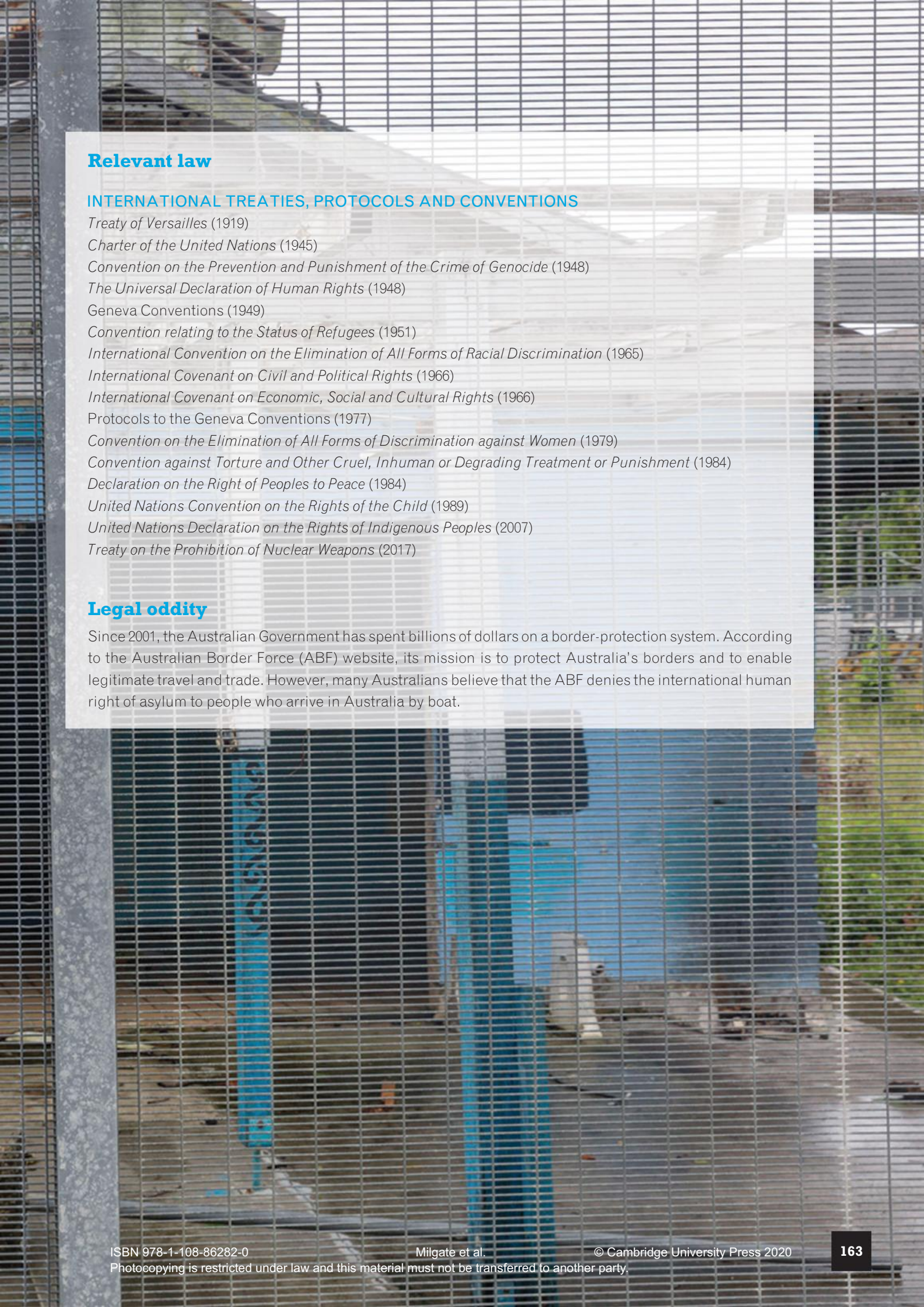

Relevant law

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Treaty of Versailles (1919)
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)
Convention relating to the Status of Refugees (1951)
International Convention on the Elimination of All Forms of Racial Discrimination (1965)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Protocols to the Geneva Conventions (1977)
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)
Declaration on the Right of Peoples to Peace (1984)
United Nations Convention on the Rights of the Child (1989)
United Nations Declaration on the Rights of Indigenous Peoples (2007)
Treaty on the Prohibition of Nuclear Weapons (2017)

Legal oddity

Since 2001, the Australian Government has spent billions of dollars on a border-protection system. According to the Australian Border Force (ABF) website, its mission is to protect Australia's borders and to enable legitimate travel and trade. However, many Australians believe that the ABF denies the international human right of asylum to people who arrive in Australia by boat.

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7.1 The definition of human rights

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.

Human rights, as we know them today, did not evolve gradually over thousands of years as many accounts of human rights history claim. Human rights originated in World War II as a response to the policies of the Axis Powers. However, there is a connection between human rights and other **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

Ideas that people possessed rights and that all people have something in common were implied in a number of world religions 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 became known as. 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, 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, women's suffrage as it was known, were known as **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 universal human rights were created in 1948 these earlier 'rights' were incorporated within the body of universal human rights 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.

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 to end slavery in the early 1800s in both western Europe and North America 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

Another right became connected with human rights. This was the right of nationhood, or self-determination. Due to the fact that nationalism had

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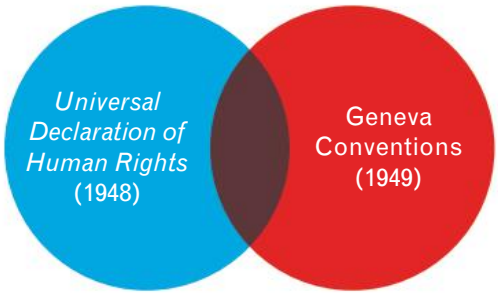

Figure 7.1 This diagram shows that by 1949 two key international documents laid down universal rights. *The Universal Declaration of Human Rights* (1948) identified human rights that applied in peacetime and the Geneva Conventions (1949) identified rights that applied in wartime. This meant that in theory, 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.

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 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 non-Western nation states in the wartime anti-Axis alliance that wanted all peoples living in colonies belonging to Western empires to be given their independence.

self-determination
the right of nations or peoples to have their own sovereign nation state with their own government

In the decades after the war, 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.

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. 20) and the 'learn to' activities (pp. 20–1) 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.

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 abolition of slavery

Article 4 of *The Universal Declaration of Human Rights* (1948)

No-one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

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.

slavery
a type of forced labour in which a person is considered to be the legal property of another

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 and brutalised, and had no real legal rights and no means of escape. Laws generally treated slaves as objects, rather than as subjects of the law.

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. 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.

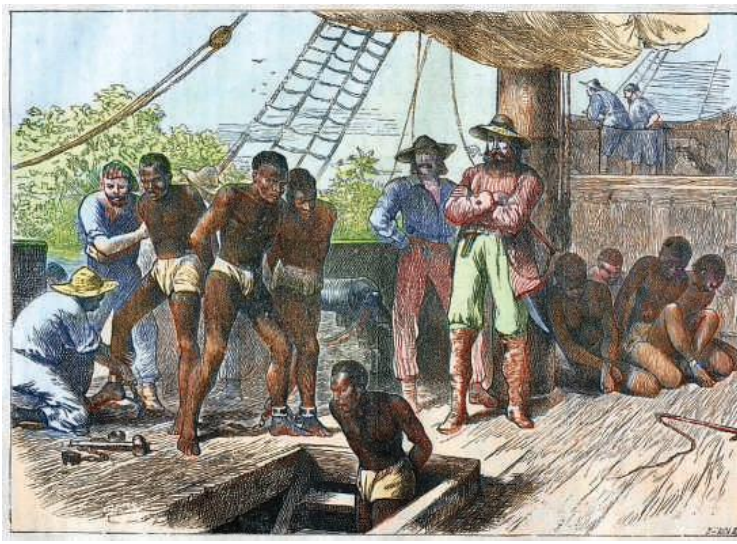

Figure 7.2 This engraving from 1881 shows African slaves being taken onboard a ship bound for the United States.

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.

transatlantic slave trade
the trading of African people by Europeans, who transported them as slaves from Africa to the colonies of the New World

However, as the horrors of the slave trade became known in Europe, a political movement aimed at abolishing it began. Known as abolitionism, the movement began in the 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 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

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ceased exporting slaves in the following decades. Many countries in Latin America abolished it 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 General Act of the Brussel's Conference relating to the African Slave Trade. This was the first ever major collaboration of international states to abolish slavery and was aimed mainly at the slave trade in European protectorates in Africa. The next significant attempt was the *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 UN.

After the end of World War II, the member states of the UN 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.

Figure 7.3 On 13 February 2008 in Vienna, Puerto Rican singer, Ricky Martin, gave a speech at the opening ceremony of 'The Vienna Forum to Fight Human Trafficking', organised by the United Nations Global Initiative to Fight Human Trafficking. The first-ever global forum to fight human trafficking brought together experts, legislators, law-enforcement teams, business leaders, representatives of non-government organisations and trafficking victims from 116 countries.

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.

Video

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery; usually recruiting, transporting or obtaining a person by force, coercion or deceptive means

Review 7.2

1 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

Like the movement to abolish slavery, campaigns to improve labour rights and conditions were waged over the 1800s. *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 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.

trade union
an organisation of workers created to preserve and further their rights and interests

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 primary industries, such as mining and textiles.

Labour and trade union 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.

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Figure 7.4 Striking building workers raise their fists during a rally in the Bois de Vincennes, Paris, on 13 June 1936.

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. The First International (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 UN, and it continues its work today.

International Labour Organization (ILO)
an international agency of the UN, created with the aim of improving conditions for workers around the world

Labour rights were finally enshrined in 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.

labour rights
rights at work, including the rights to safe working conditions, minimum wages, 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

Research 7.1

Go to the International Labor Organisation's (ILO) website.

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.

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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.

Universal suffrage

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, and 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% of the adult male population. It was not until the *Representation of the People Act 1918* (UK) that the vote was extended to the whole adult male population.

Among democratic countries, pressure grew to extend voting rights to women. Women who campaigned for the right to vote were known

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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Figure 7.5 A scene from the 2015 film, *Suffragette*, outside Parliament House in London.

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, the right to vote was extended by the Fifteenth Amendment to all adult males, regardless of 'race, color or previous condition of servitude'. In New Zealand, Māori voters were not expressly excluded from voting, but a requirement of property ownership effectively excluded them. In 1867, this requirement was removed, extending the vote across the male population. This legislation also established Māori representation in the lower house of parliament.

In Australia, indigenous peoples had the right to vote since the time of Federation in 1901, if their state of residence granted them that right, and some South Australian Aboriginal men and women voted for the first Commonwealth Parliament. However, due to later interpretations by the government and discriminatory measures adopted by the states, indigenous peoples were effectively denied the right to vote until 1962. In that year, the Commonwealth legislated to ensure that indigenous peoples had the right to vote regardless of their state voting rights although, unlike other Australians, voting was not compulsory for them. A 1967 constitutional referendum finally gave indigenous Australians the right to be counted in the Australian Census. The constitutional amendment became a symbol of public recognition of the rights of indigenous Australians.

The right to vote was recognised as a universal human right in 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 2019 more people voted in the world than ever before with over two billion people taking part in elections within 50 countries. The biggest elections were in India, with 800 million eligible voters, Indonesia with 187 million registered voters and Nigeria with 84 million voters. However, since the global financial crisis, the failure of the Arab Spring, and the rise of authoritarianism, the tide

Figure 7.6 Indonesian President, Joko Widodo, at an election rally in Indonesia. Indonesia is the second-biggest democracy in the world. In 2019, 85 million people voted in the presidential elections.

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has now turned against democracy and 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 2019 report by Freedom House, there has been a decline in political rights and civil liberties for the 13 years from 2005 to 2018.

There is another area in which the right to vote does not yet exist. In 2013, British journalist George Monbiot, argued in a his new 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.

Figure 7.7 In 2013, 16-year-old Malala Yousafzai told World Bank Group President, Jim Yong Kim, about her miraculous recovery from the attack on her by the Taliban, and her passionate fight for girls' education.

Universal education

Universal education is the idea that all human beings have a right to an education. This concept has only achieved wide acceptance in relatively recent history. Although today some type of education is compulsory for children in almost all countries, in early civilisations formal education was generally associated with wealth and power or with certain trades, beliefs or religions. Most people would have received informal education from their families and community, with other skills learnt directly through their daily work.

universal education
free and compulsory education for all children

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 UN made education a major priority of its economic and social development programs, and the right to free education for all human beings was included under Article 26 of

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.

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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 indigenous recognition.
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.

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 MDGs. 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.

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.

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

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

Self-determination

***Charter of the United Nations* (1945)**

The purposes of the United Nations are …

2 To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

***International Covenant on Economic, Social and Cultural Rights* (1966)**

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.

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Figure 7.8 There has been a strong secessionist movement in Catalonia, which is seeking independence from Spain. There was a vote for independence on 1 October 2017. This photo shows the 2018 commemorations of the one-year anniversary of that vote.

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), which states that:

1 Everyone has a right to a nationality.
2 No-one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Also, the *International Covenant on Economic, Social and Cultural Rights* (1966), adopted by the UN in 1966 and in force since 1976, includes self-determination as its primary right, under Article 1(1).

It is no surprise therefore that after World War II, a large number of people under the colonial rule of Western imperial powers (such as Britain, France and Holland) wanted to exercise their right to self-determination. Chapter 13 of the UN Charter later provided for a Trusteeship Council of the United Nations to provide international supervision for the transition of '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. Between 1960 and 1993, 53 territories became self-governing independent states. The most recent country to be granted independence was South Sudan, which achieved UN membership in July 2011. It is a member of the UN, the African Union and the Intergovernmental Authority on Development.

In our region, Timor-Leste (previously known as East Timor), exerted its right to self-determination when in 1999 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 UN in 2002. However, there are many groups in the world today who would like to exercise their right to self-determination but have failed to do so, such as the Palestinians, the Kurds and the people of Irian Jaya, 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 UN 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.

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

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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 people in the world today seeking self-determination.
5 Describe the impact of self-determination on human rights.

human rights. Many new nations 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. For decades after World War II, the world's attention was focused on national struggles for independence. However, these struggles were often won at the expense of human rights. History shows that the pursuit of 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 became a serious focus in these countries.

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 is said to relate 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.

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

Figure 7.9 A protest against the fires and tree burning in the Amazon rainforest at the Brazilian Embassy in London on 23 August 2019.

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see dramatic deterioration in the rights and living standards of millions of people globally. The UN Climate Change Conference in December 2015 produced the Paris Agreement, a plan to stabilise global warming below 2 °C above pre-industrial levels.

Another area in which environmental rights are being dealt with under international law is in the International Criminal Court (ICC). There are many examples in history where peoples' environmental rights have been violated (for instance, with unscrupulous national leaders destroying the natural environment to achieve strategic goals in wartime).

Peace rights

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**'.

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

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

Peace and security

Article 1 of the *Charter of the United Nations* (1945)

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…

Weapons of mass destruction

General comment No. 36 (2018) on Article 6 of the *International Covenant on Civil and Political Rights* (1966)

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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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.'

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:

> 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.

For further information about the *Treaty on the Prohibition of Nuclear Weapons* (2017), visit the website of the International Campaign to Abolish Nuclear Weapons.

On pages 178–179, 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.

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.

Figure 7.10 The moment the *Treaty on the Prohibition of Nuclear Weapons* (2017) was adopted by the UN General Assembly on 7 July 2017.

Photo: Clare Conboy, International Campaign to Abolish Nuclear Weapons.

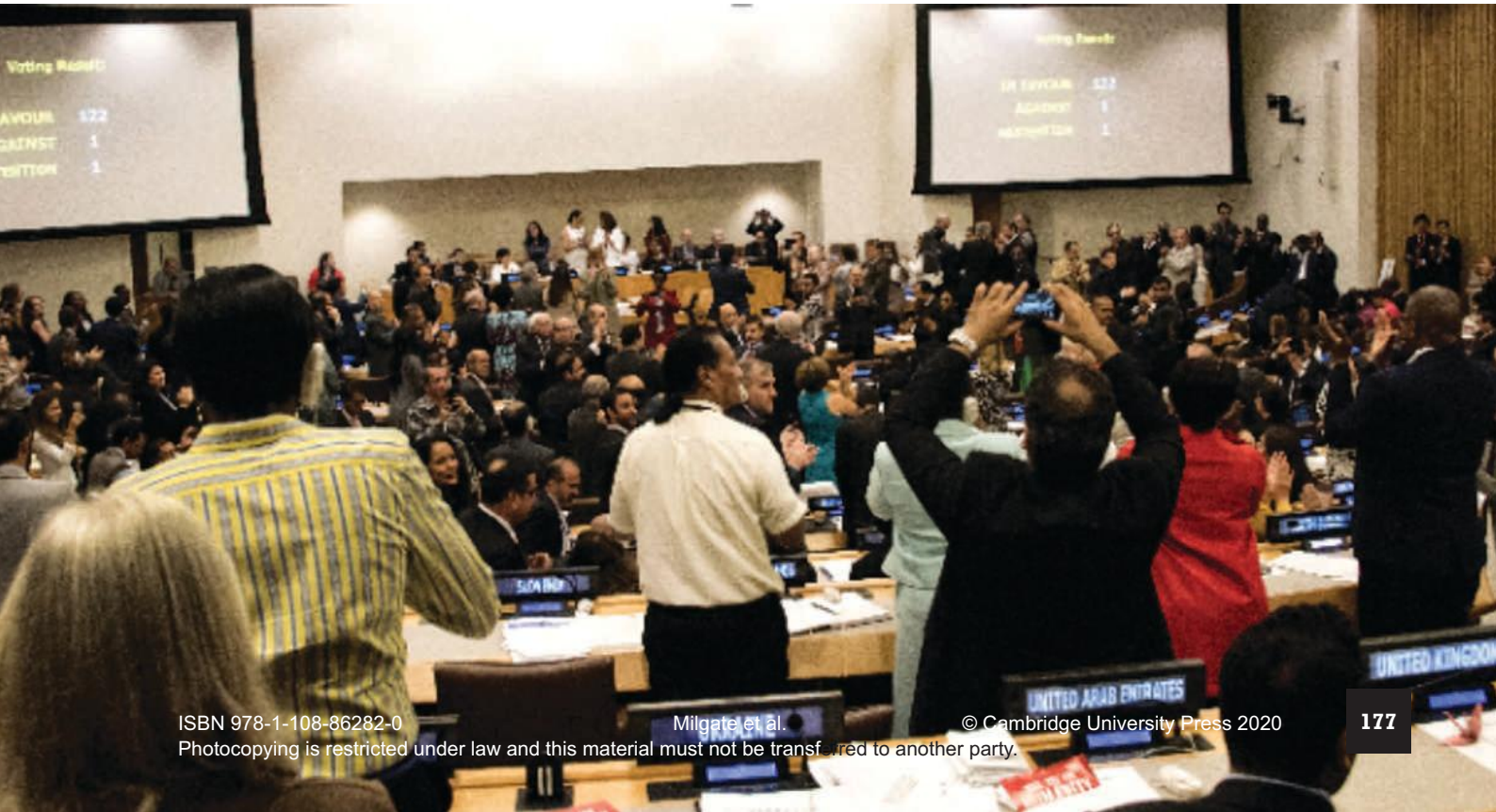

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TABLE 7.1 The origin and development of rights

	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 which intensifies after the collapse of communism at the end of the Cold War.	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	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

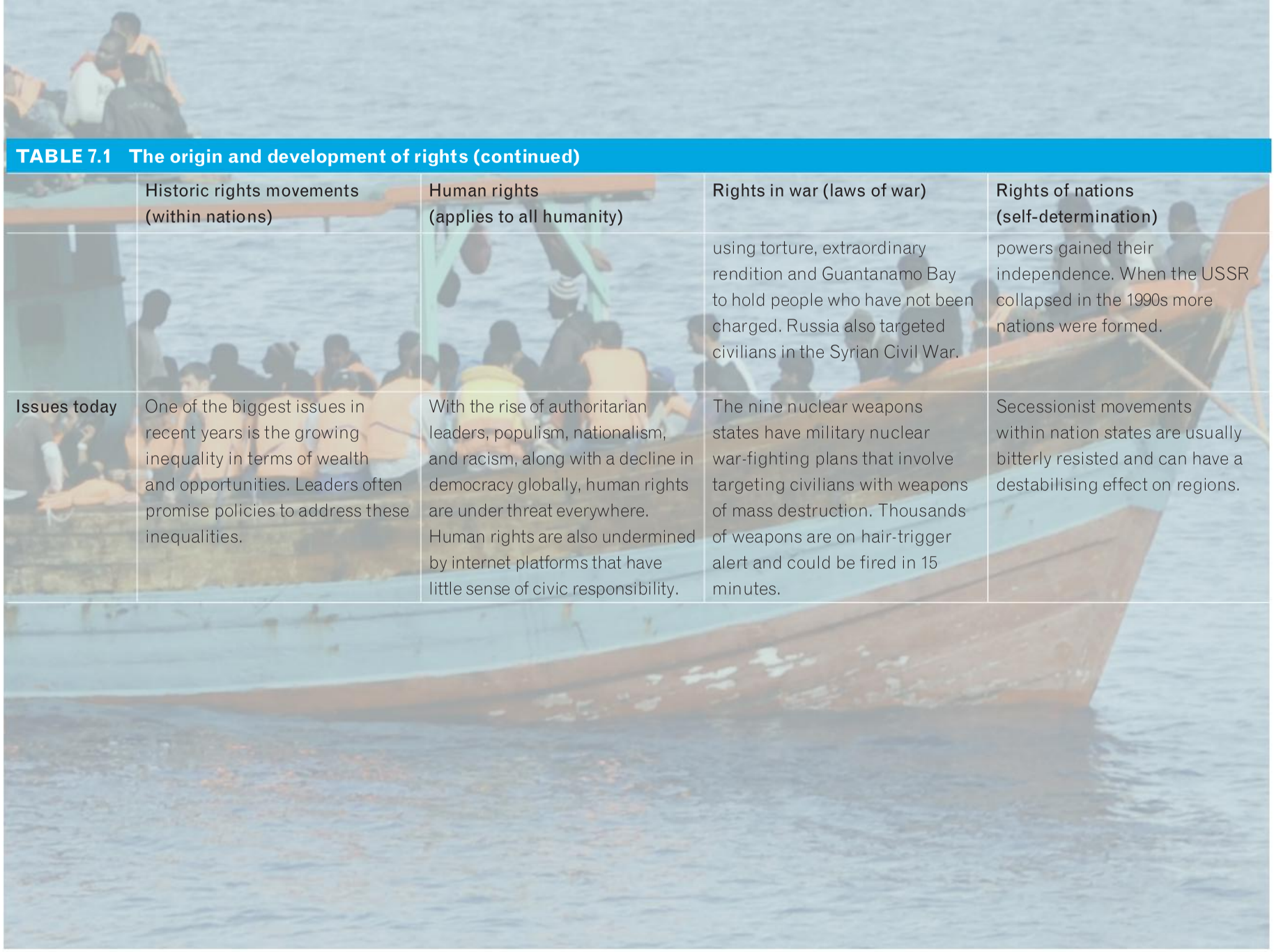

TABLE 7.1 The origin and development of rights (continued)

	Historic rights movements (within nations)	Human rights (applies to all humanity)	Rights in war (laws of war)	Rights of nations (self-determination)
			using torture, extraordinary rendition and Guantanamo Bay to hold people who have not been charged. Russia also targeted civilians in the Syrian Civil War.	powers gained their independence. When the USSR collapsed in the 1990s more nations were formed.
Issues today	One of the biggest issues in recent years is the growing inequality in terms of wealth and opportunities. Leaders often promise policies to address these inequalities.	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.

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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* 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.

The Universal Declaration of Human Rights (1948) had 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.

Figure 7.11 Eleanor Roosevelt holds a copy of *The Universal Declaration of Human Rights* in 1949. 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'.

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, *The Universal Declaration of Human Rights* (1948) is **soft law**, meaning officially non-binding but still influential, rather than containing enforceable **hard law** obligations. In hindsight, this was probably the correct decision because it meant that the maximum number of countries were willing to sign it. When *The Universal Declaration of Human Rights* (1948) 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.

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

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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, *The Universal Declaration of Human Rights* (1948) has gained wide acceptance by the international community. Even though it is not a formal treaty, it has arguably become part of **international customary law**, and has become the foundation for eight core human rights treaties, two of which are discussed below, as well as various treaty bodies that continue to monitor and report on the state of human rights around the world.

international customary law
actions and concepts that have developed over time to the extent that they are accepted by the international community and have become law

Figure 7.12 Syrian children cry at a make-shift hospital after an air strike on their village in 2018. Over 500 000 people have been killed in the Syrian Civil War that started in 2012, many of them civilians. Throughout the conflict, civilians and hospitals have been regularly targeted. The international community has failed to respond effectively to these violations of the Geneva Conventions (1949).

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 the Jews 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* (1945–1946) IMT, Nuremberg.

This declaration has been described as the 'high-water mark' for human rights because it was the first time in history that genocide was officially made a crime. The treaty was developed at around the same 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.

Research 7.2

Search the United Nations' website for 'Drafting of *The Universal Declaration of Human Rights*'. Research the members of the drafting committee.

1 Identify the other members of the committee.
2 Outline the backgrounds of the other committee members.
3 Describe the religious, philosophical and ideological backgrounds of the other committee members.

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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 Conventions (1949).
3. Outline the origins of the 'laws of war'.

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. 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.

International Covenant on Civil and Political Rights (1966)

Initially, which 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 on the next page) or whether they signed 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) with 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**.

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

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

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(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 ensured 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).

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.

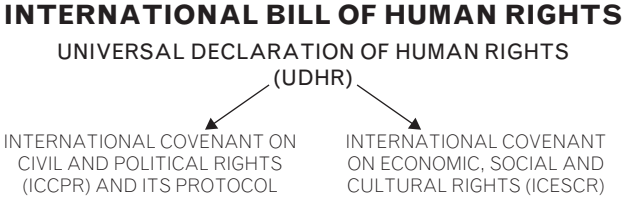

Figure 7.13 The make-up of the International Bill of Human Rights.

Figure 7.14 Former US President, Jimmy Carter (president: 1977–1981), made human rights a top priority of his administration.

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.

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), who made human rights a top priority in his foreign policy. From this time, human rights began to emerge as a truly global movement.

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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 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 Prime Minister, Neville Chamberlain.
   - **b** Former President, Franklin D. Roosevelt.
   - **c** Former First Lady, Eleanor Roosevelt.
   - **d** Former First Lady, Betty Ford.

3 As a declaration, *The Universal Declaration of Human Rights* (1948) is:
   - **a** Soft law, meaning officially non-binding but still influential.
   - **b** 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.'

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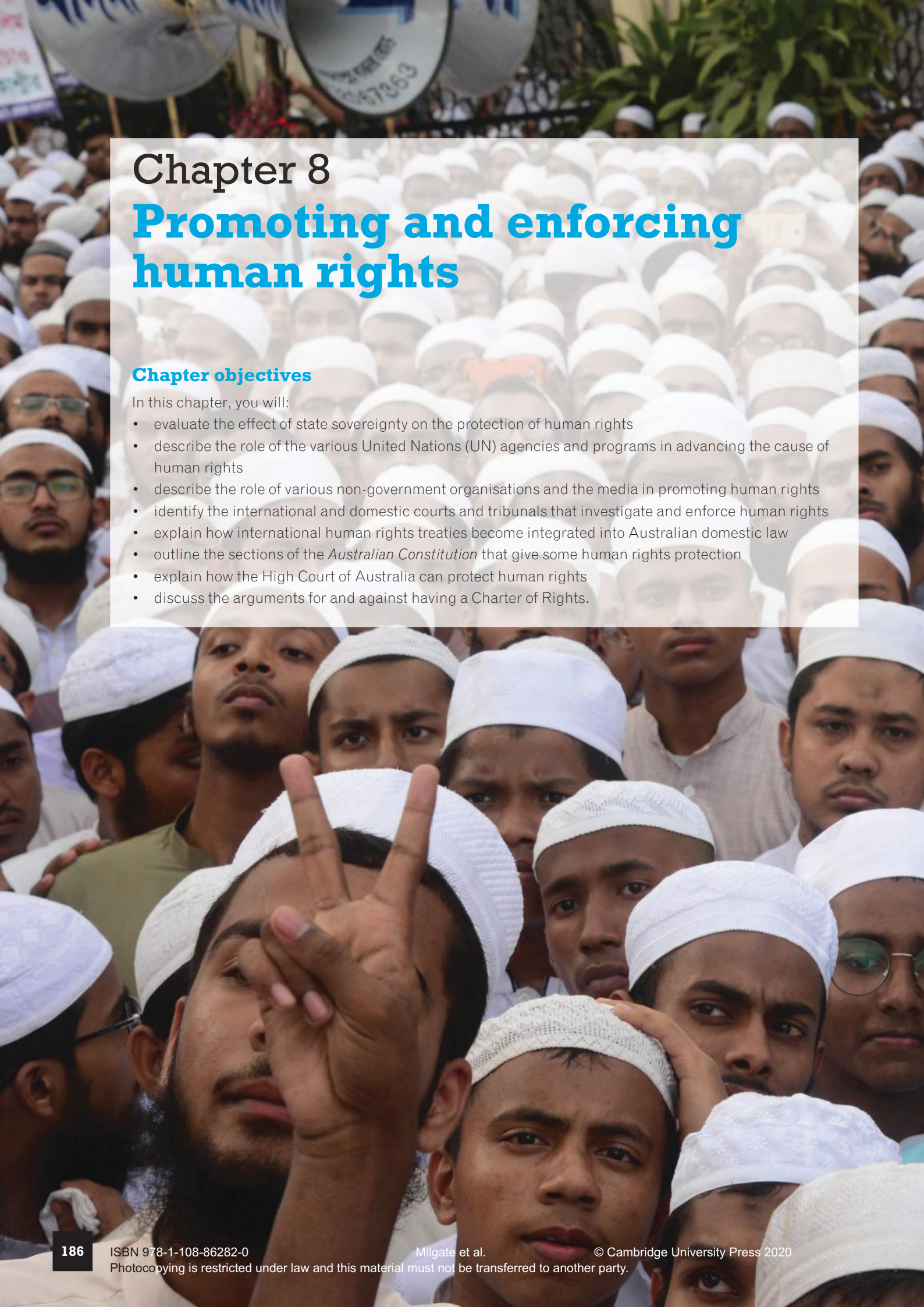

Chapter 8
Promoting and enforcing human rights

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 United Nations (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.

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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)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

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)

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

Since the September 11 terrorist attacks, successive Australian governments have enacted over 75 pieces of legislation. Many of these new laws appear to run counter to ideas of criminal justice and human rights. In June 2019, under anti-terrorism legislation, the Australian Federal Police raided the Sydney offices of the Australian Broadcasting Corporation and the home of a News Corp journalist. This sparked widespread fears that the right of freedom of the press in Australia is now under serious threat.

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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

Statehood should not be confused with political entities within a federal system, such as the domestic states of Australia or the United States. Strictly speaking, a state should also be distinguished from a **nation**, which is a people who share a common heritage, language, culture or race – nations do not always correspond with state borders. Nations or peoples seeking independent statehood will often claim a right to self-determination.

nation
a people that share a common heritage, language or culture and sometimes a common race

In international law, recognition as a state requires a number of factors. Outlined in 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 UN 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.

ratified
the process of a state formally approving a treaty, making it legally binding

How many states are there?

The exact number of states in the world is disputed. In 2019, the status of states and disputed states was as follows:

- There were 193 fully recognised state members of the UN, though there were 195 in the world.

Figure 8.1 Freddy Lim is the lead singer of a Taiwanese heavy metal band called Chthonic and he is a politician in the Taiwanese Parliament. He also served as chair of Amnesty International Taiwan from 2010–2014. Lim advocates strongly for his country to resist pressure from China. China refuses to allow Taiwan to declare itself as an independent nation.

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- The last state to become a UN member was South Sudan in 2011.
- Vatican City (the Holy See) is a recognised state, but only has observer status at the UN.
- Taiwan (Republic of China) has the characteristics of a state, but its international status is disputed. It originally represented all of China in the UN, but it was replaced in 1971 by the People's Republic of China. Currently, Taiwan has no UN representation but continues to function as a state, with informal diplomatic relations. China, the main state opposing Taiwan's recognition as a state, has veto power on the 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 UN due to opposition from Russia, which, like China, can use its veto to block Kosovo's bid for UN membership.

Five states have veto power in the UN – the United States, Russia, China, France and the United Kingdom. The makeup of the 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 regards 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.

Figure 8.2 In Hong Kong on 2 August 2019, demonstrators attend a rally organised by civil servants. The *International Covenant on Civil and Political Rights* (1966) states that all humans should have the right to self-determination (Article 1), the right to peaceful assembly (Article 21) and the right to vote (Article 25).

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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. 20) and the 'learn to' activities (pp. 20–1) 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.

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.

At the beginning of 2020, 173 states had ratified the *International Covenant on Civil and Political Rights* (1966) and another 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). Known collectively as the International Bill of Rights, these treaties create concrete legal obligations on states to comply with their human rights provisions, which include submitting periodic reports to the 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.

8.2 Roles

The United Nations

The UN is a vast organisation with substantial power, consisting of 193 member states, including almost every sovereign state in the world, and has responsibility for almost every aspect of international affairs. It is the avenue through which much of the world's international development assistance and the majority of international cooperation takes place. The UN has five principal organs under the *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.

Trusteeship Council
inactive since 1994 but originally responsible for overseeing the transition of UN trust territories to self-government after decolonisation

Organs of the UN: human rights responsibilities

The UN organs that deal with human rights are:

- **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 UN's principal human rights body, the **UN Human Rights Council**, reports directly to the UN General Assembly.

UN General Assembly
the UN organ representing all UN member states; acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council
the UN forum of member states responsible for overseeing and making recommendations on human rights in all member states

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- **UN Security Council** – 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 who have the power to veto decisions (the United States, the United Kingdom, China, Russia and France) and 10 non-permanent members with two-year terms. The council, it is argued, has the power to intervene in the most serious of human rights abuses by states. Numerous proposals have been made to change the structure and power of the UN Security Council to more accurately reflect today's world, 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 UN with over 44 000 staff working worldwide. It provides the various information, studies, tasks and facilities needed by the UN. It includes the UN's departments and offices, including the **Office of the High Commissioner for Human Rights (OHCHR)**. The UN Secretariat is headed by the UN Secretary-General, António Guterres, the most visible and influential figure in the UN.
- **International Court of Justice** – this is the primary judicial organ of the UN. 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.

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; contains the departments and offices of the UN

Office of the High Commissioner for Human Rights (OHCHR)
the UN human rights office responsible for monitoring and reporting on human rights worldwide

International Court of Justice
the primary judicial organ of the UN; has jurisdiction to hear disputes submitted by member states and issue advisory opinions

Office of the UN High Commissioner for Human Rights

The Office of the UN High Commissioner for Human Rights (OCHR) is an administrative agency under the UN Secretariat that works to promote and protect the human rights contained in *The Universal Declaration of Human Rights* (1948) and international law. Established in 1993 after a World Conference on Human Rights held by the UN, the OHCHR's purposes include:

- advancing universal ratification and implementation of *The Universal Declaration of Human Rights* (1948) and human rights standards and treaties
- promoting universal enjoyment of human rights and international cooperation, including

Figure 8.3 On 26 September 2018, Michelle Bachelet, the United Nations High Commissioner for Human Rights, briefed journalists at the UN Headquarters in New York City, United States.

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Research 8.1

Michelle Bachelet, UN High Commissioner for Human Rights

Research Michelle Bachelet's activities as the UN High Commissioner for Human Rights. Start with Jorge Poblete's article, 'Bolsonaro taunts UN rights chief over her father's torture by Pinochet regime' (*The Guardian*, 5 September 2019).

1. Identify the aspects of Michelle Bachelet's background mentioned in this article.
2. Identify who Jair Bolsonaro is and describe his criticism of Bachelet.
3. Discuss who else criticises Bachelet.
4. Using other media reports, conduct further research on Bachelet's term as the UN High Commissioner for Human Rights.
5. Outline the challenges of this position.
6. Assess the effectiveness of Bachelet's time in this position.

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 1 September 2018, Michelle Bachelet, a former President of Chile on two occasions between 2006–2010 and 2014–2018, was appointed as the seventh High Commissioner for Human Rights and her term extends to 2022.

UN Human Rights Council

The UN Human Rights Council is a relatively new intergovernmental body under the UN General Assembly, made up of representatives of member states – its 47 member seats are rotated on three-year terms. It aims to address human rights violations worldwide and make recommendations, and works closely with the OHCHR to perform its duties.

The 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 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. However, 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.

The council has in recent times received some criticism, from former Secretaries-General Ban Ki-moon and Kofi Anan, as well as from the former High Commissioner for Human Rights. It has been criticised for acting not in the interests of human rights, but according to political considerations – particularly

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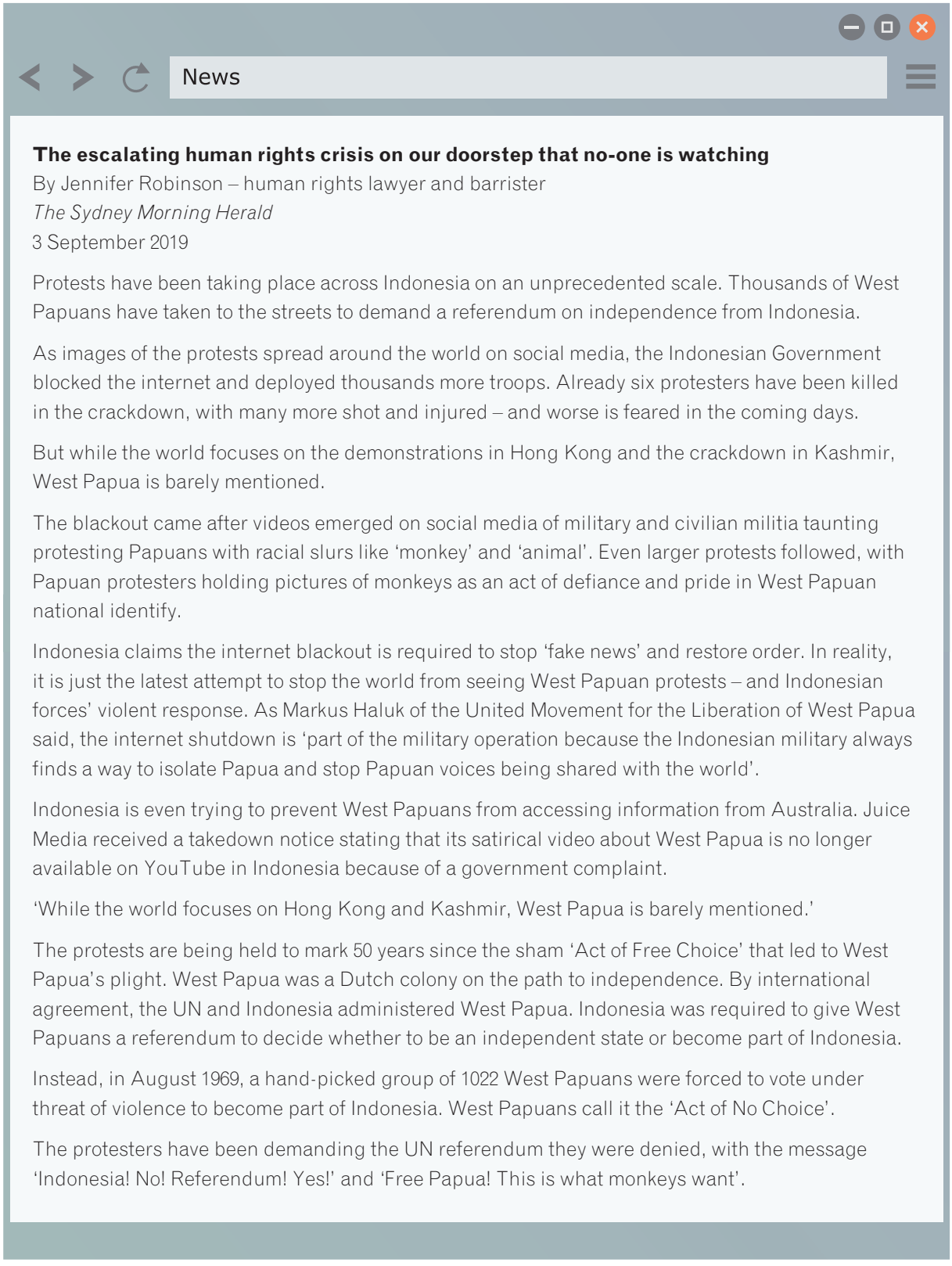
influential states, including China and Russia and have also been accused of backing and controlling certain candidates to block criticism of themselves. It remains to be seen if or how effective the council can become. Despite heavy criticism of Australia over the issue of asylum seekers in the past, the Australian Government showed strong interest in lobbying other UN member states to support Australia's successful election to the UN Human Rights Council in 2018.



The escalating human rights crisis on our doorstep that no-one is watching

By Jennifer Robinson – human rights lawyer and barrister

The Sydney Morning Herald

3 September 2019

Protests have been taking place across Indonesia on an unprecedented scale. Thousands of West Papuans have taken to the streets to demand a referendum on independence from Indonesia.

As images of the protests spread around the world on social media, the Indonesian Government blocked the internet and deployed thousands more troops. Already six protesters have been killed in the crackdown, with many more shot and injured – and worse is feared in the coming days.

But while the world focuses on the demonstrations in Hong Kong and the crackdown in Kashmir, West Papua is barely mentioned.

The blackout came after videos emerged on social media of military and civilian militia taunting protesting Papuans with racial slurs like 'monkey' and 'animal'. Even larger protests followed, with Papuan protesters holding pictures of monkeys as an act of defiance and pride in West Papuan national identify.

Indonesia claims the internet blackout is required to stop 'fake news' and restore order. In reality, it is just the latest attempt to stop the world from seeing West Papuan protests – and Indonesian forces' violent response. As Markus Haluk of the United Movement for the Liberation of West Papua said, the internet shutdown is 'part of the military operation because the Indonesian military always finds a way to isolate Papua and stop Papuan voices being shared with the world'.

Indonesia is even trying to prevent West Papuans from accessing information from Australia. Juice Media received a takedown notice stating that its satirical video about West Papua is no longer available on YouTube in Indonesia because of a government complaint.

'While the world focuses on Hong Kong and Kashmir, West Papua is barely mentioned.'

The protests are being held to mark 50 years since the sham 'Act of Free Choice' that led to West Papua's plight. West Papua was a Dutch colony on the path to independence. By international agreement, the UN and Indonesia administered West Papua. Indonesia was required to give West Papuans a referendum to decide whether to be an independent state or become part of Indonesia.

Instead, in August 1969, a hand-picked group of 1022 West Papuans were forced to vote under threat of violence to become part of Indonesia. West Papuans call it the 'Act of No Choice'.

The protesters have been demanding the UN referendum they were denied, with the message 'Indonesia! No! Referendum! Yes!' and 'Free Papua! This is what monkeys want'.

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(Continued)

President Joko Widodo has appealed for calm and invited Papuan governor Lukas Enembe to talks in Jakarta, where he is reportedly willing to discuss West Papuan demands for a referendum.

If true, this is a significant development and testament to the growing strength of the West Papuan self-determination movement – as well as the bravery of protesters, who face arbitrary arrest and detention, violence and up to 25 years in prison for raising the banned Morning Star flag.

The West Papuan protests coincide with another important anniversary. East Timor is celebrating 20 years of independence from Indonesia after the UN-sponsored referendum in August 1999. While many celebrate the role of Australia and the UN in Timor, few realise that West Papua was the first ever UN administered territory. Had the UN done its job properly, West Papuans would also be celebrating 50 years of independence, instead of 50 years of oppression and abuse.

No-one could forget the crimes against humanity committed against the Timorese by Indonesian forces in which a third of the Timorese population was killed. Recently released classified US documents showed that the United States knew of Indonesia's determination to thwart the independence vote in East Timor through violence. General Wiranto, who told the United States that the situation had been 'greatly exaggerated by the media', had been arming civilian militia led by Eurico Guterres. Guterres was later convicted for several massacres in Timor but was never sent to prison – and instead went to set up another militia group in West Papua.

Wiranto was indicted in East Timor but never faced trial because Indonesia refused to cooperate. He is now the Chief Minister for Security in Indonesia and responsible for the crackdown in West Papua. This week he brushed off inquiries about casualties, stating, 'It's up to us whether to announce the number of victims or not.' Wiranto demanded the protests stop, calling for dialogue, and insisted that repressive measures would not be taken. Days later, he banned all protests and speeches about Papuan demands for independence. Foreigners are also banned until further notice. After East Timor, we cannot claim any wide-eyed innocence about West Papua – or Wiranto.

As the military presence is stepped up and thousands of civilian militia are mobilised, Benny Wenda, leader of ULMWP, has called for UN intervention before an East Timor-style massacre takes place.

The referendum West Papuans are demanding is their right under international law. This is not a separatist issue or simply an internal matter for Indonesia. It is the unfinished decolonisation agenda of the UN. Indonesia was required by international law to provide Papuans with a free and genuine vote on self-determination in 1969. That never happened.

This means that Indonesia is unlawfully occupying West Papua. As the International Court of Justice recently found in the Chagos Islands case, the failure to consult the free and genuine will of the people renders administration of a territory unlawful. And all UN member states must cooperate with the UN to complete the decolonisation 'as rapidly as possible'.

All states, Australia included, have an obligation to help bring this unlawful situation to an end. Australia could be raising its concern with Indonesia to lift the internet blackout and permit access for journalists and international organisations. Australia could be using its seat on the UN Human Rights Council to raise concern about the crackdown on West Papuans and violent suppression of protests. And Australia could be urging Indonesia – and the UN – to provide West Papuans the referendum they are entitled to under international law.

Let's not repeat the mistakes we made in East Timor – and leave it too late.

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Case Study

'The escalating human rights crisis on our doorstep that no-one is watching'

Read the previous article, 'The escalating human rights crisis on our doorstep that no-one is watching' and answer the following questions.

1. Outline the key facts about the protests in Indonesia by West Papuans.
2. Discuss the reason for the protests and what the protesters' demands were.
3. Identify the human rights in the *International Covenant on Civil and Political Rights* (1966) that are involved in this dispute about West Papua.
4. Describe how the Indonesian authorities responded to the protests.
5. Identify the Indonesian general involved in West Papua and describe his history.
6. Discuss why Jennifer Robinson criticised Australia and assess if this is justified.
7. Watch Juice Media's video, 'Honest Government Ad – Visit West Papua', on YouTube. Note that this video is now banned on YouTube in Indonesia. Assess the video's claims and if this video should have been banned in Indonesia.

Research 8.2

Australia's term on the UN Human Rights Council, 2018–2020

1. Research Australia's term on the UN Human Rights Council.
2. Assess the effectiveness of Australia's contribution to this UN body.

Legal Info

UN intervention and the Responsibility to Protect (R2P) principle

One of the most contentious arguments on the role of the UN relates to the ability of the UN Security Council to act in cases of the most serious human rights abuses within a state's own borders. State sovereignty traditionally restrains the international community from interfering in another state's territory. When situations of serious human rights abuses are exposed, usually involving crimes against humanity or genocide, the international community will often call for the UN to intervene to put a stop to atrocities that are about to occur or are occurring.

However, the UN's powers to intervene within any state are restricted by Article 2(7) of the *Charter of the United Nations* (1945): 'Nothing contained in the present Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state.'

Under Chapter VI of the charter, the UN Security Council can recommend measures for the peaceful settlement of disputes or situations that may lead to international friction. Although this has occasionally been used to send UN peacekeeping troops into troubled regions, it requires the consent of the state or states involved and will fail if the state refuses to allow intervention. Since 2002, the UN Security Council can also refer international criminal law matters to the International Criminal Court but this may do little to stop a situation that is still occurring. In 2014, despite 65 UN member states wanting the International Criminal Court to prosecute Bashar Al-Assad for war crimes in Syria, Russia and China vetoed a UN Security Council resolution that proposed this course of action in Syria.

Article 2(7) of the charter does limit sovereignty in one instance: 'This principle shall not prejudice the application of enforcement measures under Chapter VII.' Chapter VII empowers the UN Security Council

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Legal Info (continued)

to take military or non-military action to 'restore international peace and security'. This makes it the most powerful organ of the UN, and indeed the world, giving it the power to intervene without a state's consent.

The UN Security Council has been heavily criticised for its reluctance to use its intervention powers to prevent mass atrocities or intervene where serious abuses are occurring. At the World Summit 2005 on reform of the UN, the world community decided to embrace a new doctrine, a new international approach to human rights abuses, called the R2P. The doctrine aims to make protection of human rights an integral part of the responsibility that goes with being a sovereign state – if a state fails to protect its own citizens, then the international community has the responsibility to step in under the Chapter VI or Chapter VII powers.

In 2006, the UN Security Council (by Resolution 1674) reaffirmed the World Summit Outcome Document 'regarding the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. In 2009, the UN Secretary-General, later supported by a resolution of the UN General Assembly, expressed commitment to the doctrine under three 'Pillars' of responsibility:

- It is a responsibility of states to protect their populations from these crimes.
- The international community is responsible for helping states develop the protective ability before such crises or conflicts break out.
- When a state has manifestly failed to protect its citizens, and peaceful means are not sufficient, the international community must take action to prevent harm.

Figure 8.4 Two French Mirage F-1 fighter jets fly over the Libyan coast during the 'Harmattan' air operation on 9 April 2011. The no-fly zone operation is under the control of NATO in accordance with the UN resolution that was passed in March 2011.

The Responsibility to Protect principle was first invoked in 2011, when Libya descended into civil war and a state of armed conflict. The conflict followed protests in Benghazi, during which armed state security forces fired into the crowd of protesters. The UN Security Council declared a 'no-fly zone' under Resolution 1973, which was designed to prevent dictator Muammar Gaddafi from inflicting further harm on Libyan people who had joined the uprising. The resolution authorised UN member states to use 'all necessary measures' to prevent attacks on civilians. The resolution passed with the abstentions of Russia and China. The resulting military action by NATO caused much controversy, with some arguing that the intervention infringed national

Review 8.2

1. Summarise how the various UN organs contribute to the promotion and enforcement of human rights.
2. Describe the role of the UN High Commissioner for Human Rights. Assess whether the work of the commissioner can be controversial at times.
3. Identify the measures the UN Human Rights Council adopted to increase its ability to deal with human rights issues.
4. Identify the human rights that the R2P principle was designed to protect.
5. Assess the effectiveness of the R2P doctrine in the Libyan intervention in 2011.
6. Research recent media reports on the R2P principle. Assess the effectiveness of this doctrine to protect people from human rights violations.

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sovereignty and the ability of Libyans to resolve the conflict for themselves. Others argued that according to the R2P doctrine, it was the duty of the international community to act. The NATO-imposed no-fly zone allowed the Libyan rebels to overthrow the regime of Muammar Gaddafi, but for years afterwards Libya imploded into anarchy and violence. This UN-sanctioned (with R2P reasons) and NATO-led limited intervention succeeded in ridding Libya of a dictator; but without helping Libya to establish a strong democratic nation state there was no hope of guaranteeing civil, political and economic rights.

The Sustainable Development Goals

In 2002, at the end of a conference on world poverty, all member states of the UN 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 to achieve 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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Intergovernmental organisations

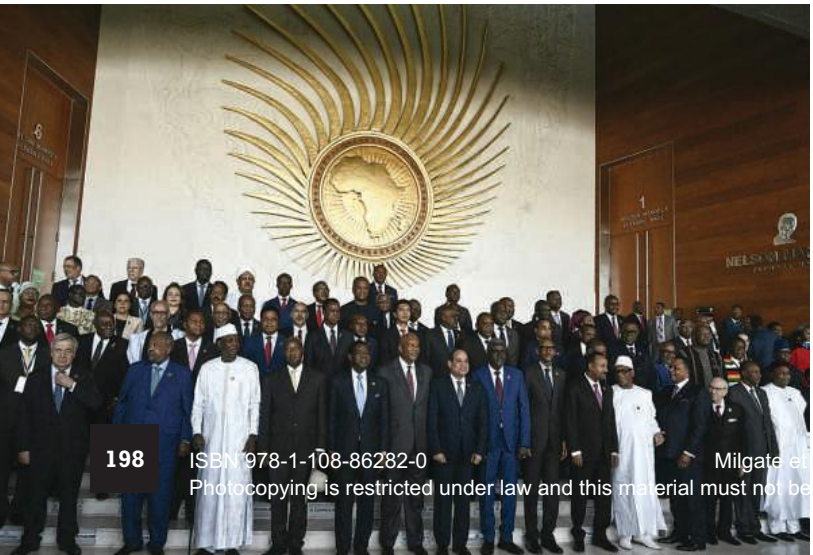
An intergovernmental organisation (IGO) is an international institution made up of member states. IGOs are created by agreement between states, and each has an international treaty that acts as a charter outlining the organisation's purpose and operation. They are usually permanent, meet regularly and 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 around 300. The UN, created by the *Charter of the United Nations* (1945), is the most important of all IGOs. Other powerful IGOs include the World Trade Organization (WTO), the International Monetary Fund (IMF), the North Atlantic Treaty Organization (NATO) and INTERPOL.

Apart from the UN, a number of IGOs have the promotion of human rights as part of their stated goals and can exert significant influence on the human rights situations of their member states, although the influence of every organisation differs. Examples are:

- **Commonwealth of Nations** – made up of 54 members, including the United Kingdom, Australia and almost all former colonies of the British Empire, it operates within a framework outlined in the Singapore Declaration of 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 The UN Secretary-General, António Guterres (left), Egyptian President, Abdel Fattah el-Sisi (centre), and other heads of state and officials during the second African Union summit in Addis Ababa, Ethiopia, on 10 February 2019.



Courts, tribunals and independent authorities

There are numerous international courts, tribunals and other independent authorities with power to hear matters involving human rights abuse.

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International Court of Justice

The International Court of Justice is an organ of the UN. It started operation in 1946 at the Peace Palace in The Hague, The Netherlands. The International Court of Justice has two roles: to hear and judge disputes between states, and to issue advisory opinions on matters of international law.

The International Court of Justice 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 International Court of Justice 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 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 International Court of Justice's ruling.

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 court's jurisdiction. 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 International Court of Justice to uphold the objection to jurisdiction by these three countries.

In July 2017, the Ninth Circuit Court of Appeals ruled to affirm 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.

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 International Court of Justice 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.

Other forums, including the UN Security Council (see earlier), the ICC, regional courts (such as the European Court on Human Rights) and the UHRC, are arguably much more effective for hearing matters of serious human rights violations.

International Criminal Court and *ad hoc* tribunals

The International Criminal Court (ICC) was established in 2002 to prosecute international crime. The ICC was preceded by various tribunals (known as *ad hoc* tribunals) established for a particular purpose by the UN Security Council or the UN 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).

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Research 8.3

International Criminal Court

Search for the article, 'International Criminal Court and India' (*International Law*, 29 August 2019).

1 Discuss why this article claims that the International Criminal Court should investigate India.
2 Outline what the International Criminal Court could do if it did investigate India.
3 Research another country of concern to the International Criminal Court today.

Figure 8.7 Russian opposition leader, Alexei Navalny (left), and his lawyer, Olga Mikhailovich, at a hearing of the European Court of Human Rights in Strasbourg, France, on 24 January 2018.

Importantly, the ICC has jurisdiction to prosecute individual people rather than states, which makes it a powerful institution for combating individuals who seek to use state sovereignty as a defence for their abuses. Australians work at the ICC in both the prosecution and defence areas.

European Court of Human Rights

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.

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

Research 8.4

European Court of Human Rights

Search for Damelya Aitkhozhina's article, 'Why you should read the European Court ruling on Magnitsky' (*Human Rights Watch*, 27 August 2019).

1 Describe the details of this case.
2 Identify what human rights were involved.
3 Find a more recent case heard in the European Court of Human Rights.
4 Assess the effectiveness of the outcomes in these two cases.

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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. Some of these are to be repealed when Britain leaves the EU in 2019.

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 203).

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 100000 NGOs.

Review 8.3

1. Identify the Sustainable Development Goals.
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.

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Legal Links

Information is available online about these well-known international NGOs working for human rights:

- Amnesty International
- Freedom House
- Human Rights Watch
- Carter Center
- International Committee of the Red Cross
- Reprieve
- A21.

Research 8.5

Visit two of the NGO websites mentioned in the 'Legal Links' box 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.

At the establishment of the UN in 1945, NGOs were already playing an important role in contributing to international discussion. Today, many NGOs collaborate on a daily basis on human rights and humanitarian work with various government and intergovernmental organisations and specialised UN agencies.

NGOs engaged in human rights play an indispensable role in informing the global community, governments and the UN of human rights violations and progress. They help ensure greater government compliance by investigating, researching, documenting and publicising cases 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 UN to apply diplomatic pressure or take action against violating states.

One of the oldest and most important international NGOs is the International Committee of the Red Cross (ICRC). With origins tracing back to 1863, the ICRC's missions are strictly concerned with international humanitarian law – protecting the life and dignity of the victims of international and other armed conflicts; this work often overlaps with human rights abuses. The importance of the ICRC is recognised internationally, and since 1990 it has been allowed observer status at the UN General Assembly. The ICRC also works closely with the International Federation of Red Cross and Red Crescent Societies (IFRC), which is made up of 190 National Red Cross and Red Crescent Societies that lead and organise relief assistance missions in response to large-scale emergencies.

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.

Figure 8.8 On 6 June 2019 at a press conference in Canberra, Acting Australian Federal Police (AFP) Commissioner, Neil Gaughan, justified the AFP raids on journalists.

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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 'everyone has the right to … seek, receive and impart information and ideas through any media and regardless of frontiers'.

The influence of the media is also recognised by violators of human rights. Media freedom is severely restricted in many countries – it is often unsafe for reporters to undertake their work, as it could result in censorship, imprisonment, beatings or even death. According to one important NGO, the Committee to Protect Journalists, at least 15 journalists were killed, 250 were jailed and 63 were missing in 2019. Iraq and Syria were the deadliest with the countries Turkey, China and Egypt jailing the most journalists. Also, the international NGO Reporters Without Borders releases an annual index of media freedom of all states. In 2019, Australia ranked twenty-first in the world for degree of press freedom.

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.

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The Australian situation

Unlike Europe, or Africa or the American states, Australia is not currently party to any regional human rights instrument or human rights court. The Association of Southeast Asian Nations (ASEAN) is in talks to develop a human rights charter and a human rights court.

The ASEAN charter contains some provisions on upholding law with respect to human rights and enabling the establishment of a human rights body and unresolved dispute mechanism, and there is a working group for a human rights mechanism, which would create:

- a regional declaration of human rights principles
- a regional human rights commission for monitoring and recommendation purposes (established in 2009)
- a court that would render binding decisions.

8.3 Human rights in Australian domestic law

In Australia, there is no one document where all human rights can be found – rights that correspond with internationally recognised human rights are drawn from different sources. These sources include international treaties, the *Australian Constitution*, the common law, and statute law of the Commonwealth, states and territories.

When an international treaty is negotiated and formed, states indicate their agreement to the principles of the treaty by signing it. Signing a treaty means the country will have to act in the spirit of the treaty, but it is not directly binding. In most cases a treaty will need to be ratified by the state before it becomes binding and enforceable.

Some countries have **monist systems**, meaning that when the country's government ratifies a treaty, the treaty automatically becomes law in the country as if it were an Act of parliament. Such countries can sign and ratify a treaty at the same time. France and The Netherlands have monist systems.

monist system
a legal system that deems treaties enforceable in domestic law as soon as they have been signed

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.


Video

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

8.4 The role of the *Australian Constitution*

The *Australian Constitution* plays two important roles in protecting human rights for Australians:

- it lays down the system of Australian Government through which human rights are recognised, including the **separation of powers** and **division of powers**
- it is the source of some specific human rights.

separation of powers
preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary

division of powers
how powers are divided between the federal and state governments

Separation of powers and division of powers

The doctrine of separation of powers 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.

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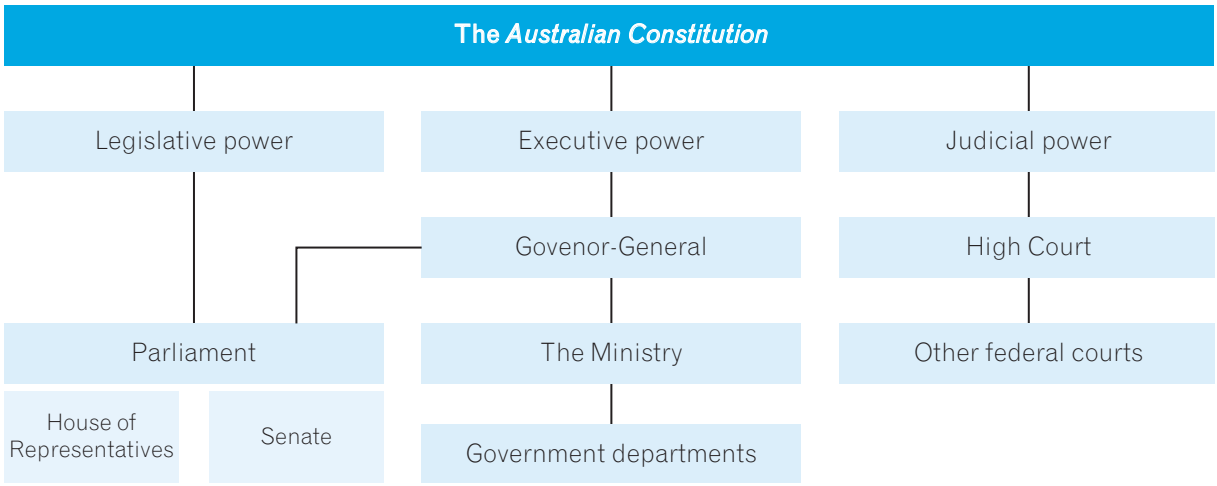

Figure 8.9 Under the *Australian Constitution*, judicial power is strictly separated from political power.

In Australia, separation of powers is protected under Chapters I to III of the *Australian Constitution*, which describe the functions of each branch respectively. As a Westminster system of responsible government, Australia has no strict separation between the legislature and executive – the *Constitution* provides for ministers to sit in parliament and to be part of the executive, which can make **delegated legislation**.

delegated legislation
laws made by people or bodies to whom parliament has delegated law-making authority

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 *Constitution*.

The *Constitution* also defines the division of powers between the Commonwealth and Australian states. This is the basis of the Australian federation: how legislative power is divided between Commonwealth and state parliaments. Most specific areas that the Commonwealth can make laws on are listed under section 51 of the *Constitution* – these areas are known as Commonwealth **heads of power** and include, for example, currency (s 51(xii)), marriage (s 51(xxi)) and copyright and patents (s 51(xviii)). Powers that are not listed in the *Constitution* are **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.

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

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.

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Express and implied rights

Unlike the United States, Australia does not have a bill of rights to bind state and Commonwealth action relating to human rights. However, the writers of the *Constitution* did include some rights; these are known as **express rights**. Additionally, over the last century the High Court has interpreted the *Constitution* as necessarily holding certain other rights. Even though they are not written in it, the High Court has found that certain rights must have been intended in order for the *Constitution* to function effectively – these are known as **implied rights**.

express rights
rights that are included (written) in a document

implied rights
rights that can be implied through the text, structure or purpose of a document

Express rights in the *Constitution* include freedom of religion (s 116), the right to vote in Commonwealth elections (s 41), the right to a trial by jury in federal indictable cases (s 80) and the right to 'just terms' where the Commonwealth compulsorily acquires property (s 51(xxxi)). These rights are clearly very limited, and over time the High Court has judged that certain other rights can be implied in the text and structure of the *Constitution*. For example, the High Court has on a number of occasions (most clearly in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520) held that the *Constitution* contains an implied right to freedom of political communication, a type of freedom of speech, in order for Australia's political system as established in the *Constitution* to function effectively.

Despite this, a finding of implied rights by the judiciary has often been controversial and the ability of the *Constitution* to act as a protector of human rights is very limited. Most Australian human rights are found in other sources of law.

Figure 8.10 Australians vote in Sydney on 18 May 2019. The right to vote in Australia is guaranteed by section 41 of the *Constitution*.

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).

Review 8.4

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* enabled international human rights law to influence domestic law in Australia.
4. Outline the express rights guaranteed by the *Constitution*.
5. Define implied rights. Give an example.

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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 criminal law 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 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 indigenous 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

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Legal Links

The AHRC 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.

Figure 8.11 Australia's former Prime Minister, Julia Gillard (left) – who started the Royal Commission into Institutional Responses to Child Sexual Abuse – is applauded by Prime Minister, Scott Morrison (second right), and opposition Labour leader, Bill Shorten (right), as she addresses the public in Parliament House in Canberra on 22 October 2018. The Prime Minister issued a national apology to victims of child sex abuse in an emotional address to parliament on 22 October 2018, acknowledging that the state failed to stop 'evil dark crimes' committed over decades.

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.

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.

High Court of Australia

While matters involving human rights might appear before the state or federal courts and tribunals, it is in the High Court where they often become most important. This is because the High Court has the power to set precedents that are binding on other courts and to overturn state or Commonwealth legislation where it conflicts with the *Constitution*.

High Court cases involving human rights include the decriminalisation of homosexuality (*Croome v Tasmania*), a constitutional right to freedom of political communication (*Lange v Australian Broadcasting Corporation*) and a possible common law right to privacy (*ABC v Lenah Game Meats*). In another case, the High Court upheld the constitutional right of all people to vote, including prisoners (*Roach v Electoral Commissioner* [2007] HCA 43).

The High Court's methods of interpretation in cases involving human rights have been particularly influential, and occasionally controversial. For example, the case of *Mabo v Queensland* (No 2) (1992) 175 CLR 1 is one of the most important cases in Australian law and involved recognition for the first time of Australia's indigenous peoples' right to

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Review 8.5

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 AHRC 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.

title in their traditional land. This principle became known as 'native title'.

Combined with the court's power to declare legislation inconsistent or invalid, to uphold the rights provided for in the *Constitution* and to continue to develop the common law, the High Court is arguably the most important protector of human rights in Australia.

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.

The role of the media

In Australia in 2019, the issue of press freedom emerged as 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

Figure 8.12 The Refugee Challenge teaches school students about the challenges faced by the world's refugees. The Challenge uses a simulation that takes participants through a refugee's journey.

Legal Links

Some of the 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 (ACOSS)
- Asylum Seeker Resource Centre
- The Refugee Challenge.

Search the internet for information about these NGOs.

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Research 8.6

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 October 2018.
3. Describe some of the functions of the organisation.
4. Find and discuss some of the cases the organisation has conducted defending human rights.

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 are concerned that freedom in Australia was being gradually eroded.

On 4 September 2019, in a speech to the National Press Club in Canberra, Law Council of Australia President, Arthur Moses, spoke about the 'creeping erosion of human rights and freedoms' due to anti-terrorism and national security laws 'which pose a threat to press freedom and personal liberties'. Moses strongly suggested that we need a 'national discussion about the importance of human rights and freedoms in our country'. He fears that we are 'heading down a slippery slope' due to the 'proliferation of statutes with a clear intention by parliament to abrogate rights and freedoms'. Furthermore, Moses said that Australia is the only country without a Charter of Rights or a human rights Act. In conclusion, Moses said, 'a free, independent press is a critical safeguard for human rights'. Also at the Press Club, prominent barrister, Matt Collins, warned that 'our laws do not adequately protect freedom of speech, and particularly freedom of the press'.

Figure 8.13 At the National Press Club in Canberra on 4 September 2019, the Law Council of Australia President, Arthur Moses (left), spoke about the 'creeping erosion of human rights and freedoms'. Prominent barrister, Matt Collins (right), spoke about the fact that our laws do not protect freedom of speech.

Review 8.6

1. Outline the role the media can play in promoting human rights.
2. Clarify why there are human rights concerns about journalists.
3. Describe the human rights issues raised by the Law Council of Australia President, Arthur Moses, at the National Press Club in Canberra on 4 September 2019.

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Research 8.7

Reporters without Borders

1. Investigate the statistics regarding journalists in five countries.
2. Assess how they compare with Australia.
3. Discuss Australia's treatment of journalists in 2019 compared with previous years.
4. Find media reports about journalism in Australia today. Assess if there are any concerns about press freedom.
5. Identify articles in the International Bill of Rights that relate to press freedom.

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.

TABLE 8.1 A summary of all the main arguments put forward by supporters and opponents of a Charter of Rights

Arguments for a Charter of Rights	Arguments against a Charter of Rights
Extremely high community support	The adequacy of current human rights protections in Australia
Remedying the shortcomings of existing human rights protections	Undermining a tradition of parliamentary sovereignty, including transferring legislative power to unelected judges
Reflecting basic Australian values	No better human rights protection is guaranteed
Protecting the marginalised and disadvantaged	Potentially negative outcomes for human rights
Improving the quality and accountability of government	Excessive and costly litigation
Supporting a culture of regard for human rights	Democratic processes and institutions offer better protection of rights
Improving how the international community views Australia with regard to human rights	A major economic cost
Bringing Australia into line with other democracies	Unnecessarily legalised human rights
Generating economic benefits	

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Review 8.7

1 Explain the role of NGOs 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.

Figure 8.14 Gillian Triggs, the president of the Australian Human Rights Commission, at 'RightsTalk: Inspiring change in human rights' at the Sydney Town Hall on 14 June 2017.

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% discussed enacting a Charter of Rights or a human rights Act, similar to that of the United Kingdom or New Zealand. Of all those, 87.4% were in favour of such a charter and only 12.6% were opposed. In April 2010, the Australian Government rejected the key recommendation of the National Human Rights Consultation Committee report to implement a legislative charter of human rights. Instead, the government announced that it would adopt a human rights framework including various measures, such as education initiatives and enhanced parliamentary processes.

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News

Gillian Triggs: How the 'fair go' became the last bulwark for Australia's freedoms

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.

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.

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(Continued)

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.

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.

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(Continued)

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 *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.

Review 8.8

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.
- The UN's R2P doctrine attempts to make the prevention of human rights abuses the collective responsibility of the international community.
- Many IGOs and NGOs play an important role in promoting human rights internationally.
- The 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 *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'.

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Chapter 9
Contemporary human rights issues

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.

Legal oddity

An Australian Government report about the Migrant Workers' Taskforce (March 2019) focused on the employment experiences of temporary migrants. These migrants have work rights under international student and working holiday-maker (backpacker) visas. Despite the gaps in evidence, the report concluded that the problem of wage underpayment is widespread and has become more entrenched over time. The most comprehensive academic survey to date on the issue suggests as many as 50% of temporary migrant workers may be being underpaid.

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

Criminal Code Act 1995 (Cth)
Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth) (repealed)
Victims of Trafficking and Violence Protection Act 2000 (US)
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

Convention to Suppress the Slave Trade and Slavery (1926)
Convention Concerning Forced or Compulsory Labour (1930)
Protocol of 2014 to the Forced Labour Convention (1930)
The Universal Declaration of Human Rights (1948)
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)
Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)

SIGNIFICANT CASES

R v Tang (2008) 237 CLR 1
R v Wei Tang (2009) 233 FLR 399

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9.1 Contemporary slavery

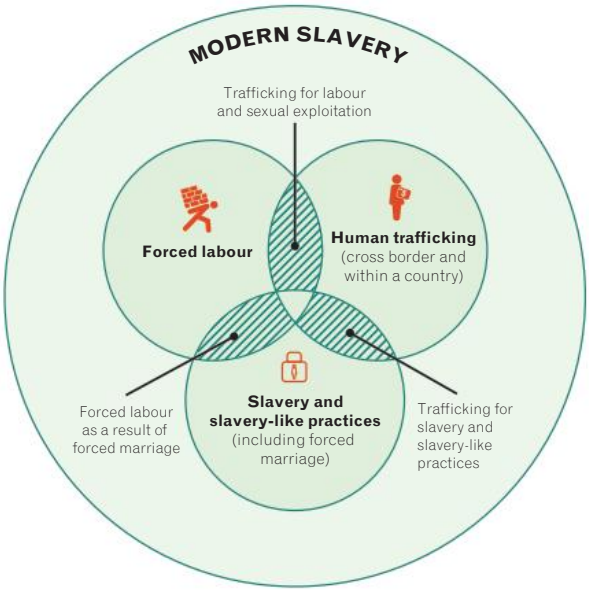

Figure 9.1 Modern slavery includes different forms of slavery that often overlap.

The Global Slavery Index uses the term 'modern slavery' to refer to 'human trafficking, forced labour, debt bondage, forced or servile marriage, and the sale and exploitation of children.' According to the Global Slavery Index, the common element in these types of slavery is that the people involved are in 'situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, abuse of power, or deception'. Slavery has been regarded as a legal institution for most of human history. Unfortunately, although the illegality of slavery is now a global norm, this does not mean that it has been eradicated. Slavery might be illegal today but it still exists and affects at least 40 million people worldwide.

Figure 9.2 Australian mining magnate, Andrew Forrest, is Chairman of the Minderoo Foundation. One of the initiatives of Minderoo is 'Walk Free', which was established to change the behaviour and laws that impact the more than 40 million people in slavery in the world today.

Research 9.1

The scope of human trafficking

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 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 and agriculture or construction. A person may, for example, be lured by the promise of a legitimate job opportunity and instead be forced to work without pay or while enduring physical abuse. It can often be difficult for authorities to find such individuals or groups.
- **Debt bondage** – the United Nations (UN) defines debt bondage as 'modern-day slavery', often a form of forced labour. Debt bondage is where a person is forced to repay a loan with labour instead of money. Debt bondage also involves the proper value of the labour not being applied towards repayment of the debt, and/or the type or duration of services not being properly limited. In many cases, the person may be deceived into paying extremely high rates of interest, making it impossible to repay the debt. They might be tricked or trapped into working for no or very little money, or have unreasonable expenses deducted from any pay or added to the debt. In some cases, children of the borrower may be forced to repay the debt across generations.
- **Sexual slavery** – this involves repeated violation or sexual abuse or forcing the victim to provide sexual services. It can take many forms, including forced prostitution, single-owner sexual slavery, slavery associated with religious practices or other types of slavery, such as forced labour where sexual abuse is also common. Sexual slaves are usually women and children. The victims might be captured, coerced, deceived or even sold by their own families or acquaintances into sexual slavery. The Vienna Declaration and Programme of Action calls for an international response to this. Sexual slavery's most problematic aspect is commercial sexual exploitation of children in the form of child prostitution, child pornography and sex tourism.

contemporary slavery
a form of forced or bonded labour, with or without pay, under threat of violence

forced labour
work performed under the threat of a penalty or harm and which the person has not voluntarily submitted to

debt bondage
a situation where a person is forced to repay a loan with labour instead of money, where the proper value of the labour is not applied towards repayment and/or the type or duration of services is not properly limited

sexual slavery
repeated violation or sexual abuse or forcing a victim to provide sexual services; it often takes the form of forced prostitution or forced labour where sexual abuse is also common

There are other more specific situations that may result in conditions of slavery, which might arguably fall into one or more of the categories mentioned. They include domestic workers kept in captivity, the adoption of children who are in effect forced to work as slaves, **child soldiers** and those pushed into a **forced marriage**.

child soldier
a person under the age of 18 who participates, directly or indirectly, in armed conflict as part of an armed force or group, including both armed and support roles

forced marriage
marriage in which one or both parties is married against their will, often on promise of payment of money or goods to the family of the other person involved

9.2 Defining human trafficking

Today, many victims of slavery are forced into slavery by way of **human trafficking**, which is the commercial trade or trafficking in human beings for the purpose of some form of slavery. It includes recruiting or transporting a person for forced labour or debt bondage, or providing or obtaining a person for forced labour or debt bondage by use of force, fraud or coercion, or trafficking people for sexual slavery. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (2000) was adopted by the UN in 2000;

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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).

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

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.

people smuggling
illegal transportation of people across borders, where people voluntarily pay a fee to the smuggler, and then are usually free to continue on their own after arrival in the hope of starting a new life in the destination country

Human trafficking can involve a whole line of criminal activity, from recruitment and harbouring of victims, to transport and sale, to obtaining or buying and finally exploiting that person in slavery or forced labour. Victims of human trafficking can be recruited in a number of ways (for example, they may be lured by a false job offer or offer of migration or a marriage proposal). In other cases, victims may be sold by family members, recruited by former slaves, deceived, intimidated or even physically abducted.

The victims might be falsely imprisoned or threatened, or bonded with debt; or it might be practically impossible for the victim to survive outside. Victims might be exploited in a commercial industry, such as the commercial sex industry or agriculture or mining, or in a private residence (for example, in a forced marriage or as domestic workers). Thailand and Brazil are considered to have the worst child trafficking statistics.

9.3 Extent of the issue

Estimates of the number of people trafficked across international borders vary dramatically. The UN Office on Drugs and Crime estimates that there are over 2.5 million victims of human trafficking across state borders. However, this does not include the millions of people trafficked within their own countries, which is especially difficult to detect. According to the UN's *Global Report on Trafficking in Persons*, sexual exploitation is the most documented type of trafficking because it is more frequently reported by countries; instances of forced labour and debt slavery, as well as forced marriage and domestic servitude, may be less well documented. The International Labour Organization estimates that at least 57.6% 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.

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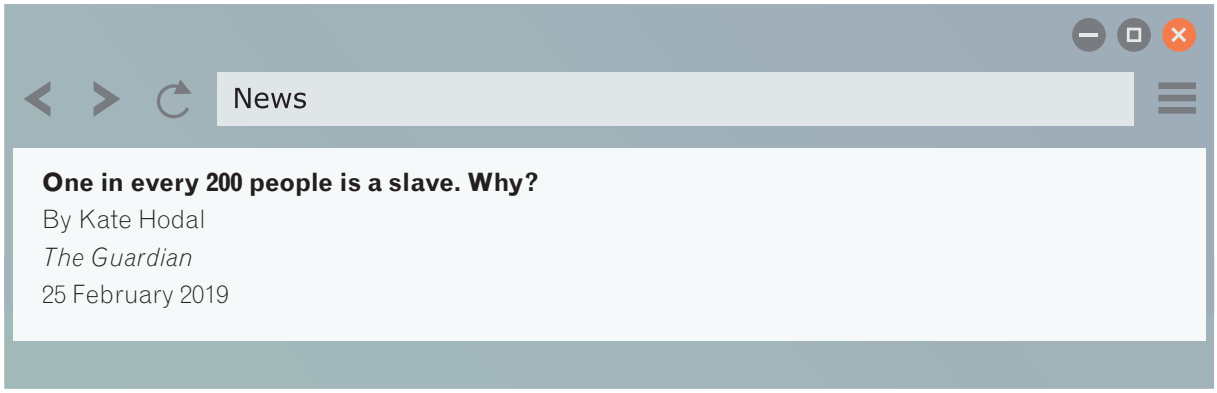
Figure 9.3 Somaly Mam is a former victim of child trafficking in Cambodia. She started the Somaly Mam Foundation to help victims of child trafficking. She became widely known after publishing her memoir, *The Road of Lost Innocence*.



Research 9.2

One in every 200 people is a slave. Why?

1. Search the internet for the above article, 'One in every 200 people is a slave. Why?'.
2. Outline the information about the scale of modern slavery this article provides.
3. Search for a more recent article about slavery. Discuss what changes, if any, have occurred in modern slavery since 2019. Discuss if things are getting better, worse or unchanged.

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

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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 UN, intergovernmental organisations (IGOs), 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 (IGO)
an organised group of two or more states, set up to pursue mutual interests in one or more areas

Figure 9.4 A human-trafficking victim in India is hugged by her sister after being rescued. According to the National Crime Records Bureau, 55 000 children were kidnapped in 2016 in India – this is a 30% increase from the year before.

non-government organisation (NGO)
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

Research 9.3

The *Trafficking in Human Persons Report*

Find the full version of the current US State Department's *Trafficking in Human Persons Report* and answer the questions below:

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 9.4

Human trafficking – victims' stories

Search online for stories about human trafficking outside of Australia. Find two stories and give court cases for each of the following categories:

- forced labour
- forced marriage
- trafficking in children
- trafficking in adults
- slavery sexual servitude.

Draw up a table like the one below for each of the stories.

Name	Source	Location	Details	Legal/Non-legal responses

Discuss your findings with your class. Evaluate the effectiveness of legal and non-legal responses in each of these cases.

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. 20) and the 'learn to' activities (p. 21) 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.

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.

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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. Article 4 of *The Universal Declaration of Human Rights* (1948) states: '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).

Figure 9.5 Rights activists – under the umbrella of the Justice Development and Peace Commission – march against human trafficking and countrywide violence during a protest march on 18 March 2017 in Lagos.

Figure 9.6 Increasingly, businesses are more aware of the necessity to deal with slavery in their supply chains to avoid reputational damage.

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. The International Labour Organization estimates that over 40 million adults and children were in forced or bonded labour, or commercial sexual servitude in 2020. 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. This signified that the member states of the UN 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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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.

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:

> 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 UN, 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.

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.

Research 9.5

Non-legal means of dealing with human trafficking

1. Find the websites of the Alliance 8.7 and Code 8.7. Also search the internet for recent media reports about these initiatives.
2. Evaluate the effectiveness of both Alliance 8.7 and Code 8.7 in making an impact on modern slavery.

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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.

In Court

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.

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Figure 9.7 The arrest of criminals suspected of human trafficking.

Research 9.6

Human trafficking and the Australian Federal Police

In Australia, the Australian Federal Police (AFP) is responsible for the crime of human trafficking. Look up 'human trafficking' on the AFP's website, then respond to the following:

1. Analyse the main aim of the AFP's 'human trafficking' webpage.
2. The AFP is also responsible for the crime of organ harvesting. Define organ harvesting. Discuss where this crime is a major concern today.
3. The AFP is also responsible for the crime of people smuggling. Explain the difference between people smuggling and human trafficking. (Hint: Visit the Australian Institute of Criminology website and look for the webpage titled, 'People smuggling versus trafficking in persons: what is the difference?'.)

Australia's *Modern Slavery Act* – how does it measure up internationally?

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 asses 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.

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Figure 9.8 Andrea Tokaji is an international human rights lawyer, lecturer and business consultant. She has been involved with a number of anti-slavery projects in Australia and Asia and has undertaken political lobbying for vulnerable women and children in several jurisdictions. Andrea has also been very involved in educating the business community about the implications of the *Modern Slavery Act 2018* (Cth).

Experts, including Human Rights Watch – a human rights watchdog organisation that investigates human rights violations in 90 countries – say that while the *Modern Slavery Act 2018* (Cth) is a good start, it doesn't go far enough. They recommend dropping the qualifying threshold to $25 million, requiring a 'systematic evaluation' of the corporate slavery risk, and penalising companies that fail to address the issue.

The modern slavery reporting requirement's primary objective is to assist the business community in Australia to take proactive and effective actions to address modern slavery by encouraging them to identify and report on slavery in commercial supply chains.

However, the *Modern Slavery Act 2018* (Cth) does not support large businesses to work towards due diligence human rights practices, it does not penalise non-reporting, and it does not provide for an Anti-Slavery Commissioner with an educational, reporting, enforcement and regulatory oversight role.

The central principle of 'due diligence human rights practices to eradicate slavery' was left out of the Californian, United Kingdom and now Australian laws. This arguably reduces the legislative approach in California, the United Kingdom and Australia to a corporate regulatory reporting exercise. There is no incentive for corporations to change their practice. They are merely encouraged to act for the greater good and strive towards a more just and equitable human rights standard that upholds the dignity of the person in the way commercial business, trade and the procurement of raw materials and services in their supply chains is conducted.

In other words, the transparency in supply chain laws miss the opportunity in its legislation to uphold the principle of social justice by requiring a due diligence human rights approach to the eradication of slavery, trafficking and criminality of all kinds in the labour force globally in the pursuit of working towards global peace, security and justice.

This leaves a serious gap in legislative and regulatory oversight as well as in the role of legal education – with civil society left to pick up most of the responsibility.

Review 9.2

1. Explain why the business world is a new front on the war on human trafficking.
2. Identify the key provisions of the *Criminal Code Act 1995* (Cth) that relate to human trafficking.
3. Discuss what international instruments are at the centre of the campaign against human trafficking
4. Evaluate the main objective of the *Modern Slavery Act 2018* (Cth).

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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.

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.

Effectiveness of responses

At the international level, the problem of modern slavery is showing no signs of going away. The main contributors to the risk of people trafficking and slavery and the difficulty in preventing it have been identified as:

- Developing states do not have the resources to fight these forms of exploitation and transnational crime.
- There are socio-political and economic factors driving the movement of people from one place to another.

In a globalised economic system there is an increased demand for all types of labour, legal and illegal. This demand is exploited by criminal organisations, and vulnerable people are trafficked as victims to meet this demand. Poverty in source countries, combined with a lack of both education and the rule of law, can contribute to the vulnerability of victims and the success of recruiters' coercive or deceitful techniques.

The implementation and enforcement of international treaties, especially the 2000 protocol, is left up to national governments. While some states vigorously pursue offenders, others may be unwilling or unable to effectively tackle the problem. The UN, the 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.

Legal Links

Anti-Slavery Project

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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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 slavery risks and to report on their findings.
>
> **Andrea Tokaji, international human rights lawyer**

Review 9.3

1. Describe how the UN and the International Labour Organization are tackling human trafficking.
2. Explain the role of the media, NGOs and other non-legal responses in combating human trafficking. Evaluate how these groups can complement the legal measures in place.
3. Critically evaluate the effectiveness of legal and non-legal responses to human trafficking based on consideration of the causes of and drivers behind the problem.

Research 9.7

Commonwealth and New South Wales Modern Slavery Acts

Search for scholarly articles and media reports on the effectiveness of the Commonwealth and New South Wales *Modern Slavery Act 2018* and then answer the following:

1. Describe to what degree do these two Acts complement each other.
2. Discuss if there has been any difficulties in the relationship between the two Acts.
3. Outline to what extent has the appointment of an Anti-slavery Commissioner raised community awareness about modern slavery.
4. Discuss if these two Acts enhanced government and community efforts to deal with the issue of modern slavery in Australia today.

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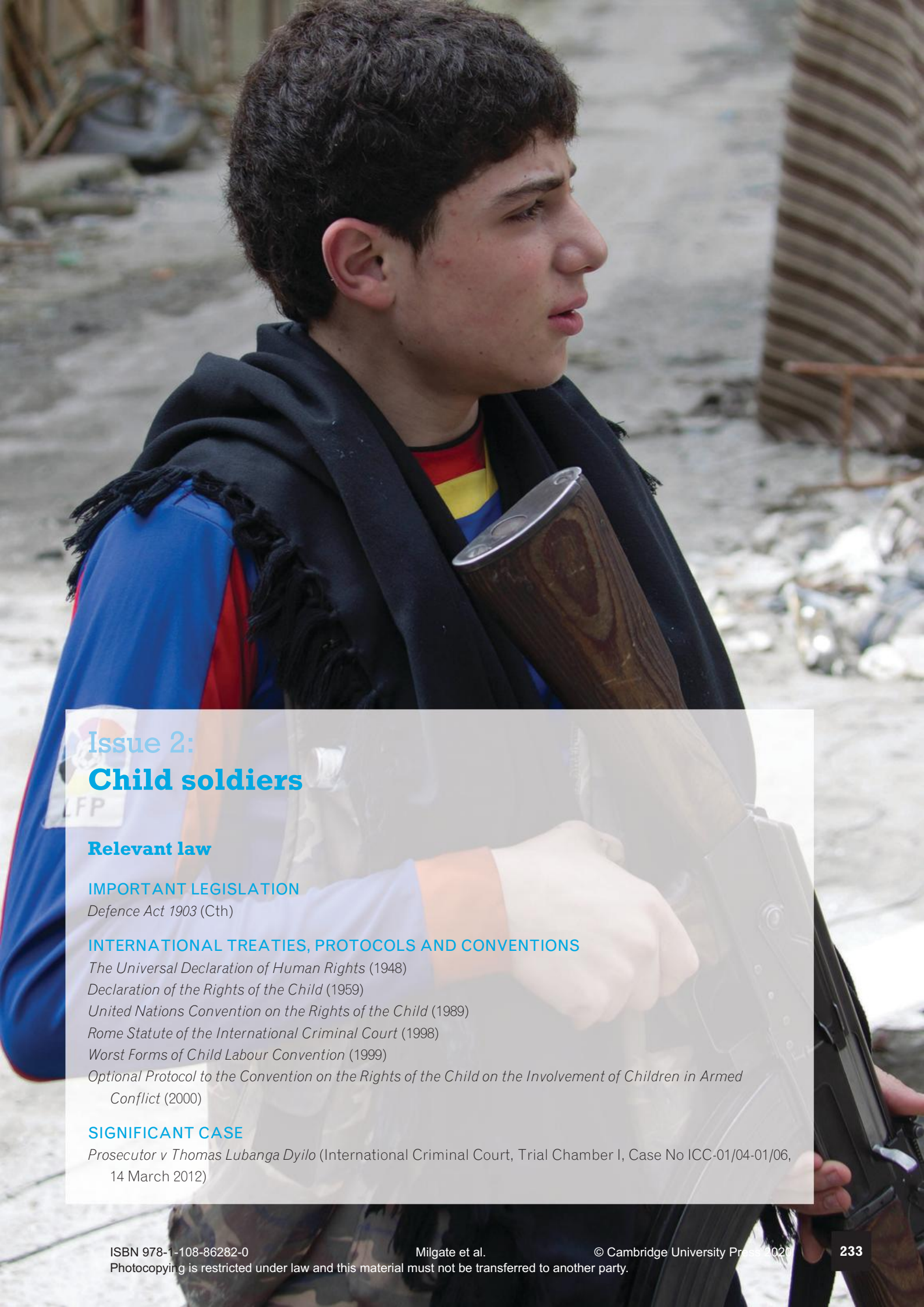

Issue 2:
Child soldiers

Relevant law

IMPORTANT LEGISLATION

Defence Act 1903 (Cth)

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)

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9.5 Defining the issue

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 UN expanded on this with the adoption of the *Declaration of the Rights of the Child*. 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. In some countries, children are also recruited into armed forces as **child soldiers**.

child soldier
a person under the age of 18 who participates, directly or indirectly, in armed conflict as part of an armed force or group, including both armed or support roles

Children have been involved in military campaigns in many cultures throughout history, even when their use was widely condemned by society. For example, child soldiers have been documented as having participated as aides, scouts, 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 though the use of force, intimidation or deception, and are used for labour in conflict areas, or sexually exploited.

Children in armed conflict are likely to be exposed to high levels of danger or abuse and significant psychological trauma. They may also be injured or

Figure 9.9 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.

Figure 9.10 Men and boys suspected of being Islamic State (IS) fighters wait to be searched by members of the Kurdish-led Syrian Democratic Forces after leaving the IS's last holdout of Bāghūz in Syria on 1 March 2019.

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killed, or suffer other kinds of serious harm. Groups may target children for use in armed conflict because they are seen as free and expendable labour, or as easier to abduct or manipulate. Children may also be more willing than adults to take risks, while the other side may also be less inclined to suspect children, or may hesitate to attack where children are present. Children are particularly vulnerable to military recruitment – they may be more easily manipulated, their youth makes it harder for them to resist, and they do not fully understand the conflicts they are being recruited for.

The parties recruiting children can be government forces, paramilitary organisations or rebel groups. Children might be recruited at home, on the street or even at school, or they might be physically abducted by recruiters. They might even be forcibly conscripted by governments. In many cases, children 'voluntarily' join armed groups: there are social or economic pressures on them, and they believe that joining the group will get them food or security. In other cases, children may be abducted or **press-ganged** by armed groups.

press-ganging
the act of forced conscription used in England during the 1800s; groups of men known as 'press gangs' were employed by the government to recruit people forcibly into lifetime service with the armed forces

Children are usually unable to escape or are subjected to severe punishment for attempting to escape. Sometimes children may be forced or indoctrinated into committing atrocities against neighbours or even their own families, and may become stigmatised in their communities because of this, making it impossible for them to return home.

The use of child soldiers takes three main forms:

- direct involvement in armed conflict, where the child may be expected to take part in the fighting and armed with a weapon
- indirect involvement through support roles, such as messenger, scout, cook, porter, servant, to lay or clear landmines or even as a sexual slave
- use for particular political advantage, such as propaganda or as a **human shield**.

human shield
the placement of civilians in or around military targets to deter the other party from attacking that target

9.6 Extent of the issue

It is impossible to calculate how many children around the world are involved in armed conflict as child soldiers, but the issue has come to the public's attention due to conflicts in Sierra Leone, Liberia, Uganda and Iraq that have involved heavy use of child soldiers. Child soldiers may serve in government armies, but they also serve in government-linked militias and opposition or rebel forces, where reliable data are unavailable. Some countries may have inadequate procedures to verify the ages of new recruits. In other countries, low levels of birth registration mean that children may be inadvertently or even deliberately recruited; in Paraguay, for example, this assisted forced conscription of children as young as 12.

The NGO Peace Direct estimates that the number of child soldiers in the world is about 250 000, while Human Rights Watch says that it could be as much as 300 000. The UN 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 (LRA) 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 Dapchi, 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 and more than 100 girls are still missing.

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Figure 9.11 Ihaji Inuwa (left), the father of one of the 110 schoolgirls kidnapped by the terrorist organisation, Boko Haram, in February 2018. According to the government, by March 2018, Boko Haram had returned 101 of the kidnapped students.

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 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 manpower requirements. For example, the US Army has acknowledged that in 2003 and 2004, it sent nearly 60 17-year-old US citizens to Afghanistan and Iraq. In recent years, the US Army has lowered educational requirements, and increased bonuses for recruitment: this has led to a striking increase in the number of under-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.

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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. He was frequently beaten during training. When he was only 12 years old, Aung was 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 she would be sentenced to death. Before managing to escape, Estelle was forced to kill, and lived in constant fear of being killed.

Figure 9.12 Areas in Uganda affected by the Lord's Resistance Army.

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Research 9.8

Explore the United Nations' website, 'Children and Armed Conflict'.

1. Identify and make a list of the conflict situations around the world where the use of child soldiers is currently an issue (there should be about 20 conflict situations). Identify the regions where the use of child soldiers is particularly widespread.
2. Recall what 'the six grave violations' are.
3. Discuss how children are affected by armed conflict.
4. From the website's 'Library' section, download the most recent document about one of the conflict situations that is close to Australia. Describe the nature of this document. Assess the information this document gives about the conflict situation.
5. Using the website's 'Library' section, find the latest Secretary-General's report on children in conflict situations.
6. Describe the latest campaign about children in conflict situations. Assess how effective the campaign is in raising awareness about this issue.

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.

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, 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

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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. 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 UN, 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 UN adopted the most important and comprehensive treaty on child soldiers – the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*.

The optional protocol, which entered into force in 2002, says 18 years of age is the minimum for compulsory recruitment or direct participation in hostilities. It also raises the absolute minimum voluntary recruitment age to 16. It requires certain safeguards for recruitment and calls on governments to cooperate to put an end to the use of child soldiers and to provide for support and rehabilitation of former child soldiers. The optional protocol 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'.

The various treaties have been some of the most rapidly and widely ratified treaties worldwide and have created a much stronger international framework for ending the recruitment and use of child soldiers. However, violations do continue by both government and non-government parties. The UN Security Council has adopted a number of resolutions recently, particularly in 2004 and 2005, condemning the use of child soldiers and calling for a rigorous monitoring and reporting system for abuses. Research, monitoring and reporting on compliance by all countries around the world now occurs and abuses are more regularly exposed.

The framework is still relatively new and will take time to take full effect. However, the International Criminal Court, 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 on the next page.

Research 9.9

Search the internet for the full text of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000). Read the protocol and complete the following tasks:

1. Read the preamble to the protocol, then 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.

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Legal Links

Further information about the trial of Thomas Lubanga Dyilo in the International Criminal Court is available on the court's website.

In Court

***Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012)**

Figure 9.13 Former Congolese militia commander, Thomas Lubanga Dyilo. Lubanga 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 International Criminal Court. 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 International Criminal Court.

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 one armed group, the Patriotic Forces for the Liberation of Congo. In March 2004, the DRC Government authorised the International Criminal Court to investigate and prosecute international crimes in the DRC relating to the conflict.

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In Court (continued)

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 International Criminal Court 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).
- **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 that at one point 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 International Criminal Court 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 International Criminal Court 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 International Criminal Court 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 International Criminal Court imposed a US$10 million liability on Lubanga for reparations to 425 recognised victims. Lawyers on both sides appealed the decision but the International Criminal Court judges rejected Lubanga's appeal.

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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. Critically evaluate the effectiveness of the International Criminal Court in achieving justice for the victims. Consider issues of national resources, delay, exposure and deterrence.

Domestic responses

Although numerous treaties have now been established to try to combat the various issues around child soldiers, these treaties rely on the will of states to implement them and pursue their objectives.

There are few known cases of domestic prosecutions for the recruitment or use of children in armed conflicts, with the exception of some cases in the DRC and recent truth commissions – established following serious conflicts in Sierra Leone, Timor-Leste and Liberia – that are known to have addressed child soldier issues.

As mentioned previously, the international treaties have been well accepted and widely ratified, and domestic legal systems have had to be brought into line with their requirements. For example, in 2008 the United States enacted the *Child Soldiers Accountability Act*, which allowed the United States to prosecute domestically individuals who have knowingly recruited or served as child soldiers in or outside the United States or to deny such people entry into the country. Similar laws have been enacted in other countries. These not only send an important message to military commanders but also prevent travel or fleeing by offenders to international safe havens.

In Australia, the minimum compulsory conscription age under 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 International Criminal Court 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'.

Child soldiers have more recently become a domestic concern in Australia due to 'foreign fighters' going to Syria and Iraq to fight with ISIS or Islamic State. The case of 15-year-old Canadian Omar Ahmed Khadr, who was caught by the US military fighting with the Taliban in Afghanistan in 2002 and held at Guantanamo Bay for 10 years, may be relevant for Australia as it deals with its returning foreign fighters. Though Khadr was a minor at the time, he was prosecuted in a US military commission. The UN condemned his prosecution and while being held in Guantanamo Bay detention camp his case was taken up by many protestors. From 2015, Australia

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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, which aim to combat the causes and effects of the recruitment and use of child soldiers worldwide.

International responses

At the international level, the UN plays an important role in monitoring the use of child soldiers around the world. The 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 UN and to member states where necessary, and promoting the spirit and obligations of the treaties on children in armed conflict. For example, in 2010 UNICEF and the Chad Government held a conference that sought to end the use of child soldiers by armed forces and groups across Central Africa.

There is also a host of international NGOs that conduct important work in monitoring and reporting on the issue, educating the public and lobbying government and international organisations to take action.

Video

Domestic responses

As on the international level, there are many domestic NGOs that work in the area of children's rights. These may include focusing on issues relating to child soldiers, particularly in countries where recruitment of child soldiers is a significant problem. 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 developed internationally. 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.

Other forms of domestic responses include groups or individuals who assist with rehabilitating former child soldiers by helping to relocate their families, getting them back into school or vocational training, and helping them re-enter life. The media also plays a role in informing the public about the existence and problems of child soldiers. Films, books and documentaries have also played an important role. 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.

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

Legal Links

Further information about child soldiers is available from the websites of the following IGOs and NGOs:

- the Roméo Dallaire Child Soldiers Initiative
- Amnesty International
- International Labour Organization
- Child Rights International Network.

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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 UN.

While the establishment of the International Criminal Court – 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.

One radical method of tackling this difficult issue was the 'StopKony' campaign. In March 2012, the issue of child soldiers was catapulted into the world spotlight with a social media campaign called 'StopKony', which was designed to focus attention on the notorious Lord's Resistance Army leader Joseph Kony. The campaign featured a YouTube clip that went viral on the internet, particularly on social media. Despite being indicted by the International Criminal Court in 2005, charged on 33 counts, Kony remains at large and the official hunt for him ended in 2017. At that time, there was also controversy about the effectiveness of the 'StopKony' campaign in pressuring political leaders to have the political will to get results, and about the extent to which the organisation used money on the campaign that had been donated for use with the actual children in these situations.

Review 9.6

1. Discuss how 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.

Figure 9.14 Former child soldiers play soccer at a Transit Centre in Goma, Democratic Republic of Congo (DRC). Hundreds will spend several months here before being reintegrated into the community. UNICEF is working with MONUSCO (UN DRC stabilization mission) to support some of the tens of thousands of child soldiers that have been recruited in eastern DRC since 2013.

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Issue 3:
Exploitation of workers

Relevant law

IMPORTANT LEGISLATION

Trade Union Act 1871 (UK)
Fair Work Act 2009 (Cth)
Hospitality Industry (General) Award 2010 (Cth)
Transparency in Supply Chains Act 2010 (US)
Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)
Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth)
Modern Slavery Act 2018 (NSW)

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 Ohmedia Melbourne Pty Ltd [2015] FCCA 50

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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.

exploit
the act of using another person's labour without offering adequate compensation; often the work is not voluntary and is obtained through the threat (real or perceived) of violence

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 and 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 in which 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.

Figure 9.15 Unions were established during the Industrial Revolution in response to the exploitation of workers, which included workers not receiving fair wages or not being provided with appropriate working conditions.

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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 programmes promoting decent work for all workers.

Under the International Labour Organization's *Convention Concerning Forced or Compulsory Labour* (1930) exploitation of workers may include any of the following in a workplace:

- 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 section 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 are 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.

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

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% 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.

Domestic situation

Despite extensive workplace laws, high-profile cases and media, Australia is not immune to worker exploitation. Since wages represent approximately 70% 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 on the following pages highlight clear examples of forced labour as defined by the International Labour Organization in the categories of withholding of wages and excessive overtime.

In a 2019 article published in *The Age*, the high-profile *MasterChef* judge, restaurant owner and media personality, George Calombaris, came under scrutiny for significantly under paying over 500 of his employees during 2015 to 2019.

In the same year, luxury hotel owner, the Escarpment Group also demanded portions of wages back to the company for 'meals and accommodation'. Many of the employees were migrant workers on **407 visas**, often too afraid to speak out against their bosses for fear of losing their jobs.

407 visa
a temporary arrangement for overseas applicants wishing to undertake occupational training in Australia – this visa allows an employer to sponsor a worker in an occupation while they are partaking in a structured training program

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News

George Calombaris underpayment scandal blows out to $7.8 million

By Cameron Houston, Chris Vedelago and Hanna Mills Turbet
The Age
18 July 2019

Attorney-General Christian Porter says former *MasterChef* judge George Calombaris' fine for underpaying staff $7.8 million in wages was too 'light'.

The celebrity chef's hospitality group, MAdE, was forced to pay back current and former employees wages and will also make a $200 000 'contrition payment' under a court-enforceable undertaking made with the Fair Work Ombudsman.

A four-year investigation by the Fair Work Ombudsman uncovered a raft of breaches, including a failure to pay minimum award rates, penalty rates, casual loadings, overtime rates, split-shift allowances and annual leave loadings.

The full extent of the underpayment scandal has dwarfed initial estimates by Calombaris from April 2017, when his company Made Establishment announced that 162 workers had been underpaid $2.6 million because of 'historically poor processes'.

Made Establishment also failed to keep records of the hours worked by staff on annualised salaries, some of whom were also denied accrued overtime and penalty rates.

News

Luxury Blue Mountains hotel group clawing back wages from migrant workers

By Anna Patty
The Sydney Morning Herald
7 July 2019

The Department of Home Affairs and the Fair Work Ombudsman are investigating a luxury Blue Mountains hotel group after a *Sun-Herald* investigation found it is clawing back wages from migrant workers through overpriced accommodation and unpaid overtime.

The Escarpment Group owns Lilianfels and Echoes in Katoomba, the Hydro Majestic in Medlow Bath, the Parklands Country Garden and Lodges in Blackheath and the Convent Hunter Valley.

A 14-month Sun-Herald investigation has found the Escarpment Group forces workers on 407 Training Visas to return $480 out of their wages each week to their employer for a shared bedroom and meals that are not always provided. Employees are also not paid for up to three hours of overtime they work each day.

The migrant staff who worked at the group's properties said these conditions made them feel like 'prisoners'. Most workers interviewed did not want to be identified because they feared reprisals. One said: 'For me I am in a first-world country working in third-world [conditions]'.

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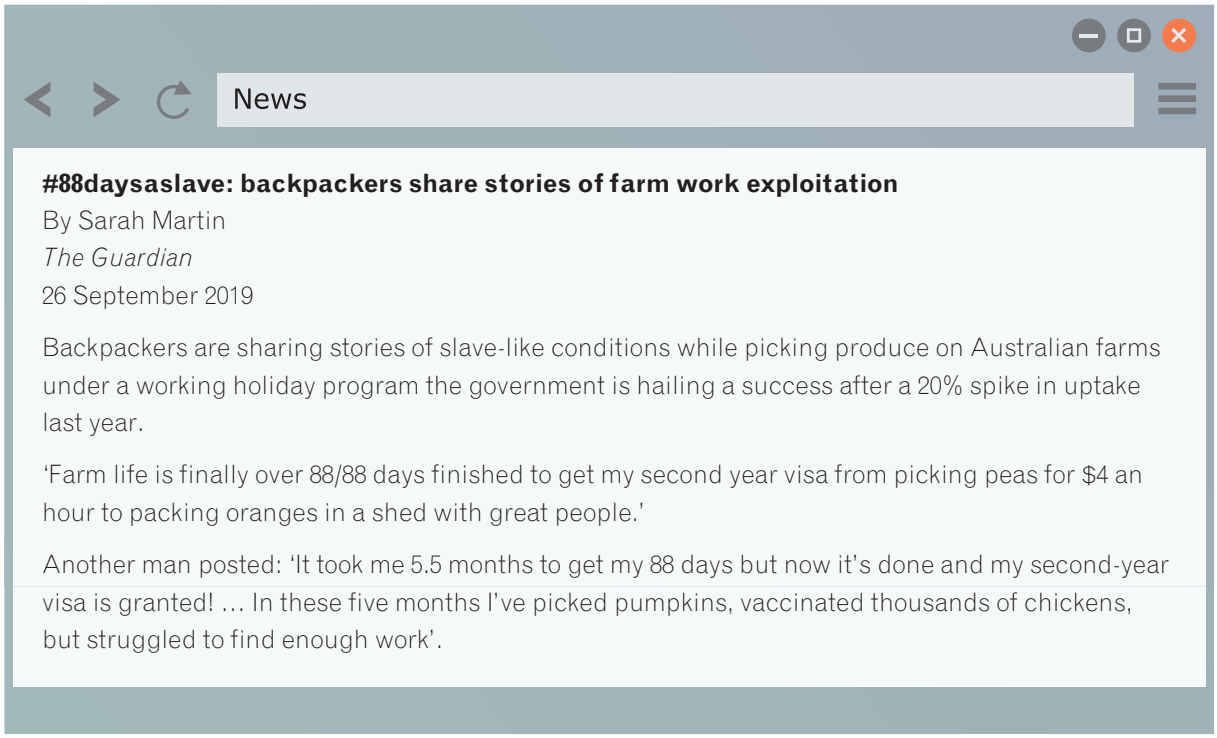

#88daysaslave: backpackers share stories of farm work exploitation

By Sarah Martin

The Guardian

26 September 2019

Backpackers are sharing stories of slave-like conditions while picking produce on Australian farms under a working holiday program the government is hailing a success after a 20% spike in uptake last year.

'Farm life is finally over 88/88 days finished to get my second year visa from picking peas for $4 an hour to packing oranges in a shed with great people.'

Another man posted: 'It took me 5.5 months to get my 88 days but now it's done and my second-year visa is granted! … In these five months I've picked pumpkins, vaccinated thousands of chickens, but struggled to find enough work'.

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) Harvester judgment).
4. Read the three media articles 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.

Over the last few years, there has been an increasing number of backpacker workers speaking out against exploitation on Australian farms. The #88daysaslave refers to the number of days (88) a worker must complete in a year to have a second-year 407 work visa granted and hence stay in Australia. More than 5000 posts by visa holders illustrated rampant problems of exploitation in the agricultural sector.

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

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News

'Such brutality': Tricked into slavery in the Thai fishing industry

By Steve Dow

The Guardian

22 September 2019

In 2006, a young Cambodian sculptor, Vannak Anan Prum, left his village to look for labouring work. He needed to earn enough money to pay for his wife Sokun's impending hospital stay to give birth to their first child. He intended to be away for two months.

He would not see his wife again for five years. After a middleman on the Thai-Cambodian border promised he could earn a lot of money drying fish, Prum was sold into slave labour and sent to sea on a fishing trawler. He was forced to work around the clock and through storms, allowed a maximum two hours' sleep by day and two hours at night.

Violence happened on the boat every day for the next four years as a way of keeping those enslaved in line.

He says people would disappear off the boats without warning, and were assumed to have been killed and thrown into the sea. One night, Prum says he saw one Thai worker cut another man's head off with a cleaver.

The boys and men are typically 'tricked' onto boats: 'They're not being paid, they're trapped on boats, and it's particularly violent.'

Ship captains use electric shock treatment, sleep deprivation and drugs to keep the labourers passive.

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. This section 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 9.16 There are many reports of abuse in Thailand's multi-billion dollar seafood industry. The deep-rooted problem caused the huge global brand, Nestlé, to admit in 2015 that it had discovered clear evidence of slavery at sea in parts of the Thai supply chain. Thailand is the world's third-largest exporter of seafood.

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Review 9.8

Read the article, '"Such brutality": tricked into slavery in the Thai fishing industry'.

1. Propose why the abuse in the Thai fishing industry has become the subject of a film.
2. Explain why the term 'Thai fishing' gives seafood consumers reason to cringe.
3. Describe the conditions on some Thai fishing boats. Propose why employers create such harsh working environments.
4. View the YouTube clip at https://cambridge.edu.au/redirect/8866 (15 minutes) and then describe the ways in which many Thai fisherman are being exploited.
5. 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) and *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) 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**.

awards
a legal agreement, made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

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 can't ask for 'cashback' from employees or prospective employees. Employers who don't 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).

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

In Court

***Fair Work Ombudsman v Ohmedia Melbourne Pty Ltd* [2015] FCCA 50**

Ohmedia and one of its directors, Mr Zhou, employed 45 casual employees to perform work for Lycamobile across a 3.5 week period. Thirty-seven of the 45 workers were not paid for the work that they performed in that time. The remaining eight workers were paid less than the prescribed minimum rate of pay. The total amount underpaid to the 45 employees for the 3.5 week period was $59 145.43. The Court ordered Ohmedia to rectify the underpayments to each of the employees (which, remarkably, it hadn't yet done, despite the matter having taken some three years to proceed to judgment) and ordered a total aggregate penalty against Ohmedia of $85 000 and against Mr Zhou personally in the amount of $15 000 – sizeable penalties for a string of offences spanning only 3.5 weeks (the fact that Ohmedia hadn't rectified the issue as at the date of the judgment didn't help with the size of the penalties).

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Review 9.9

1. Describe the under payments and the time periods involved in the *Fair Work Ombudsman v Ohmedia Melbourne Pty Ltd* [2015] FCCA 50 case.
2. Evaluate the effectiveness of the law in achieving fairness for the 45 employees of Ohmedia.
3. Examine recent international laws that have attempted to combat the exploitation of workers. Describe in what ways can supply chain legislation be effective.
4. Examine the Thai Government's response to worker exploitation detailed in the article, 'Government, employers and trade unions launch Thailand's first Decent Work Country Program (2019–2021), on the internet.
5. Discuss why union membership is an important issue in tackling forced labour.

companies from federal contracts if they failed to report on human trafficking in their supply chain.

In the UK, a recently concluded review of the *Modern Slavery Act 2015* (UK) made recommendations to strengthen transparency in the supply chain. 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. New South Wales legislation 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 programmes 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 Australia it is estimated at being around 25%.

Figure 9.17 Human Rights Watch is a United States-based non-government organisation that was formed in 1978 to monitor the integrity of various governments and their treatment of citizens.

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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.

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.

Research 9.10

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 might the Seafood Taskforce 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 workers in the luxury hotels of the Blue Mountains clearly demonstrates that workers with poor English skills who are in desperate situations are being targeted by unscrupulous employers looking to make higher profits by paying their workers as little as possible. In addition, back-packer workers in Australia have little choice but to accept the conditions presented to them, often deceptively, in order to achieve their 88-day visa requirement. Accusations of physical and sexual abuse should be reported to police and involve criminal sanctions but as an overseas visitor, many lack the confidence and knowledge to pursue employers and would rather move on during their overseas visit.

According to Amnesty International, at an international level it is difficult to see rapid change and decline in the exploitation of workers. Three key reasons for this are:

- lack of resources for government and non-government organisations to identify and expose exploitative employers
- sociocultural factors such as long-held traditions of underpaying workers and a willingness of people living in poverty to accept whatever wage is offered – in a sense that something is better than nothing
- state sovereignty, which implies that nations can set their own minimum wages that cannot be legally challenged by other nations.

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Issue 1 summary

- Although slavery has officially been abolished internationally, it continues as a form of criminal activity today.
- Slavery can take the form of forced labour, debt bondage or sexual slavery.
- Human trafficking is an illicit activity involving the trade in slaves.
- International treaties have provided a framework to help countries implement measures to deal with human trafficking.
- There are many IGOs and NGOs doing important work all over the world to end contemporary slavery.
- The Australian Government has recently improved its approach to combating human trafficking and a number of prosecutions have been made.
- 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 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.
- IGOs and NGOs play an important role in monitoring and reporting on the issue of child soldiers.
- More needs to be done to combat the issue of child soldiers: poverty, conflict and the lack of the rule of law and respect for human rights remain as root causes of the problem.

Issue 2 questions

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, has created hope for millions of workers, and law enforcement agencies have been able to prosecute or sanction many employers.
- With the exploitation of workers being a centuries-old phenomenon, it is difficult to see rapid progress being made to completely alleviate the problem in the next few years. Boycotting major 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 questions

1 Discuss the problems of exploitation of workers in Australia. What consequences are there of enforcing awards and agreements?
2 Outline the origins of the International Labour Organization. Evaluate the effectiveness of the organisation in achieving fairness for workers worldwide.
3 Discuss the tactic of boycotting major brand labels and its impacts on workers in developing nations.

Themes and challenges for Part II – Human rights

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.

Dealing with compliance and non-compliance in respect 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 increase in compliance with international human rights law.
- Since the global financial crisis in 2008, there has been a gradual erosion of compliance with human rights.

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How changing ethical standards and values are reflected in the development of human rights

- Human rights have expanded 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 rights to democracy gained greater global acceptance.
- In recent years, changing ethical standards have led to the prominence of gender rights.

How law reform helps to continually protect human rights

- The creation of universal human rights is in itself a massive reform of the international legal system.

Effectively protecting human rights through legal and non-legal measures

- UN human rights treaties have led to a greater understanding of the different areas of human rights.
- Nation states that signed and ratified human rights treaties then incorporated them into their domestic legislation, which has led to the human rights of many people being protected.
- NGOs became a major force in world affairs by promoting human rights using 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 the 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).

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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.

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Relevant law

IMPORTANT LEGISLATION

Sale of Goods Act 1923 (NSW)
Minors (Property and Contracts) Act 1970 (NSW)
Contracts Review Act 1980 (NSW)
Fair Trading Act 1987 (NSW)
Telecommunications Act 1997 (Cth)
Australian Securities and Investments Commission Act 2001 (Cth)
Corporations Act 2001 (Cth)
Spam Act 2003 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Competition and Consumer Act 2010 (Cth)
Civil and Administrative Tribunal Act 2013 (NSW)
Motor Dealers and Repairers Act 2013 (NSW)

SIGNIFICANT CASES

Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387
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
Qanstruct Pty Ltd v Bongiorno Ltd (1993) 113 ALR 667
Astley v Austrust (1999) 197 CLR 1
Director of Consumer Affairs of Victoria v AAPT Ltd (Civil Claims) [2006] VCAT 1493
eBay International AG v Creative Festival Entertainment Pty Ltd (2006) 170 FCR 450
Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd [2010] SASC 37
Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd [2015] FCA 1263 and *ACCC v Virgin Australia Airlines Pty Ltd*
Australian Competition and Consumer Commission v Amaysim Energy Pty Ltd (trading as Click Energy) [2019] FCA 430
Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd [2019] FCA 797

Legal oddity

In March 2019, the Australian Competition and Consumer Commission successfully brought a case against Click Energy in the Federal Court of Australia for making false and misleading claims in its marketing materials. The claims related to certain discounts and other savings consumers might obtain if they choose Click Energy as their supplier – up to 29% off if the monthly payment was received on time. However, analysis of the actual market demonstrated that the savings and discounts were significantly smaller than Click Energy led its customers to believe. There were also complex issues about exactly when the 'savings' from on-time payment would be applied to the bill, which the court held to also be misleading. The court fined Click Energy $900 000 and ordered it to correct its advertising, reimburse all parties damaged by the claims, and make enforceable undertakings to change its behaviour.

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10.1 The nature of consumer law

The developing need for consumer protection

The need for consumer protection has grown over time. Prior to the Industrial Revolution, the vast majority of people throughout Europe lived simple lives based on subsistence agriculture. The typical marketplace of the time offered a small range of products 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 '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 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. Governments began to create laws that would, in time, address the need for consumer protection.

Today, contemporary consumers often need to rely upon the expertise of others (for example, shop assistants or financial advisers) when purchasing products such 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.

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

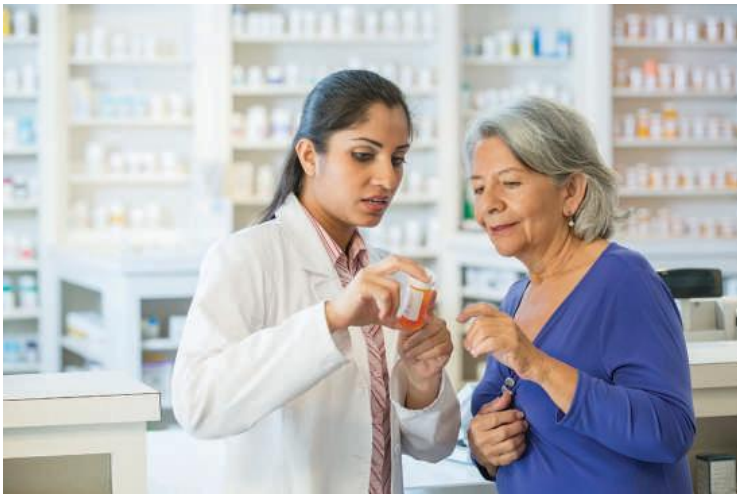

Figure 10.1 Under Australian consumer law, when purchasing products and services, buyers must be able to rely on the experience, knowledge and skill of sales people.

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 example, 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 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 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

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Figure 10.2 As more technology is incorporated into consumer products, the concept of *caveat emptor* becomes impossible for consumers to negotiate. Legislative safeguards have therefore become necessary to protect consumers.

purchase an item – whether it's a can of soft drink, a computer or an insurance policy – but we are often influenced by marketing and advertisements.

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

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. Discuss how the ACL deals with transactions that occurred prior to its enactment.

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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. 22) and the 'learn to' activities (pp. 22–3) 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.

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. Investigate how a consumer is defined under the Australian Consumer Law.

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.

contract
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**.

offeror
the person making an offer of an agreement

offeree
the person to whom the offer of an agreement is made

Once the terms and conditions of a contract have been agreed to, a contract must be 'executed'. This means that the contract must 'signed off' in order to demonstrate the parties' agreement to the terms, and to enable 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 above two
- by clicking an 'I agree' button on a web page.


Video

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 which describes the terms of the contract in such a manner as to avoid the need to rely upon memories of the original agreement
- the parties' signatures
- the assumption that all the terms have been read and agreed to.

Parties to contracts will opt for written contracts in order to avoid having to prove:

- that the contract existed
- what the terms of the agreement actually were and/or
- to try to limit the obligations to what is on the paper rather than what was said or understood in the negotiations.

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Figure 10.3 Written contracts provide more certainty for the parties, providing clarity of the terms and conditions they will rely on.

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.

Oral contracts

Many contracts are oral. Every time 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 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.

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 would not entitle you to sue them for breach of contract. However, where an agreement is made in the course of business, there is a presumption that the parties intend to create a legal relationship.

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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 Identify the elements that a court will consider when deciding whether a contract exists (orally or written).

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.

offer
a firm proposal to form a binding contract, made with a willingness to be bound by its terms

invitation to treat
an initial invitation to others to make an offer

An invitation to treat is not an offer and, therefore, its **acceptance** cannot give rise to a contract. At an **auction** sale, the call for bids by an auctioneer is an invitation to treat (that is, an invitation to buyers to make an offer) and the bid by the intending buyer is the offer. The acceptance is indicated and completed by the fall of the auctioneer's hammer. Thus, a bid may be withdrawn by a buyer at any time before it is accepted by the auctioneer. Similarly, an auctioneer may refuse to accept an offer if the bid does not reach the minimum 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.

acceptance
the unconditional consent to all the terms of an offer

auction
a public sale in which people bid for goods or property, and the sale is to the highest bidder

Acceptance of the offer

An acceptance of an offer is the unconditional agreement to all the terms of the offer. For a binding contract to exist between the parties, the acceptance must be communicated to the offeror. It is open to the offeror to state how the offer shall be accepted. Quite often, an offeror makes it clear that the offer must be accepted in writing by mail (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 counter offer and so is a rejection of the offer. An offer can only be accepted by those people to whom it was made. An offer may be revoked at any time before it is accepted. Any acceptance must be within the time period stipulated in the offer. If an offer, for example, states that acceptance must be within three days, then any attempt to accept after five days will be

Figure 10.4 When an offeree accepts an offer, it must be unconditional. Acceptance of an offer is to accept all the terms of the offer and to meet all the obligations agreed to.

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invalid. If no time period is specified, the offer may be accepted within a reasonable time.

Consideration

The element of **consideration** is essential to any valid contract. This is what turns a mere promise into a contract that the law will enforce 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.

consideration
something given, done or suffered by the promisee in return for a promise in a contract

Figure 10.5 It is unlawful for any supplier, including online ticket purchasing websites, to imply or expressly state that a product or service is not subject to the provisions of the Australian Consumer Law.

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).

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

In Court

***ACCC v Jetstar Airways Pty Ltd* [2019] FCA 797**

In July 2019, the Australian Competition and Consumer Commission (ACCC) successfully brought an action against Jetstar Airways for misleading and deceptive conduct in relation to information provided on its website. The Federal Court of Australia ordered Jetstar to pay $1.95 million in penalties for the illegal website content.

The case related to Jetstar's online promotional advertisement of certain 'non-refundable fares'. The ACCC alleged that Jetstar had made false and misleading statements to the effect that refunds would not be granted for certain tickets on certain flights. It was alleged that this implied that the tickets were exempt from the automatic guarantees provided by Australian consumer law. Jetstar's purpose for making these representations was to compel consumers to upgrade to more expensive fares.

To mitigate its costs and penalties, Jetstar admitted liability for the conduct in December 2018 and made a number of enforceable undertakings to the ACCC to amend its promotional practices.

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Research 10.2

Visit the website of the Office of Fair Trading and answer the following questions.

1. Define 'unsolicited contract' and provide two examples of this type of contract.
2. Define 'cooling-off period' and 'extended cooling-off period' and identify when each applies.
3. Outline how to terminate an agreement during the cooling-off period.

- 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.

Terms of contracts

The terms of a contract relate to the basis of the agreement; for example, Amy agrees to sell certain goods to Liam, and Liam agrees to pay the sum of $500 to Amy. These promises are known as the terms of the contract, and can be express or implied.

Terms may appear in the form of a written document, usually signed by both parties, or may consist of oral statements. If a document is not signed, written terms may be incorporated into a contract that would otherwise be an oral contract (for example, terms on the back of a ticket, or on a sign at the entrance to a place where the customer has paid for entry).

Conditions and warranties

A term within a contract can be either a **condition** or a **warranty**. If one party to a contract breaches a condition (for instance, using the earlier example, if Liam refuses to pay Amy), the aggrieved party can terminate the contract and sue for damages. Warranties, on the other hand, are terms that are less important or peripheral aspects of a contract (for example, a manufacturer's promise to repair or replace faulty goods). If a party fails to honour its warranty, the aggrieved party can sue for **damages** but is not entitled to end the contract.

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

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.

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

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

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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**.

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

Implied terms add another layer of consumer protection because they ensure that individuals who are sold inadequate goods, for instance, 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 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.

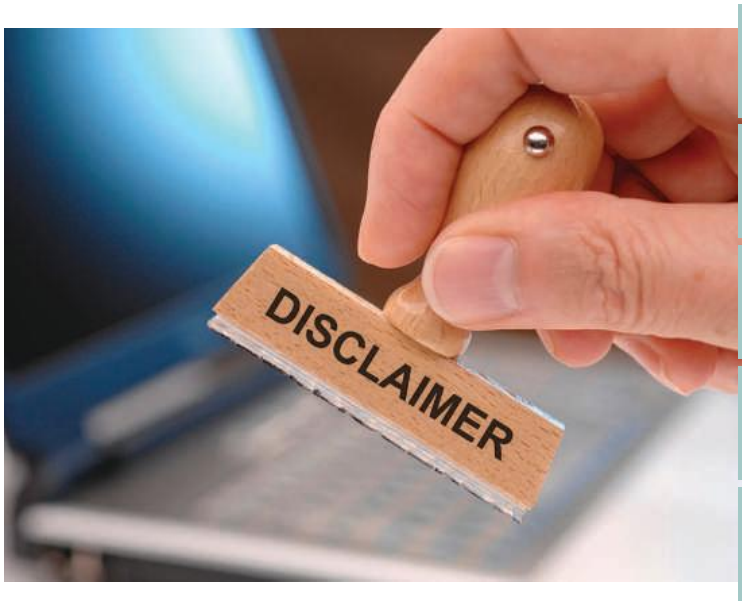

Figure 10.6 An exclusion clause, also called a disclaimer, attempts to circumscribe the rights of one party to a contract, often to the benefit of the other party. Terms such as these must be clearly explained before the contract is formed.

Unconscionable contracts

The general rule is that the court will not grant relief to a party just because the contract operates against them. However, where a contract is entered into as a result of one party's **unconscionable conduct**, the other party may seek a remedy. A contract can be set aside (**rescinded**) where one party, if at a special disadvantage against another party, has this disadvantage exploited by the other party using their superior bargaining power or position in an unfair way.

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 who were not fluent in English and had little formal education, signed a mortgage with the bank as security for the debts of one of their sons' building companies. The mortgage included a guarantee that the parents would be liable for the debts of the company. Their son's explanation to them of the guarantee was inaccurate, and the bank made no attempt to explain it to them. When the son's business went into liquidation, the bank claimed nearly $240000 under the guarantee. The contract was set aside on the basis of unconscionable dealing by the bank.

The High Court held that a contract can be rescinded where one party has knowledge of, or is aware of the possibility, or a reasonable person would be aware of the possibility of another party's 'special disadvantage', and takes unfair advantage of this through their superior position in entering into a transaction. In this case the parents were considered to have a 'special disadvantage' because of their age, background and reliance on their son's misleading information about the extent of their liability under the guarantee.

Research 10.3

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 ACL 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.

Review 10.3

1. Investigate the elements which 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.
5. Explain the notion of an unconscionable contract. Identify the remedies available to individuals who enter such contracts.

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.

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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.
- 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 *Qanstruct Pty Ltd v Bongiorno Ltd* (1993) 113 ALR 667, the members of a company were induced to purchase four life insurance policies, and also to finance their purchase by borrowing from a company associated with Bongiorno. They were told that payments on the policies would be tax deductible. They suffered financial loss as a result of going into debt without gaining the promised tax benefits. The statements of the defendant company, Bongiorno, were held to have been misleading. Similarly, in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377,

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Figure 10.7 All products must be sold in accordance with the provisions of consumer law. The law obliges sellers to ensure their products are safe, fit for their purpose, and also match the description provided to the buyer at the time of sale.

the defendant (trading as Europcar) was found to have relied on a number of terms in their 2013 standard rental agreement which 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.

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 *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). Propose an example of case law that supports this implied contractual term.

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 a number of state and federal statutes ensure that all consumer contracts contain implied terms, providing broad protection against unconscionable conduct, defective products, and deceptive or misleading advertising. The most significant of these are:

- *Competition and Consumer Act 2010* (Cth)
- *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 (ASIC) and governs consumer protection in relation to financial services, including education of

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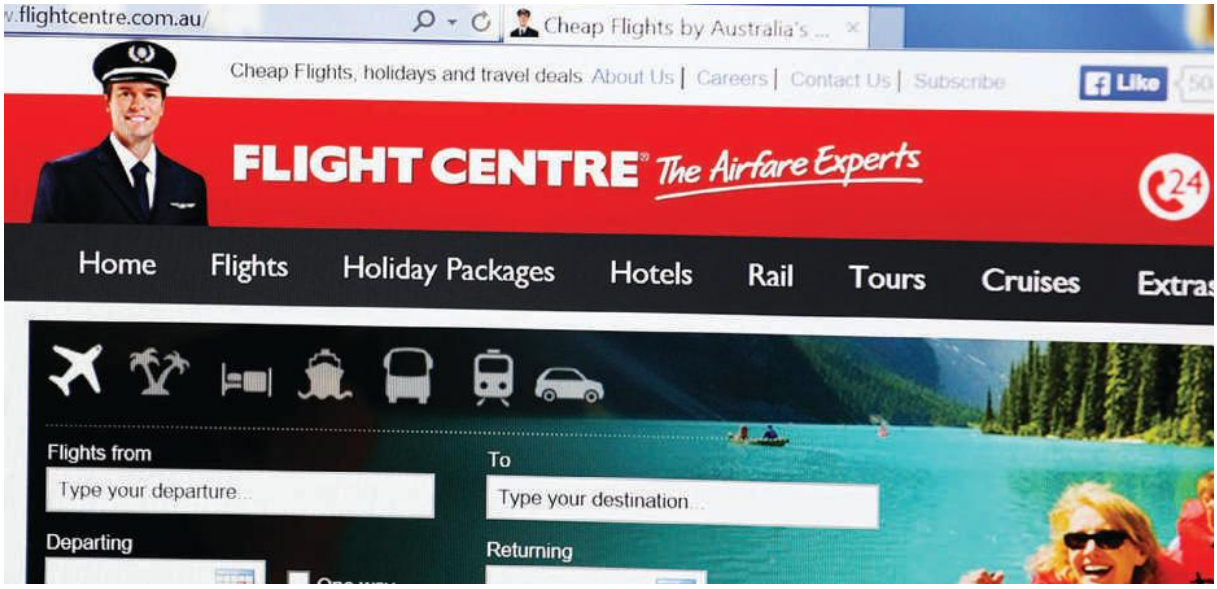

Figure 10.8 In 2018 Flight Centre was fined $12.5 million in penalties after a long-running legal battle with the Australian Competition and Consumer Commission (ACCC) relating to attempts to fix international flights. The ACCC is responsible for enforcing the law with respect to consumer goods and services, while ASIC has the same responsibilities in relation to the provision of financial services.

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 legitimate interests of the party who would be advantaged by the term, and would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on' (s 12BG).

consumer contract
a contract for the supply of goods or services, or for a sale or grant of interest in land, to an individual purchasing the goods, services or land for personal, domestic or household use

In determining whether a term in a consumer contract is unfair, a court must take into account:

- the contract as a whole and
- the extent to which the term is clear and readily understood by the parties.

The court may also take into account any other matters it considers relevant.

A good example can be seen in *ACCC 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 10.4

Go to the NSW Fair Trading home page to complete the following tasks:

1. Outline the automatic guarantees to which you as a consumer are entitled at law, regardless of any other warranties that merchants might provide.
2. Identify the products and services guaranteed under the ACL.
3. Describe the conditions under which the consumer guarantees do not apply to you.

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Negligence and consumer protection law

Where goods manufactured without proper care cause injury, loss, damage or death, the consumer is entitled to bring an action under the relevant federal or state legislation. Alternatively, they may have a cause of action for breach of contract, if the supplier or manufacturer has expressly or impliedly promised that the goods are free of defect. A third type of claim is an action in **negligence** (breach of a duty of a person to take reasonable care not to cause harm to other people), as demonstrated in *Grant v Australian Knitting Mills* [1936] A.C. 562, a case in which sulphite was left in woollen underpants, causing the plaintiff to contract dermatitis.

negligence
a breach of the duty of reasonable care owed by one party to another, and damage to the plaintiff resulting from this breach

In Australia, governments seek to keep unsafe products from the market and inform consumers about product safety by ensuring that:

- safety warning notices for goods or services are published regularly (ACL ss 129–130)
- consumer goods or product-related services may only be provided if they comply with a compulsory safety standard (ACL ss 104–108)
- suppliers notify the Commonwealth minister within 48 hours of becoming aware that a person has suffered serious injury, illness or death associated with a consumer good or product-related service they supplied – either in Australia or overseas (ACL ss 131–132A)
- unsafe products that reach the market are readily detected and reported
- there is effective and timely removal of unsafe products from the market (ACL ss 109–119)
- compulsory product recall occurs if required (ACL ss 128 and 201 for supplier-initiated recall; ss 122–127 for minister-ordered recall)
- 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). Some examples of product recalls include:

- Takata airbags (2017) were installed in 2.3 million cars in Australia and are a 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).
- Big W Australia's Girl's Frill pyjamas (2019) did not comply with the Safety Standard 2017 and could be a fire hazard.

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. 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.

Figure 10.9 Product testing is conducted on pharmaceuticals and foods to ensure that consumers are not harmed and unsafe products are detected and reported early.

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Legal Links

Search online for the Australian Competition and Consumer Commission's product safety recall list.

Regulation of marketing and advertising

Statutory protection

Although common law provides some protection for consumers with regard to the deceptive practices of manufacturers and suppliers, it was not until it was codified into statute that consumer law truly emerged as a force for social and economic justice. Provisions protecting consumers from deceptive advertising and marketing practices are contained in both federal and state consumer legislation. They are found in the 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 it 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 (*ACCC v Jetstar Airways Pty Ltd* [2015] FCA 1263 and *ACCC v Virgin Australia Airlines Pty Ltd*). Both airlines were subsequently fined for this behaviour.

Under the ACL, a consumer can recover damages for the loss or damage suffered by the conduct of another which contravenes provisions in the ACL.

Under the *Australian Constitution*, a federal Act applies to all trading, financial and foreign corporations within Australia, as well as to people who are engaged in trading, financial and foreign trade across state borders. The *Fair Trading Act 1987* (NSW) regulates people who have a link to New South Wales and who are not covered by the federal Act.

Figure 10.10 Puffery has historically not been considered to be malicious behaviour where 'no reasonable person' would find a particular statement likely to be taken literally. This approach is also reflected in the current consumer law.

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In Court

***eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450**

A concert promoter sold tickets that stated that all tickets resold for profit would result in the holder of the newly bought ticket being refused entry to the concert. The court held that the promoter had engaged in misleading and deceptive conduct and that the new condition of sale conveyed a false representation that all tickets resold for profit would be cancelled.

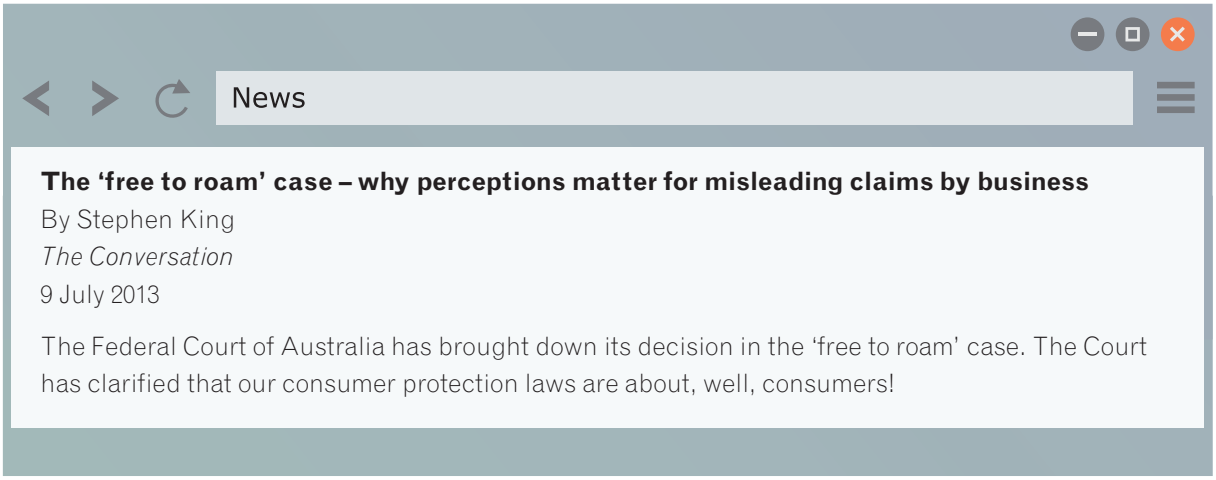
False or misleading representations

In addition to the provisions concerning misleading and deceptive conduct, the ACL contains specific provisions regarding representations (s 29), 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 *ACCC 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 actually 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 were fined $10 800 by the ACCC for false representation that its oregano product was only oregano, when 50% of the package had olive leaves.

Figure 10.11 Consumers expect to be able to rely on the information provided by food and beverage suppliers, including nutritional data, content, use-by dates, and health effects. For example, understating sugar content or overstating a health effect could be a breach of the ACL.



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(Continued)

Some background to the case can be found here. In brief, two chicken processors made statements that their chickens, when growing, were 'free to roam in large barns'. The Australian Competition and Consumer Commission (ACCC) noted that the chickens each had less space than an A4 sheet of paper for much of their growing cycle. The ACCC claimed that the advertising was misleading or deceptive, and contravened the ACL. The Federal Court [in *ACCC v Turi Foods Pty Ltd* (No 4) [2013] FCA 665] has agreed.

The controversy behind the case is that chickens 'flock'. They do not tend to wander aimlessly, even if given the chance. An expert in animal welfare provided evidence to the court that:

'The scientific literature on stocking density indicates that stocking densities [more than those involved in the case] do not affect the spatial distribution of broiler chickens, the time spent walking, the distances travelled by commercial broiler chickens or walking ability … '.

At least one commentator made the same point arguing that the ACCC was not protecting animal welfare by its case.

No, they weren't!

As the court has made clear, animal behaviour and animal welfare is not the relevant test. The Consumer Law is anthropomorphic. It asks what consumers will infer from claims made by business.

'It is necessary for the court to determine how this statement would reasonably be understood by a significant number of those persons to whom it was directed and, in particular, whether the phrase would have conveyed, as the ACCC contended, the assertion that the chickens had "substantial space available allowing them to roam around freely" in the sheds.'

And the court agreed with the ACCC.

For business the lesson is clear. In advertising, business must ask themselves a simple question: What will consumers infer from my claims? If the inference is false then the advertisement is misleading or deceptive. Whether 'organic', 'full of fruit', 'free range' or some other term, the consumer laws look at the interpretation by consumers.

Review 10.5

Read the media article about the 'free to roam' case and complete the following tasks.

1. Identify the defendants' (the chicken processors) claim. Explain why the claim was found false. Describe in what respect the claim breached consumer law.
2. Discuss why the court was not concerned with the welfare of the chickens when determining whether the consumer law had been breached.
3. Analyse how the court decides when a statement is misleading or deceptive. Outline the test used to evaluate the information conveyed in such a statement. Discuss the validity of this test.

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Unconscionable conduct

The ACL (ss 20–22) provides protection for consumers against unconscionable conduct.

Offering gifts and prizes

Suppliers who entice consumers to buy their goods or services by offering gifts, prizes or other free items with the intention of not providing the advertised gift contravene section 32 of the ACL. Suppliers participating in such marketing schemes are considered to have been engaging in deceptive practice.

Bait advertising

Bait advertising is the practice of advertising something at a specified price, with the knowledge that it will not be possible to offer it at that price for a reasonable time and in reasonable quantities. Often referred to as 'bait and switch', this tactic has the objective of getting the consumer into shops, where sales staff inform customers that they have 'run out of' a particular line and attempt to convince them to buy a more expensive product or model. Such behaviour contravenes section 35 of the ACL.

bait advertising
advertising goods or services for sale at a specified price with the knowledge that the company will not be able to offer them at that price for a reasonable period

For example, in *Reardon v Morley Ford Pty Ltd* (1980) 49 FLR 401, the Federal Court found that a car dealership breached what is now 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 *ACCC 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.

pyramid selling
an illegal type of selling in which an individual pays to become a distributor of goods in return for a reward for recruiting new distributors

Unsolicited and unordered goods

Sections 69–95 of the ACL deal with unsolicited consumer agreements. An unsolicited consumer agreement is where a 'dealer' enters into an agreement for the supply of goods or services with a consumer as a result of negotiations, and these negotiations were not invited by the consumer. This is commonly evident in door-to-door sales. For example, in *ACCC 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

Figure 10.12 Under the ACL, it is unlawful for a supplier to demand payment for goods or services supplied without an express agreement with the buyer, regardless of whether the goods have been delivered.

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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.

cooling-off period
a period of time that gives buyers an opportunity to rethink their decision to enter into a contract of sale

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).

Non-statutory controls on advertising

Non-statutory bodies provide protection when it comes to deceptive and/or misleading marketing and advertising. Australia has a highly accessible self-regulatory framework which complements its statutory regime.

Research 10.5

Read the ACL sales practices guide online and complete the following tasks:

1. Distinguish between unsolicited goods and services.
2. Discuss if a business or person can issue an invoice that states an amount to be paid for unsolicited goods or services.
3. Recall what the maximum penalty is for requesting payment for unsolicited goods and/or failing to include a warning notice on an invoice

Review 10.6

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 explain the sections of the 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 what the expression 'false and misleading representation' means to you. Provide some examples of circumstances where people have made such representations.
6. Distinguish between 'referral' and 'pyramid' selling. Explain why they are deemed to be illegal, in terms of the harm these schemes do.

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Review 10.7

1 Describe how statute law combats high-pressure sales tactics.
2 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.

That system is administered by Ad Standards (formerly known as the Advertising Standards Bureau) through the Advertising Standards Board and the Advertising Claims Board. These boards operate on the principle that advertisers have a shared interest in promoting consumer respect for, and confidence in, general advertising standards.

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. For example, in March 2017, Ad Standards upheld a complaint that a Bakers Delight billboard was advertising lollies on bread for school lunches. The images showed mini finger buns covered in chocolate M&Ms and had coloured pencils at the bottom of the advertisement to make it appealing to children. The ASB found that the advertisement series undermined the promotion of healthy balanced diets and breached the Australian Association of National Advertisers (AANA) Code for Advertising and Marketing Communications to Children.

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 AANA Code of Ethics, the AANA Food and Beverages Code, and the AANA Code for Advertising and Marketing Communications to Children.

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.

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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

If all individuals in the workforce could be trusted to maintain high standards of ethical practice, there would be no real need for licensing. The imposition of licensing and registration is an attempt to guarantee that people employed in various occupations have the requisite skills and perform their roles honestly. Licensing controls govern most professions, trades and businesses, including those in Table 10.1, above.

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.

Figure 10.13 Medical doctors, research scientists, and many other professionals in the areas of allied medicine are subject to self-regulatory bodies.

Review 10.8

1 Outline the three ways in which professions and occupations are regulated in Australia, and explain why this 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.

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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 below.

fiduciary duty
where one person (the fiduciary) undertakes to act in the interests of a second person (the beneficiary) and has the power to 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)

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 motor cycle 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 motor cycle gangs.

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)). 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 $110000 and a subsequent offence can also result in a 12-month jail term. Odometer tampering can also result in a maximum penalty of $22000. This statute also governs the activities of all licensed auto-electricians, panel beaters, spray painters, and brake and transmission mechanics to ensure that only licensed repairers complete such work. Any **licensee** whose work is below the industry minimum standard may have their licence revoked and will not be able to undertake any repair work which could potentially harm a vehicle owner or cause further damage to the car.

licensee
licence holder

Review of licensing decisions

The regulatory body for a particular profession or occupation may grant or revoke a licence. When it makes an administrative decision to deny access to, or revoke a licence, it must do so in accordance with the rules of **procedural fairness**.

procedural fairness
the body of rules that ensure that decision-makers act fairly, in good faith and without bias when resolving disputes

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

TABLE 10.2 Reasons for a licence to be refused or revoked

Possible reasons for the refusal of a licence	Possible reasons for revoking a licence
Inadequate training or education of the applicant	Malpractice by the licence holder
Inability of the licence holder to meet minimum industry or professional standards	Fraudulent, misleading or deceptive behaviour by the licence holder
Concern regarding the character of the applicant, such as their honesty	A breach of the licence holder's fiduciary duty with regard to trust funds

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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) for further review.

10.2 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 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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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)

Complaints to manufacturers

Consumers do not always have direct access to manufacturers. Once the location of the manufacturer has been determined, it is prudent for the aggrieved consumer to contact them via telephone and in writing.

Under the *Competition and Consumer Act 2010* (Cth), manufacturers have an obligation to fulfil their express warranties and implied guarantees and to ensure that a supply of spare parts and repair facilities is reasonably available for a reasonable period after goods are supplied to consumers.

Manufacturers must also meet the requirements for acceptable quality and fitness for purpose.

Government organisations

State government organisations

There are various bodies within or authorised by the NSW Government that deal with consumer complaints. The roles of these agencies include:

- educating the public about their rights in the area of consumer law
- providing advice to consumers about negotiating with providers of goods and services, and assisting them in their negotiations
- advising the government about consumer issues
- investigating serious complaints
- in the event of a breach, applying to the relevant tribunal or court to bring an action.

Some of the relevant agencies are discussed below.

NSW Fair Trading

This government body is a division of the New South Wales Department of Finance, Services and Innovation, whose role is to manage consumer laws, safeguard the rights of consumers and advise businesses and traders regarding fair and ethical practice. The legislative framework that this body oversees sets the rules for fairness in the daily transactions between consumers and traders. It investigates unfair practices and administers the licensing of operators in a range of industries, including home building, the automotive trades, real estate, business and retail, and retirement villages.

Consumers can contact NSW Fair Trading for information on their rights and responsibilities and for the resolution of disputes. It covers a range of services, including a statutory public register with information to help buyers of second-hand

Figure 10.14 NSW Fair Trading is responsible for enforcing a wide range of consumer and business related matters, including assistance with choosing tradespeople for house construction.

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Research 10.6

Visit the homepage of NSW Fair Trading.

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.

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.

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.

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.

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Figure 10.15 There are many legal and other advocacy services available to consumers and businesses to counter the growing number of consumer rights abuses.

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 (CCAAC) provides independent advice to the Minister for Competition Policy and Consumer Affairs on consumer policy issues. Its specific tasks are to:

- receive reports, papers and issues from the minister and advise on the implications for consumer policy
- investigate and report on consumer issues referred to it by the minister – 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.

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
- as a consumer credit regulator; license and regulate businesses engaging in consumer credit activities as per the *National Consumer Credit Protection Act 2009* (Cth), and ban any businesses from such activities, if necessary
- as a market regulator; ensure 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.

monopoly
exclusive control of a market by one company, which generally results in increased prices because there are no alternative suppliers

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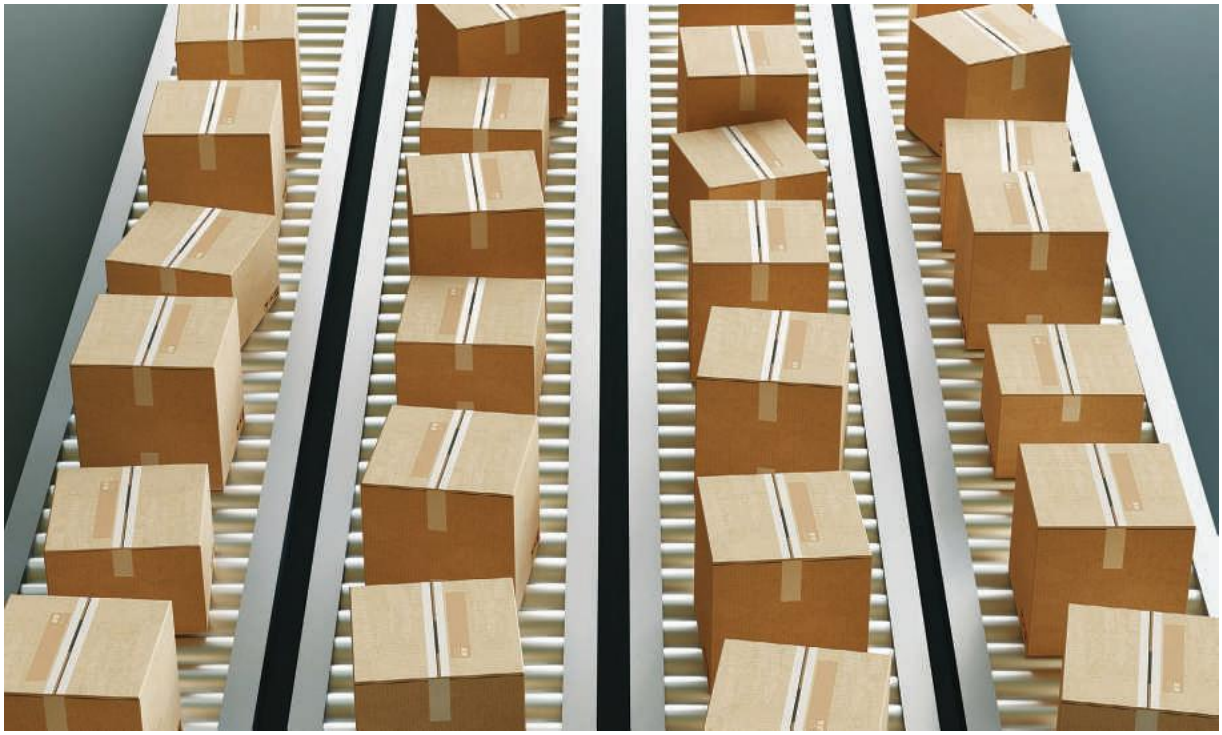

Figure 10.16 Amcor and Visy, who between them controlled the majority of the Australian cardboard packaging industry, were found to have engaged in cartel conduct. The companies paid $95 million in damages, plus large fines and hefty legal bills.

The ACCC thus has an important responsibility: ensuring that businesses and individuals comply with laws on fair trading and consumer protection. The ACCC complements state consumer affairs agencies, provides education to consumers and businesses about the relevant laws, and regulates national infrastructure industries, which include communications, energy, water, post and transport.

An example of a high-profile prosecution initiated by the ACCC involved the packaging and recycling group Visy Industries Pty Ltd. The company received a $36 million fine in November 2008 for price-fixing in the market for cardboard cartons. The penalty handed down in the Federal Court followed an ACCC investigation that found Visy breached the then *Trade Practices Act 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 similar case in 2013, Flight Centre was originally fined $11 million for engaging in **price-fixing** behaviour with three international airlines: Malaysian Airlines, Emirates and Singapore Airlines. Flight Centre asked all three airlines to stop selling tickets at a lower price than their travel agents and threatened to stop selling their tickets unless they agreed.

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

Consumer Affairs Forum

The Consumer Affairs Forum (CAF) (formerly the Ministerial Council on Consumer Affairs) consists of the Commonwealth, state and territory ministers responsible for fair trading, consumer protection and credit laws, along with the New Zealand ministers with those portfolios. Its role is to assess consumer policy issues of national significance and develop a consistent approach to those issues, and it facilitates communication and cooperation between Australia and New Zealand in those areas.

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Review 10.9

1 Describe what role 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.

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. 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.

Industry-based ombudsman

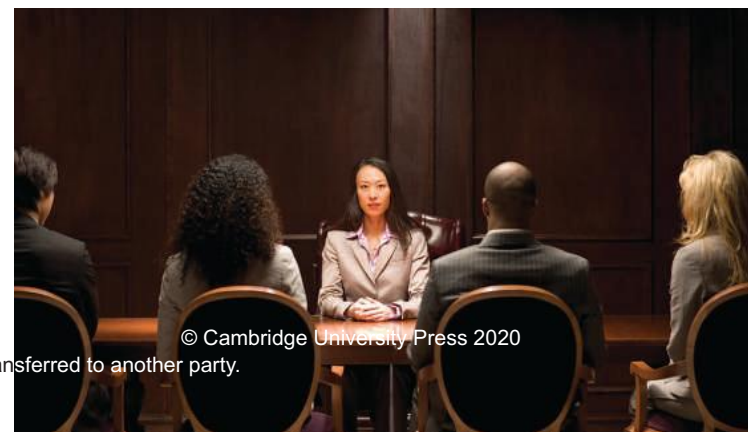
An industry-based ombudsman takes complaints from citizens or consumers about companies, workplaces or providers and investigates those complaints in order to reach a resolution that is fair to both sides. These schemes provide affordable dispute resolution for consumers who would face considerable cost 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 60998 complaints to the Telecommunications Industry Ombudsman in the last six months of 2018. While telephone complaints were down, those about internet service has 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.

Figure 10.17 If disputants cannot reach agreement, a tribunal can make legally binding orders on either or both parties to resolve the dispute. This is a cost-effective dispute resolution process.



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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 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
- that the consumer 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:

- considering the evidence and arguments put forward by each party
- interpreting the relevant statute law
- interpreting and applying common law principles
- following precedent when seen as appropriate
- determining the lawfulness of legislation.

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

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).

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Figure 10.18 Consumer law cases concern federal law and are therefore heard in the Federal Court. However, because the court system is so complex and expensive to negotiate, disputants are advised to settle their differences through alternative dispute resolution processes.

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.

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.

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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 10.10

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
- **rescission and modification of contract** – where the court will set aside a contract and restore the parties to their original pre-contractual position
- **special order** – such as for rectification of the wrong (for example, the repair of defective goods)
- **injunction** – an order forbidding or commanding the performance of an act
- **specific performance** – an order requiring a party to a contract to perform their obligations under a contract.

Figure 10.19 Before a dispute is heard by a court, the parties must submit to compulsory alternate dispute resolution. Parties are statutorily required to negotiate in good faith; courts look askance at those who refuse to do so.

injunction
a court order directing someone to do something or prohibiting someone from doing something

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.

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

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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.

10.3 Contemporary issue: Credit

Why this is an issue

Many individuals in our consumer-driven society obtain goods and services via the use of a credit card or loans. In a sense, the 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% of all payments.

In fact, many consumers spend beyond their income and, as a consequence, can risk exploitation by unscrupulous lenders.

They may have trouble meeting their repayments, and cars, household goods or even homes can be repossessed. In addition, consumers face other credit issues, such as:

- unfair contract terms
- credit providers with inadequate procedures for handling complaints
- time delays in the handling of complaints by credit providers
- so many steps involved in the process of seeking legal redress that only the most sophisticated consumers will persevere.

In recent times credit card providers in Australia have been criticised by the media, CHOICE and the RBA for the exorbitantly high interest rates they are charging their customers. As a result, some

Review 10.11

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.

Legal Links

The Consumer Action Law Centre website has information about consumer issues, and a full list of consumer advocacy groups.

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consumers have accrued thousands of dollars of debt across numerous credit cards. Indeed, credit card interest accrued in 2018 totalled $33 billion dollars despite mortgage and general interest rates being relatively low.

Banks and other credit card providers are therefore finding it increasingly more difficult to justify credit card interest rates of around 20% in a financial setting where the RBA reduced the nation's cash rate to 1.5% in August 2016 and it has remained at that level for more than two years. Clearly, people from low socioeconomic backgrounds suffer significant financial hardship in such situations.

Another growing 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.

Legal responses

A meeting of the Council of Australian Governments in 2008 determined that there should be a transfer of consumer credit regulation powers from the states and territories to the Commonwealth. This resulted in the evolution of the ACL, amendments to the *Australian Securities and Investments Commission Act 2001* (Cth), and to the *National Consumer Credit Protection Act 2009* (Cth) and its schedule, the National Credit Code. Australia now has a single uniform law for the regulation of consumer credit, providing both better protection for consumers and stability for the consumer credit sector.

One of the main aims of this legislation is to ensure that consumer protections for financial services are consistent with general consumer protections.

Substantial benefits arise from this legislation:

- Consumers and industry benefit from a robust licensing regime that excludes unscrupulous and incompetent credit providers.
- The credit market in Australia has greater integrity and consumers can be confident that credit providers are being monitored by the government.
- Rigorous entry conditions must be met before an Australian credit licence is granted.
- Credit providers must meet responsible lending standards when providing credit or credit assistance.
- The credit market benefits from an assurance that consumers are well protected.

All Australian jurisdictions are now – in accordance with the National Partnership Agreement to Deliver a Seamless National Economy – applying the full ACL.

National Credit Code (and Credit Law Toolkit)

The objective of the code, which is a schedule to the *National Consumer Credit Protection Act 2009* (Cth), is to provide laws which apply with equal force to all forms of consumer lending and to all credit providers, and which are consistent across all jurisdictions in Australia. The 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 it 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.

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- It gives credit providers more freedom to decide their fees and charges as long as they are explicitly disclosed.
- Non-compliance may result in civil penalties up to $500 000 and/or criminal charges.
- It provides for variations of repayments when consumers experience temporary hardship.
- A Credit Law Toolkit provides business owners with a 'plain English' guide to setting out a credit contract.
- Credit agreements between businesses and consumers must be in the form of a written contract.
- Credit providers must ensure that the consumer is given both a pre-contractual statement containing required details about fees and charges and a statement describing the consumer's rights and their obligations.

Non-legal responses

There are a number of useful non-legal avenues which are free, and thus accessible to all consumers experiencing credit concerns. Some are:

- **NSW Fair Trading** (https://cambridge.edu.au/redirect/8755) – provides free advice (via phone, in person or online) regarding the National Credit Code (for example, regarding loan repayments, default notices and car repossession).

Figure 10.20 The terms of a credit contract are typically provided during the application process or immediately afterwards. The customer must be aware of all the fees and charges before a contract can be properly formed.

- **Community Justice Centres** (https://cambridge.edu.au/redirect/8756) – 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.
- **Australian Financial Complaints Authority** (https://cambridge.edu.au/redirect/8757) – 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/8758) – 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/8759) – 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

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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. While the Royal Commission did shake-up the financial industry, time will tell if the behaviour changes to a great level. The media reporting of the actions taken by businesses to gain a customer will, perhaps, be the best outcome in creating greater consumer awareness.

Responsiveness of the legal system

The uniform laws outlined above are designed to protect consumers entering credit agreements, and to regulate credit providers. A national response to this issue is appropriate, so that all Australian consumers are protected from unconscionable credit contracts to the same extent and with the same consequences for breach. These include:

- criminal penalties for licensee misconduct – those who do not follow responsible lending protocols may be imprisoned for up to two years
- civil penalties for licensee misconduct – ASIC can levy fines of up to $220 000 for individuals and $1.1 million for corporations
- infringement notices which let ASIC respond swiftly in penalising breaches of the law
- compensation or other remedies which can put aggrieved consumers back in their original position prior to the financial loss suffered.

Review 10.12

1 Outline and discuss two major credit issues that exist in the twenty-first century economy. Explain whether current consumer law is adequate to deal with these issues.
2 Explain the benefits associated with Australia having a single uniform law for the regulation of credit.

10.4 Contemporary issue: Product certification

Why this is an issue?

Consumer goods must pass performance and quality assurance tests according to an industry code and/or nationally accredited test standards. If a product gains certification, it has complied with a set of regulations governing quality and minimum performance standards.

In a globalised world, trade knows no boundaries. Products made in Australia can be sold anywhere 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.

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*.

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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 our country:

- **Safety standards** – these are legal requirements and contain safety, labelling and design requirements. They are established when there is a clear risk to consumers (for example, for children's nightwear and flotation toys). If these standards are not met, the product cannot be sold.
- **Information standards** – this is information which must be given to consumers when they buy specified goods, 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 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.

Figure 10.21 Food safety standards, country of origin labelling, ingredient analysis, as well as product safety and usage information, are all required by law to be clearly labelled or otherwise available to consumers.

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

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- 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.

TABLE 10.5 Common Australian and international certification marks

Intertek	Products bearing the S-mark demonstrate compliance with legal European electrical safety requirements via third-party testing by Intertek Semko AB. Intertek is an internationally renowned organisation specialising in electrical product safety and benchmark performance testing. It operates more than 1000 offices and laboratories in 110 countries.
CE	The CE mark indicates that a product can be legally sold within the European Union. It means the manufacturer has prepared a 'Technical File' to demonstrate the product's compliance with applicable essential requirements and obtained a 'product-specific' CE marking certificate from a body specified by the European Union.
bsi. ISO 9001 Quality Management	The British Standards Institution (BSI) is a non-profit distribution organisation incorporated under a royal charter, and is formally designated as the National Standards Body for the United Kingdom. It certifies products and services as having met the requirements of specific standards within designated schemes.
JIS	Japanese Industrial Standards (JIS) specify the standards used for industrial activities in Japan.
Certified Product Australian Standard	The 'Five Ticks' standards mark is a well-known product certification symbol from SIA Global, used in Australia and internationally. It indicates that the product and its production processes meet recognised national or international standards. The standards mark is not just a manufacturer's claim – consumers can have additional confidence in the safety and performance of the product they are purchasing.

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Research 10.7

Access the ACL product safety guide and answer the following questions.

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.

Figure 10.22 Under the ACL, all bicycles, bicycle helmets, bicycle tyres and brakes, and every other consumer product and component, must be tested and assured as safe to use and fit for purpose.

- 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.

Non-legal responses

Individuals may take action through one of the independent consumer groups which advocate on behalf of consumers, lobby parliament to influence legislation, and act as consumer 'watchdogs' to highlight unsafe products in the Australian market.

The media can also be a powerful tool for highlighting and publicising consumer safety issues.

News

Thermomix fined $4.6 million for failure to report burns

By 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.

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(Continued)

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 100000 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.

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: $108500
- Total: $4608500

Thermomix was also ordered to pay the ACCC's legal costs of $230000.

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, and produce publications on safety and standards. They also conduct ongoing market surveys to be sure that products continue to meet acceptable standards. Both organisations can prosecute suppliers who ignore their statutory obligations.

Where problems do occur with a product, both the ACCC and NSW Fair Trading are able to remove unsafe goods from sale. They can issue public

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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.

Review 10.13

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.

10.5 Contemporary issue: Marketing innovations

Why this is an issue

Marketing is a process by which a business creates a 'consumer interest' in its products. Over time, the marketing process has become increasingly more sophisticated – especially with the advent of e-commerce. Therefore, recent innovations in global marketing technologies are of particular interest to law-makers.

As soon as a business website becomes operational, it is marketing to the world. When this is combined with Australian consumers' increasing reliance on their credit cards and online purchasing, consumer protection becomes problematic. Governments have a vital role to play in developing appropriate legislative responses that will facilitate a fair marketplace.

Legal responses

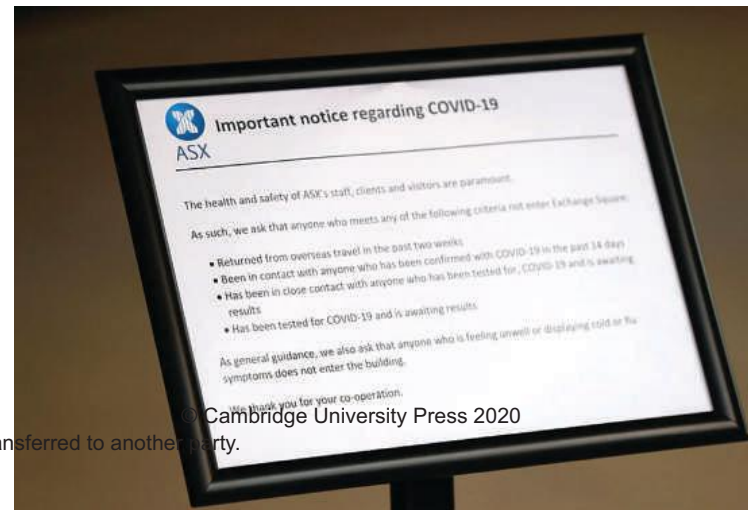
Marketing innovation can be utilised for bogus purposes, posing new challenges to Australian law. For example:

- many Australian consumers routinely receive fraudulent overseas offers via the internet
- scammers have the ability to obtain email addresses and contact millions of internet users very quickly
- overseas pyramid-selling schemes 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. In 2018, the ACCC's Scamwatch reports having received 24291 phishing scam reports with total losses of $944370. It should be noted that this only reflects the losses reported to Scamwatch. Unreported losses would likely make these numbers significantly higher. The total reported losses from all scams in 2018 was $489 million.

Spam is also becoming commonplace. Spam is unsolicited commercial messages, sent via email, SMS, MMS, instant messaging or any other form of electronic communication. The *Spam Act 2003* (Cth) made it a civil offence 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* in which Clarity1 were 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 $12600 infringement notice following an ACMA investigation that found it had sent commercial electronic messages without the consent of consumers.

Figure 10.23 In March 2020, the Australian Government released advice on scam texts claiming to be COVID-19 testing, which were aimed at stealing bank details.



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Research 10.8

Visit the ACCC's Scamwatch website and then 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.

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. The key provisions that relate to marketing can be summarised as follows:

- Section 18 outlaws deliberate misleading or deception of consumers.
- Section 29 states that it is illegal for suppliers to make false or misleading representations when marketing/advertising their goods or services.
- Section 32 makes it illegal for suppliers or merchants to offer gifts and prizes if they do not intend to provide the advertised gift.
- Section 35 makes it illegal to use bait advertising.
- Section 49 outlaws referral selling: offering discounts or benefits to consumers in return for their introducing other customers to the supplier.
- Section 50 makes it illegal to coerce consumers via aggressive marketing practices.
- Section 44 prohibits pyramid selling: it is illegal to sell the right to 'distribute' as opposed to the actual product.
- Section 39 makes it illegal for suppliers to send unsolicited credit cards through the mail.
- Section 40 prohibits the act of sending unsolicited goods to a person and then demanding payment.

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. One of the biggest scams is online dating. According to a 2015 ACCC report, romance scams were the biggest financial fraud in 2014, costing Australians almost $82 million that year.
- The **Australian Communications and Media Authority (ACMA)**, the government agency responsible for regulating telecommunications, radio communications, broadcasting and the internet. Consumers can make complaints to ACMA regarding deceptive marketing and advertising practices. According to a media release in 2016, ACMA issued a formal warning to Web 1000, an online marketing business.
- The print and electronic media, which report questionable marketing activity to provide the consumer with a greater awareness of the nature and prevalence of scams.

Responsiveness of the legal system

The legal system responds very well to domestic marketing issues. Australian consumers buying products in Australia have a high level of protection. The emerging problem, however, relates to marketing that originates from foreign countries and is accessed via the internet.

Advances in electronic marketing make it easier for fraudulent marketers to communicate with their victims and to transfer money across borders. The transnational nature of scams makes it very difficult for Australian authorities to catch the perpetrators. Further, there are complicated and difficult questions of jurisdiction and foreign law.

For example, if marketers in country X use a service provider in country Y to establish a home page upon which false claims are made about the safety of their goods, where does the act of false representation take place? Millions of consumers

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Review 10.14

1 Explain why marketing innovation poses new challenges to the Australian legal system.
2 Outline the provisions contained in the ACL that directly relate to marketing.
3 Assess the effectiveness of Australian law in dealing with transnational marketing.

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.

10.6 Contemporary issue: Technology

Why this is an issue

The use of new technology in the areas of computing and global communication is constantly changing the level and complexity of interaction between consumers and sellers. Technology has infiltrated all levels of consumer transaction services, from Automated Teller Machines (ATMs) to Electronic Funds Transfer at Point of Sale (EFTPOS) and electronic home and office banking services.

The problem facing consumer law is that the various services now available over the internet operate in a less regulated environment. The web and telephony have facilitated electronic services such as:

- internet marketing
- electronic service delivery
- electronic lodgement services for submissions such as tax returns
- branchless banking from home
- teleshopping in 'virtual malls' anywhere in the world
- online reservation schemes for entertainment, travel and accommodation
- online ordering of and payment for goods
- electronic service delivery programs based on customer convenience; for example, websites which provide consumer protection advice 24/7.

As global marketing and virtual shopping become the norm, Australian and international law will have to work hard to protect consumers regardless of whether a product is purchased domestically or internationally. Many areas of technology were discussed earlier in the chapter – for example, scams, spam, telemarketing, phishing, online fraud and credit.

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.
- 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

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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.
- 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

Figure 10.24 New biometric technologies enable law enforcers to investigate fraud and better identify criminals. However, some technologies can also be used by criminals to perpetrate crimes and avoid judicial authorities.

contained in that Act, and, as noted above, it also has enforcement powers under Part 20 of the *Telecommunications Act 1997* (Cth). The extension of trade and commerce into the online environment poses interesting challenges for the law. 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:

- The **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.
- The **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)

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to supplement the *Spam Act 2003* (Cth), which regulates commercial electronic messages and outlaws spam. This code stipulates how direct marketers can and cannot use electronic messages, including email, SMS and other online and wireless applications, with the aim of reducing the volume of spam.

- The **Internet Industry Association**, 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.
- The **Australian Securities and Investments Commission (ASIC)**, which has the mission of regulating and enforcing laws relating to fairness and honesty in financial services, markets and companies. In this context, it oversees the regulatory issues posed by developments in electronic communication. ASIC is also responsible for approving codes of practice in the financial services industries. One of these is the Electronic Funds Transfer Code of Conduct, which applies to banks and other financial institutions that offer electronic funds transfer services to their customers.

Responsiveness of the legal system

Generally, the Australian legal system affords consumers some protection against the misuse of technology provided that e-marketers are located within Australian borders. The *Competition and Consumer Act 2010* (Cth) and the *Telecommunications Act 1997* (Cth) allow the ACCC to police the consumer law domestically, with an arsenal of criminal and civil sanctions at its disposal. However, cross-border e-marketing raises complex jurisdictional questions, and the law's evolution in order to adapt is ongoing. Future consumer remedies may be dependent upon the existence of multilateral international treaties.

Review 10.15

1. Describe at least two influential electronic consumer services that have evolved as a consequence of the enormous increase in internet-derived technologies.
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 cyber-crime.

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 then complete the following tasks:

1. Explain how iris and face-recognition technology may affect consumers.
2. Suggest some potential legal issues for consumers if this technology is introduced into the marketplace of the future.

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Chapter summary

- The need for consumer protection grew from the operation of *caveat emptor* in the marketplace.
- Contract law attempts to define the circumstances under which parties who make promises to each other are legally bound.
- The essential elements of a contract are intention to be legally bound, offer, acceptance and consideration.
- Implied terms can provide protection to consumers from unjust contracts.
- The *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) and the *Fair Trading Act 1987* (NSW) apply the ACL in New South Wales by prohibiting sellers from knowingly deceiving or misleading consumers.
- Occupational licensing and practising standards may come from either industry self-regulation or from state regulation.
- Consumer remedies are available through tribunals, courts, self-help, government agencies and industry organisations.
- The National Credit Code standardises credit transactions throughout Australia.
- Product certification guarantees that goods have passed performance and quality assurance tests.
- Advances in electronic marketing have allowed fraudulent marketers to exploit consumers via internet scams.
- The use of technology in the global marketplace makes it problematic for Australian law due to jurisdictional questions.

Chapter questions

- Outline the essential elements of a contract.
- List three ways a consumer can seek a remedy for injury or loss suffered as a result of defective goods.
- List the major statutory provisions that govern marketing and advertising.
- Briefly outline the main avenues available to consumers seeking redress.
- Explain why both marketing innovations and technology pose challenges for consumer protection law.

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 this textbook. Refer to these criteria when planning and writing your response.

Review 10.16

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.

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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 ACL makes it an offence for a supplier or manufacturer to deliberately mislead or deceive a consumer.
- Any action by unscrupulous suppliers is punishable by law. The statutes seek to protect vulnerable consumers, especially with regard to unconscionable contracts.
- Non-statutory mechanisms such as industry self-regulation and media scrutiny will continue to have a significant role in ensuring compliance with consumer law.

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 above statutes will be keenly tested, especially with respect to fraud and the provision of after-sales service, guarantees and warranties.
- Effective consumer protection requires not only legislation against fraud and deception, but also initiatives resulting from the combined work of government, business and consumer groups.

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Chapter 11
Option 2: Global environmental protection

25% of course time

Principal focus

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. The 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 the key legal concepts and terminology that relate to global environmental protection, especially the need to protect the global environment
- describe the key features of the relationship between domestic and international law and understand the effect of international law on sovereign states
- discuss the effectiveness of the legal system in addressing global environmental issues
- explain the role of the law in encouraging cooperation and resolving conflict, as well as its ability to respond to the dynamic nature of global issues
- describe the interrelationship between the legal system and society in relation to global environmental issues and the subsequent responses to global environmental protection
- impart legal information using arguments that are logical and well-structured
- assess the effectiveness of legal and non-legal responses to the global environment
- analyse different perspectives on contemporary issues concerning global environmental protection.

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Relevant law

IMPORTANT LEGISLATION

Environmental Planning and Assessment Act 1979 (NSW)
Protection of the Environment Operations Act 1997 (NSW)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

International Convention for the Regulation of Whaling (1946)
Convention relating to the Status of Refugees (1951)
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)
Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) (Basel Convention)
Convention on Biological Diversity (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)

SIGNIFICANT CASES

Bury v Pope, Cro. Eliz. 118 [78 Eng. Rep. 375] (1587)
Bradford Corporation v Pickles [1895] AC 587
Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270
Trail Smelter Case (*United States v Canada*) 3 RIAA 1905 (1941)
Bradley v The Commonwealth (1973) 128 CLR 557
Nuclear Tests (*Australia v France*) [1974] ICJ 4 (20 December 1974)
Nuclear Tests (*New Zealand v France*) [1974] ICJ 3 (20 December 1974)
Murphyores v The Commonwealth (1976) 136 CLR 1
Australian Conservation Foundation v The Commonwealth (1980) 28 ALR 257
Commonwealth v Tasmania (1983) 158 CLR 1
Tasmania v The Commonwealth (1983) 158 CLR 1
Certain Phosphate Lands in Nauru (*Nauru v Australia*) [1992] ICJ 2 (26 June 1992)
EPA v Gardner [1997] NSWLEC 169
Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage [2006] FCA 736
Aerial herbicide spraying case (*Ecuador v Colombia*) [2008] ICJ
Masig Island Case 2019 UN Human Rights Committee

Legal oddity

The European carp was introduced into Australian rivers at various times in the 1800s and 1900s. However, it was their escape from a fish farm near Mildura in 1964, which coincided with a massive flooding event, that led to them becoming the most dominant species of the Murray–Darling Basin. In 2016, the National Carp Control Plan was introduced. The chief scientist behind the plan (known as 'The Carpinator') outlined the release of a Carp-specific herpes virus that aimed to wipe out at least 70% of the carp population. Concerns about the impact of hundreds of thousands of fish rotting in waterways led to additional research designed to augment and cross-check previous scientific work. No implementation date had been announced at the time of this book going to print.

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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.

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

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.

holistic
taking into account all aspects; looking at the whole system rather than just specific components

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 paragraphs (a), (b), (c) or (d).

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.

external costs (externalities)
the effects of an activity (such as the production, transport and sale of goods) on people who are not directly involved in the activity, and that are not paid for by those who are involved (such as the producer)

Early legal decisions reinforced the capacity of individual landowners to do with the land whatever was in their best interests. In *Bradford Corporation v Pickles* [1895] AC 587, Edward Pickles owned the land through which the 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.

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

Figure 11.1 The introduction of the foreign species, the European carp, is an economic and environmental disaster.

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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.'

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.

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 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 which have since spread across the globe. In fact, after trade the environment has become the most common area of global rulemaking.

Standing and interests

Since the decision in *Australian Conservation Foundation v The Commonwealth*, discussed in the 'In Court' box, a more liberal approach to standing has been taken by the legal system. 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. Section 123 of this Act states:

> Any person may bring proceedings in the court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

The shift from the common law decisions in *Bradford Corporation v Pickles* and *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 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

***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'.

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group has a sufficient interest in the subject matter in order to be permitted to bring an action

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In Court

***Coast & Country Association of Queensland Inc v Smith* [2016] QCA 242**

Figure 11.2 The Coast and Country Association of Queensland argued that the proposed coal mine would have significant groundwater impacts and also contribute to climate change.

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). This decision has been challenged several times, including in December 2018, when the Australian Conservation Foundation instigated a third judicial review of the decision in the Federal Court, arguing that the minister made an error of law related to the 'reckless waste of water'. In April 2019, the federal government granted the Adani Mine final Commonwealth environmental approval and the Queensland Government gave their approval in June 2019.

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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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. 24) and the 'learn to' activities (pp. 24–5) 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.

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.
4. Research the competing views over the Adani coal mine. Assess if you agree with the statement that 'Australia is exporting its greenhouse gas emissions'.

Figure 11.3 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 protecting a multitude of interests is not clear-cut. 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.

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.

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 *War on Waste* and in 2019 by school students protesting about climate change. A simple search of 'student

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protests about climate change' images highlights a multitude of actions across Australia and the globe.

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.

pollution
environmental damage caused by the discharge or emission of solid, liquid or gaseous materials into the environment

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. It was not long before this became a global phenomenon (a search for Greta Thunberg will highlight this).

International conferences and treaties

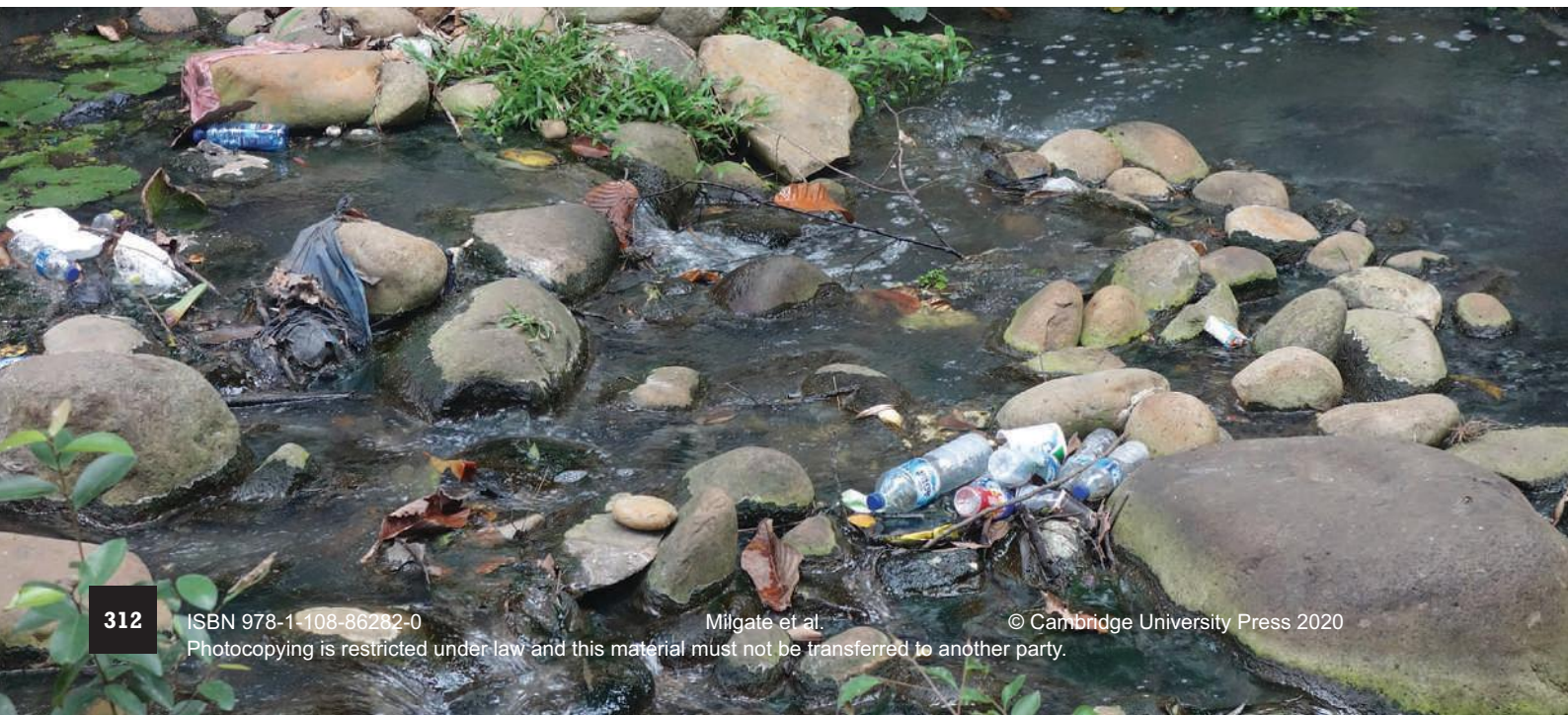
These social changes, plus high-profile pollution and ecosystem disasters (see later in this chapter), created a push for change which led to the emergence of a number of international conferences and **multilateral treaties**. For example, the *United Nations Convention on the Law of the Sea* (1982) 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'.

multilateral treaty
an international agreement involving three or more parties

convention
another term for a treaty; an international agreement between parties who are subject to international law (states and international organisations such as the UN and its bodies)

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.

Figure 11.4 Concern about pollution has placed environmental issues firmly in the public arena.



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Every 10 years since there has been an attempt to hold a conference with a global environmental focus:

- 1982 – Nairobi
- 1992 – the 'Rio' Earth Summit
- 2002 – the Johannesburg Summit
- 2012 – the Rio+20 Earth Summit.

Later in this chapter we will look at these conferences in greater detail.

In some countries, a treaty that the nation has signed and **ratified** automatically becomes part of the domestic law of that country, and its citizens are bound by it; 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).

ratified
the process of a state formally approving a treaty, making it legally binding

The need for global environmental protection

Environmental impact of consumption and development

Human activities have global dimensions. As mentioned earlier it is the delicate balancing act between environmental and economic interests that has become the critical issue in global environmental protection. The image of Scott Morrison bringing a lump of coal into parliament in 2017 also illustrates this divisive issue. 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 the priority.

Globalisation not only gives markets worldwide operation, providing consumers with the goods they desire from other countries, but it also multiplies the problems associated with the production of those goods. 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% is recycled.

globalisation
the ongoing integration of regional economies, societies and cultures brought about by the removal of restrictions on international trade, and advances in travel and mass communication

The reasons for the links between development and environmental degradation are complex. Globalisation and **free trade** have been accompanied, in many countries, by policies encouraging economic growth. Without regulation, production of goods is usually highly energy intensive, uses enormous amounts of natural resources, and produces vast quantities of waste. Many of these resources are non-renewable or are used in an unsustainable manner.

free trade
trade between countries that is subject to few or no government restrictions

Research 11.1

Construct a table that illustrates the 'think globally, act locally' concept. In the left-hand column describe local initiatives that aim to protect the environment. In the right-hand column, describe the corresponding global initiatives relating to that issue. Some relevant issues include fishing regulations, littering (plastic), and coal seam gas mining.

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'.)

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A globalised economy also has indirect effects. For example, countries with less stringent regulation of environmental and safety standards enjoy a competitive advantage over countries with more regulation. These countries can produce the same item at a lower cost, giving companies an incentive to relocate their factories to those countries.

Businesses' reluctance to accept measures designed to mitigate the negative effects of industry on the environment, and in turn governments' reluctance to introduce those measures, can therefore be traced to economic growth pressures. A constant issue in democratic societies is the need for political leaders to respond to voter demands – as elections approach the political will of leaders to tackle environmental concerns can often be compromised. Politicians face a dilemma when they wish to implement environmental protection measures that can be seen to increase unemployment, close some industries or lead to the relocation of industries to nations without strong environmental controls.

Like today's markets and economies, detrimental environmental effects are also global. Pollution, ocean acidification, global warming and ecological catastrophes causing massive damage to an ecosystem or the broader environment are not confined by national boundaries. Hence, there is a need for international environmental law.

Both international and domestic laws need to be dynamic, and to some extent holistic, in order to take account of political and economic changes, and new issues in human rights. For example, the Intergovernmental Panel on Climate Change (IPCC) has estimated that by 2050 there could be 150 million environmental refugees – people forced to relocate because of environmental disasters – yet there is no recognition for such people under the *Convention relating to the Status of Refugees* (1951), as they are not 'fleeing persecution'.

Case Studies

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.

Figure 11.5 Reading the radiation levels with a Geiger counter in front of the reactor in Chernobyl, Ukraine.

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.

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Case Studies (continued)

Environmental disaster 3: Alaska, United States, 1989

In March 1989, the Exxon Valdez oil tanker hit a reef in Prince William Sound, Alaska, United States. The tanker spilled approximately 40 million litres of crude oil. The spilled oil killed as many as 500 000 seabirds, and devastated fish and otter populations in the area.

Figure 11.6 NASA's satellite image of the Deepwater oil spill.

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 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, Japan. 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: Brazil, 2015

In November 2015, the largest environmental disaster in Brazil's history occurred in the Samarco iron ore mine. The dam at the Samarco mine collapsed, releasing millions of tonnes of muddy iron ore waste, which devastated local communities and killed 19 people directly. A thick red sludge flowed into the Rio Dulce River and devastated the river ecosystem for hundreds of kilometres all the way to the Atlantic Ocean. BHP and its partners have agreed to pay over $3 billion to restore the area and compensate those affected.

Environmental disaster 7: 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.

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.

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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 11.2

1 Research the term **ecological footprint**. Calculate your own footprint and work out how many planets are needed if everyone on Earth lived a lifestyle like yours.
2 Over 500 billion disposable coffee cups are manufactured each year. Assess if reusable coffee cups really make a difference.

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

Interdependence and cooperation

Nations must cooperate if there is to be a comprehensive response to the need for global environmental protection. As we know, pollution does not stop at geographical or political boundaries (for example, the Great Pacific Garbage Dump and global warming), resources are dwindling (for example, oil), more species are becoming endangered (according to the UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) 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.

Figure 11.7 The Australian Koala Foundation estimates that 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, with their pelts shipped to London, the United States and Canada, between 1888 and 1927.

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.

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Figure 11.8 Environmentalists believe that massive fishing trawlers like the Russian *Kapitan Vdovichenko*, which is capable of processing 60–80 tonnes of fish fillets a day, contribute significantly to the problem of overfishing and depleted fish stocks in the world's oceans.

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 UN estimated that 33% 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

Origins

In 1983, the UN asked a commission to study the consequences of environmental degradation on economic and social development. The World Commission on Environment and Development (WCED) produced an influential report in 1987 titled, *Our Common Future*, also known as the *Brundtland Report*. The commission was concerned with 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.

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.

Globally, the key elements of ecologically sustainable development are:

- biodiversity
- intergenerational equity
- intragenerational equity
- the precautionary principle.

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Principles of ecologically sustainable development

Section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

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.

Biodiversity

Biological diversity, or **biodiversity**, is the variety of life forms within an ecosystem, a biome or the planet. An ecosystem is the set of relationships among the plants, animals, micro-organisms and habitats in a small area, and a biome is a regional, much larger group of ecosystems in a wide geographic area. There are different types of biodiversity: diversity among species, diversity of habitats on Earth (for example, deserts, forests, wetlands and rivers) and genetic differences within each species (for example, different breeds of cattle or wheat).

biodiversity
the variety of life forms on Earth; the complete range of types that are possible within an ecosystem, biome or species

Biodiversity is important for many reasons. Diverse ecosystems are more productive, which is a significant issue for agriculture. They can better withstand and recover from disasters. Diverse ecosystems, species and habitats are more sustainable over the long-term, and species' interdependence within an ecosystem contributes to the health of both the ecosystem itself and the life forms within it. A variety of genes in a population is important to health (for example, in decreasing the incidence of harmful mutations).

The *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 commited 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.

intergenerational equity
fair and just behaviour of one generation towards subsequent generations; in terms of environmental issues, a concept that centres on preserving Earth's resources for future generations

Intragenerational equity

Intragenerational equity, in contrast to intergenerational, refers to fair and just treatment of groups of people within a generation. It is accomplished through policies that endeavour to raise the standard of living of disadvantaged peoples and nations, and to ensure that the management and use of the environment does not exploit them.

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Principle 5 of the Rio Declaration enjoins states and individuals to cooperate in eradicating poverty as a necessary condition of sustainable development, and Principle 8 articulates their duty to reduce and eliminate wasteful patterns of production and consumption. The Masig Island case referred to at the beginning of this chapter highlights 'intragenerational equity'.

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

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.

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

An interesting view on the precautionary principle is that it applies to 'omissions' as well – that is, to failing to act. For example, if we do nothing about climate change because there may be some uncertainty in the science, there is a risk that we will cause significant environmental harm.

Ecologically sustainable development in domestic law

As mentioned previously, the principles of ecologically sustainable development are well established in the domestic and international arena. 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 Australia's Governments (COAG) produced an agreement on the 'Commonwealth – State Roles and Responsibilities for the Environment', which led to the enactment of the *Environmental Protection and Biodiversity*


Britain passes one week without coal power for first time since 1882

Landmark follows government pledge to phase out coal-fired electricity by 2025

Figure 11.9 This 8 May 2019 headline in *The Guardian* highlights the transition in energy use that is beginning across the globe.

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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 *Pickles v Bradford Corporation* and *Bury v Pope* and compare them with the key elements of ESD).

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.

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.

11.2 The role of the state and state sovereignty in 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
a government and the people it governs; a country

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

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their best interests to do so, and 'best interests' have often been equated with innovation, economic growth and corporate profitability. Various nations' approaches to addressing climate change and Japan's insistence on whaling for 'scientific purposes' and then, in July 2019 withdrawing from the International Whaling Commission to re-commence commercial whaling, illustrate state sovereignty in action.

state sovereignty
the authority of an independent state to govern itself (for example, to make and apply laws, impose and collect taxes, make war and peace, and enter into treaties with foreign states)

Some have argued that environmental health is crucial to long-term wellbeing or that economic prosperity 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.

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.

Kumi Naidoo stated that:

> We didn't get the Future We Want in Rio, because we do not have the leaders we need. The leaders of the most powerful countries supported business as usual, shamefully putting private profit before people and the planet.

In other words, the 'consensual theory' and the doctrine of sovereignty have together undermined a global, holistic response to sustainable development.

It is the implementation of various international agreements and how vigorously they are acted upon 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.

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. See the decision in *Bradley v The Commonwealth* (1973) 128 CLR 557, in the 'In Court' box, as the authority for this statement.

State sovereignty therefore enables nations to implement international agreements, but also to reject them if they so choose.

The role of the UN in response to global environmental protection

The UN was established in 1945 with international peace and security as its main objective, along with developing friendly relations among nations, promoting human rights, and facilitating social and economic progress. Over time, however, its aims and functions have evolved to keep pace with changing global conditions. In its early years, global environmental protection was of little significance, but now it is one of the dominant aspects of UN affairs.

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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.

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.

Figure 11.10 International flags outside the UN building in Geneva, Switzerland.

The UN has five principal organs or bodies:

- **UN General Assembly** – the main organ, made up of representatives of all 192 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 UN, carrying out tasks in all areas dealt with by the UN
- **Economic and Social Council** – the body that coordinates the work undertaken by the UN and its specialised agencies in this large area
- **International Court of Justice** – the judicial organ, which settles disputes between states and provides advisory opinions to the UN and its agencies.

The full UN organisation is much larger, 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) and many programs and funds. The programs and funds are subsidiary bodies of the UN General Assembly. The specialised agencies are linked to the UN 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 UN to deal with environmental issues. The main ones are discussed 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:

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- **Food and Agriculture Organization** – a specialised agency whose aim is defeating hunger and achieving 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.

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.

More recently, the UNEP has produced the sixth *Global Environment Outlook* report (2019). This report calls on decision-makers to take immediate action to address pressing environmental issues. The report also stresses the urgency of achieving the Sustainable Development Goals and other internationally agreed environment goals. For more information about *Global Environment Outlook 6*, visit the website of the UNEP.

The UNEP's work encompasses:

- assessing global, regional and national environmental conditions and trends
- developing international and national **instruments** and guidelines
- acting as an advocate and educator, both within the UN and with international organisations, national governments, **non-government organisations (NGOs)**, private corporations and society at large, on behalf of the environment
- assisting the transfer of knowledge and technology for sustainable development
- hosting several environmental convention secretariats, including 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).

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 on human rights worldwide

Some of its areas of priority are environmental aspects of disasters and wars, management of ecosystems, harmful substances, resource efficiency and climate change. In 1988, the UNEP and the World Meteorological Organization (another specialised agency of the UN) established the Intergovernmental Panel on Climate Change (IPCC), the primary international source of scientific information about climate change.

Since the 1992 Rio Conference and the new focus on 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, *Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989), to introduce the legally binding amendment in extremely quick time for international law. Nations then had to determine the specifics of how they would adhere to the accord.

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Research 11.3

Class research

Visit the website of the UN Environment Programme (UNEP). Divide the class into three groups. Each group is to prepare a presentation on the key role of the UNEP in regard to:

1 Environmental rights and governance.
2 Climate change.
3 Sustainable development goals.

At the completion of the presentations, have a class discussion on how 'sovereignty' impacts on the work of the UNEP.

Intergovernmental Panel on Climate Change

The Intergovernmental Panel on Climate Change (IPCC) is open to all member states of the UN 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 October 2018, the IPCC released a *Special Report* on the impacts of global warming of 1.5 °C above pre-industrial levels and what 'mitigation measures' need to be adopted to promote sustainable development. The report noted (p. 282):

> The impacts of climate change are being felt in every inhabited continent and in the oceans. However, they are not spread uniformly across the globe, and different parts of the world experience impacts differently. An average warming of 1.5 °C across the whole globe raises the risk of heatwaves and heavy rainfall events, amongst many other potential impacts. Limiting warming to 1.5 °C rather than 2 °C can help reduce these risks.

The IPPC will release its sixth *Assessment Report* in 2022.

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.

UN Educational, Scientific and Cultural Organisation

The UN Educational, Scientific and Cultural Organisation (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.

International instruments

International instruments are documents setting out commitments or obligations of states and sometimes other parties such as international

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Review 11.5

1 Evaluate how and why the UN's approach to the environment has changed over time.
2 Describe the functions of the UNEP and the UNESCO.
3 Explain the origin of the Intergovernmental Panel on Climate Change and describe its functions.

Figure 11.11 A crab on Henderson Island, an uninhabited island in the South Pacific.

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 to what exists at domestic levels.

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

Table 11.1 shows a range of key hard law and soft law in the area of environmental protection. Each instrument has a different focus, but fundamentally, like all international law, their role is to stipulate a body of rules and principles which regulate states' relations with one another.

Soft law

Non-binding norms include resolutions and declarations of the UN General Assembly, as well as statements, principles, codes of conduct, codes of practice, action plans such as Agenda 21, and other obligations that are not contained in a treaty. Soft law instruments usually identify a problem and set out in general terms how the problem will be dealt with, but do not include specific commitments. They have the potential to become hard law in the future, 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

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TABLE 11.1 A 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 the 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

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TABLE 11.1 A selection of international instruments (continued)

International law	Year signed	Hard or soft law	Mission or aim	Number of parties*
Kyoto Protocol (linked to the *United Nations 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 *United Nations 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. Global stocktakes will take place every five years (the first in 2023) to determine progress.	197
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 outside their borders.	187

* In the case of a treaty, 'number of parties' means the number of states for whom the agreement has entered into force.

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).

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

Most international agreements, despite being termed 'hard', have compliance mechanisms aimed at encouraging compliance. According to Professor Jutta Brunnée, (international environment law expert based at the University of Toronto, Canada), nations will more likely abide by such international laws when there is:

> ... a sound treaty-making process, well-defined obligations, transparent compliance mechanisms with foreseeable consequences for Parties' and benefits of compliance that outweigh the costs of non-compliance.

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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 to 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, below).

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.

The table below highlights the enforcement mechanisms contained within some of the key international laws discussed in this chapter.

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. 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: • 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.

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TABLE 11.2 International law enforcement mechanisms (continued)

International law	Enforcement mechanism
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.
Paris Agreement (linked to the *United Nations Framework Convention on Climate Change*)	The *Paris Agreement* outlines 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* includes provisions for a 'global stocktake' every five years beginning in 2018; this will inform future emission pledges. Once it enters into force (when at least 55 parties accounting for at least 55% of total greenhouse gas emissions ratify the agreement), 'modalities, procedures and guidelines' will be produced to shape the enforcement mechanisms of the *Paris Agreement*.
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.

Courts

Ad hoc tribunals and the International Court of Justice

Prior to the establishment of the UN (and thus also of the International Court of Justice), there was practically no court or tribunal in place to settle environmental conflicts between states, since few issues had arisen. In 1928, and again in 1935, the United States and Canada referred a matter to the International Joint Commission (a tribunal that had jurisdiction to consider issues arising along their common border) for resolution. It involved sulphur dioxide emissions from a zinc and lead smelter located in the town of Trail, British Columbia, 15 kilometres from the Washington state border. The main problem was the damage being done to fertile farming and logging lands in the Columbia River Valley.

In both instances the Canadian Government had to pay damages to the state of Washington, and in the 1935 decision the two parties decided to enact a special agreement or 'convention' for the settlement of difficulties arising from the smelter operation. As part of this agreement, a tribunal was established which determined that Canada had to pay US $78 000 to the United States as compensation for all damage and that smelter operators had to refrain from emitting harmful materials (instruments were put in place to record weather conditions and emission levels, and if emissions exceeded the prescribed levels, further compensation was payable).

The Trail Smelter Case (*United States v Canada*) 3 RIAA 1905 (1941) highlighted the responsibilities of neighbouring states for damage caused by transboundary pollution. It is important to realise that the nations involved consented to the establishment

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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.

ad hoc
for a particular purpose, usually exclusive and often temporary

Only states 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 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.

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

Environmental disputes have never dominated the International Court of Justice. The UN 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 UN 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 and in July 2019, Indonesia sending 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.

Figure 11.12 Environmental activists in front of the State Palace in Jakarta, Indonesia.

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In Court

Aerial herbicide spraying case (*Ecuador v Colombia*)

The significance of the *Ecuador v Colombia* 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 highlights the role of sovereignty in both assisting and impeding global environmental issues. Ecuador is the eighth most biodiverse country on Earth; Ecuador's 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'.

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'.

Figure 11.13 In Colombia, poppy plants are sprayed to eradicate cocaine crops. The toxic herbicides float across the border and disrupt Ecuador's delicate ecosystems.

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.

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Figure 11.14 Masig Island in the Torres Strait, Queensland.

Legal Links

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. These include:

- the nuclear test cases (1974–1975) involving Australia and New Zealand against France, which was testing nuclear devices in French Polynesia. The cases – Nuclear Tests (*Australia v France*) [1974] ICJ 4 (20 December 1974) and Nuclear Tests (*New Zealand v France*) [1974] ICJ 3 (20 December 1974) – did not proceed to the merits stage, as the court decided that once France stated that it was ceasing the atmospheric tests of its own accord, the cases no longer had any object. Later, France commenced underground nuclear testing.
- Nauru's case against Australia for failing to remedy the environmental damage caused by 90 years of phosphate mining (Certain Phosphate Lands in Nauru (*Nauru v Australia*) [1992] ICJ 2 (26 June 1992)). In 1992, a negotiated settlement was reached whereby Australia agreed to pay $107 million in compensation for the extensive damage caused to Nauru prior to its independence.
- 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, and 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?'

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Legal Links (continued)

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. 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'.

Figure 11.15 Japanese whaling protestors.

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

During the 1960s, it was recognised that this sort of piecemeal approach was insufficient to address the global threats facing the environment. Under the guidance of the UN, the first international conference to focus on the global environment

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. 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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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, the decision-making body of a convention, meet 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; and the 1997 Conference of the Parties in Kyoto, Japan, gave rise to the *Kyoto Protocol* (1997). The twenty-first Conference of the Parties was held in Paris during December 2015 and resulted in the *Paris Agreement* (2016). The fourteenth Conference of the Parties for the Basel Convention was held in May 2019 in Geneva.

Stockholm Conference 1972

According to the UN Environment Programme, formed as a result of the Stockholm Conference, the conference's main aim was to consider 'the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'. Officially titled the 'UN Conference on the Human Environment', this was the first international gathering to consider the natural environment and material human needs – economic development – together.

The conference produced the Stockholm Declaration, which can be credited with providing the impetus for sustainability becoming the focus of global environmental protection. **Declarations** have no binding legal effect, but they do have an undeniable moral force and provide practical guidance to states about how they should behave. The Stockholm Declaration contains four key themes:

- States have a responsibility to manage their environment and they are accountable to their neighbours.
- All people have a right to an adequate environment.
- There is a need for intergenerational equity.
- There is a need for international cooperation.

declaration
a formal statement relating to a particular issue or set of issues, agreed to by a group of states but without binding legal force

While it can be argued that the Stockholm Conference produced nothing concrete in international law, it did result in the formation of the UN Environment Programme. 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, and the UN Environment Programme became the major forum for promoting global environmental protection.

Nairobi Conference 1982

The main emphasis of the conference, held in Nairobi, Kenya, was to mark the 10th anniversary of the Stockholm Conference and reaffirm the participants' and the world's commitment to the Stockholm Declaration and Action Plan. The conference did not generate as much worldwide interest as Stockholm and for that reason it is not considered an official Earth Summit. The Nairobi Declaration urged 'all governments and people of the world … to ensure that our small planet is passed over to future generations in a condition which guarantees a life of human dignity for all'.

Rio Conference: the 1992 Earth Summit

The Rio Earth Summit is more formally called the UN Conference on Environment and Development (UNCED), and was held in Rio de Janeiro, Brazil in 1992. It was hoped that Rio would produce a range of binding environmental agreements, but the different perspectives of the 180 states and NGOs represented made it difficult to reach a consensus.

While Stockholm provided the general guidelines for ecologically sustainable development, it was Rio that produced a framework for domestic and international law aimed at global environmental protection. Five key agreements came out of Rio, including the UN Framework Convention on Climate Change, the Rio Declaration and Agenda 21. The Rio Declaration contains 27 principles for using the environment in a sustainable manner. Agenda 21 is a comprehensive, voluntary plan of action to help

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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:

- setting a target to reduce by half the number of people without access to safe drinking water by 2015, and obtaining commitments from governments and bodies – such as the governments of the United States and the European Union, and the Asian Development Bank – to fund initiatives to achieve this target
- 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. 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.

Global financial considerations have always limited national and international responses to sustainable development measures. A state of financial paralysis allows no leeway to provide funding for sustainable development measures as the state simply tries to cater for the current demands of its citizens.

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 (December 2015) adopted a historic accord for a new treaty to commence in 2020. Its aim is to limit global warming to well below 2 °C with an aspirational target of 1.5 °C. Formally adopted by 195 countries, the first universal climate deal aims to see fossil fuels gradually phased out, the growth of renewable energy globally and the creation of new carbon markets to enable countries to trade emissions and protect forests.

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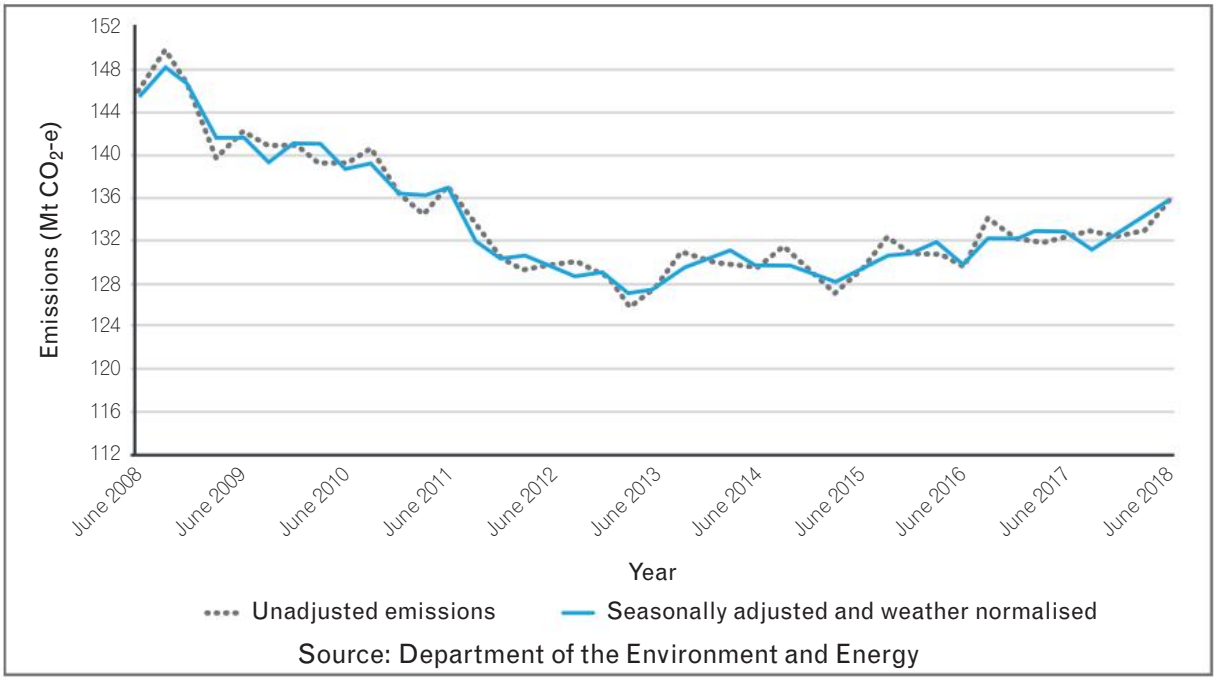

Figure 11.16 Australia's carbon emissions from 2008 to 2018. Australia pledged to be 26–28% below 2005 levels under the terms of the *Paris Agreement* (2016). However, according to the 2018 *Emissions Gap Report* released by the UNEP, Australian emissions are projected to 'remain at high levels rather than reducing in line with the 2030 target'.

The agreement does not mandate specific measures or targets, but instead instigates a legally binding five-yearly global stocktake combined with a review mechanism to assess each country's performance. To encourage compliance nations are able to set their own targets. The agreement acknowledges that developed and developing countries have different responsibilities with regard to reducing emissions. This 'differentiation of responsibilities' is evident in the industrialised nations' agreement to deliver a minimum of US$100 billion a year in public and private funding to help poorer nations cope with the impacts of climate change and cut their emissions.

While there is no doubt about the historic nature of this accord, the real challenge for nations will be to implement the required domestic changes to reduce emissions while at the same time making energy affordable for their citizens. The key question is whether the immense goodwill that ensured the accord was reached will be reflected in action around the world. Conversely, the actions of industry to shift their business model away from greenhouse gas emissions to more sustainable sources of energy may be a significant factor in influencing nation states to take action.

Research 11.4

Visit the UN Climate Change website. Outline the latest global climate change initiatives.

Review 11.7

1 Outline the key developments of the five 'mega conferences'.
2 Explain the purpose of a conference of the parties to a framework convention.
3 Discuss how sovereignty influences the effectiveness of the conferences.

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Intergovernmental organisations

Various international bodies not directly linked to the UN also play a role in global environmental protection. The European Union (EU) set up an Environment Agency (EEA), 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 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.

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.

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 UN and they are often consulted for their views when international law on the environment is being drafted.

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

Figure 11.17 The MV *John Paul DeJoria* in San Felipe bay in the Gulf of California, Mexico, on 7 March 2018, as part of the Sea Shepherd Conservation Society's 'Milagro IV' operation to save the critically endangered vaquita porpoise.

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Case Study

Action by non-government organisations

Figure 11.18a Plastic Pollution Coalition.

Figure 11.18b People for the Ethical Treatment of Animals.

Figure 11.18c Greenpeace.

Figure 11.18d World Wide Fund for Nature.

Figure 11.18 Campaigns run 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 as a means of disposing of such rigs.
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 often use attention-grabbing promotions to raise awareness of environmental issues involving animals.
4. The Plastic Pollution Coalition aims for a 'plastic free world'.

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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.

envirostunt
a publicity stunt to attract attention to a particular environmental issue

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, and must appeal to listeners and viewers for financial support. Also, governments must take care not to exert too much influence on publicly owned media, even by well-intentioned efforts to ensure 'balance'. A recognition of the potential for political 'spin' 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. Also, the debate surrounding the Adani coal mine in Queensland was a controversial factor in the 2019 federal election.

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.

Effects of Australia's federal structure in responding to global environmental protection

State powers and legislation

Under the *Australian Constitution*, the power to legislate on environmental issues can be considered to be a **residual power**. It is not one of the

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.)

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enumerated powers of the federal parliament, and therefore it belongs to the states. Like the rest of the world, Australia was unaware of the consequences of exploiting the environment until relatively recently. New South Wales passed the *Forestry Act 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.

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*

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 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 *Heritage Act 1977* (NSW), the Pesticides Act (repealed and superseded by the *Pesticides Act 1999* (NSW)) and the *National Parks and Wildlife Act 1974* (NSW).

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 'In Court' boxes illustrate how this was accomplished through interpretations of the *Constitution* by the High Court.

The main federal environmental law is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). It provides the legal framework for the protection and management of nationally and internationally important animals, plants,

In Court

***Murphyores v The Commonwealth* (1976) 136 CLR 1**

During the early 1970s, the Queensland Government granted a lease to a company called Murphyores to extract certain minerals from sand on Fraser Island. Today, such a proposal would 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 *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 11.19 By denying an export permit, the Commonwealth was able to protect Fraser Island in Queensland.

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In Court

***Tasmania v The Commonwealth* (1983) 158 CLR 1**

In the 1980s, the Tasmanian Government wanted to build a hydroelectric dam on the Franklin and Gordon River system. A group of environmentalists began a protest campaign against this proposal, and The Wilderness Society and the Australian Conservation Foundation became actively involved. Nationwide protests were organised under the 'no dams' slogan and a range of high-profile personalities took up the cause.

The Tasmanian Government argued that the building of the dam was a residual power and the protesters, while entitled to their view, were not going to change the government's decision. In the lead-up to the 1983 federal election, the leader of the Australian Labor Party promised to stop the dam if elected. Labor won the election, but the Tasmanian Government continued to build the dam.

The federal government recognised Tasmania's Wild Rivers area as a region of special significance and it was listed under the World Heritage Convention. Since international law is not binding until implemented by domestic legislation, the federal government passed the *World Heritage Properties Conservation Act 1983* (Cth) (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 *Constitution*, when a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law prevails. The construction of the dam was stopped.

The significance of this case 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.

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.

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

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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.

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 which allows the Commonwealth to accept an environmental assessment done by the state if it fulfils certain conditions. In other words, some assessment procedures under the *Environmental Planning and Assessment Act 1979* (NSW) can replace the need for assessment under the *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'. The report referred to 'conflicts of interests' as the managing authority represents the interests of the governments while, at the same time, being responsible for compliance.


Video
© Victorian Environmental Water Holder

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 they also provide for when and how breaches should be punished. In the area of the environment, laws have the aim of preventing, mitigating and/or remedying damage that human activities have caused to the environment. To achieve these aims, the law must also encourage cooperation and resolve conflicts between parties whose interests are affected. 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.

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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 spill) highlights the contrast between domestic and international enforcement mechanisms.

However, when states do implement their obligations, they can be characterised as 'thinking globally and acting locally'. To have domestic effect in Australia, an international treaty must be implemented in national law. And in Australia there can be heavy penalties for individuals and organisations that breach domestic environmental law (see the 'In Court' box, below).

When the world's states do work collaboratively, the results can be spectacular.

The Vienna Convention for the Protection of the Ozone Layer was negotiated in 1985 and came into force in 1988. The accompanying *Montreal Protocol 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 (chlorofluorocarbons – used in aerosols, refrigerants and packaging) 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 UN, once referred to it as 'perhaps the single most successful international agreement to date'.

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. 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 *Paris Agreement* (2016) are not such easy accomplishments. 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).

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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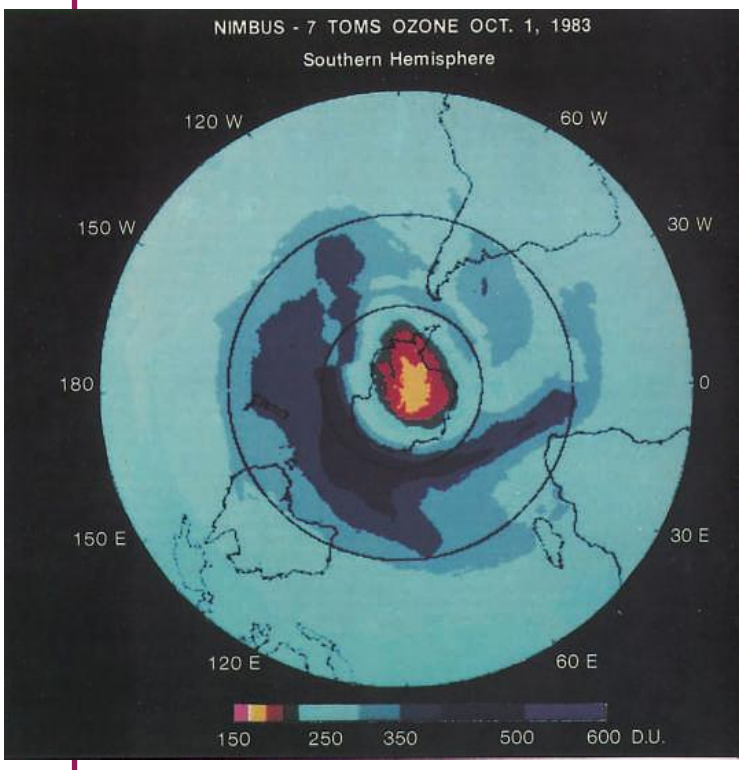
Case Study

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 – 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 the Earth's surface, and its continued depletion could have dire consequences, including accelerated global warming, harm to marine life and increased rates of skin cancers.

As explained above, the implementation of the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) has seen the reversal in the size of the hole in the ozone layer. 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.



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.

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).

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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 30000 species. Yet, it is common knowledge that the blackmarket 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.

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 illustrate the effectiveness of NGOs.

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 NGOs can influence the law.

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 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.

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Research 11.5

Visit the United Nations Climate Change website. As a class, investigate the latest developments in the *Paris Agreement* (2016).

A key HSC theme is to analyse the effectiveness of the law. Assess if the *Paris Agreement* is an affective initiative for global environmental protection. Justify your answer.

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. 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'. While Kyoto did set binding targets, this was not possible in Copenhagen in 2009 when the nations could not agree on targets and could only produce a non-binding agreement.

The need for a more comprehensive global response after Kyoto led to the Copenhagen Conference in December 2009 and the Durban Climate Change Conference in November 2011. It has generally been accepted that Copenhagen was a great disappointment, as only a weak political accord was reached and it involved no numerical targets. Durban did reach an agreement: that developed and developing countries will work together on an agreement that should be legally binding on all parties. *The Guardian* (UK) described it as a 'deal to agree to a deal'. However, as indicated, the *Paris Agreement* (2016) did achieve a (nearly) global consensus.

Undermining the success of such conferences are the usual key stumbling blocks, for HSC purposes, these are the issues which make international law less effective and make nations reluctant to comply:

1. **Equity**: States must agree on targets for emissions cuts. This would involve considerations including past emissions, prior attempts to limit emissions, their populations and how they can continue to develop. There may be considerable antagonism between states on 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.
2. **Funding**: Developing countries are demanding financial support if they are to cut emissions, as this will affect living standards domestically.
3. **Sovereignty**: Political leaders have different philosophies, and states change leaders, so there is no certainty that new leaders will comply with the 'deal'. Global financial concerns already have seen environmental issues regularly pushed aside.
4. **Legal enforcement**: The final outcome is 'an agreed outcome with legal force', but the 'toothless' nature of international law and the ability of nations to ignore even 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).

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Case Study

Fossil fuels and greenhouse gas emissions

Fossil fuels (e.g. 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% 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, the 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.

Figure 11.21 Fossil fuels have long been the major contributors to greenhouse gas emissions.

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.

Case Study

Uranium and nuclear energy

Australia has about 40% of the world's uranium. One tonne of uranium can generate the same amount of energy as 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*

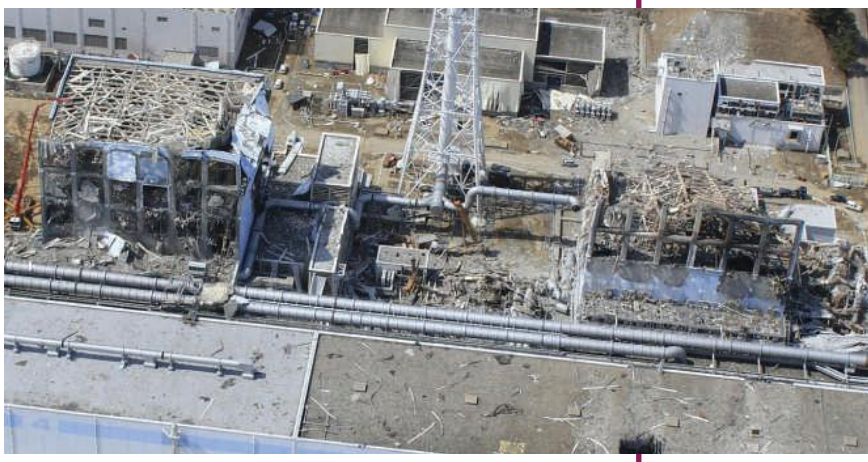

Figure 11.22 In March 2011 a tsunami hit the Fukushima nuclear plant, causing a nuclear disaster.

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Case Study (continued)

(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'.

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) *Constitution*) to implement international obligations. Furthermore, no international law has effect in Australia until it is enacted into domestic legislation. Responses to international initiatives must therefore comply not only with the *Constitution* but also with the limitations set by relevant legislation.

It is not only the creation of international laws (both hard and soft) that influences the direction of Australia's responses to international environmental initiatives; the outcomes of the various conferences and findings of intergovernmental organisations also play a critical role.

NGOs play a pivotal role by placing pressure on governments. Any environmental event or issue that has a direct impact on Australian citizens will inevitably lead to pressure from parts of the community on elected representatives. Governments respond to community demands because of the power of elections. 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. The 2019 federal election was a classic example of this.

Former Prime Minister, Kevin Rudd, once called climate change 'the greatest moral, economic and social challenge of our time', but during his term he did not introduce any key legislation. The Australian response to this issue over the last decade has largely reflected the political views of the government of the day and often conflicted with international 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 state to introduce a carbon tax and then repeal it. It has been replaced with the Direct Action Plan, which has the Emissions Reduction Fund as its centrepiece and involves providing financial incentives for polluters to reduce emissions.

The 2019 election saw the Morrison government re-commit to the Direct Action Plan. In Madrid at

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Fig 11.23 In the lead up to the 2019 federal election, there were widespread protests about the Adani mine in Queensland. However, the election results showed that the protests resonated very little in the areas where the proposed mine would create numerous jobs.

Research 11.6

Research a significant Australian environmental law case. Identify whether or not international initiatives played a part in this case. Provide a summary of the events that unfolded.

the UN Climate Change Conference in December 2019, the Energy and Emissions Reduction Minister, Angus Taylor, stated that Australia was on track 'to meet and beat' its *Paris Agreement* emissions reduction target. Some argued this claim was based on 'accounting tricks'. *The New York Times* noted that under the 2020 Climate Change Performance Index, Australia was ranked 57th out of 57 on climate change action.

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 in Section 11.3) 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.

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.

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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. The government's current stance on climate change is outlined on the Australian Parliament's website (search for 'Climate change – reducing Australia's emissions')
Kyoto Protocol	2007	
Paris Agreement	2016	

Legal Links

A range of environmental law cases are outlined on the Environmental Law Australia website.

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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Case Study

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 11.23 A King Cobra concealed in a chip container. In June 2018, Australian wildlife officers intercepted 150 lizards being smuggled to China and Hong Kong. The total value was $550 000. A common blue tongue lizard can sell for $2000.

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 UN is in the difficult position of having to respect state sovereignty – as mandated by its charter – while serving as the means of achieving international cooperation.

When states work collaboratively the results can be extremely positive, as evidenced by the results of the *Montreal Protocol on 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, many were reluctant to undertake the ratification process. 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) 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.

Figure 11.24 Pictures on social media can, and do, influence people. This image from June 2019 shows a dog sled on melted sea ice in Greenland – this would normally be thick ice. Meteorologist, Steffen Olsen, noted that it was unusual but the image was 'more symbolic than scientific to many'.

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Environmental processes and natural phenomena are different from political and other social events; they are arguably more difficult to deal with in the process of negotiation and compromise that constitutes policy-making. Environmental policy-makers must have at least some understanding of the science supporting the instruments they propose to enact, and must be able to resolve various tensions between the ethical and political implications of the precautionary principle.

The UN is large and labyrinthine, and there is some lack of coordination between the 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.

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 at encouraging compliance rather than punishing breaches.

The treaty-making process is time-consuming. Ratification by the parties requires persuasion at the domestic level, as governments attempt to create support for the treaty and consensus among their citizens.

Other challenges for international environmental protection stem from the fact that the world is much more complex than it was when the UN was formed. Development, consumers' expectations and population growth all contribute to increased competition for natural resources. In addition, corporations exert a much greater influence on domestic economic and social policies today, and governments must find ways of making sustainability attractive to entities whose chief objective is profit or political survival.

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.
- **Aim**: The public outcry over the disposal of toxic wastes in developing countries led to the formulation of the Basel Convention (research the Khian Sea 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 back 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 UN 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 and it is estimated by National Geographic

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Case Study (continued)

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 in the Convention amendment – invites. It is a reflection of the need to acknowledge each nation's sovereignty. This wording is deliberate, 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 takes 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.

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, this 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 who stated:

> We need urgent action at government, business and consumer levels, and a global treaty with global targets to address plastic pollution.

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'.

This humble development was the forerunner of the plastics industry. Plastics were cheap and industry

Figure 11.25 This seahorse clutches a cotton bud to help it ride the currents in Indonesia.

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Case Study (continued)

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 NGOs and the change in public opinion (reflecting inter- 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 EU 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% 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 peoples' ethical values and behaviour. Consumers are demanding that companies use biodegradable plastic, many people will not use single-use plastic bags or drinking straws and 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 Bounties Network used a form of cryptocurrency to pay locals money for removing trash from Manila Bay in The Philippines in January 2019. The successful program not only cleaned the bay and paid locals directly, but also served as an education program about the benefits of recycling.

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 UN 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.
- Intergovernmental and non-government organisations (IGOs and NGOs) play a pivotal role in publicising, educating and promoting global environmental issues.
- Australia's federal structure and power over environmental issues are determined by the Constitution. The environment is a residual power and thus the states have the bulk of environmental law-making power, but the precedent set in the Tasmanian Dam case has given the federal government the authority to introduce environmental laws of international importance.
- State sovereignty is a key factor in the success of international initiatives. States will act in their own best interest and this can both assist and impede international law.

Chapter 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.

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 UN.
- Nation states may sign and ratify international agreements, but in Australia they are of no effect until enacted into domestic law.
- Consequently, international law aimed at environmental protection relies heavily on the willingness of nation states to act in accordance with global needs, or their perception that it is in their own best interests to do so.

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Review 11.14

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 climate change, exploitation of fishing or whaling stocks, loss of biodiversity, transboundary pollution and depletion of non-renewable resources) and:
   a Describe the issue and why it is a concern.
   b Outline any international law/s aimed at resolving this issue.
   c Assess the effectiveness of these international responses.
   d Explain the significance of any 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 NGOs that have taken action over this issue.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended-response questions can be found in the digital version of this textbook. Refer to these criteria when planning and writing your response.

Issues of compliance and non-compliance

- The means of enforcing compliance with international agreements are limited. Without the enforcement mechanisms that exist at a domestic level (see *EPA v Gardner*), compliance at an international level often involves intense negotiations and compromise (as occurred in the 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.
- 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. (Note that numerous 'enforcement mechanisms' of hard law are designed to encourage compliance.)
- 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 industrial development to protect the environment.

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The effect of changing values on environmental protection

- People's attitudes towards environmental protection have changed radically over the past 50 years, but these changes have not been uniform across the planet. Cultural characteristics as well as material and economic circumstances are different. The 'mega conferences' have played a role in highlighting global concerns and these have had an impact on people's values and ethical viewpoints.
- Information about the environment has influenced these changes in values and attitudes. Environmental catastrophes, species extinction, dwindling resource supplies and pollution have a strong effect on people's wellbeing. Communication technology and the media allow people to view events in distant locations, and can strongly influence the way they view such issues.
- Social attitudes give rise to pressure placed on governments and businesses by voters and consumers to implement change – for example, the use of plastics, the Brent Spar and the Tasmanian Dam protests. NGOs 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 Australian bushfires triggered enormous international debate about climate change and transformed many people's views – how this impacts domestic and international responses will be an interesting phenomenon.

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 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 NGOs are generally more effective when they gain widespread community support so that genuine pressure can be placed on decision-makers (governments and corporations) to introduce measures aimed at protecting the environment.
- 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) 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 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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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Matrimonial Causes Act 1959 (Cth) (repealed)
Marriage Act 1961 (Cth)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Property (Relationships) Act 1984 (NSW)
Commonwealth Powers (Family Law – Children) Act 1986 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
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 (Protection and Parental Responsibility) Act 1997 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Marriage Amendment Act 2004 (Cth)
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)
Succession Act 2006 (NSW)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)
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)
Coroners Act 2009 (NSW)
Adoption Amendment (Same Sex Couples) Act 2010 (NSW)
Surrogacy Act 2010 (NSW)
Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)
Bail Act 2013 (NSW)
Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)
Child Protection Legislation Amendment Act 2014 (NSW) (repealed)
Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 (NSW)
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)

SIGNIFICANT CASES

Hyde v Hyde & Woodmansee (1866) LR 1 P&D 130
Di Mento v Visalli (1973) 1 ALR 352
In the Marriage of Sanders (1976) 10 ALR 604
F v Langshaw (1983) 8 Fam LR 832
B v J (1996) 21 FamLR 212
R v Majdalawi [1996] NSWSC
Re Evelyn (1998) 145 FLR 90
Aldridge & Keaton (2009) Fam CACFC 229
Mr & Mrs Efrosin [2013]
Ackerman v Ackerman (2014) SKCA 137 (CanLII)
R v Gittany (No 5) [2014] NSWSC 49
Hoffman v Hoffman [2014] FamCAFC 92
Adair v Adair [2018] FamCA 239
Parsons v Masson [2018] FamCAFC 115 (28 June 2018)

Policy documents

Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986)
NSW Domestic Violence Death Review Team Report 2015–2017
Australian Government's *National Plan to Reduce Violence against Women and their Children 2010–2022*

Legal oddity

A couple that had been married for 20 years decided to divorce in 2013. After being apart for six months, the wife won $6 million dollars in Lotto. The wife thought she could keep all the money for herself. However, a judge ordered she pay 15% ($500 000) to her ex-husband, even though he had not purchased, or been involved in, the winning ticket.

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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 30% 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.

Whilst 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 Aboriginal and Torres Strait Islander families, **de facto relationships**, **blended families**, **extended families** and most recently, 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.

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

blended family
a family that is created when a parent remarries; it includes a stepmother or stepfather and stepchildren

extended family
a family that includes individuals related through marriage or parentage and not limited to one couple and their children; in some cultures, close family friends are regarded as members of the extended family

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.

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*

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, in front of 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,

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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).

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 are not recognised in Australia and are void if entered into within Australia.

polygamous
having more than one wife or husband at the same time

Requirements for a valid marriage

Certain requirements must be met if a marriage is to be legally valid. These requirements, found in the *Marriage Act 1961* (Cth), are discussed next.

Marriageable age

A person may marry at the age of 18 years (s 11). If either of the parties wanting to marry is between the ages of 16 and 18, they must apply to a judge or magistrate for an order authorising the marriage (s 12). Such an order will only be granted in circumstances that are sufficiently 'exceptional and unusual' (for example, if the couple's parents consent and/or if the couple are shown to be mature and financially independent). Pregnancy alone will not guarantee an order. 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 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.

descendant
a person who by genetics or adoption follows the family line of another, such as a child, grandchild or great-grandchild

ancestor
a person from whom someone is descended, on either parent's side, such as a parent, grandparent or great-grandparent

Notice of marriage

A couple intending to be married must complete a Notice of Intended Marriage form and give it to the authorised marriage **celebrant** who will conduct the ceremony, no earlier than 18 months before the marriage and no later than one month and one day before it. The notice must be in writing and be signed by both parties in the presence of a witness.

celebrant
a person who is authorised to perform a civil or religious marriage ceremony

Figures 12.1 and 12.2 According to the *Marriage Amendment Act 2004* (Cth), marriage is 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) changed this union to 'two people'.

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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, 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 become void if the marriage fails to meet the criteria for a valid marriage – if, for instance:

- one or both parties were too young
- the parties are too closely related, by blood or marriage
- the marriage did not meet the requirements set out in the *Marriage Act 1961* (Cth).

In Court

***Di Mento v Visalli* (1973) 1 ALR 352**

14-year-old Mattia Di Mento was living in Sicily with her parents when she was kidnapped by Visalli, a 20-year-old man. Visalli repeatedly asked her to marry him, but she refused. Di Mento was eventually released, however, her father told her that he would shoot her if she did not marry Visalli.

The father argued that if she did not marry him the family's reputation would be ruined. Di Mento agreed and married Visalli. Two years later, she gave birth to a child, and when the child was a month old Visalli left her, never to return.

Di Mento immigrated to Australia and sought to have the marriage annulled on the grounds that she did not voluntarily give her consent. The court held that the marriage was void because it was obtained by duress, and noted that the Act does not require that the duress exerted be that of the spouse; in this case, it was exerted by Di Mento's father.

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. 26) and the 'learn to' activities (pp. 26–7) 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.

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.

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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 the marriage, in the eyes of the law, is deemed to have never taken place because it was illegal.

nullify
to declare legally void or invalid

annulment
a declaration by a court that a supposed marriage is void

However, any children born during the marriage are considered to be the legitimate children of the marriage.

Alternative family relationships

Aboriginal and Torres Strait Islander peoples' customary law marriages

Relationships within Aboriginal and Torres Strait Islander communities are bound by traditions and enforced through customary law. Children may be betrothed at an early age and parents or elders generally arrange marriages. Typically, such customary law marriages do not conform to the requirements of a valid marriage under the *Marriage Act 1961* (Cth). These marriages are generally not legally recorded, or registered with the relevant authorities. The law, therefore, does not formally recognise Aboriginal and Torres Strait Islander customary law marriages as having any legal standing.

Figure 12.3 A court determines what is in the 'best interests' of a child. This can include a child's need to maintain a connection with their Aboriginal or Torres Strait Islander culture and traditions.

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 Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander 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 and if an Aboriginal or Torres Strait Islander 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. The orders are made on the basis of what the court determines is in the 'best interests' of the child, and of the child's need to maintain a connection with Aboriginal or Torres Strait Islander culture and traditions.

In the *Marriage of Sanders* (1976) 10 ALR 604, the Family Court ruled that a child from a marriage between a non-Aboriginal 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 Bureau of Statistics, in 2019, approximately 75% of couples married had lived

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together prior to marriage. De facto relationships also included same-sex couples.

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 are now also 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).

ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born to parents who are not married

Single-parent and blended families

Changing values in the community have contributed to the growth of single-parent and blended families. Nearly half of those who get divorced, remarry. According to the Australian Bureau of Statistics, in June 2019 there were just over 7.2 million families in Australia; of these, 15% were single-parent families. The majority of these families were single-mother families, namely 83% of one-parent families.

When two single-parent families unite, the result is considered a blended family. The family includes the parents and any stepchildren. One out of every four registered marriages in Australia in 2016 involved individuals who were marrying for the second time.

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 & Conchita* (2009), 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 of countries

Legal Links

For more information about changes to family structures, visit the website of the Australian Institute of Family Studies.

Review 12.2

1. Outline a range of alternative family relationships.
2. Discuss the status of traditional Aboriginal and Torres Strait Islander and polygamous marriages within current social and community values.
3. Compare and contrast single-parent and blended families.
4. Define 'de facto relationship' and outline the extent to which the law recognises de facto relationships.

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that have legalised same-sex marriage, for example Canada, France, New Zealand, Norway, United Kingdom and Germany. According to the Australian Bureau of Statistics (ABS), there are currently 47000 same-sex couples living in Australia.

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 (UN) 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 this convention in 1990 and is bound, in international law, to its terms.

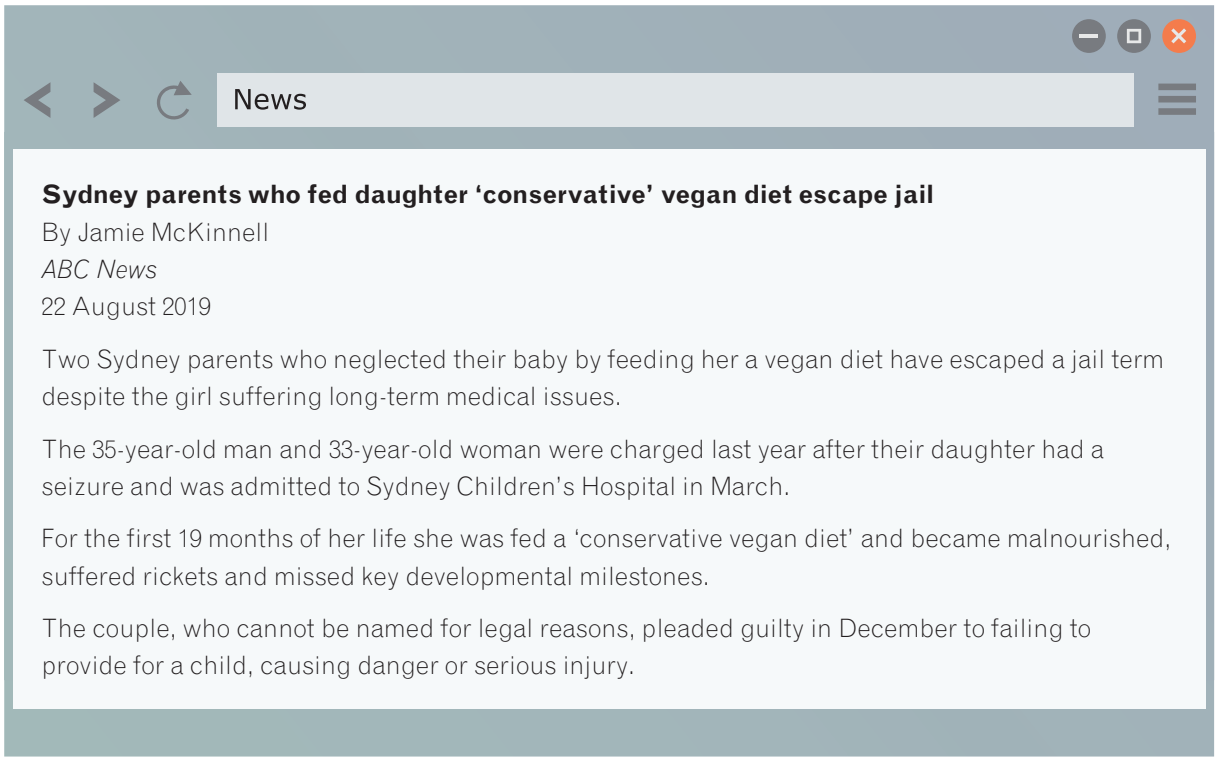
Therefore, both state and federal legislation requires parents to undertake a range of obligations and responsibilities in regards to their children whether they are together in a relationship, or separated. NSW laws govern the behaviour of parents regardless of their relationship. Federal law governs 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, shelter and
- 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 $22000, and the *Crimes Act 1900* (NSW) (s 43A), which provides for a jail term of up to five years.

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



Sydney parents who fed daughter 'conservative' vegan diet escape jail

By Jamie McKinnell

ABC News

22 August 2019

Two Sydney parents who neglected their baby by feeding her a vegan diet have escaped a jail term despite the girl suffering long-term medical issues.

The 35-year-old man and 33-year-old woman were charged last year after their daughter had a seizure and was admitted to Sydney Children's Hospital in March.

For the first 19 months of her life she was fed a 'conservative vegan diet' and became malnourished, suffered rickets and missed key developmental milestones.

The couple, who cannot be named for legal reasons, pleaded guilty in December to failing to provide for a child, causing danger or serious injury.

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programs provide 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).

Figure 12.4 Failure to enrol a child in a school or to give a child access to an education is a criminal offence.

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 UN 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.

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,

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News

Jail for man who beat young stepson until skin turned blue

By Adam Cooper

The Age

10 October 2018

A violent bully who repeatedly bashed his young stepson – at one point beating him until his skin turned blue – has been jailed amid emotional scenes in court.

The boy was eight when his mother's partner began to regularly punch or strike him. He used a walking stick, baseball bat and hammer to inflict beatings over seven months in their Traralgon home, the County Court heard on Wednesday.

The stepfather was serving a community corrections order for bashing a 12-year-old girl in 2014, over some of the time he was assaulting the boy. The girl is the daughter of the man's previous partner.

The 36-year-old man cannot be named because it might identify his victims.

In 2015 and 2016, the man beat the eight-year-old boy in assaults that included punching him to the face and hitting him on the knees and legs with a baseball bat and the handle of a hammer.

He dragged him by the neck, leaving the boy with carpet burns, struck him with a walking stick, wrapped a T-shirt around his neck making it difficult for him to breathe and, one day, slapped him so hard his buttocks turned blue.

The stepfather also threatened the boy he would 'break his head like his toy'.

The man showed no expression as he was jailed for three years and nine months after being found guilty of a string of charges. He must serve two years and three months before he is eligible for parole.

But the man's partner – the woman believed to be the boy's mother – gasped and shook uncontrollably as Judge Murphy imposed his sentence, and screamed out as he was led away.

'No, no, no, no! Two years! Two years! I can't live without him for two years. We were supposed to get married,' she wailed as she hugged another woman.

Judge Damian Murphy said the bashings left the boy with yellow bruises across his body, and meant he had to stop attending school and playing football. He endured nightmares, was scared of the dark and of riding his bike, and recalled black eyes, bleeding from the ear and the distress of speaking to police, the court heard.

Now 11, he and his siblings are in their grandparents' care.

Judge Murphy said the grandparents found caring for the boy challenging because he was so angry that he punched holes in walls and needed tutoring to catch up on school.

In a victim impact statement, the grandfather recalled the boy looked like he was tortured.

'I felt so angry a small child had to endure such suffering,' he said.

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(Continued)

The grandmother had trouble sleeping, the court heard, because she was so distressed at the thought of the beatings and lack of care her grandson received in his mother's home.

'He was so skinny and bony, in my eyes he looked malnourished,' she said.

The offender was abused as a child by his own stepfather and began using alcohol and cannabis at 13, the court heard.

He became a father at 16, and found some work as a painter and decorator. But he had a long criminal history, and a psychologist considered him a risk to other children unless he underwent rehabilitative counselling for his anger problems.

Judge Murphy said the man had to be jailed given his serious and protracted offending against a vulnerable boy, and to deter others from similar crimes.

'The community must protect its young people. The sentence of the court must denounce your conduct for your abuse of trust and your violence against a defenceless child,' the judge told him.

The man was found guilty by a jury of eight counts of intentionally causing injury, three of recklessly causing injury, one of threatening to inflict serious injury and three of common assault.

He was acquitted of one charge.

Figure 12.5 If parents refuse to give their child medical or dental treatment, a court can authorise the treatment.

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 and *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 JCPR program.

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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 children is the chief factor that courts must take into consideration when parents separate and wish to make parenting orders. 'Best interests', as listed in section 60B of the *Family Law Act 1975* (Cth), include:

- the opportunity to maintain a meaningful relationship with both parents
- protection from harm, including neglect and abuse
- proper parental care.

Section 60B(2) of the *Family Law Act 1975* (Cth) also sets out the principles underlying these objects:

a children have the right to know and be cared for by both their parents

b children have the right to spend time … and communicate on a regular basis with, both their parents, and other people significant to their care, welfare and development

c parents jointly share duties and responsibilities concerning the care, welfare and development of their children

d parents should agree about the future parenting of the children

e children have the right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The emphasis on responsibilities being shared equally by both parents was introduced in large part by the *Family Law Reform Act 1995* (Cth), which made significant amendments to the *Family Law Act 1975* (Cth) with respect to children. Further amendments made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) emphasised the child's right to meaningful family relationships and care, rather than either parent's 'right' to have the child live with them.

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.
5. Research and explain the term 'presumption of parentage'.

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 2017–2018, only 330 adoptions were finalised, compared to over 10000 in the 1970s. This is a reflection of changing social and community values where, traditionally, unplanned teenage pregnancies were kept secret

adoption
the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

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and frowned upon (see ex-nuptial children). 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

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 parent
a parent who nominates their child for adoption

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)
- must be a person of good repute, be a fit and proper parent, and be able to fulfil the responsibilities of a good and caring parent.

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 18000 children being 'foster cared'.

Figure 12.6 One criteria for prospective adoptive parents is that applicants must be over 21 years of age and under 51 years of age.

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News

MPs get conscience vote on gay adoption

By Mark Tobin

ABC News

25 June 2010

New South Wales MPs will be allowed a conscience vote on the issue of same-sex adoption.

A private member's Bill which would allow same-sex couples to adopt children was introduced into state parliament by Independent MP, Clover Moore, yesterday.

The Bill will be debated when parliament returns from its winter break in late August.

Premier Kristina Keneally has given her personal in-principle support to the bill, saying her primary concern is what is in the best interests of children.

She says Labor MPs will get a conscience vote because she recognises there are very deeply held and divergent views on the issue.

Opposition Leader, Barry O'Farrell, is also allowing a conscience vote for the same reason.

The New South Wales Gay and Lesbian Rights Lobby says there is no logical reason to deny same-sex couples the right to adopt children.

The lobby's Policy and Development coordinator, Senthorun Raj, says legally recognising same-sex parents is in the best interests of their children.

'The sexuality of a prospective parent or couple should not be a relevant or determining factor when it comes to considering parenting ability,' he said.

'In fact, most psychological and social science research points to family processes, rather than structure, that matters when it comes to raising children.'

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

Review 12.5

1. Define 'adoption'. How have changing community values 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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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, the number of children globally being adopted has declined from 45000 in 2004 to just 12000 in 2015.

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 the ABS, in 2017, about 30% marriages were likely to end in divorce, with 97000 Australians divorcing annually. A total of nearly 1.5 million Australians aged 25–64 years are currently separated or divorced, representing one in every eight adults in this age group.

divorce
the legal termination of a marriage by an official court decision

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.

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.

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. 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, but has been declining ever since and was 2.0 in 2017. In approximately 95% of separation cases, families are able to avoid resolutions by the Family Court. Unfortunately, in some cases, disputes can end bitterly and become extremely expensive.

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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
a Family Court order that is made to signal the intended termination of a marriage

decree absolute
a final decree of the dissolution of marriage

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 the presumption is that it is in the best interests of the children for both parents to share this responsibility. Therefore, irrespective of where the children reside, both parents are still responsible. Parental responsibility will only cease with a court order, the adoption of the children, the children's 18th birthday or the children's marriage. Parents are encouraged to make and voluntarily agree to their own arrangements in relation to the care and responsibility of their children, rather than asking the court to do so.

Figure 12.7 Irrespective of where the children live, both parents are still responsible for the children.

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.

In those instances, where there is reasonable grounds to believe that the child has been subject to abuse or family violence, the presumption of 'equal shared parental responsibility' does not apply. The priority for the Family Court is the protection of the child rather than the maintenance of a meaningful relationship with an abusive parent. To this end, the Family Court may take into account any aspects which may adversely affect the future welfare of the child, including the parent's criminal actions, drunkenness, illicit drug use or mental stability.

The presumption that equal shared parental responsibility is in the best interests of the child will not apply 'if there are reasonable grounds to believe that a parent of the child … has engaged in abuse of the child … or in family violence' (s 61DA(2)(a), (b)). The Magellan Program was developed by the Family Court to protect children who have been allegedly exposed to abuse by dealing with such cases within

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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), which introduced shared parental responsibility and other provisions of Part VII, have been criticised for not dealing adequately with family violence, exposing children who had previously been victims of parental abuse to the possibility of further abuse. This will be discussed in further detail within 'dealing with domestic violence'.

Another criticism centres on the idea that the child's views are not given enough weight. There have also been complaints that the Act does not make clear the distinction between shared parental responsibility and shared care – some parents mistakenly believed that shared parental responsibility entailed 50–50 'custody' of the children or a 'one week on, one week off' arrangement.

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 who could not reach an agreement, applied to the combined Federal Circuit and 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.

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) achieved 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 Family Court for consent orders or enter into a financial agreement.

If the division of property is fair and equitable, the court will then make the consent orders legally binding. A couple in dispute regarding property allocation can choose to have the matter heard in the Family Court. When determining property allocation under 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 home-maker and carer for children)
- the age of both parties and the income, property and financial resources of both parties
- the financial commitments of the parties in supporting themselves and a child of another person that the party has a duty to maintain
- whether or not each or either party has the care and control of a child of the marriage who is under 18 years of age
- the ability of each party to maintain a reasonable standard of living
- other contributions, such as any inheritance, and the acquisition, conservation and improvement of any assets (including maintenance of the family home or working for the family business).

The court can, and usually will, order the disputing couple to attend a conference in an attempt to have them determine a fair and equitable allocation of property and an agreeable settlement. If this mediation process is unsuccessful, the Family Court can make an order about the allocation of matrimonial property, which is all property purchased or acquired during the marriage. Superannuation is regarded as an asset and the court takes into account the financial and non-financial contributions made by both parties to superannuation entitlements. Since 2002, separating couples have been able to claim superannuation that each spouse had accumulated during the marriage as part of the matrimonial property.

There is no set formula for the distribution of property. The court aims to be as fair as possible and to achieve an equitable outcome for both parties, taking into account their differing needs and contributions. For example, in the case of *Hoffman v Hoffman* [2014] FamCAFC 92, the judge rejected Mr Hoffman's claim of 70% 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. Such agreements tend to reduce the combative nature of divorce and separation by removing two of the main sources of hostility between parties: money and property. Any agreements regarding children are deemed illegal.

Review 12.7

1. Describe the factors that are taken into account when deciding the allocation of property after a marriage or de facto relationship has broken down.
2. Outline the major changes that have been made in family law regarding property allocation.
3. Identify and explain the various orders that the Family Court can make 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

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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% will experience repeated attacks. Additionally, 61% will have children in their care. According to the New South Wales Bureau of Crime Statics and Research (BOCSAR), in June 2019, there were over 30 000 domestic-related assaults in New South Wales and domestic assaults accounted for over half (54.4%) of reported assaults. The ABS reports that 38% of all homicide victims were in domestic-related incidents and that family violence costs the community of New South Wales $4.5 billion each year and the Australian community about $21 billion.

Figure 12.8 The People Opposing Women Abuse (POWA) organisation and Joko's #EndDomesticSilence initiative aim at fighting abuse against women. The initiative seeks to provide safe spaces for abused women to speak out and end their silence.

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
- 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**.

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

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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.

breach
to fail to obey

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.


Video

Federal responses

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 Australian community has responded with a range of major reviews over recent years, two of which are:

- *Family Courts Violence Review: A Report,* by 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,* BOCSAR (2019).

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 is the federal government's 'National Plan to Reduce Violence against Women and their Children 2010–2022', aiming 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. The program consists of four action plans, each lasting three years.

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.

However, in 2015, Rosie Batty's 10-year-old son, Luke, was beaten to death by his father at cricket training. 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. 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.

In Court

***R v Gittany (No 5)* [2014] NSWSC 49**

In *R v Gittany (No 5)* [2014] NSWSC 49, Simon Gittany was sentenced to 28 years imprisonment for the murder of his fiancée, Lisa Harnum. Gittany had been secretly using spyware and CCTV to monitor his partner's whereabouts. He had grown increasingly angry and violent over her plans to leave him. In July 2011, Gittany threw his fiancée over his fifteenth-floor balcony but claimed that she had jumped. The case highlights the complex definitions of what constitutes domestic violence and how physical violence often follows a pattern of social and economic abuse.

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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. 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 2016 BOCSAR report, Dr Don Weatherburn stated that, in four out of the five cases, ADVOs have 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% of cases, former partners share responsibility when they agree to consent orders.

On 9 August 2019, the Council of Australian Governments endorsed the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022, agreeing on

Figure 12.9 On 18 September 2019 in Le Havre, France, around 800 people gathered to ask for justice for Johanna. Johanna was a 27-year-old woman who was killed by her ex-husband in front of her children in a street, on 16 September 2019.

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five national priorities to reduce family, domestic and sexual violence. As the final action plan of the National Plan series, the Fourth Action Plan sets 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% of people claimed they understood what constituted violent behaviour and expressed their intention to change their behaviour.

The innovative Domestic Violence Response Training program (DV-Alert) was expanded to offer free training to health workers. The First Action 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 indigenous 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 indigenous 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 indigenous 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) was launched in October 2016 and focused on prevention and early intervention by changing societal attitudes towards violence and stopping violent behaviour through early action. Its key focus is on indigenous women and children who experience violence in their homes, and to develop information to support women start a new life after escaping violence.

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 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, 80–90% 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 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.

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News

Sydney dentist Preethi Reddy's body found in suitcase, ex-boyfriend dies in fiery car crash

By Cameron Gooley and Selby Stewart
ABC News
7 March 2019

Detectives investigating the disappearance of Sydney dentist Preethi Reddy spoke to her ex-boyfriend, Harsh Narde, before he died in a fiery car crash on the New England Highway.

Dr Reddy, 32, was found dead in a suitcase in Sydney's east on Tuesday night after she went missing on Sunday morning.

Dr Reddy worked at Glenbrook Dental Surgery in the Blue Mountains, about 70 kilometres west of Sydney.

Dr Narde, also a dentist, was killed at Willow Tree – about 340 kilometres from where Dr Reddy was found – on Monday night in a head-on crash believed to have been a deliberate act.

Police confirmed they spoke to Dr Narde before his death.

The ABC understands he was the key suspect in Dr Reddy's murder.

'I can't imagine the absolute pain Preethi's family and friends are feeling this morning at the devastating news that has come to light,' one woman posted on Facebook.

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.

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 Family Court and the Federal Circuit Court of Australia (the Family Law Courts) can refer disputing parties to an extensive range of counselling services for both adults and children, and can also order separating couples to attend dispute resolution. Although individuals have to pay for these services, some associated costs may be subsidised by the government, depending on the financial circumstances of the individual parties.

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Figure 12.10 Section 601 of the *Family Law Act 1975* (Cth) requires couples who have a dispute involving children – that may be dealt with by a court order under Part VII of the Act – to make a genuine effort to resolve their dispute, using family dispute resolution, before applying for a court order.

Types of dispute resolution services include:

- **reconciliation counselling** – for separating couples who are attempting to reconcile
- **post-separation parenting programs** – for couples whose issues adversely affect their carrying out of parenting responsibilities; the program usually takes the form of family counselling, group lectures and discussions, and teaching techniques to resolve disputes
- **mediation** – for separating couples who have made an application to the Family Court, mediation involves a neutral, impartial third party (a mediator) helping them identify issues, formulate options, consider alternatives and reach agreement; this service may be used before a court hearing.

Couples are more likely to comply with an agreement that they have had some say in. Individuals also learn additional skills, such as better communication, which may help reduce future conflicts. In addition, dispute resolution is less costly than court proceedings, in terms of both time and money, and less stressful for all parties involved.

Individual counselling is available to any child whose parents are separating. The counsellor (mediator) will meet and discuss with the child their needs, issues, fears and concerns. The counsellor will then present a family report, which will include a summary of the information that the child has given to the counsellor, to the presiding judge. The purpose of this process is to ensure that the needs and welfare of the child are identified and met by any parenting order issued by the Family Court.

Once an agreement has been reached, separating parents enter into a parenting plan or file consent orders with the court. All matters relating to the children of the relationship must be finalised before the divorce is granted. If parties fail to reach an agreement, or if there are issues relating to abuse or family violence, the matter will be heard by a court.

Adjudication

Adjudication is the determination of a matter by a court judgment or ruling. The Federal Circuit Court of Australia and the Family Court 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).

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.

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For this reason, the Family Court focuses more on reconciliation and on encouraging compliance than on arbitration and the use of sanctions or coercion.

Family Court of Australia and Federal Circuit Court of Australia

Before the establishment of the Family Court in 1975, the state courts would hear matters relating to divorce. The Family Court is a specialised court – that is, outside the judicial hierarchy – and it hears matters relating to separation, divorce and other disputes related to marriage. Its jurisdiction is limited to those areas controlled by the *Family Law Act 1975* (Cth), which include property and financial matters, maintenance, and parenting arrangements.

In late 1999, the Federal Magistrates Court, now 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 has a similar jurisdiction to the Family Court in that it can hear matters relating to divorce, the division of property, maintenance and children, and it can hear these for both married and de facto couples. It cannot hear any matters related to adoption, applications concerning nullity (that the marriage did not exist in the first place) or the validity of a marriage.

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 are causing great challenges and the 2019 merger of the Family and Federal Circuit Courts may assist with clearing some of the backlog.

The majority of divorce applications (about 80%) are 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) are heard in the Family Court of Australia. All other issues (such as adoption, child support, inheritance and wills) are 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). In New South Wales, any matter relating to the care and maintenance of a child will now be heard in the Family Court, and the same federal provisions cover all children.

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

Figure 12.11 If the Children's Court finds that a child needs care, the court can make a variety of short-term or long-term orders.

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parental responsibilities. Alternatively, the court may decide to place the child with a relative, foster family or other appropriate adult. If this decision is reached, the child's parents no longer have control over their child. Contact visits may be permitted to allow the parent(s) and child to maintain a personal relationship, but such visits are closely supervised and regulated.

The role of non-government organisations

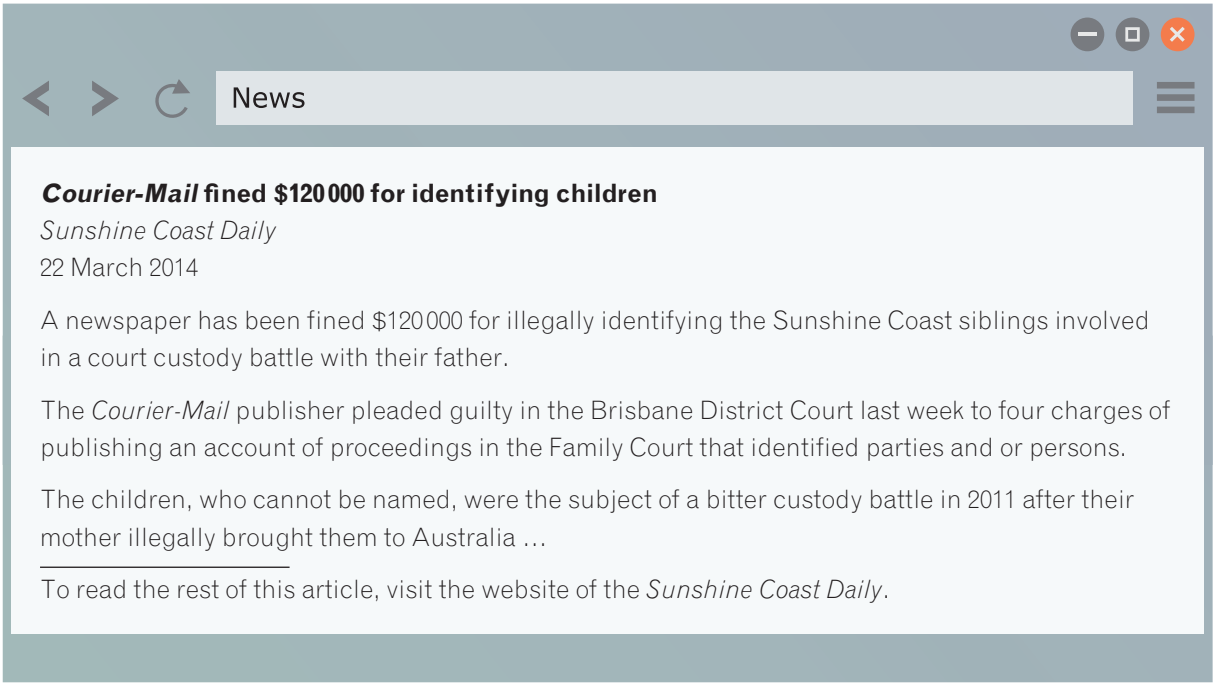
There are a number of non-government organisations (NGOs) that provide support for families and individuals who may be struggling with personal relationships and other family issues. Some of the better-known organisations are operated by religious groups such as the Salvation Army, or by churches such as the Anglican Church (Anglicare).

NGOs 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 both in the public and commercial interests. 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 courts need to protect the privacy of individuals affected by the breakdown of a relationship, so they restrict how the media publish



***Courier-Mail* fined $120 000 for identifying children**

Sunshine Coast Daily

22 March 2014

A newspaper has been fined $120 000 for illegally identifying the Sunshine Coast siblings involved in a court custody battle with their father.

The *Courier-Mail* publisher pleaded guilty in the Brisbane District Court last week to four charges of publishing an account of proceedings in the Family Court that identified parties and or persons.

The children, who cannot be named, were the subject of a bitter custody battle in 2011 after their mother illegally brought them to Australia …

To read the rest of this article, visit the website of the *Sunshine Coast Daily*.

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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. Outline and contrast the tasks of the Family Court and the family law jurisdiction of the Federal Circuit Court of Australia.
4. Justify why a separate Children's Court is necessary.

court proceedings, thus the protection of personal information about separating families. Media outlets can face fines for the publication and identification of family members and the Family Court uses pseudonyms for all family members.

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 and, 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

At the time, this was consistent with all 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; for example, the United States, England, France, Brazil, Ireland, Canada, New Zealand and Germany.

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.

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.

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The vote was not binding, but the desire of the voters was recognised and the government responded by passing new legislation: 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. 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 parental rights and responsibilities towards a child conceived during the relationship, that is, biological parents are regarded as having joint responsibility for the child. However, a partner of the same sex had no legal standing and could not make decisions about the day-to-day care of the child unless the Family Court had so ordered. Children conceived through donor insemination or assisted reproduction had only the mother listed on their birth certificates. The *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) (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 gives children born into same-sex relationships equal rights to inheritance from both parents and protects the rights of both mothers in matters involving the children if the relationship ends.

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% of respondents supported same-sex marriage. In a similar poll conducted by the Crosby Textor Group in 2014, 72% of respondents supported same-sex marriage.

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 LGBTIQ community on their rights and providing referrals to legal and welfare services.

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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.

At the NRL Grand Final in October 2017, there was some controversy about the song 'Same Love' sung by rapper Macklemore as it is about same-sex relationships. Former PM Tony Abbott suggested the song should be banned.

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.

The 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. The ADNSW's third function is to advise the government and make recommendations. 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.

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

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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.

There is a perception that the ideal of shared parental responsibility is frequently not reflected in reality. There are always instances where the child will spend a disproportionate amount of their time with one parent. This could be because of financial or geographic constraints, or issues such as a parent's alcohol abuse or poor health. In more than 60% of parenting plans and orders, children spend more than half of their time with their mother. The main reason for a child spending no time or less than 30% of their time with a male parent was concern about abuse or family violence and entrenched conflict. In the case of the female parent, it was 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' and 'additional' considerations. Primary considerations include the benefit of the child having a positive and meaningful relationship with both parents, and the need to protect the child from abuse and family violence. Additional considerations include the child's wishes, the nature of the relationship between the child and the parent, the financial ability of the parent to care for the child and the ability of the parent to provide for the intellectual and emotional needs of the child. Where there is the risk of violence, the court may consider that further contact may not be in the best interests of the child.

Another change involved the notion of the child spending 'substantial and significant time' with each parent, where equal time is not considered to be in the best interests of the child (*Family Law Act 1975* (Cth) s 65DAA). Some have argued that this provision has not been sufficient to address parents' misperception that both are 'entitled to' time with the child, and that they should both have 'substantial and significant time' even when there are other factors suggesting otherwise.

When the desire for more time with children is coupled with reduced child support payments, the relevant parent's motivations for seeking shared care become less clear, and courts may have a harder time reconciling the aim of facilitating the child's relationship with both parents with the actual facts of the particular family situation.

A parent who has been pressured into allowing the other parent more time with the child may be discouraged from raising concerns about family violence, and may think that the court will order shared care anyway.

The federal government's plan, 'Time for Action: The National Council's Plan to Reduce Violence against Women and Their Children 2009–2021', identified a range of issues that undermined the effectiveness of the present domestic violence and child protection legislative framework. In response, the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) was passed. Under that Act, courts must now take into consideration evidence of and any findings made in relevant domestic violence order proceedings in determining parenting matters. If there are reasonable grounds to believe that one or both parents have neglected or abused their child, this overrules the presumption of equally shared parental responsibility. Under the 2011 amendment, the priority is to protect children from harm rather than to ensure that children maintain a meaningful relationship with a parent.

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Non-legal responses

Community- and church-based institutions, as well as nation-wide organisations such as Relationships Australia, can help separating parents negotiate their own parenting agreements and can also provide a range of information and referrals. Counselling, education and skills training not only help parents develop better parenting skills, but may also assist in recognising gender issues that affect relationships with children in negative ways.

Resolving problematic issues about shared parenting and shared responsibility requires changes in societal attitudes, and these interact with legislative enactments and amendments. Successful shared care was occurring before the 2006 amendments, where the parents involved were willing to cooperate to achieve the best circumstances for their children. Non-legal mechanisms such as women's resource centres, the National Council of Women of Australia and parenting networks for mothers, fathers or both may be of value in furthering this aim. Dads in Distress Support Services provide support for men who are going through a divorce, separation or relationship breakdown. The service provides counselling, a helpline, referrals and advocacy. A second support group, Interrelate, provides 'fathering programs' and aims to help men build and maintain positive relationships with members of their families. It also provides counselling and referrals to other agencies.

Figure 12.12 It is important to dispel attitudes such as fathers are inherently less competent than mothers in caring for toddlers, or that a good work–life balance is essential for mothers but less important for fathers.

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, 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. Some of the trends that have arisen since the 2006 reforms to the *Family Law Act 1975* (Cth) suggest that courts – and society – still need to distinguish between families in which shared care is desirable and those in which there are concerns that override this aim. The most obvious legal response would be to change the law to distinguish between equal responsibility and equal time.

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

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News

Fathers vow to unite and fight family law reversal

By Adele Horin

The Sydney Morning Herald

30 January 2010

Fathers' groups have vowed to fight any attempt to roll back shared-care provisions in family law with plans to form a coalition to lobby the Senate and marginal electorates.

Responding to government-commissioned reports that were published on Thursday and pointed to problems with family law reforms of 2006, the national president of the Lone Fathers' Association, Barry Williams, said: 'If the [Federal] Government intervenes, there'll be a backlash at the (2019) election this year. We can reach probably hundreds of thousands of people.'

Fathers' lobby groups were influential in securing passage of the (2006) reforms under the Howard government, using phone and email trees to reach 79000 people, Mr Williams said.

An evaluation of the reforms by the Australian Institute of Family Studies found 70 per cent of male and female lawyers surveyed believed they had favoured fathers over mothers and 62 per cent that they favoured parents' rights over children's needs.

Professionals often said perceptions of the act had 'created fear and apprehension among separated mothers'. One senior member of the bar said, 'a lot of women are desperate to settle because they're so frightened of what might happen if they go to court'.

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. Assess whether further legislative reforms would be useful to address the problems raised by parents' misunderstanding the idea of shared parental responsibility. Outline the ways groups like Lone Fathers fear changes to the current *Family Law Act 1975* (Cth).
3. Discuss why the Lone Fathers have vowed to fight any changes that may affect their access to children.

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.

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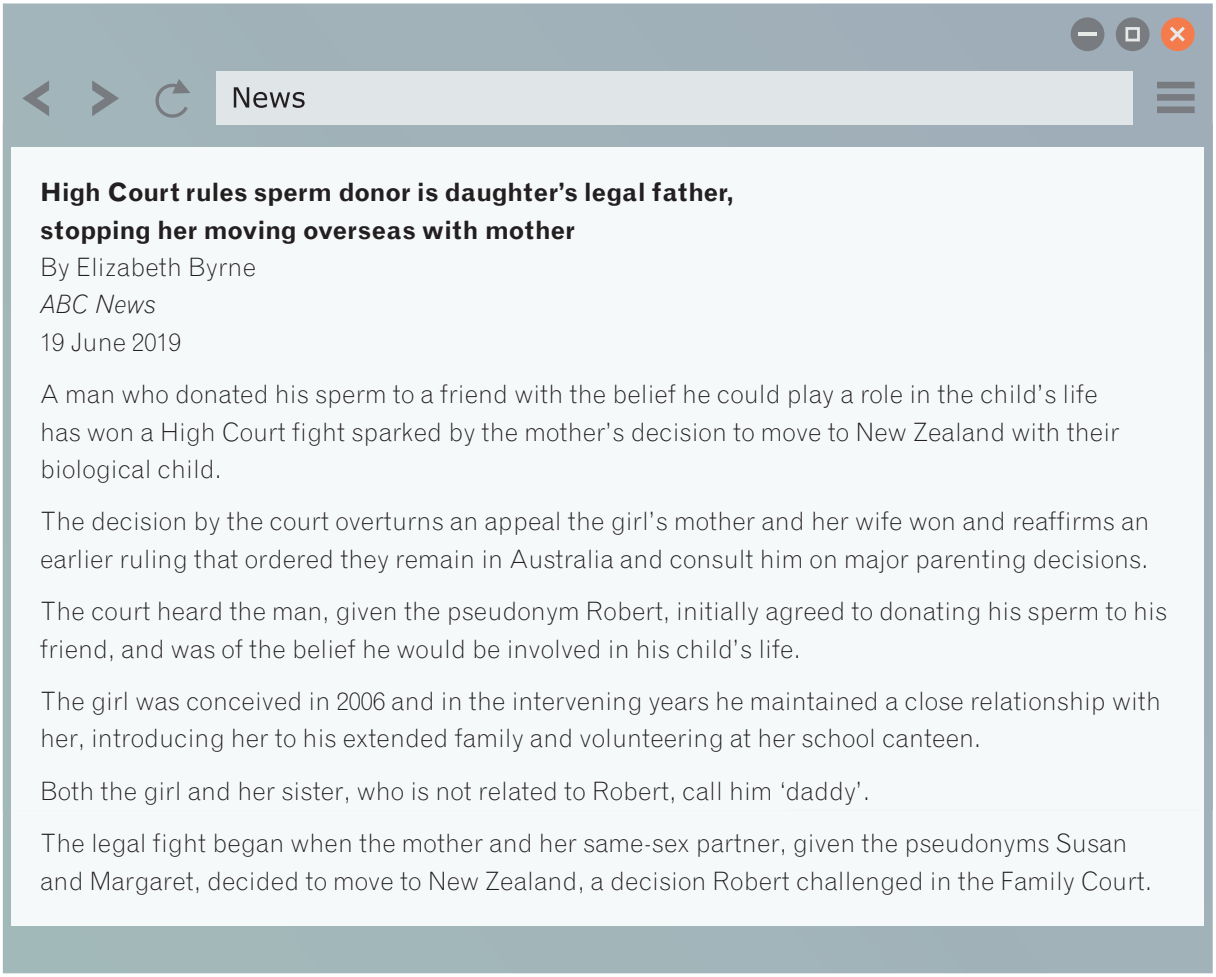
Birth technology has created many legal issues, from paternity and rights of inheritance to who has care of and control over the child. The father of the child may not necessarily be the 'natural father'. For any child conceived via artificial insemination or in vitro fertilisation, the parents (whether 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 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



High Court rules sperm donor is daughter's legal father, stopping her moving overseas with mother

By 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.

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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.

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 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.

Figure 12.13 Surrogacy involves an agreement between a commissioning couple and a woman

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 (SCAG), 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 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

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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 noted above, New South Wales at the time lacked clear state legislation relating to surrogacy. The commissioning parents were attempting to apply to the Family Court to adopt the child under 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 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. Some of the other requirements of the new framework are:

- An order can be made only if it is in the best interests of the child.
- An order cannot be made in relation to a commercial surrogacy.
- The parties must have counselling and legal advice before entering into a surrogacy arrangement to ensure that they fully understand the implications, and the arrangement must be in writing.

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- 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.

The problematic nature of international surrogacy was raised in 2014 when Australian couples who had entered into a surrogacy arrangements refused to take both children when the surrogate mother gave birth to twins. In one instance, 'Baby Gammy', who was born with Down syndrome, was 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 which 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. Some of these issues include:

- The *Australian Citizenship Act 2007* (Cth) does not define 'parent'; this means that a child born in India, which currently allows commercial surrogacy, will be granted Australian citizenship by descent 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

Research 12.1

Go online and read the article, 'Should commercial surrogacy be legal in Australia?' (*The Sydney Morning Herald*, 14 May 2015), then answer the following questions.

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.

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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.

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 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, particular 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.

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12.6 Contemporary issue: Care and protection of children

About the issue

As previously mentioned in this chapter, the *United Nations Convention on the Rights of the Child* (1989), 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)) focuses 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 2017–2018.

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 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).

Figure 12.14 Stefanie Millette poses for a portrait in a room that she keeps for younger children when she serves as a foster mother.

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 work alongside FACS and with the biological parents to 'foster' the care and protection of children that need 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 is to improve early intervention services, introduce parental capacity orders and allow adopted children to maintain a connection with their biological parents.

According to the submission of the NSW Ombudsman to the Wood Inquiry (Special Commission of Inquiry into Child Protection Services in NSW) on mandatory reporting, the number of

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'at risk of harm' reports made to Community Services has increased steadily and continues to grow.

A 2018 report by Australian Institute of Health and Welfare (AIHW) showed that the number of notifications has risen from 272 980 in 2012–2013 to 379 459 in 2016–2017 – an increase of 39%. Around 50% of notifications of child abuse are investigated, and between 2012–2013 and 2016–2017 the total number of substantiations of notifications received across Australia increased by 27%.

The report showed that in 2016–2017 there were 168 352 children who had an investigation, care and protection order and/or were placed in out-of-home care; that is, one in 32 children. Aboriginal and Torres Strait Islander children continued to be over-represented as they were seven times more likely to have received child protection services.

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. The 2006 amendments to the *Family Law Act 1975* (Cth) endeavoured to ensure that children are protected from both direct harm and harm resulting from exposure to family violence. The presumption of equal shared parental responsibility does not apply if there is a risk of child abuse or family violence (*Family Law Act 1975* (Cth) s 61DA).

If there is evidence of family violence, the court may order that the child's contact with the offending parent is restricted or that the contact takes place within a controlled environment, such as with a social worker present. In this instance the concept of 'shared parental responsibility' does not apply. If relevant authorities consider that the child or young person is in urgent need of protection, Community Services can apply to the Children's Court for an Emergency Care and Protection Order.

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 JCPRs 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 the amount of administrative work for a caseworker as well as the call load on Helpline, thus allowing caseworkers to focus on assessment. The implementation of the Child Protection National Minimum Data Set in 2013 has standardised the reporting procedures and enabled a more comprehensive collection of data. It now has child figures for three areas of notification, investigation and substantiation; care and protection orders; and out-of-home care. The 2018 AIHW report showed increases in all of these areas: the number of substantiated notifications rose from 7.8 per 1000 children in 2012–2013 to 9.1 in 2016–2017. The number of children on care and protection orders rose from 8.2 to 9.9 per 1000, and the number in out-of-home care rose from 7.7 to 8.7.

In 2016, the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016* (NSW) (repealed) amended the following legislations 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

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support and educational services to children in need. These services include childcare centres, counselling services (for example, for addiction and bereavement), and emergency housing and youth support programs. Although these groups have provided necessary help and support to children and families in crisis, some groups have also been heavily criticised for their lack of action in dealing with accusations of child abuse made against their own members.

Clergy members of various churches have been accused and found guilty of serious misconduct and child abuse. Some church organisations have been heavily criticised for their lack of support for victims of abuse at the hands of the clergy and some churches have been accused of protecting known child-sex offenders within their ranks.

In response, the Anglican Church established a Professional Standards Unit that investigates complaints involving clergy and ancillary staff. In 2002, the Anglican Church made a public apology for the misconduct of clergy and staff and reaffirmed the church's condemnation of such behaviours. In 1996, the Catholic Church established the Melbourne Response to investigate claims of clergy abusing young children. This has been heavily criticised as inadequate, with the average compensation paid to victims of systemic church abuse being $50 000.

Victims of abuse have been encouraged to contact the relevant church authorities to lodge a complaint. All major religious bodies which have contact with children and young people have established internal procedures for investigating abuse claims. As part of this process, each has established counselling services for abuse victims and compensation funds to pay future claims made by victims.

There are also a number of initiatives 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
- the **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 which 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.

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

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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 Indigenous 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. AIHW in 2019 reported that nationally nearly 159000 children received child protection services (investigation, care and protection orders and/or out-of-home care in 2017-2018). During 2014–2015, there were 57861 children on care and protection orders.

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 – has brought together all government agencies, non-government organisations and the community to deliver the right supports to vulnerable children and families.

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, the 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.

Figure 12.15 The legal system has been accused of acting too slowly to protect child victims of abuse; there are also claims that existing mechanisms to protect children are inadequate.

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, 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. Recent reforms to the *Family Law Act 1975* (Cth) centre on shared parental responsibility.
- 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 AVOs and 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.

Chapter questions

1 If a marriage breaks down, should the dependent spouse be entitled to maintenance? Outline and explain the various factors that should be taken into account when determining maintenance issues.

2 Discuss the issues surrounding blended families and explain why a step-parent is not financially responsible for the children of their spouse.

3 Briefly explain how family law has responded to changing social values, such as increased incidence of divorce and the acceptance of de facto and same-sex relationships.

4 Create a table listing in chronological order the legislative and common law changes in family law and their effects.

5 Outline the legal issues surrounding family violence, and evaluate the effectiveness of current family law remedies in achieving just outcomes for all family members.

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Review 12.14

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 NGOs in family law.
5. Identify and critically evaluate current Australian surrogacy laws. Suggest reforms that could be made in this area.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended-response questions can be found in the digital version this textbook. Refer to these criteria when planning and writing your response.

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.
- The Family Court has reviewed its own internal processes and made substantial changes to make them less complex.

Issues of compliance and non-compliance

- The Family Law Council (a Commonwealth statutory authority established under 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 Family Court. Court intervention is seen as a 'last resort' because individuals are more likely to comply with a decision that they negotiated and reached voluntarily. Enforcement of Family Court orders therefore only comes into effect when there is a breach. The court will act to protect individual rights and enforce spousal or parental responsibilities.
- An individual must apply to the court to enforce orders breached by another party. Once the court is satisfied that a breach has occurred, it can impose various sanctions depending on the type, magnitude and number of breaches.
- If the breach was of orders pertaining to children, the court has a range of actions available to it. Remedies available to the court include variation of parenting orders,

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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% of individuals do not comply with protection orders. AVOs depend on the named individual's voluntary compliance with the order, the active policing of the AVO, and the victim's willingness to report any breaches to the police.

Changes to family law as a response to changing values in the community

- The law reflects community values. Individuals are therefore more likely to obey the law if they believe that the law is essentially enforcing and promoting 'right' behaviours. Family law is concerned with managing human relationships, which is complicated by the multicultural nature of our society. The legal system must balance different cultures, ethical systems, religious values, social and family attitudes, and individual rights in the effort to develop the best processes for society as a whole.
- When children born in Australia to migrant parents adopt the cultural beliefs and practices of their new country, family conflict can result.
- The first major change in family law was the introduction of no-fault divorce. The declining influence of religion, an interest in removing the conflicts and difficulties resulting from blame, and the idea that marriage does not always last 'for life' were social factors that influenced this change, reflected in the *Family Law Act 1975* (Cth), as well as the introduction of the sole ground for divorce – 'irretrievable breakdown of the marriage'.
- Another important change in social attitudes has been in the increasing acceptance of LGBTIQ 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 NGOs 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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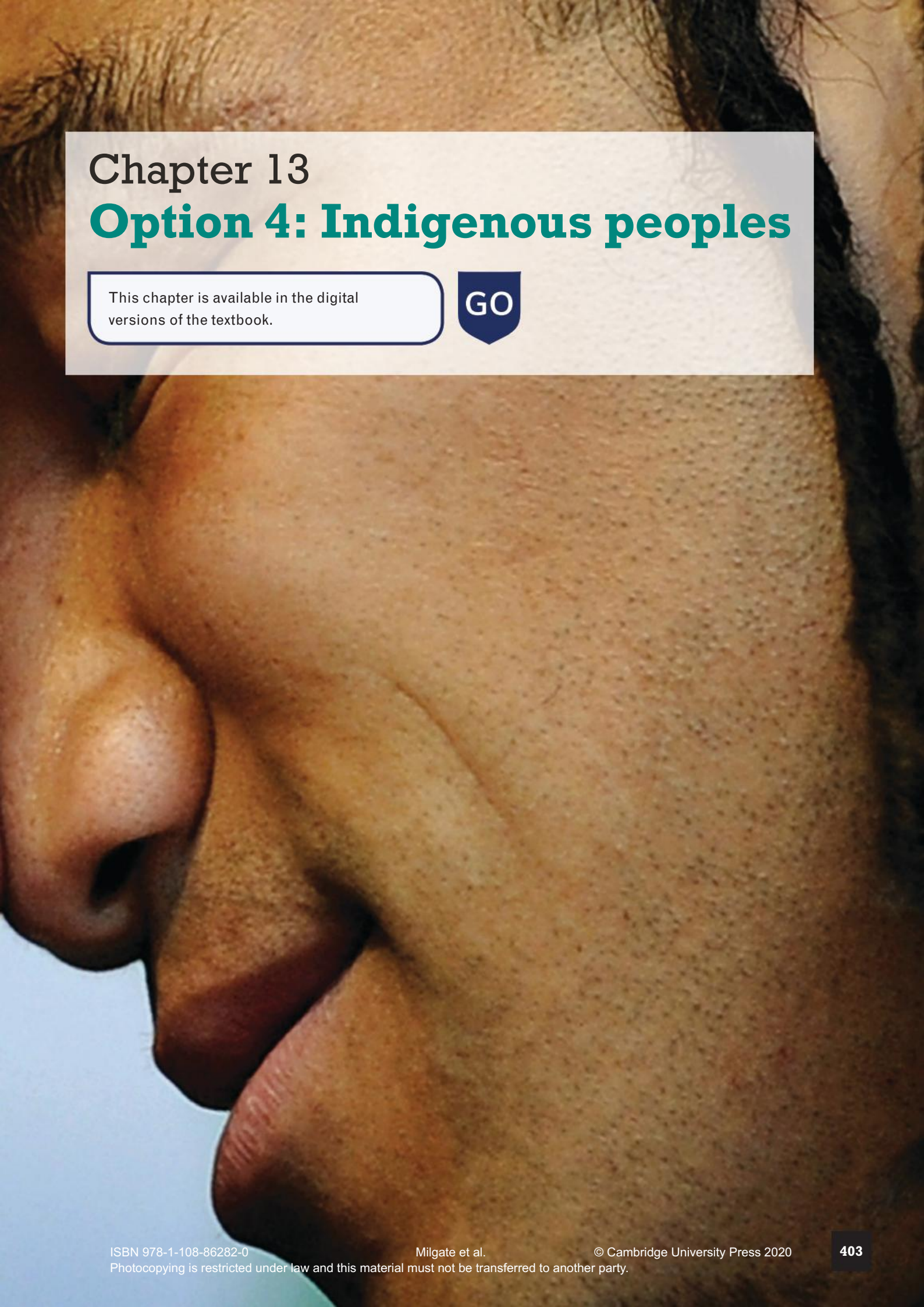

Chapter 13
Option 4: Indigenous peoples

This chapter is available in the digital versions of the textbook.

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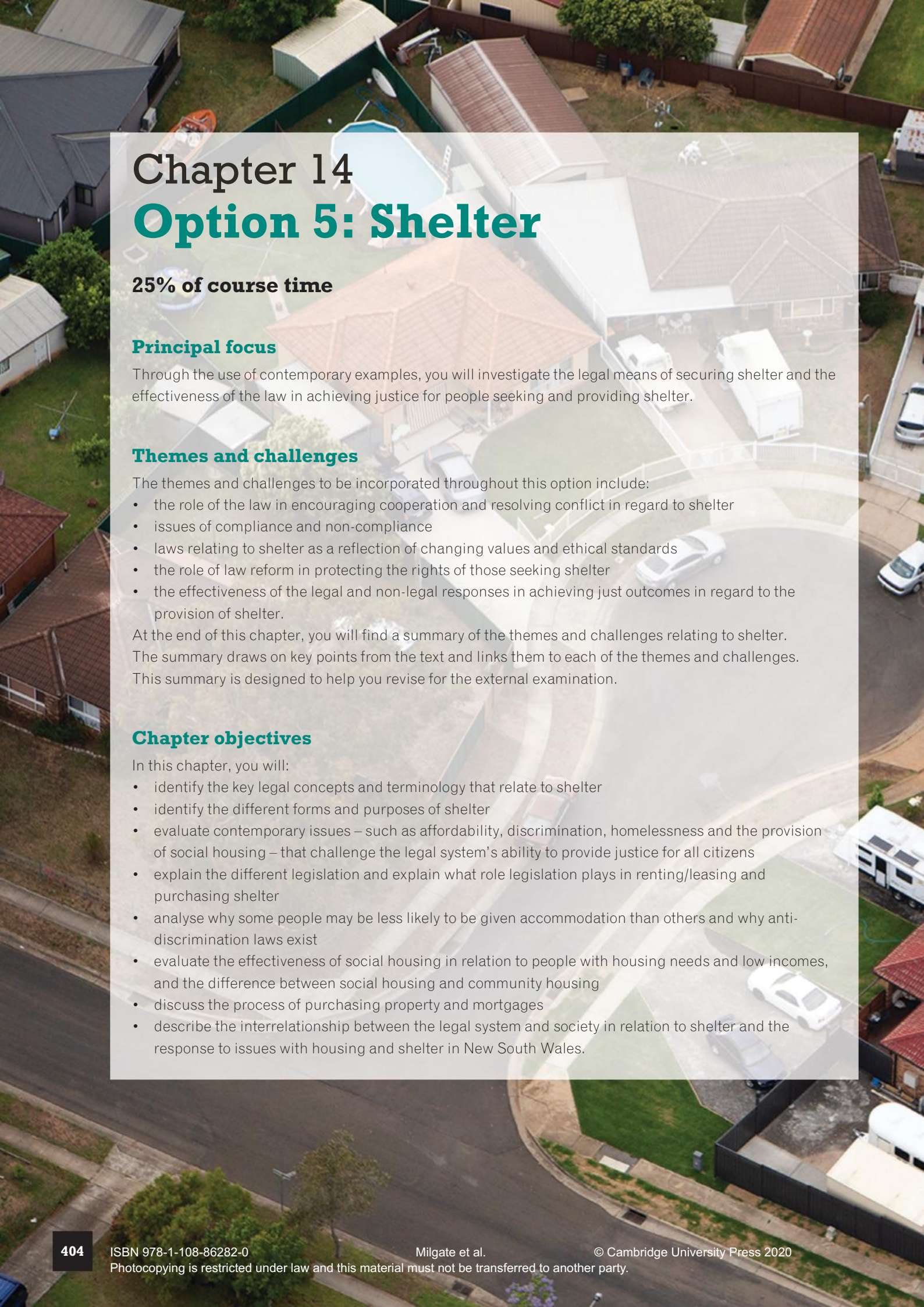

Chapter 14
Option 5: Shelter

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. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, 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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Relevant law

IMPORTANT LEGISLATION

Real Property Act 1900 (NSW)
Conveyancing Act 1919 (NSW)
Landlord and Tenant (Amendment) Act 1948 (NSW) (repealed)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Privacy Act 1988 (Cth)
Community Land Management Act 1989 (NSW)
Crown Lands Act 1989 (NSW) (repealed)
Home Building Act 1989 (NSW)
Privacy Amendment Act 1990 (Cth) (repealed)
Disability Discrimination Act 1992 (Cth)
Aged Care Act 1997 (Cth)
Retirement Villages Act 1999 (NSW)
Housing Act 2001 (NSW)
Age Discrimination Act 2004 (Cth)
Retirement Villages Amendment Act 2008 (NSW) (repealed)
National Consumer Credit Protection Act 2009 (Cth)
Retirement Villages Regulation 2009 (NSW) (repealed)
Competition and Consumer Act 2010 (Cth)
Residential Tenancies Act 2010 (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)
Conveyancing (Sale of Land) Regulation 2017 (NSW)
Residential Tenancies Amendment (Review) Act 2018 (NSW)

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)

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 ago. 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, is also examined. At times the rights of individuals are abused or denied with respect to various forms of shelter, and the ability of legal and non-legal measures to redress this situation is assessed.

Presently, contemporary issues such as affordability, discrimination, homelessness and the provision of **social housing** challenge the legal system's ability to provide justice for citizens.

social housing
affordable and secure housing provided by Housing NSW for low to moderate income earners who meet specific eligibility requirements

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. 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.

Figure 14.1 Shelter is a fundamental human right.

People who lack adequate and affordable housing are confronted with many other layers of disadvantage that make it difficult to escape a cycle of poverty. An increasing concern within Australia is housing affordability, which has been affected by government policies and a lack of supply of housing, especially in our cities. In addition to this, having a fixed address is important for a number of state and federal government authorities that deliver essential services and ensure that the rights and responsibilities of people who cohabit are being met. It is also imperative for such requirements as taxation collection, adherence to motor vehicle and traffic regulations, and enforcement of the criminal law, to name a few. In essence, a socially just and cohesive society strives to ensure that its citizens have shelter that is adequate and affordable.

The extent of laws concerning shelter

The majority of laws pertaining to the acquisition of property and the regulation of the rights and responsibilities of individuals within various types of shelter, are state-based. The federal government has no explicit constitutional power to legislate in this area. However, it can, through various funding powers and policy development, influence the types of housing policies the states adopt, as seen in 'The Commonwealth–State Housing Agreement 2009'.

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TABLE 14.1 The 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. Also covers residents occupying premises provided under public and Aboriginal housing. Boarders and lodgers, in the main, are not covered by this Act. Since 2010, it provides for the responsibilities of the Rental Bond Board of Australia. The review Act has updated the provisions in the 2010 Act and has given tenants greater protection.
Residential Tenancies Act 2010 (NSW)	A small number of 'protected tenants' in New South Wales and their premises are now covered by 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.

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TABLE 14.1 The main body of legislation concerning the purchase of shelter and related planning matters (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.

The external affairs power has been used in the past by the Commonwealth to influence or override state laws.

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

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).

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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. 30) and the 'learn to' activities (pp. 30–1) 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.

Review 14.1

1 Define 'shelter', using your own words.
2 Identify five reasons 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, according to the Australian Human Rights Commission, should satisfy the considerations discussed below.

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.

Figure 14.2 Housing that is isolated or not easily accessible can considerably affect an occupant's quality of life.

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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.

TABLE 14.2 An 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.'

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 Affordable Housing Agreement, which took effect on 1 January 2009, is such an example and is referred to later in this chapter.

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Research 14.1

1 Explain why the right to shelter is not provided for in Australia's domestic law.
2 Summarise the role of the Australian Human Rights Commission.
3 Investigate two policies passed by the federal government that affect the right to shelter in Australia.

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.

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. This makes it easier for people to enter the housing market. In addition to this, most governments in Australia are investigating ways to alleviate 'housing affordability' problems. One method is to increase housing supply through planning powers invested in other government departments.

Governments also provide 'public housing' for people on low incomes at a rental rate much cheaper than what they would pay in the marketplace. 'Rental assistance' can also be made available to enable people on low incomes to rent a property in the market that they otherwise would not be able to afford.

Figure 14.3 Patricia Corowa speaks during a protest march to stop the sale of public housing in Millers Point, Dawes Point and The Rocks.

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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% the number of young people who move from these services into long-term accommodation.

Under the National Partnership Agreement on Homelessness (NPAH) 2015–2017, the federal government provided $115 million per year across Australia to help each state support frontline homelessness services. Commonwealth funds needed to be matched by funds from the states and territories, but each state and territory was able to decide for itself which providers, in which areas, would receive funding. A key priority of the NPAH was domestic violence, as this is recognised to be a leading cause of homelessness. Homeless youth was also a focus area. The NPAH funded activities incorporated in the New South Wales Homelessness Action Plan. Under this partnership, the NSW Government and the Australian Government agreed to add an extra $284 million to address homelessness in New South Wales over four years. The NPAH was terminated on 30 June 2018, replaced by a new National Housing and Homelessness Agreement.

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.

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 last 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 2016 approximately 98.7% of Australians were living in 'self-contained' private homes, such as houses, flats and units. Others live in institutional dwellings: residential colleges, staff accommodation, boarding houses, hostels, nursing homes and prisons.

Historically, the 'Australian dream' was to own your own free-standing home on a traditional quarter-acre block of ground. 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 2016 census showed that the number of Australians living in a separate house decreased by five per cent from the 2011 census. This was offset by an 8.8% rise in population. The number of Australians living in denser townhouse and low-rise flat accommodation increased by 42%. Increasing trends particularly in urban areas has seen an increase in high to medium density housing due to population growth in some city areas.

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TABLE 14.3 Proportion of Australians by type of accommodation

Dwelling structure	2016 (%)	2011 (%)	2006 (%)
Separate house	72.9	75.6	76.6
Semi-detached, row or terrace house, townhouse, etc.	12.7	9.9	9.2
Flat, unit or apartment	13.1	13.6	13.1
Other dwelling	1.3	0.9	1.1

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 strategies, goals and priorities of the NSW Government's Homelessness Action Plan. 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.

14.2 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 of levels of income and personal circumstances. There are numerous legal and non-legal responses protecting the competing interests of those parties involved. In addition to these, various dispute mechanisms are available to promote cost-effective and efficient conflict resolution between vendors and buyers, landlords and tenants. The extent to which the law achieves justice for people securing shelter continues to evolve, but at times the competing interests of the parties involved can make this difficult.

14.3 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

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

Figure 14.4 Shelter will more than likely be the most expensive acquisition in a person's life.

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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 (LEPs)**. An unsuspecting buyer will not find matters affecting a New South Wales property when they do the required checks at NSW Land Registry Services.

Local Environment Plan (LEP)
a document prepared by a local council, and approved by the state government, to regulate the use and development of land within the council's control

The 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 section, 'Protection for buyers'.

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.

private treaty
when the sale of a property is carried out directly between the vendor and buyer; usually completed with the assistance of a registered real estate agent

When a property is on sale through private treaty the price of the property will be advertised through a real estate agency, encouraging potential buyers to make an offer on the property. They may inspect the property, ask a number of pertinent questions, carry out inspections, and peruse the sale of contract before making an offer. Both the vendor and the buyer can haggle over price before agreeing to an amount, at which time the contracts for sale will be exchanged.

When buying through an auction, the buyer will usually be competing against a number of potential buyers who turn up on the day of the auction to bid on the property. The vendor will set a reserve price, which is the lowest price the vendor is willing to sell the property for. The auctioneer or agent is not required to accept the highest offer if it fails to reach the reserve price once the bidding has ceased. If the highest bid does not reach reserve price, the vendor may wish to enter into negotiations in the form of a private treaty with the highest bidder. If the reserve price is reached, contracts will be exchanged with the highest bidder once the auction is over; the successful buyer must hand over 10% of the purchase price immediately.

There are definite advantages in buying at auction. For example, the buyer will know how the property fared with respect to reaching the reserve price, and at times the bidding process sets a more realistic price when potential buyers understand the nature of the market at that point in time and what a fair price is.

There are important points to consider that the law does not protect against. Potential buyers must ensure they have their finance arranged and need to

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be prepared for the pressure of the bidding process. It helps if the buyer knows their limit in terms of price and does not bid above it.

The vendor is allowed one bid in the process and the auctioneer must state when this bid has occurred.

Critics of the process argue that potential vendors bear costs that may be wasted if the property is not sold at auction (real estate agents charge a fee for conducting an auction).

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 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).

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.

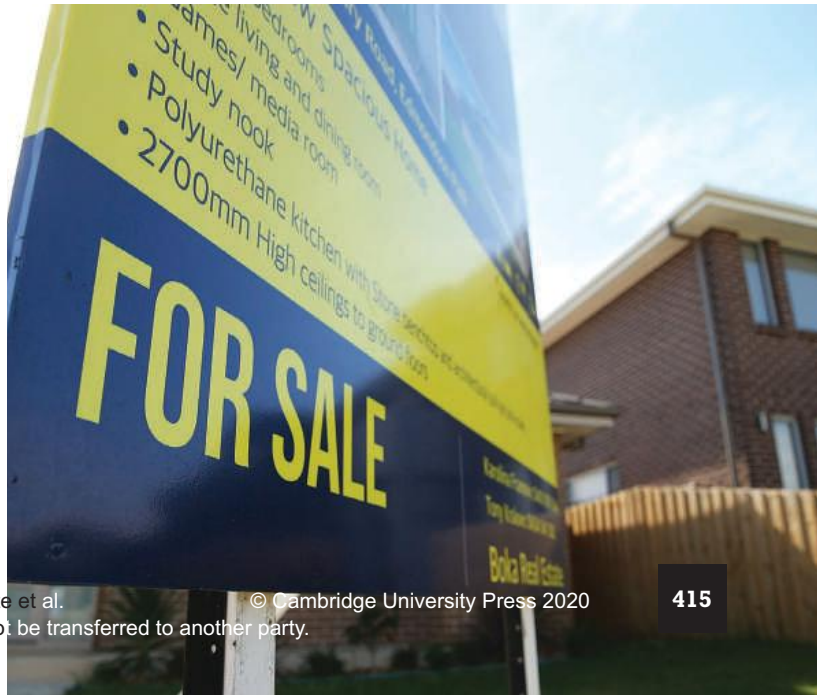
The contract must also include a copy of the 'property certificate' that will allow the title to be searched at NSW Land Registry Services. A drainage diagram showing the position of sewer lines on the site map will be included, as well as an official plan of the land, which could include a 'subdivision 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 fish in a privately owned pond. 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.

easement
a right of someone other than the property owner to use the property for certain purposes

Also included will be information making the buyer aware of their 'cooling-off' rights, (see later section on 'Protection for buyers'). If these types of

Figure 14.5 Before a residential property can be advertised for sale, a contract for sale must have been prepared.



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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 and it is from this point that a 10% deposit of the purchase price is paid and the 'cooling-off' period applies.

exchange of contracts
when the vendor and the buyer of the property exchange signed copies of the contract for sale

Between exchange and **settlement** there are a number of things that need to be completed. The buyer will need to search the title to verify the seller's warranties and compliance with the conditions contained in the contract. The buyer should also obtain their own zoning certificate (s 149) to ensure that it is accurate and that there have been no changes since the contracts were drawn up. Buyers may also wish to take out insurance at this point as they have an insurable interest once exchange occurs; most buyers will have this arranged at settlement.

settlement
when final payment for the purchase of the property is made to the vendor, and the purchaser receives the title

Settlement will usually occur when answers to most of the buyers searches have been satisfied; then the balance of the price of the property will be paid, comprising the other 90% of the purchase price. NSW Land Registry Services will need to be notified about the transfer of the property to the buyer and it will pass this information on to the local council and water suppliers. It is also suggested that a final inspection be carried out prior to settlement to be sure that the property is still in good order and that any inclusions in the contract (such as light fittings and carpets) are still present.

Figure 14.6 At settlement, the buyer pays the balance of the price of the property. Unless they are doing their own conveyancing, the vendor and the buyer do not need to be present at settlement – it will be managed by each party's conveyancer and financial institution.

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).

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

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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.

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.

Old System title (or common law)

The Old System title dates back to English common law and was a logical choice of land management used the by colonial authorities to register, record and transfer land ownership. This system was used in the New South Wales colony until 1863 when it was replaced by Torrens title.

Under the Old System title, each time a vendor sold land to a buyer, there was a need to establish a **chain of title** that established proof of ownership: that the vendor was the rightful owner of the property prior to purchasing. This was demonstrated by a series of **deeds**, one for every time that property was sold. Each deed would contain a description of the property and the identities of the previous vendors and buyers. If this can be established it is said that a '**good root of title**' exists, as the chain has not been broken through the loss of one or more of the previous deeds of sale.

chain of title
a series of deeds under the Old System title, used to establish the ownership history of a property

deed
documentary proof establishing ownership of a property

good root of title
when the Old System chain of title has not been broken through the loss of one or more of the previous deeds of sale

Under the *Conveyancing Act 1919* (NSW) 'good root of title' need only be established as far back as 30 years ago to allow the sale of the property to go forward. The reality, however, is that it is advisable for a potential buyer to ensure that the root of title is established even further back to provide greater assurance that they are purchasing from the rightful owner. Even so, if any of the documents establishing ownership is challenged, this could result in a 'defect in title', so that the vendor is not declared the rightful owner.

A small percentage of land in New South Wales (such as properties sold before 1900) is still registered this way, but there are 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.

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

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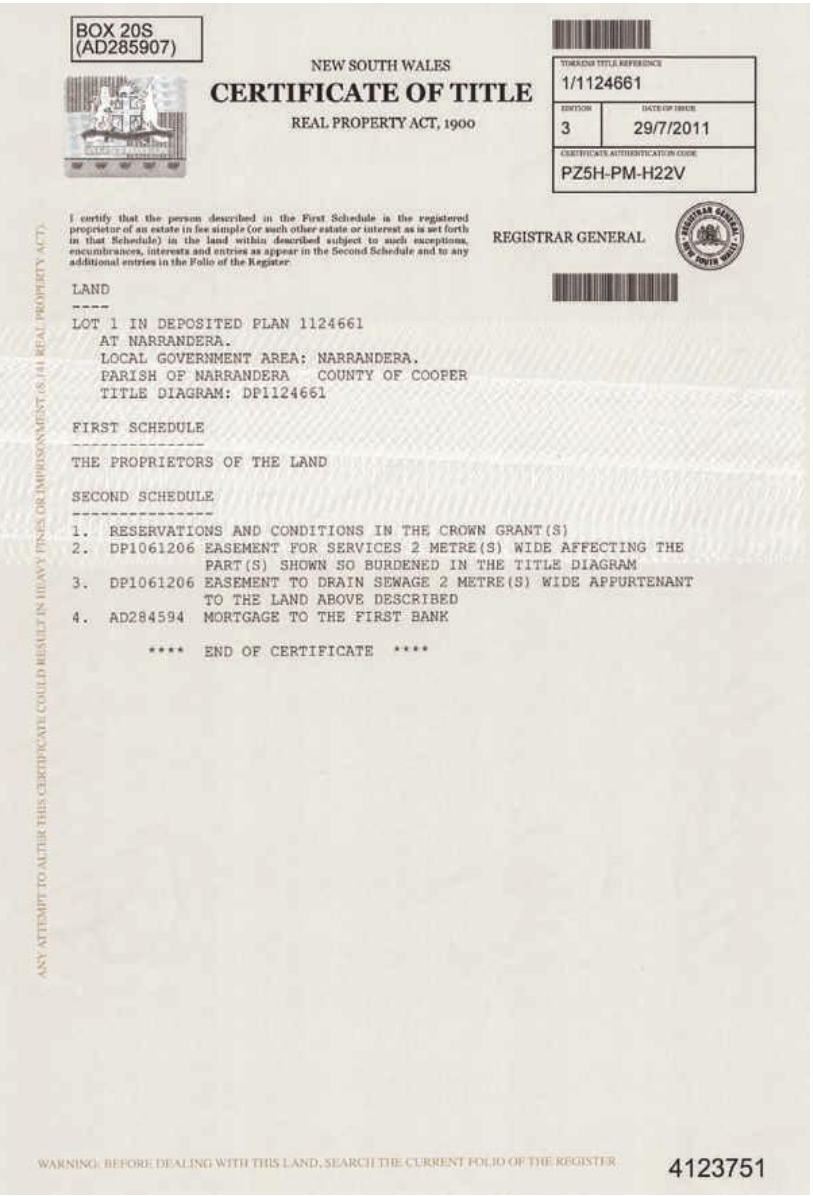
in New South Wales. Transferring ownership, leasing and registering any other legal matters to do with land require certainty and efficiency, which are features of the Torrens title system. Properties registered under this system are assured that the title is recognised by the state and hence people 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.

Figure 14.7 A certificate of title.



BOX 20S
(AD285907)

NEW SOUTH WALES

CERTIFICATE OF TITLE

REAL PROPERTY ACT, 1900

TORRENS TITLE REFERENCE
1/1124661

EDITION 3

DATE OF ISSUE 29/7/2011

CERTIFICATE AUTHENTICATION CODE
PZ5H-PM-H22V

I certify that the person described in the First Schedule is the registered proprietor of an estate in fee simple (or such other estate or interest as is set forth in that Schedule) in the land within described subject to such exceptions, encumbrances, interests and entries as appear in the Second Schedule and to any additional entries in the Folio of the Register

REGISTRAR GENERAL

LAND

LOT 1 IN DEPOSITED PLAN 1124661
AT NARRANDERA.
LOCAL GOVERNMENT AREA: NARRANDERA.
PARISH OF NARRANDERA COUNTY OF COOPER
TITLE DIAGRAM: DP1124661

FIRST SCHEDULE

THE PROPRIETORS OF THE LAND

SECOND SCHEDULE
---
1. RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
2. DP1061206 EASEMENT FOR SERVICES 2 METRE(S) WIDE AFFECTING THE PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
3. DP1061206 EASEMENT TO DRAIN SEWAGE 2 METRE(S) WIDE APPURTENANT TO THE LAND ABOVE DESCRIBED
4. AD284594 MORTGAGE TO THE FIRST BANK

**** END OF CERTIFICATE ****

ANY ATTEMPT TO ALTER THIS CERTIFICATE COULD RESULT IN HEAVY FINES OR IMPRISONMENT (S.141 REAL PROPERTY ACT).

WARNING: BEFORE DEALING WITH THIS LAND, SEARCH THE CURRENT FOLIO OF THE REGISTER

4123751

indefeasible title
title that has been transferred to the new owner, and will not be changed except under very limited circumstances

The land register is central to the effectiveness of the Torrens title system. 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. 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. Instead of a chain of documents, the landowner receives a current certificate of title, which shows all of the information – ownership, easements, mortgages and other relevant interests.

As mentioned previously, 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.

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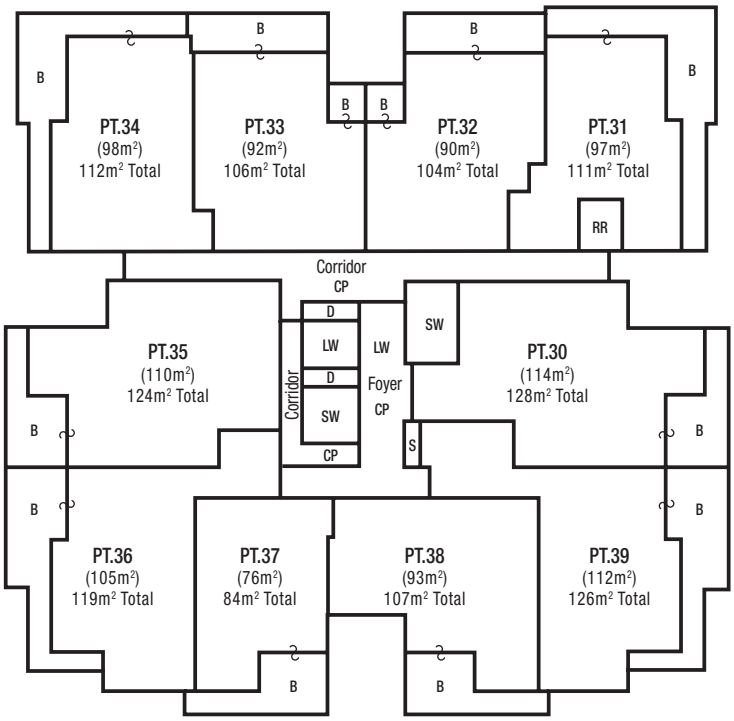
Figure 14.8 A strata plan.



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.

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, barbeque areas and green space.

A strata plan is a diagram of the strata complex, showing details of all the individual lots. It includes the outlines of the buildings, the dimensions of each lot, the details of each unit entitlement, and the common property. Any notifications and encumbrances affecting the plan will also be noted. Importantly, it will also contain the certificate of title numbers for each lot.

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Under the *Strata Schemes Management Act 2015* (NSW), the owners of the properties make up what is referred to as the **owners' corporation**. The owners corporation must elect an **executive committee** to make decisions about the management of the common property and other areas of concern that affect all residents.

owners' corporation
a group consisting of all the lot owners within a strata scheme

executive committee
an elected subgroup of the owners' corporation, which makes decisions about the management of the common property and other areas of concern that affect all residents

The executive committee has to ensure that the residents contribute to the following funds so the upkeep of the property is maintained and that financial and legal requirements are met:

- **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, 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 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 Torrens 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

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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.

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.

Sources of finance

Mortgages

Due to the expensive nature of purchasing shelter the use of mortgages is commonplace to ensure financial institutions are willing to lend to buyers. A mortgage is a type of loan where the property being purchased is used as collateral in case the borrower fails to meet their repayment obligations as set out in the home loan contract. The financial institution holds the deed or ownership of the property until the buyer has fully repaid the loan. The buyer occupies the premises, as under credit regulation they are considered the owner of the property.

If the owner of the property falls upon financial hardship and cannot make the ongoing repayments, the financial institution has the option of selling the property to recover outstanding debts. Contrary to popular belief, this is the last option that a credit provider may want to take. For it to maximise its profits, it is better for the loan to run its course and the calculated interest be paid.

Historically, many mortgages were fixed interest over 25 to 30 years. The 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.

Figure 14.9 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.

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Since the global financial crisis in 2008–2009, financial institutions have tightened their lending policies, demanding more consistently that potential borrowers provide a 10–20% deposit on the value of the property.

People who take out a mortgage are covered by consumer credit laws and all mortgage contracts must be in writing. The *National Consumer Credit Protection Act 2009* (Cth) covers a range of credit contracts signed after 1 July 2010 and includes mortgages and personal loans, to name but two. Any contracts signed before 1 July 2010 are covered by uniform state credit code legislation and have similar provisions.

Under these laws all, credit providers have to be licensed and to belong to an external dispute resolution scheme approved by the Australian Securities and Investments Commission. 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**.

arrears
money that is owed but has not been paid

In addition to this, the second stage of consumer credit reforms that are relevant to home buyers include the banning of exit fees after 1 July 2011 and the provision of key facts that outline rights and responsibilities.

Credit reporting

Once a person has obtained credit from a financial institution, a personal credit history 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 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.

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.

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.
3. Explain why greater restrictions were put in place in 2009.

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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% 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.

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% of the purchase price, which will usually be deducted from the 10% deposit already paid. This is to compensate the vendor for having the property off the market for a period.

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.

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.

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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Figure 14.10 Building insurance is taken out by the owner of the property to insure the property against damage.

- **Mortgage protection insurance** – this can be taken out voluntarily or may be requested by the financial institution lending money for the purchase of a property. This insurance covers loss of income through a range of factors, such as economic downturn resulting in fewer hours worked, redundancy or a death in the family.
- **Public liability insurance** – this is taken out by home owners to insure against injury or death to anyone on or around their property. People will come into a property for various reasons whether invited or not, and all property owners have a duty of care to ensure it is safe for people to do so.

Additional protections

Under the *National Consumer Credit Protection Act 2009* (Cth) all consumers entering into credit contracts (including home loans) can expect that the loan amounts to 'responsible lending', there is appropriate time for adjustments to repayment schedules to be made in times of financial hardship and, consistent with the *Contracts Review Act 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.

Standard contract of sale

The evolution to a standard contract of sale is in itself a form of protection for the parties involved in the purchase of a property. The clearly outlined process from exchange of contracts to settlement ensures a degree of certainty in the rights and obligations of both vendor and buyer. (This is discussed in the section, 'Private treaty or auction'.)

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.

residential lease
an agreement between the owner of a property (landlord) and the person who is renting it (tenant)

The rights and obligations of landlords and tenants

The *Residential Tenancies Act 2010* (NSW) sets out the main rights and obligations of landlords and tenants. Some of the standard terms and conditions of a residential lease agreement include things such as:

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.

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- 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 will need a residential parking permit, who will pay for that and if there are any easements that may affect the tenancy.

There are a number of notable areas of rights and obligations of tenants and landlords, which are discussed below.

Condition reports

A **condition report** is an inspection checklist of the state of the premises, signed by both landlord and tenant, prior to 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.

condition report
an inspection checklist of the state of the premises signed by both landlord and tenant prior to the tenant moving in

Rates, water and electricity

Under 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, who 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

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In Court

***Groth v Kantipudi (Tenancy)* [2012] NSWCTTT 410 (10 October 2012)**

In this case, the landlord (applicant) claimed bond money to be paid for unpaid water rates and cleaning costs due to the generally untidy state of the premises. The applicant also claimed compensation for carpet cleaning, repair of the kitchen benchtops, removal of graffiti and replacement of some doors and locks. Money was also sought to replace the lino floor in the kitchen and to repair some holes in the walls.

The tribunal was satisfied in this case that the applicant was owed compensation on all of these matters and the respondent (tenant) was ordered to pay $1458. 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.

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.

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-

Figure 14.11 Landlords have an obligation to ensure premises are habitable, clean, safe and secure.

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term lease. The rent cannot be increased during a fixed term of less than two years unless otherwise stated in the agreement. For fixed terms of two years and more, the landlord must give 60 days' written notice but, 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.

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 outlined above, mainly with regard to the residential tenancies agreement, are important checks and balances to ensure that adequate housing and appropriate property rights are afforded to tenants.

Landlords, in contrast, have outlaid significant sums of money for the purchase and upkeep of residential property available for rent. Tenancy serves an important social function given the shortage of housing in many housing markets. They can also experience situations where their properties can be extensively damaged or where it becomes problematic evicting tenants who have breached the tenancy agreement, and they may spend time and resources retrieving money owed as a result.

The *Residential Tenancies Act 2010* (NSW), which replaced the 1987 Act, essentially attempts to balance the protections afforded to both landlords and tenants. Some of the changes include:

- 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

Research 14.3

Do an internet search to answer the following questions 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.

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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 is an improvement on the 1987 legislation, as it has improved the rights of and protections for tenants.

There is also a suite of state and federal legislation that outlaws discrimination, especially for those seeking rental accommodation. This is examined in the 'contemporary issue' sections.

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 can not 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 have 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.

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, harsh rent increases, and give

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.

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them greater privacy and security of tenure within the confines of their accommodation. New South Wales lags behind other states that have improved legislative protections for these tenants.

At present, boarders and lodgers have to rely on NCAT to ensure that some basic rights to shelter are enforced. In the case of *Doran v Lia*, GEN 10/57830, 20 April 2011, the Consumer, Trader and Tenancy Tribunal found 'that the accommodation was not reasonably fit for the purposes of [a boarding house] and thus the money outlaid by the applicant [$600] should be returned by way of compensation'.

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:

1. self-contained premises for people who can live independently
2. serviced premises (or assisted living apartments), where cleaning, meals and other services are provided
3. a mix of the two, so that residents can transfer if it becomes necessary.

One of the criticisms of retirement villages is that there is a variety of fee structures and financial arrangements for entry to and exit from a retirement village and that it is hard for people wishing to enter a retirement village to compare services and costs. 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.

Figure 14.12 As Australia's population ages, more supported accommodation will be needed to meet older people's requirements.

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All residents have a right of appeal to NCAT. It can make orders with respect to the movement of residence from a self-care situation to a hostel unit due to deterioration in health. The tribunal can also make orders with respect to matters arising from village contracts and rules, ongoing charges and accounts, termination, security and the sale and letting of premises.

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 doesn't need to be in a hospital, but requires more care than can be offered at home, they may move to a nursing home. Most nursing homes have nurses and aides trained in aged care on hand 24 hours a day. These are usually classified into 'low level' and 'high level' care and are regulated by the *Aged Care Act 1997* (Cth).

People in these situations are permanent residents who have been assessed by an aged-care assessment team which has ascertained that whether they are no longer able to live at home unassisted. In 'low care', the resident will be provided with assistance with day-to-day living such as meals, laundry and cleaning. Other services such as various treatment and therapies as needed should be provided.

All residents, depending on their assets, will have to pay an **accommodation bond** to secure a place in hostel-style accommodation. Part of this will be refunded when the resident leaves the home, but a proportion of the bond will be paid to the home for services rendered. This is predetermined when the resident signs the resident agreement (contract) upon entry. Any interest earned on the investment of the bond by the home is also returned to the resident.

accommodation bond
a payment made by nursing home residents to secure a place, which is partially refunded when they leave the home

In addition, if a resident enters 'high care' for more than 28 days, they may be asked to pay an **accommodation charge**. This daily amount, which is asset-tested, is fixed from the day they enter high care until they are discharged. They cannot be required to pay the charge more than a month in advance. An aged-care home must be certified as meeting minimum building and care standards before it is allowed to levy an accommodation charge.

accommodation charge
a daily amount payable by nursing home residents who require 'high care'

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.

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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 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 provides the same rights to all consumers, regardless of the type of Australian Government-funded aged care and services they receive.

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. Further ongoing and widespread concern continued to be flagged about the treatment of our elderly people in some aged-care facilities. This led to the establishment of the Royal Commission into Aged Care Quality and Safety, which heard submissions and has already exposed some horrific instances of neglect, abuse and maltreatment of aged people in care. It is likely that further reform to the sector will be forthcoming when the commission hands down its findings. An interim report is due on 31 October 2019 and a final report by 30 April 2020.

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.

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 home owners and for those who rent in residential parks under the *Residential Tenancies Act 2010* (NSW).

For many people this is an alternative form of accommodation that has a variety of tenures associated with it. Some people stay temporarily overnight or up to a number of weeks. This is usually classed as some form of holiday accommodation and in these circumstances, a licence is paid to the park owner to occupy a site for the length of the stay.

Alternatively, some residents who wish to stay long-term are classed as being in a landlord and tenant relationship. As such, they are given protections under the *Residential 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 Summarise the differences between retirement villages and nursing homes, in terms of both the level of care and the fee structures.
2 Explain why 'squatters' have no legal property rights.

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.

Courts and tribunals

Specialist tribunals have improved the accessibility of the law for many people with disputes around shelter. Courts will ultimately be an avenue of appeal and importantly an avenue of justice in some matters that require a specialist understanding of the law. Contractual disputes can arise during the conveyancing process. This can occur when false and misleading information may have been disclosed in the contract for sale, or when a legal representative fails to discover easements or other factors affecting a property for sale.

The evolution of specialist tribunals has been a sensible one, especially in the area of landlord and tenant rights and responsibilities.

The NSW Civil and Administrative Tribunal (NCAT) was established under *Civil and Administrative Tribunal Act 2013* (NSW). It ensures access to the law, particularly for tenants who might otherwise be unable to pursue matters arising from their tenancy agreement. NCAT can hear most disputes revolving around residential tenancy agreements involving landlords and tenants, including residents of Housing NSW (public housing) and residential parks; matters are usually heard within 21 days. Urgent hearings can be scheduled within two or three days when needed. Legal 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, '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 forums 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.

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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.

Figure 14.13 Housing NSW is one of the largest providers of social housing in the world.

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.

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

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missions. At times they are ignored by government – especially those groups that represent the more marginalised people in society who might not make a significant impact at the ballot box.

NGOs include the following:

- The **Seniors Rights Service** (formerly known as the Aged-care Rights Service or TARS) is a community legal centre. It provides legal advice and advocacy for people living in self-care retirement villages. It also provides non-legal advocacy to people in Commonwealth-funded hostels and nursing homes, and recipients of in-home aged care in New South Wales. All calls to the service are confidential. Its 2018–2019 annual report said:

> In the past financial year, we have provided advocacy services to more clients than ever before, reaching 4,451 people. ... We have seen an emphasis on reaching a broader range of people in the community this year, with an increase in service delivery to older people with diverse backgrounds and needs. These included contact with Indigenous Elders, veterans, and those who reported social disadvantage and isolation, including those who live in remote areas of NSW. With 52% of aged care residents living with some degree of dementia, we are seeing an increased demand for support and services in this area.

It would seem that NGOs such as the Seniors Rights Service are valuable advocates for older people who need support and advice when faced with difficulties in the aged-care system.

- The **Tenants' Union of NSW** is the key NGO for the representation of tenants and other renters in New South Wales. It gives advice to tenants about their rights and obligations under the existing residential tenancy law.
- **Homelessness Australia** is the main national organisation that offers advocacy for people experiencing homelessness and those who provide services to them. It is involved in the research, development and promotion of national policies and action to reduce homelessness. It also has a role in educating the community about homelessness.

The 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.

The media

Complex contractual disputes involving the plight of the most marginalised people in Australian society often form the basis of public interest stories that mainstream media want to follow. The power of the media is in the audience they can reach and the ability to highlight an issue that might well be swept aside or ignored within a government department. The media does not always change government policy, funding or decision-making, but they are an important part of the law reform process.

The media have the ability to present the views of various stakeholders on an issue that may be in the public interest. An example of this has been the ongoing need to strengthen the protections afforded to people classed as boarders and lodgers. Many of the people who live in this form of tenure have been denied basic rights to safety and privacy, as well being the subject to misleading and deceptive behaviour by some operators of boarding houses.

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.

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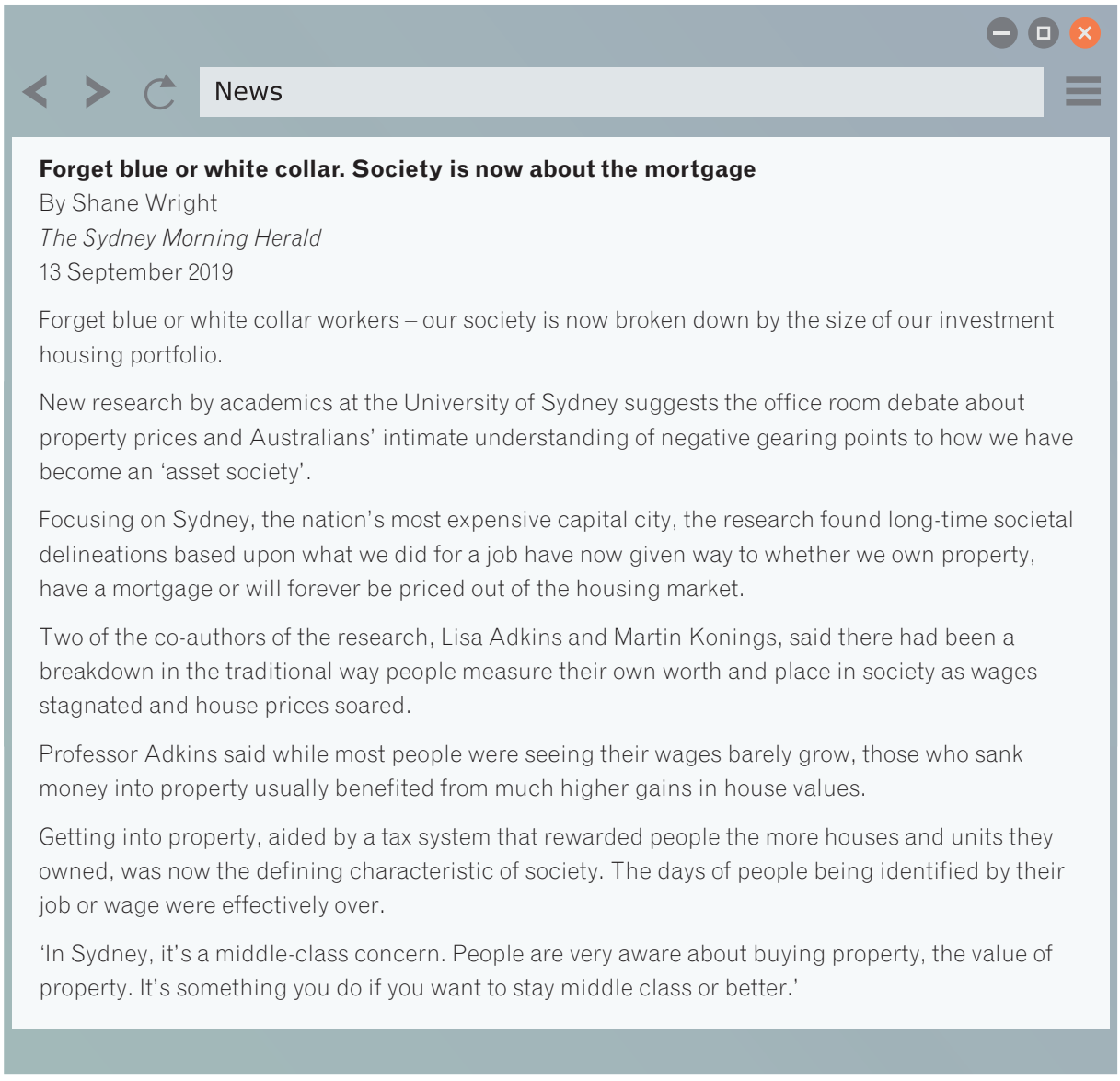
14.7 Contemporary issue: Affordability

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% of household income for housing is considered to be the benchmark. Some estimates put the number of Australians paying more than this at around 1.5 million people. It is well established that this puts substantial pressure on family finances, especially for people in rental situations where it is becoming increasingly difficult to find adequate and affordable accommodation without having to relocate away from essential services.

The Urban Policy and Research journal found that in 2019, 11% of Australians were experiencing housing stress. A household is typically described as being in 'housing stress' if it is paying more than 30% of its income in housing costs. A higher proportion of these where in lower income families.

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% in 2009 but in 2019 are at approximately 64%.



Forget blue or white collar. Society is now about the mortgage

By Shane Wright

The Sydney Morning Herald

13 September 2019

Forget blue or white collar workers – our society is now broken down by the size of our investment housing portfolio.

New research by academics at the University of Sydney suggests the office room debate about property prices and Australians' intimate understanding of negative gearing points to how we have become an 'asset society'.

Focusing on Sydney, the nation's most expensive capital city, the research found long-time societal delineations based upon what we did for a job have now given way to whether we own property, have a mortgage or will forever be priced out of the housing market.

Two of the co-authors of the research, Lisa Adkins and Martin Konings, said there had been a breakdown in the traditional way people measure their own worth and place in society as wages stagnated and house prices soared.

Professor Adkins said while most people were seeing their wages barely grow, those who sank money into property usually benefited from much higher gains in house values.

Getting into property, aided by a tax system that rewarded people the more houses and units they owned, was now the defining characteristic of society. The days of people being identified by their job or wage were effectively over.

'In Sydney, it's a middle-class concern. People are very aware about buying property, the value of property. It's something you do if you want to stay middle class or better.'

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(Continued)

'We're living in an asset society.'

According to professors Adkins and Konings and fellow researcher, Melinda Cooper, the developed world now has a five-tier asset-based class system which is topped by an 'investor' group. This included people who don't have an ordinary wage but live off the income garnered from their property investments.

They are followed by people who own their home outright, then by those who hold a mortgage.

A separate group called 'churners' with no housing assets are underneath the mortgage holders, split into renters and the homeless at the bottom rung of society.

According to the research, a 'structural reconfiguration' has taken place that means the life chances of most people is now determined by property ownership rather than their job and weekly wage.

Professor Konings said Sydney and Australia's other major capitals were good examples of the way society was now focused around asset prices rather than wages and employment.

He said so pervasive was property in the thinking of many Australians, they could explain in detail a tax arrangement like negative gearing.

'Everyone seems to understand negative gearing and how it works for property investment. People know its importance to housing prices and its clear policy focus,' he said.

The professors found that as wages had stagnated and house prices climbed, people wanting to get into property were increasingly reliant on assistance from their parents.

University students, apprentices or those taking unpaid work internships were now relying on in-kind rental assistance, usually from their parents, another sign of the way society was based on property assets.

Figure 14.14 Previous societal delineations based on what people did for a job have now given way to whether we own property, have a mortgage or will forever be priced out of the housing market.

In addition to this, the numbers of people on waiting lists for social housing across Australia continue to climb.

One of the main measures of housing affordability is the **Housing Affordability Index**, which reports on the relationship between household income, mortgage costs and the price of housing. If the reported index value is 100, this means that the earnings of a median-income family is exactly enough to let them get a mortgage on a median-priced home. If the index is below 100, then a median-income family would not be able to get a mortgage loan on a median-priced home. For example, in 2016 the Housing Affordability Index in Sydney was 61.5, indicating poor housing affordability in that city. This was even lower than the national Housing Affordability Index (see Figure 14.15), which has been under

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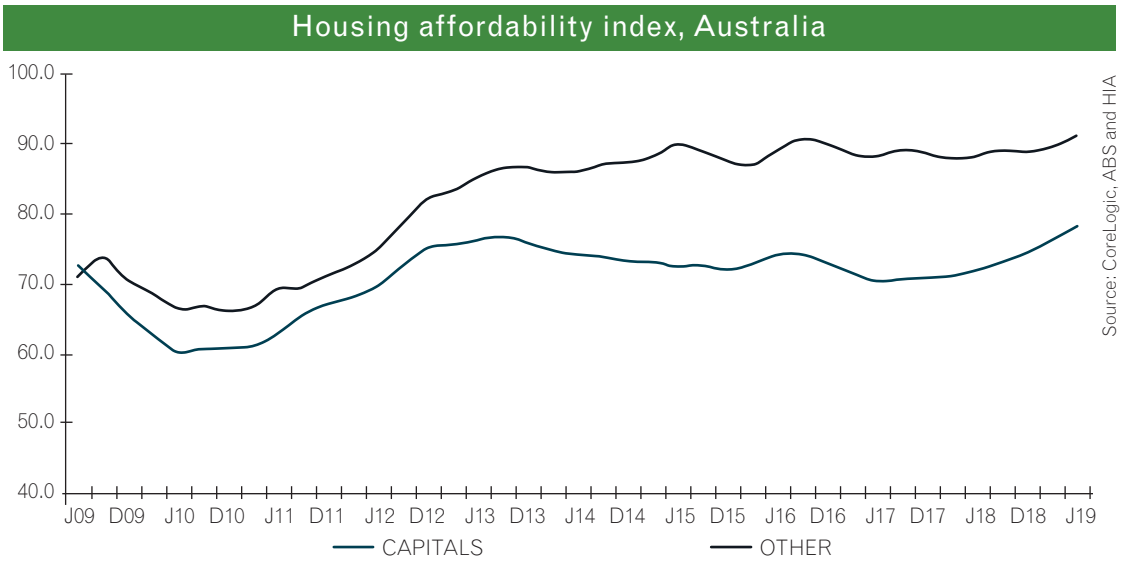

Figure 14.15 The Housing Affordability Index.

100 for some time. Figure 14.15 indicates that housing affordability has increased since 2011 – this is partly due to the Reserve Bank cuts to interest rates in 2014–2015 in response to economic factors such as growth of the economy. Figures have been reasonably steady, with fluctuations of generally less than one per cent, since the end of 2012. Since property values fell from 2017 to early 2019 in Sydney and Melbourne there has been some x = correction in the market with affordability slight improving. It should be noted though that the property market in Australia is still considered over valued and continues to impact of affordability.

Housing Affordability Index
a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

Legal Links

The Numbeo website takes user-contributed data to present an interactive world map of housing price to income ratios.

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 property price reductions from 2017 and subsequent interest rate cuts have had on housing affordability.

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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.

Housing NSW has provided funds for mortgage assistance for low-income earners as well as rental assistance schemes such as 'Rentstart'. The National Affordable Housing Agreement, which came into effect in 2009, was signed between the state and federal governments. It aims to ensure that 'all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation'. It aims to do this through better coordination and integration of all governmental services and improvements to social housing as well as housing for indigenous Australians. It will also continue to explore ways to increase the supply of affordable housing. Ultimately, some of the structural problems associated with housing affordability will take a number of years to address, especially in the private market. But improvements can be achieved with sustained government policies that aim to improve market conditions.

The Housing Industry Association Housing Affordability Index released in June 2018 showed a reading of 74.9, an increase of 0.8% on the June 2017 quarter, which had shown the poorest level of affordability in nearly six years.

These results, however, do not indicate whether there has been an improvement in the supply of private rental properties or a levelling off of increasing rental prices. Sydney is now regarded as one of the most expensive cities in the world, and some of our other major cities are not far behind in terms of housing affordability. Housing affordability will continue to be a significant challenge for all governments and will be integral to long-term social inclusiveness and cohesion. It is well accepted that prolonged high housing costs and low interest rates result in a widening of the wealth distribution between those able to purchase housing and those who cannot.

Figure 14.16 In 2017, the construction of tents by the homeless outside the Reserve Bank of Australia become a symbol of the housing affordability crisis.

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The following are some generally recognised solutions to housing affordability:

- increasing the supply of affordable rental housing
- tax reform – many commentators have argued that negative gearing of investment properties for tax benefits has artificially increased demand and hence property prices
- improving rental assistance
- setting benchmarks for all levels of governments to achieve in housing affordability.

The law can be effective to some degree in promoting the above conditions, but non-government organisations that deal with the fallout from housing stress continue to lobby government to adopt a well-funded, coordinated approach to housing affordability. Achieving such a coordinated approach would seem to be politically challenging.

Groups such as the Salvation Army, Australians for Affordable Housing, Shelter NSW and many more understand that addressing housing affordability is a long-term issue that requires political and economic will. Lastly, the media has the ability to highlight the plight of those Australians experiencing housing stress and the social implications of this.

Research 14.5

Using the internet, find and read three articles related to housing affordability and stress.

Review 14.10

1 Recall the Housing Affordability Index in 2016 for Sydney and the comparison figure of the national average.
2 Explain why the 2016 Housing Affordability Index revealed a recent improvement in housing affordability, and recall what change was identified in June 2018.
3 Critically evaluate the solutions to housing affordability and decide which you believe would be most and least effective.

14.8 Contemporary issue: Discrimination

State and federal laws make it illegal to discriminate against a person seeking shelter. The issue of discrimination is more prevalent in the rental market, particularly in areas where there is a shortage of housing supply. Migrants, indigenous Australians and single mothers are more likely to be denied accommodation due to prejudiced beliefs about a person due to their race, family or financial situation.


Video

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.

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Figure 14.17 Some people are judged purely on appearance or culture. In some cases, these people are denied their rights.

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 body of federal discrimination legislation is the:

- *Australian Human Rights Commission Act 1986* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

Complaints made against being denied shelter due to certain forms of discrimination are investigated by the Human Rights Commission.

It should be noted that under the current regime of discrimination law at state and federal levels, discrimination in all areas (including access to housing) is difficult to establish. In addition to this, some argue that the monetary penalties are too low and hardly entice people to bother making a complaint.

Discrimination in the housing sector is commonplace for marginalised people within the community and will remain difficult to eliminate. In essence, some landlords and the real estate agents they operate through have predetermined the types of people they do not want

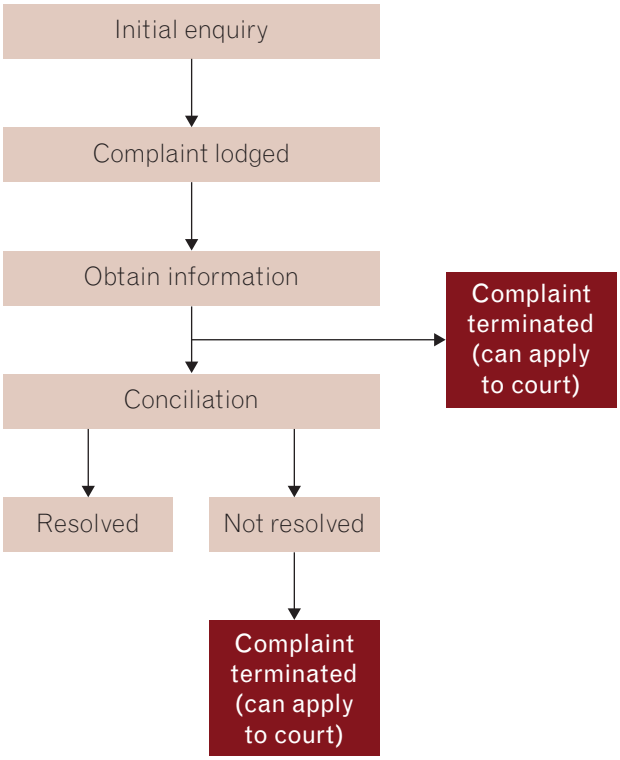

Figure 14.18 The complaints process followed by the Human Rights Commission.

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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.

It was estimated that 116427 people were homeless on the 2016 census night – up from 102439 in 2011. In 2014–2015, 255 657 people received support and almost seven million nights of accommodation were provided by specialist homelessness services.

Another way of examining homelessness is to consider the two following categories:

1 primary homelessness, which includes people who live on the streets or in deserted buildings
2 people who move between temporary shelters, living in boarding houses with no security of tenure.

There are numerous causes of homelessness, so reducing the number of people living 'rough' or in very insecure or unsafe housing situations requires a variety of strategies. According to the Salvation Army, people can end up homeless due to:

- domestic or family violence, relationship breakdown and 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.

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Figure 14.19 Reducing the number of people living 'rough' or in very insecure or unsafe housing situations requires a variety of strategies.

It is estimated that approximately 75% 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'.

In 2008, the federal government released its white paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness*, and committed to a target of halving the number of people experiencing homelessness by 2020. The paper set interim targets of reducing this number by 20% by 2013. However, as Table 14.4 shows, this target was not met, as total homelessness had actually increased by this time. It also committed to ensuring that all rough sleepers who needed overnight accommodation would be offered crisis accommodation by the same year. Part of this strategy was coupled with the National Affordable Housing Agreement, which commits to more public and **community housing**, and renewing and building more housing for overcrowded indigenous shelters.

community housing
secure and affordable rental properties for people who earn a low income and who have a housing need; homes are provided by not-for-profit community housing organisations

Close to $2 billion has been targeted to deliver improved housing outcomes for indigenous Australians who reside in remote areas, and additional funds for social housing maintenance and new projects.

It remains to be seen how effective the government's white paper on homelessness will be over the long term. As Table 14.4 shows, homelessness has increased between 2006 and 2018. On this indicator it is difficult to imagine

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TABLE 14.4 Shelter

Rate of homeless persons per 10,000 of the population, by State and Territory of usual residence - 2001, 2006, 2011 and 2016 (a)

States and Territories	2001	2006	2011 (b)	2016
New South Wales	36.4	33.9	39.7	50.4
Victoria	38.9	35.3	41.7	41.9
Queensland	54.8	48.3	43.9	46.1
South Australia	39.8	37	36.4	37.1
Western Australia	53.6	42.3	41	36.4
Tasmania	27.5	24	31	31.8
Northern Territory	904.4	791.7	723.3	599.4
Australian Capital Territory	30.4	29.3	48.7	40.2
Australia	**50.8**	**45.2**	**47.6**	**49.8**

(a) Cells in this table have been randomly adjusted to avoid the release of confidential data. As a result cells may not add to the totals.
(b) Homeless estimates from 2011 for the category 'Persons living in boarding houses' have been revised.

Review 14.12

1. Analyse and justify why the definition of homelessness includes far more than just someone living on the streets.
2. Explain the purpose of the federal government's white paper, *The Road Home: A National Approach to Reducing Homelessness*.
3. Evaluate and explain why social service groups have a completely different approach from the federal government to homelessness.
4. Summarise the suggestions for solutions for the lack of safe and affordable housing.

the ambitious goals of the paper being fulfilled and the criticisms made of Australia in 2006 being a catalyst for change. However, the white paper does represent a more positive political commitment to address what is a complex and difficult area.

Non-government organisations that interface with the homeless on a daily basis provide an invaluable safety net for those most in need of shelter. Groups such as the Salvation Army, the St Vincent de Paul Society, the Wesley Mission and the many youth shelter and advocacy groups try to fill the gaps where government assistance fails or does not reach. They also keep reminding governments of their obligations under their own policies and international law, and provide invaluable responses to government position papers from hands-on perspectives.

14.10 Contemporary issue: Social housing and community housing

Social housing

Social housing includes public housing and indigenous housing properties managed by Housing NSW. This is a type of secure housing that 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

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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.

In assessing whether an applicant meets the criteria for social housing, the relevant government minister will determine eligibility and whether rental rebates apply under the *Housing Act 2001* (NSW). People who apply after 2008 are now subject to income limits, which are adjusted annually. Income limits are calculated according to the make-up of the family that will be occupying government-provided housing. Additional levels are also available for people with disabilities, with varying rates for the degree of disability. Whilst this support is greatly needed, it will not cover the all the costs of families occupy 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 obligated to deal with repairs, whether they are urgent or non-urgent, under the *Residential Tenancies Act 2010* (NSW). Residents also have the right to apply to NCAT to have repairs 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:

- **Rent start** – 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.

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.

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Community housing

Community housing is similar to social housing in that both provide secure and affordable rental housing for people on low or very low incomes who have a housing need. The essential difference is that community housing is provided by not-for-profit community housing organisations instead of Housing NSW. There are a number of these providers around the state and the rationale is that this low-cost housing provides another avenue for the provision of housing infrastructure.

Tenants may appeal decisions made by community housing providers to the Housing Appeals Committee. This includes decisions about eligibility for community housing, transfer, offers of housing and rental subsidy calculations. Some matters come under the jurisdiction of NCAT, such as maintenance and leasing issues.

The provision of social housing has many benefits to the community. Marginalised and disadvantaged members of the community who require shelter should be able to enjoy their human right to adequate and affordable housing. While this is a financial burden on the community, governments around Australia have recognised for many years the obligations they have to ensure all citizens are able to contribute and participate in their communities, and shelter is central to the ability to do this.

Resources will never be able to sufficiently meet the need for social housing even though waiting lists in New South Wales indicate some improvement over the previous decade. Creating the conditions for people to find long-term accommodation in the private market is always a desirable goal, and social housing at times can assist this process. There are many people with varying degrees of disadvantage, some of their own doing and others due to circumstances out of their control, and they do not have the financial resources to provide for themselves and their families.

Integrating social housing into our neighbourhoods is not cost-effective but avoids the stigmatisation that many social housing tenants continue to experience. However, there remain too many social housing precincts that are over-represented in criminal and adverse health statistics and welfare dependency. Policy-makers must continue to look for creative solutions, given the ever-increasing costs of social and community housing in the context of diminishing budgets, if we are to meet our international obligations regarding the provision of shelter.

Figure 14.20 Sirius building. The last resident moved out of the former public housing building in January 2018. The building, sold by the NSW Government to a property development company, will be converted into private apartments.

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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 Indigenous 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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Chapter 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 Identify the abbreviation NCAT.
5 Critically evaluate the difference between needing shelter and being homeless.

Review 14.14

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.

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.

Themes and challenges for Chapter 14 – Option 5: Shelter

The themes and challenges should be integrated throughout the teaching of this topic. The following are some suggestions as to how the content covered is related to themes and challenges.

The role of the law in encouraging cooperation and resolving conflict in regard to shelter

International law sets international benchmarks with respect to the rights of shelter and encourages states to work proactively in providing adequate and affordable shelter.

The legislative framework that exists with respect to purchasing shelter and leasing is ultimately aimed at encouraging cooperation and resolving conflict. Standard form contracts when purchasing shelter have made clearer the obligations of all parties. The rights and obligations of landlords and tenants are clearly provided for in the *Residential Tenancies Act 2010* (NSW) and in the *Residential Tenancies Amendment (Review) Act 2018* (NSW).

The creation of NCAT provides an accessible and cost-effective avenue for the resolution of tenancy disputes. This includes disputes in relation to social and other forms of housing.

The mediation and conciliation process used in the resolution of disputes arising from discrimination in the acquiring of shelter encourages all parties to come to an agreement themselves. 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.

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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).

NCAT has improved compliance with the law because it makes the law more accessible to all and makes orders with respect to breaches of the *Residential Tenancies Act 2010* (NSW).

The standard form contract has improved the rights of buyers in the conveyancing process because of the mandatory disclosures that must be made by the vendor.

Boarders and lodgers lack effective legislative protection and as a result are the more vulnerable residents in society. There are many examples of landlords making false and misleading statements about the state of premises.

Comparing aged care is problematic and it is difficult to ensure that resident's rights are clear and compliance issues are being met.

Enforcement of discrimination provisions in state and federal law is a challenge for authorities. Proof can be hard to establish and the monetary payout may deem the process not worth pursuing.

Strata schemes can produce entrenched and ongoing conflict as a result of people living in close proximity to each other. Improved compliance has resulted from the clearer guidelines established under the *Strata Schemes Management Act 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.

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 in the electorate. For example, the need for boarders and lodgers to be given greater legislative protections has been well established but so far state governments have taken no real action.

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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. The 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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Relevant law

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

Peace of Westphalia (1648)
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)
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)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
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

Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*) *(Merits)* [1986] ICJ Rep 14
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 1996
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v United Kingdom*) [2015] ICJ No 2015/16
Timor-Leste v Australia, 2018, Permanent Court of Arbitration in The Hague
Philippines v China, 2019, Permanent Court of Arbitration in The Hague

Legal oddity

The majority of the world's countries are in favour of filling the legal gap on the worst of the weapons of mass destruction: nuclear weapons. In July 2017, the UN General Assembly created the *Treaty on the Prohibition of Nuclear Weapons*, which came into force after being ratified by 50 nations. Nuclear weapons are now banned under international law. However, a small number of nation states that possess nuclear weapons refuse to accept the evidence presented at three international conferences – run by the Red Cross and the International Campaign to Abolish Nuclear Weapons between 2013 and 2014 – that any use of nuclear weapons would be catastrophic and that there can be no humanitarian response to a nuclear catastrophe.

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16.1 The nature of world order

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.

globalisation
the ongoing integration of regional economies, societies and cultures brought about by the removal of restrictions on international trade, and advances in travel and mass communication

Although outdated now, the term 'new world order' originated in the early 1990s in the wake of the optimism at the end of the **Cold War**. Many world leaders hoped that the end of communism and the Cold War would mark the beginning of a new era in which states would act collectively to address global problems that were beyond the capability of any of them to solve individually. Both former US President George Bush (Snr) and former President Mikhail Gorbachev of the USSR used the phrase to define the emerging spirit of cooperation between the superpowers, which they hoped would continue.

Cold War
the state of hostility, without actual warfare, between the USSR and its satellites and the United States and its allies in the Western world, which lasted from just after World War II until about 1991

As 'world order' implies a certain level of peace and stability, world order issues are those that relate to promoting peace and resolving conflicts between states. The importance of world order as a goal can be seen in the dramatic growth and development of international law over the 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.

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, an outbreak of illness in a single area, 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 threats of nuclear war and climate change demonstrate.

Figure 16.1 A volunteer caring for orphaned children linked with foreign fighters of the Islamic State (IS) group. IS was defeated in 2019 but left in their wake millions of refugees as well as widows and orphans of dead IS fighters.

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mass-atrocity crimes (mass atrocities)
a broad term for crimes that fall into the categories of genocide, war crimes, 'ethnic cleansing' and crimes against humanity; this is the term favoured by the United Nations because it avoids making distinctions on the basis of whether the crimes were committed in war or peace, or as part of an intrastate or interstate conflict

Benefits of interdependence

There is a positive side to **interdependence**. Those in the developed world, representing one-sixth of the total global population, benefit greatly from the current world order. Recognising the threats posed by interdependence, states have made serious efforts towards cooperation over the past 30 years. The volume of international law has grown exponentially and, most incredibly, there is a high degree of compliance with international law. The reason for this level of compliance is simply that most international law is created by consensus. All treaties are negotiated and no state is ever forced to sign a treaty; states agree to binding treaties and commit themselves to the treaties' provisions because of mutual benefit. While there are always some states that do not wish to sign up to treaties seen as detrimental to their interests, the vast majority of international treaties, whether they relate to trade, finance, transport or security, are recognised by the parties as benefiting them in some way.

interdependence
the interconnection of two or more states to such an extent that they are mutually dependent on each other for survival and mutually vulnerable to crises

The development of world order over time

The current world order is founded upon two principles that on their face value seem contradictory: **state sovereignty** and **multilateralism**. State sovereignty is a state's legal power and authority over everything that occurs within it. Multilateralism is cooperation between multiple states for mutual benefit or to deal with common threats. Multilateralism often requires a surrender of some degree of sovereignty.

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

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. 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

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war of previously unimaginable levels. In addition, between 1848 and 1870 there was a violent series of revolutions and wars, which further increased the desire for multilateral cooperation to ensure peace. Peace conferences were held at The Hague, Holland (now The Netherlands) in 1899 and 1907.

conscription
compulsory enlistment in the military force of a state

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 Britain, or the Central Powers, led by Germany. Both armed camps were prepared to fight to the finish and the warring nations of Europe bled themselves dry as they unleashed all the horrors of modern warfare on each other. But victory seemed elusive. Meanwhile, there were many people who viewed the war as insanity and argued for a return to multilateralism through the creation of a 'league of nations'. 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**.

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. However, it was hampered by serious flaws in its legal framework and a lack of political will on the part of the world leaders at the time to fully support it. Finally, it was blatant military aggression by powerful nations, the very thing that the League was designed to prevent, that sealed its fate. The League had no answer for Japan's annexation of Manchuria in 1931, Italy's invasion of Abyssinia in 1935, and finally Nazi Germany's annexations of Austria and Czechoslovakia by March 1939. By the time Germany invaded Poland in September 1939, the League was nothing but a distant memory, though as a legal entity it lingered until 1945.

World War II and the United Nations

It would be reasonable to assume that the failure of the League of Nations in the 1930s would have killed off any further ambitious experiments in multilateral cooperation to prevent war. However, in the first dark years of World War II, when the Nazi war machine seemed unstoppable as it overwhelmed all opposition in Europe, another blueprint for a world organisation was placed on the agenda. In August 1941, two experienced world leaders, both of whom had been in office during World War I, met on a battleship off the coast of Canada and drew up a document that was to become the first step in the creation of a new world organisation. The document, drafted by then US President Franklin Delano Roosevelt and British Prime Minister Winston Churchill, has since become known as the *Atlantic Charter* (1941). This was an eight-point plan in which they pledged themselves:

> after the final destruction of Nazi tyranny … to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want [sixth point]
>
> and to the 'abandonment of the use of force' and 'the establishment of a wider and permanent system of general security' [eighth point].

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The *Atlantic Charter* (1941) was a visionary attempt to avoid the mistakes of the past, to formally establish early in World War II what the Allies' objectives were, and to bring about a peace that would be fair and enduring, unlike the outcomes from **Versailles** in 1919. However, 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 (UN) became a legal entity.

Treaty of Versailles
A treaty signed in 1919 which brought a formal end to World War I. The treaty divided up the territory of the defeated nations, restricted Germany's armed forces, and helped to establish the League of Nations. It left Germany resentful about what it considered a vindictive settlement

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. 34) and the 'learn to' activities (pp. 34–5) 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.

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.

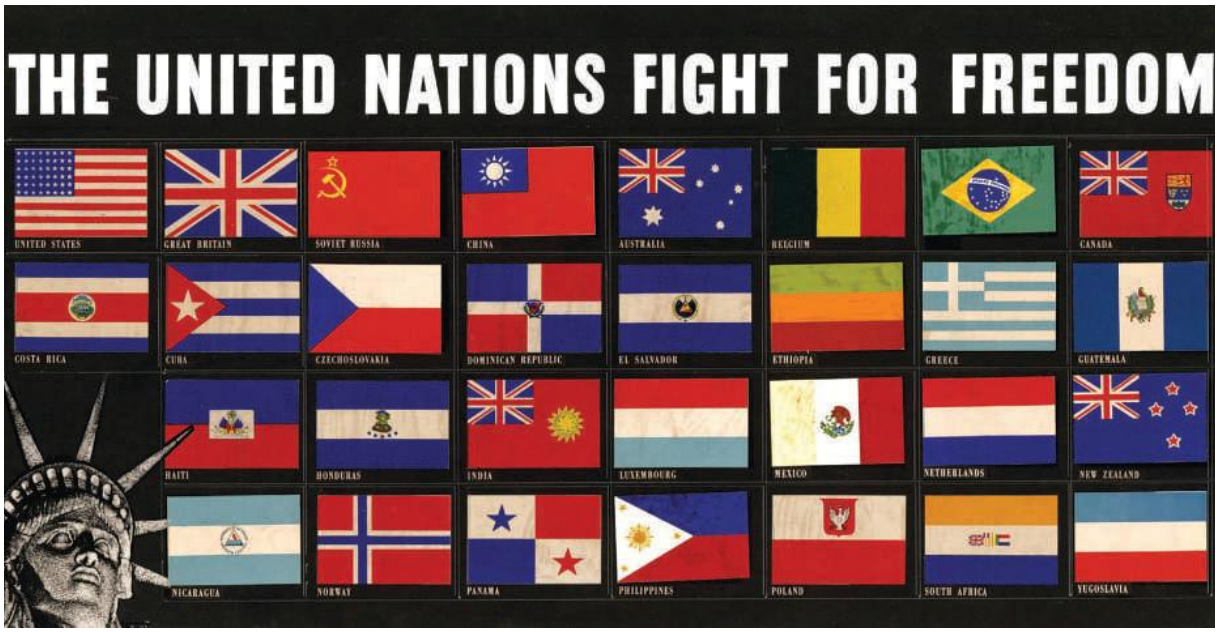

Figure 16.2 This World War II American propaganda poster was released by the US Army in 1942. The slogan of the 'United Nations' would eventually lend its name to the new international organisation formed at the end of the war.

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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.

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.

Today there are nine countries which possess nuclear weapons: the United States, Russia, Britain, France, China, India, Pakistan, Israel and North Korea. In 2015, Iran was suspected of attempting to build nuclear weapons in violation of the *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 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, at the Nuclear Non-Proliferation Review Conference in May 2015 neither Russia nor the United States offered any hope of a reduction in their nuclear arsenals. By 2020, the nine nuclear weapons states had all embarked on nuclear modernisation programs.

There are approximately 14 000 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, use of thousands of nuclear weapons in a conflict between Russia and the United States would probably destroy all life on Earth.

Cyber warfare

A cyber-attack can direct a carefully engineered packet of data towards systems that control essential infrastructure, such as power stations, dams, airports, hospitals, schools, transport systems, electricity grids and financial systems. A cyber-attack could be launched by terrorists, criminals

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Figure 16.3 A screenshot from a cyber-warfare exercise during a NATO interoperability exercise in Poland in 2017.

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 cyber-attack is that it is hard to determine its origin. An enemy can strike without leaving their desks. Everyday, networks are attacked and probed for weaknesses which 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 UN 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.

Intrastate

The one thing that all the following forms of warfare have in common is that the UN Charter was not written with them in mind. The UN Charter focused on provisions to deal with interstate conventional warfare, yet today internal conflict now outstrips interstate conflict. The UN has had to develop approaches to each of these types of warfare and graft them into the UN system. The notable example of this is **peacekeeping**.

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

Civil war

A civil war is a conflict between two or more parties within one country. Prominent examples are the American Civil War (1861–1865) and the war in

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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 is 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.

Guerrilla war

Guerrilla war involves the use of hit-and-run tactics and the element of surprise. Guerrilla fighters harass the enemy, hide, retreat and repeat this pattern until the enemy's army is worn down. Only then will the guerrillas attack with some force. Such tactics can bog down a greatly superior military force. The Vietnam War (1954–1975) is a prime example of a much smaller force, the Viet Cong, using guerrilla tactics against the technologically superior US (and other) forces. Guerrilla war tactics have been used by some armed groups opposing US occupation in Iraq and Afghanistan.

War waged by governments against their own people

Dictatorial regimes often engage in systematic campaigns of **genocide**, mass murder, the elimination of classes of people, or state-sponsored terror and death squads. These activities can be classified as war crimes, crimes against humanity or mass-atrocity crimes.

dictatorial
(of a government) having unrestricted authority or power

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

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.

terrorism
acts of violence against a population, intended to cause terror and thereby influence a government

Communal violence

Communal violence refers to violence and warfare within communities, not necessarily perpetrated by the government. This may be a result of ethnic rivalries, historical differences, religious differences or territorial grievances. This type of violence has been a feature of the world since the end of the Cold War in the 1990s. During the Cold War, the superpowers exerted some restraining influence on rival groups in countries within their political orbit. Following the collapse of the USSR's empire in Eastern Europe, however, there were outbreaks of communal violence in Yugoslavia in the 1990s, after it was split up into Bosnia, Serbia and Croatia.

communal violence
violence and killing within communities

Communal killing has also occurred in the African states of Somalia (1993) and Rwanda (1994). Since 2004, the international community has been concerned about this type of conflict in the Darfur region in Sudan. Many of these activities may fit into the categories of **crimes against humanity**, **war crimes** or mass-atrocity crimes. This type of internal warfare often spills into neighbouring states, thus becoming a serious issue of regional security and world order. The UN has found it very difficult to deal with communal killing because acting on it can be seen as violating the sovereign rights of that state.

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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.

crime against humanity
a widespread or systematic attack against any civilian population

war crime
action carried out during a time of war that violates accepted international rules of war

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**

When nations do not get what they want by peaceful means, they are often tempted to revert to war. War has been a constant feature of the human race throughout history. However, for most of human history, war was also seen as a legitimate and in many cases a desirable way of sorting out issues between states. Technological advances in the weapons of warfare in the 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 UN, 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 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.

hegemony
dominance of one nation over others

Access to resources

One reason why the United States has so many military bases around the world, and particularly in the Middle East, is so that it can secure energy resources for its economy, which is highly energy-dependent. The United States continues to be Israel's staunchest ally partly because of its pivotal position in the Middle East, and has sought good relations with oil-rich Arab states such as Saudi Arabia and the Gulf states. One major factor in the first Gulf War (1990–1991) 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. Similarly, a major factor in the US invasion of Iraq in 2003 was Iraq's oil. Ridding Iraq of its leader, Saddam Hussein, and installing a democratic pro-US Government in Iraq would be in the United States' geopolitical interests.

Other major powers are also very concerned to secure future access to essential resources. China, with the fastest growing economy in the world, is making great efforts to secure gas, coal, iron ore and oil contracts as well as food supplies in Australia and around the world, particularly in Africa.

It is highly likely that competition for increasingly scarce resources will become a major source of

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conflict in the future both internationally and within states. Disputes over water supplies, minerals, gas and precious metals are all possible. These will probably be exacerbated by climate change and disruption to the global financial system.

Food scarcity is also likely to be a cause of future conflict. Lack of sufficient food for the people of the world today has a number of causes, including overpopulation, climate fluctuations and drought, soil degradation (from pesticides and inorganic fertilisers) and the redirection of food crops (to biofuels and livestock production). Water shortages caused by poor agricultural practices combined with drought are another source of conflict. The upheavals caused by climate change will also be catastrophic, creating millions of refugees in the Asia–Pacific region alone and a rise in tensions between states. The movement of large numbers of displaced people is almost certain to result in a scarcity of resources and disputes about which states are to bear responsibility for the refugees' survival and health.

Other causes of war

While competition over resources is a major cause of conflict, there are many others as well, such as:

- **ideological disputes** – the Cold War was in part a competition of ideas, between communism and capitalism
- **religion** – while religious conflict has been a recurring theme in wars throughout history, the rise of extreme fundamentalism in a number of countries has accompanied a backlash against the perceived decadence of Western consumer culture
- **global or regional hegemony** – a state's desire for dominance in an area or in the world often leads to conflict as other nations resist what may be seen as imperialism or the thwarting of their own ambitions
- **ethnic, religious or racial intolerance** – the wars that occurred when Yugoslavia split apart in the 1990s were fought on ethnic and religious lines, as have been many contemporary conflicts in Africa, including the conflict in Rwanda between the Hutus and Tutsi, where over 500 000 Tutsi were killed in 100 days by the Hutu majority.

16.2 Responses to world order

The role of the state and state sovereignty

As explained earlier in the chapter, the states of the world are like the building blocks of world order. States have sovereignty, which is the right to make all the laws within the territories they govern. State sovereignty also gives a state the right to make treaties with other states. These treaties are the primary source of international law. However, states can also impede the influence of international law to a certain degree, by using their sovereignty as a barrier to unwanted input from the international community regarding their conduct.

The architects of the UN opted to use the current system of international law, based on treaties made between sovereign states. As a result, individual states still have significant legal power. States can decide to cooperate with the international community on matters in which they have some interest, and they can also decide to reject international treaties that they believe conflict with their national interest. The principle of state sovereignty was enshrined in Article 2.7 of the UN Charter:

> Nothing contained in the present Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state 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 second priority in the Preamble, has provided a thin legal wedge which 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

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Figure 16.4 On 13 March 2014 at the UN headquarters in New York, United States, the Ukraine interim Prime Minister, Arseniy Yatsenyuk, holds a copy of the UN Charter as he speaks at a meeting of the UN Security Council to discuss the situation in Ukraine.

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. The difficulty is that the interpretation of these thresholds varies. In short, this means that the effects of human rights violations must in some way spill across the border of the offending state. For instance, mass killings within a state may cause an exodus of refugees into neighbouring states, which can then be viewed as a 'threat to peace' requiring UN Security Council-sanctioned intervention. This type of action is known as **humanitarian intervention**.

humanitarian intervention
military intervention in a state in order to stop serious human suffering and/or human rights violations

The problems with UN Security Council-sanctioned intervention in a state to stop mass-atrocity crimes are:

- It is very difficult to get UN Security Council agreement, especially when the interests of one of the **Permanent Five** is threatened, as is the case with China's blocking of effective UN action in Darfur, due to its interest in obtaining oil from Sudan.
- The Permanent Five members of the UN Security Council are often unwilling to undertake the intervention themselves, yet usually they are the only ones that have the military muscle to mount an effective humanitarian intervention.
- It is also difficult to get other member states to place their armed forces in harm's way to protect the human rights of some distant state. The public back home may have little or no enthusiasm for placing their own troops in danger in some far-off land.
- States have a justified fear of failure, such as occurred with the US-led and 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.

Permanent Five
the five permanent members of the UN Security Council: France, the United Kingdom, China, Russia and the United States

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 (UN).

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The UN 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's 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 UN.

The purposes of the UN – as stated in Article 1 of the UN Charter – are:

- to maintain international peace and security
- to develop friendly relations among nations
- to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character
- promoting respect for human rights.

Article 2 states that the UN and its members should act in accordance with the following principles:

- sovereign equality of all its members
- fulfilling obligations in good faith
- settling international disputes by peaceful means
- refraining from the threat or use of force against of any state
- assisting in any action taken in accordance with the UN Charter, and refraining from giving assistance to any state against which the UN is taking preventive or enforcement action
- ensuring that states that are not members of the UN 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 UN. In reality, no stringent conditions have to be met for a state to join the UN. By 2016, there were 193 member states.

Research 16.1

The United Nations

1 On the internet, research how many states there are in the world. Identify if all states are members of the UN. Discuss why or why not states are members of the UN.

Use the UN's website to complete the following tasks.

2 Construct a table to show the six major organs of the UN. 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 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 UN that have been awarded the Nobel Peace Prize.

5 Locate the UN Treaty section on the UN's 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 UN's six major organs) section on the UN's 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 UN website, describe the overall impression you have about the UN, its mission and its work.

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The UN 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 trust territories and help them prepare for self-government and independence. By 1994, all the trust territories had attained self-government or independence. The Trusteeship Council suspended its own operations, its work completed, and agreed to meet 'as and when occasion may require'.

In addition to the myriad day-to-day activities of the UN and its agencies to promote world order, various other organisations participate in cooperative initiatives with the UN. These include NGOs, regional organisations (such as the European Union (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 UN also provides leadership in dealing with issues that affect global order by:

- commissioning research and reports
- convening conferences
- initiating new treaties
- promoting arms control
- promoting human rights
- carrying out peacekeeping operations
- providing humanitarian and development assistance.

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, and, second, it can be used to block the appointment of someone to the position of Secretary-General and to block any changes to the UN Charter, thereby hampering any substantial reform.

The 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.

Figure 16.5 A general view of the UN Security Council meeting about Syria at the UN headquarters in New York, United States, on 7 August 2019.

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).

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There have been many calls for its reform, particularly with respect to who the permanent members are – they reflect the power realities of 1945 rather than of today. For instance, it has been suggested that India, Brazil, Germany and Japan would be front-runners for permanent member status today.

The non-permanent members of the UN Security Council are selected according to a geographical and rotating formula. There must be:

- three African states
- two Asian states
- one Eastern European state
- two Latin American states
- two states from Western Europe.

In 2007, the Rudd government campaigned vigorously to get a seat on the UN Security Council. This effort was successful and in October 2012 it was announced that Australia had won a seat with 153 nations at the UN giving Australia their vote. Australia took up its seat and served its two-year term from 2013 to 2014.

Peacekeeping

The term 'peacekeeping' is not found anywhere in the UN Charter. However, the founders of the UN 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 Britain, 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 Britain and France. The UN 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 UN, 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.

The future possibilities for the UN

Peace Building Commission

Realising that regional situations which threaten peace and security cannot be completely dealt with by peacekeeping operations, the UN General Assembly and the 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.

Proposals for a United Nations Emergency Peace Service

Several peace and security NGOs are currently arguing that a permanent UN Emergency Peace Service (UNEPS), which could intervene quickly in a crisis, should be established. The World Federation of UN Associations 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 further information about peacekeeping, go to the UN's peacekeeping website.
- An article by independent researcher, Peter Nadin, on Australia and UN peacekeeping ('Australia's false start on peacekeeping: A post-summit review,' 13 October 2015) is available on the website of the Global Peace Operations Review.

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Under Article 25 of the UN charter, UN member states are obliged to carry out the decisions of the UN Security Council. A former UN weapons inspector Hans Blix's report states:

> The primary responsibility placed upon the Council for the maintenance of international peace and security is thus matched by the authority that is given to it and that can be exercised to reduce the risk of WMD, whether in the hands of the five permanent members or other members of the United Nations, or non-state actors.

Proposal for a United Nations Parliamentary Assembly

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 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.

International instruments

Treaties and customary law are the main sources of international law. Treaties are also known as **conventions**, charters, covenants and statutes – all these terms refer to a binding agreement voluntarily entered into by states. The agreement, or treaty, places an obligation on the parties to act in a particular way or adopt a certain type of behaviour as the norm. Usually a treaty is entered into because a state perceives that it will benefit from it.

convention
another term for a treaty: an international agreement between parties that are subject to international law (states and international organisations such as the UN and its bodies)

There are two types of treaty:

- **bilateral treaties** – treaties between two states (for example, the Free Trade Agreement between the United States and Australia, signed in 2004)
- **multilateral treaties** – treaties between a number of states.

Treaties between states have existed for thousands of years. The majority of these treaties have been bilateral. The number of multilateral treaties has increased over the past few hundred years, escalating sharply since the end of World War II. Multilateral treaties now number in the tens of thousands and are an indispensable part of the current world order.

Since 1945 all states have been obliged to lodge their treaties with the UN. This requirement is stated in Article 102 of the UN Charter:

> 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.

The most significant treaties in terms of their contribution to world order are undoubtedly the *Charter of the United Nations* (1945), the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), *The Universal Declaration of Human Rights* (1948), the Geneva Conventions (1949), the *Convention relating to the Status of Refugees* (1951), the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), and the *Rome Statute of the International Criminal Court* (1998). To a large extent, these treaties have set the framework for international law.

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TABLE 16.1 The most significant international documents since 1945

International document	Year signed
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
Convention relating to the Status of Refugees	1951
Protocol to the Convention relating to the Status of Refugees	1967
Treaty on the Non-Proliferation of Nuclear Weapons	1968
Rome Statute of the International Criminal Court	1998
Treaty on the Prohibition of Nuclear Weapons	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

Courts and tribunals

International Court of Justice

The International Court of Justice deals with disputes between states. The International Court of Justice was established in 1945 (began work in 1946) as an organ of the UN. The court is based in The Netherlands and has 15 judges, elected by the UN. The questions before the court are usually decided by a majority of judges, and decisions are arrived at by applying international conventions and international customary law. The International Court of Justice 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 International Court of Justice hears two types of case:

- **disputes between states** – the court gives rulings between states that have agreed to be bound by them
- **advisory opinions** – the court provides reasoned, but non-binding, rulings on questions of international law submitted by the UN General Assembly.

Figure 16.6 On 3 June 2019, Ukraine launched action against Russia in the International Court of Justice at The Hague, The Netherlands. Ukraine disputed Russia's use of terrorism against Ukraine including the shooting down of Malaysian Airlines flight MH17, the bombing of civilians on Ukrainian territory and the annexation of Crimea.

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Research 16.2

The International Criminal Court

Do an internet search to locate the article titled, '*The Observer* view on the effectiveness of international law' (*The Guardian*, 17 December 2017), then answer the following questions.

1. Recall the concerns expressed in this article about the effectiveness of the International Criminal Court.
2. Discuss what reasons this article gives for the current ineffectiveness of the International Criminal Court.
3. Research two more current media articles about the International Criminal Court.
4. Outline what concerns are expressed in these more recent articles.
5. Analyse what conclusions can be made about the effectiveness of the International Criminal Court today.

There are numerous treaties that confer jurisdiction on the International Court of Justice. 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 International Court of Justice's effectiveness has often been limited by the losing party's unwillingness to abide by the court's ruling, and by the reluctance of the UN Security Council to enforce the rulings.

International Criminal Court

The *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 was established at The Hague, although it can hear cases anywhere in the world if it decides to. The International Criminal Court was given jurisdiction only over acts of genocide, war crimes and crimes against humanity committed since 2002 – these are the three most serious types of international crime and the cause of a great deal of regional disorder.

The International Criminal Court is a legal entity created independently of the UN 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 International Criminal Court.

Despite this autonomy, the International Criminal Court works closely with the UN. One hundred and twenty-four states are members of the International Criminal Court, 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 International Criminal Court Prosecutor. It can be argued that this reduces the mandate and reach of the court and renders it perhaps not as beneficial to the countries who need it the most, as they may not be parties to the Rome Statute.

Other international tribunals

Following is a discussion of some other major international courts and tribunals. The first two of these were *ad hoc* tribunals set up by the UN Security Council in the 1990s to deal with the human rights abuses that had occurred in the Balkans and Africa, respectively.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a 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.

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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			

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.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 as a joint venture between the UN 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 is plagued by the slow pace of its trials, lack of funding and corruption issues. Many of the ex-Khmer Rouge leaders die while awaiting trial. In 2010, Kaing Guek Eav, better known as 'Duch', was convicted and sentenced to life imprisonment for his role in the killing of up to 16000 people. 'Duch' had been the chief of the infamous Tuol Sleng centre in Phnom Penh. In August 2015, Ieng Thirith, a former top Khmer Rouge official on trial in the ECCC, died at the age of 83. She had been known as the 'first lady' of the Khmer Rouge. Her husband was former foreign secretary Ieng Sary, who died in 2013 at age 87, before the genocide case against him could reach a verdict. Since its creation in 2003 the ECCC has only brought half a dozen of the Khmer Rouge top leadership to justice and it is unlikely that it will seek out any further prosecutions despite the fact that there are vast numbers of ex-Khmer Rouge members either in hiding or living openly in Cambodia.

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 January 2011 there were almost 140000 applications pending before it, more than half of which were lodged against Russia, Turkey, Romania or Ukraine. The court has been highly influential, not only in reforming the laws of the member states but also in promoting the development of human rights law both regionally and globally. Some commentators argue that the ECHR is one of the most effective mechanisms for the protection of human rights in the world.

As states intensify their competition for access to natural resources, tribunals with jurisdiction over the management of these resources, such as the International Tribunal for the Law of the Sea, are likely to grow in importance. This tribunal, established under the UN Convention of the Law of the Sea, can look at any issue relating to the sea, such as mining the seabed or overfishing of certain types of fish. State parties are obliged to use either this tribunal or the International Court of Justice to settle peacefully any sea-related disputes.

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Intergovernmental organisations

Regional **intergovernmental organisations (IGOs)** are making an increasingly significant contribution to world order. Each of these organisations has been set up for a particular purpose. They vary enormously in their economic power, effectiveness, level of cooperation and integration, plans for the future and impact on the rest of the world. Profiled are two of the larger regional organisations: the EU and NATO.

The following are other notable examples:

- **African Union** – 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** – this is made up of former members of the British Empire. In the past the Commonwealth made a strong stand against apartheid in South Africa. The Commonwealth has taken a strong stand against the dictatorship that has existed in Fiji since 2006. In 2009, Fiji was suspended from the Commonwealth for refusing to agree to hold elections in 2010.
- **Association of Southeast Asian Nations** – this organisation has the most influence in trying to encourage the military dictatorship in Burma (Myanmar) to stop its systematic human rights violations.

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 28 members unlikely. A large number of states seek admission to the EU and it is emulated by other regional organisations, including the African Union. It is a **supranational organisation**.

intergovernmental organisation
an organised group of two or more states, set up to pursue mutual interests in one or more areas

supranational organisation
an organisation in which decisions are made by the appointed or elected representatives of the member states; because decisions are made by majority vote, it is possible for a member state to be forced to do something it does not itself agree with

A European federation of democratic states that would forever end the scourge of war in Europe was a dream of visionaries during and after World War I. Despite their hopes, it took another world war and the political commitment of a few individuals, especially Jean Monnet (credited as the 'father of Europe'), to bring the European federation into existence.

The EU officially began in 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 (EEC), 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 had 28 members but the exit of the United Kingdom has seen it reduced to 27 members. The EU has strict membership criteria, adheres to the UN Charter regarding the use of force, and requires that its members are democracies that uphold the rule of law and respect human rights. It has a Charter of Fundamental Rights and a Fundamental Rights Agency whose role is to advise policy-makers and raise public awareness. Member states work together to develop common solutions in the areas of immigration and asylum, and to manage the application process for people coming to Europe to escape war, persecution, natural disasters or poverty. The states also cooperate to fight organised crime, including drug and people trafficking, money laundering and terrorism, through both legislation and police powers. Europol (the European Law Enforcement Agency) is responsible for coordinating the various states' police efforts in this area.

The EU has become a powerful role model to other states and regional organisations, and exercises a 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

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Figure 16.7 A tense meeting between French President, Emmanuel Macron (left), German Chancelor, Angela Merkel (second right), and British Prime Minister, Boris Johnson (right), on 23 September 2019. The Brexit debate had dominated EU affairs from 2016 to 2019.

developing strategies for conflict management for use around the world. However, the debt crises that have afflicted the EU in recent years have led some commentators to question the EU's long-term viability.

North Atlantic Treaty Organization

The North Atlantic Treaty Organization (NATO) was established in 1949 to counter the threat from the USSR-led communist bloc of Eastern Europe. It is an alliance of 29 countries from North America and Europe, and its mission is to safeguard its members through political and military means. It provides a forum for European states, Canada and the United States to discuss and address security issues of common concern.

NATO military forces have helped to end conflicts in Kosovo and Bosnia. The organisation provided transport and training for the African Union's peacekeeping mission in Darfur, Sudan. In 2019, NATO had forces deployed in Afghanistan, aiming to support the fledgling democratic government. NATO's International Security Assistance Force (ISAF) in Afghanistan is under the authority of the UN Security Council, although it is not a UN body.

Like the EU, NATO has strict membership criteria, adheres to the UN Charter regarding the use of force, and requires that its members are democracies that uphold the rule of law and respect human rights. Ex-communist countries from Eastern Europe have flocked to join NATO, which they see as a guarantee against Russian domination. However, this eastwards spread of NATO has led to a Russian backlash. Many historians now view this eastward expansion of NATO as one of the biggest blunders made by the United States in the post-Cold War period. Russia sees the NATO expansion up to its borders as a threat to its security.

On 10 February 2007, in a landmark speech in Munich, the Russian leader Vladimir Putin, attacked the United States for its policies pursued since the end of the Cold War and signalled a determination to allow no more former members of the old USSR to come into either the EU or NATO orbit. Putin has actively worked to destabilise the EU by supporting extremist political parties and separatist groups. Russia's annexation of Crimea in 2014 and promotion of a separatist rebellion in eastern Ukraine was also to ensure that neither the EU nor NATO expand any further eastwards.

Review 16.4

1. Assess the importance of peacekeeping for the promotion of world order. Assess the two UN 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 EU.

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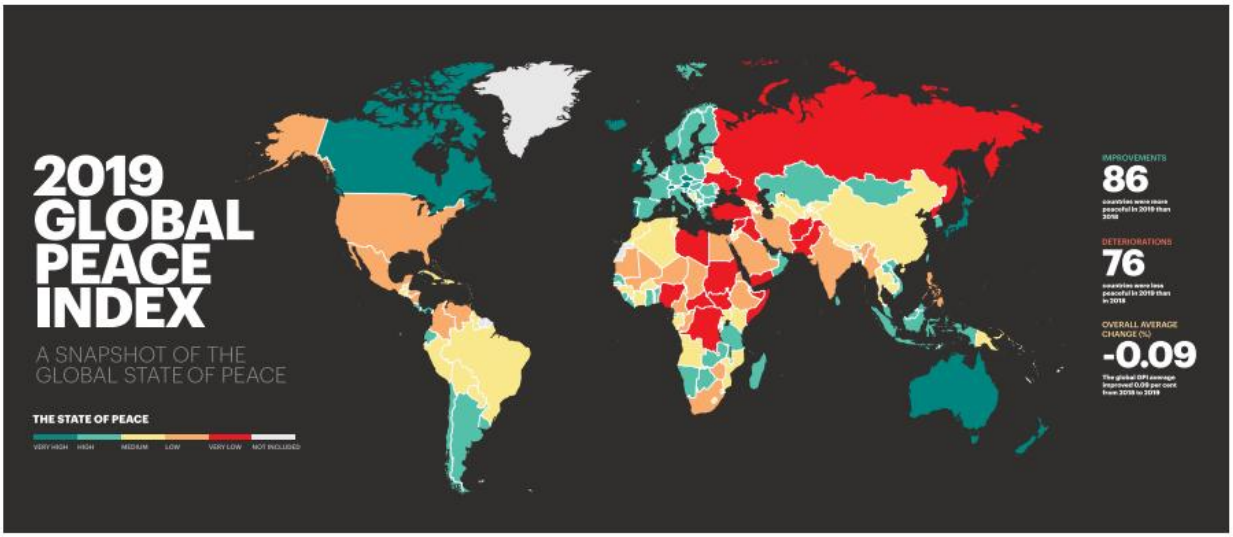
Non-government organisations

Organisations 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, citizen associations and civil society organisations commonly known as **non-government organisations** (NGOs). One of the first NGOs was the Red Cross. (In some countries the Red Cross is known by other names, such as the Red Crescent or the American Red Cross.) The Red Cross gives humanitarian aid to victims of war and natural disasters, and champions international humanitarian law. NGOs have played an increasingly important part in world order since the end of World War II. There are about 10 million internationally operating NGOs today, campaigning globally for humanitarian ideals. NGOs helped to write the UN Charter and are an integral part of the UN, and many of them collaborate with various specialised agencies in their humanitarian work on a daily basis.

non-government organisation
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

In addition to these NGOs, there are NGOs that specialise in world order issues by investigating, researching, educating policy-makers and the public, and lobbying leaders to take action. The International Crisis Group 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. The International Crisis Group also uses the media effectively, getting 14000 mentions annually.

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.



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Legal Links

For further information about the International Crisis Group, refer to its website.

Research 16.3

Non-government organisations

1. Locate the websites of five internationally operating 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, 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.

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, such as those in Burma (Myanmar) and Iraq and the Israel–Palestine conflict
- giving an early warning when a security situation is becoming a full crisis; the International Crisis Group is constantly on alert in areas like Darfur, Somalia, Pakistan and even Timor-Leste (which is still in a fragile nation-building stage after initial UN intervention in 1999).

Finally, the International Crisis Group is strongly supportive of a multilateral, rules-based approach to world order using the current structures of the UN and other international organisations, regional organisations and international courts. The International Crisis Group is particularly supportive of the new UN doctrine, the Responsibility to Protect principle. Some other NGOs that specialise in world order issues are:

- The Department of Peace and Conflict Studies (Sydney University), formerly known as the Centre for Peace and Conflict Studies
- Campaign for Nuclear Disarmament (UK)
- Global Zero
- Carnegie Endowment for International Peace (a private, non-profit US organisation dedicated to international cooperation, especially US engagement; it has offices in Washington, Moscow, Beijing, Beirut and Brussels)
- World Federation of United Nations Associations (a global network connecting UN Associations, which disseminate information about the UN, lobby governments, and undertake other activities in support of the UN).

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

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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 major contribution in World War I was due to its obligations to the maintenance of the British Empire, which it saw as essential to global stability, the spread of civilisation and the rule of law. From 1907 to 1914 Australia was a **dominion** of the British Empire – a political entity that was nominally under British sovereignty but independent from Britain in all matters except its foreign policy. Australia's contribution during World War I won it, along with the other dominions of Canada, New Zealand and South Africa, recognition as a state in its own right in the League of Nations. As a foundation member of the League, Australia played a very active role internationally. Many of its proposals were taken up by the UN when it was formed.

dominion
a semi-autonomous political entity that was nominally under the sovereignty of the British Empire

Australian involvement in the United Nations

A number of notable Australians have represented Australia internationally. One of these was Jessie Street, who attended the League of Nations Assemblies in Geneva in 1930 and 1938. She was co-founder of the UN Commission of the Status of Women and helped establish the Australian Women's Charter. After World War II, Australia was a strong supporter of the international organisations to promote world order. Dr H.V. Evatt, Foreign 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 UN with distinction. From 1997 to 1999, Richard Butler was one of the most powerful and controversial figures in world politics as head of the UN Special Commission (UNSCOM) charged with monitoring Iraq's dismantling of its weapons facilities after

Research 16.4

Australia's term on the Human Rights Council

On the internet, locate Ben Doherty's article, 'Saudi Arabia accuses Australia of racism in extraordinary UN broadside' (*The Guardian*, 25 September 2019).

1. Identify why Australia was criticising Saudi Arabia.
2. Evaluate what this article reveals about the nature of the Human Rights Council.
3. Search for media reports that assess Australia's two-year record on the Human Rights Council.
4. Discuss how commentators have viewed Australia's term on the Human Rights Council. Analyse if the commentators' views were in agreement or disagreement about Australia's record on this human rights body.
5. In the light of Australia's experience on the Human Rights Council, assess the effectiveness of the Human Rights Council in promoting human rights as a key part of a just world order.

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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 UN in the areas of nuclear disarmament and the new UN doctrine of the Responsibility to Protect. In 2009, then Prime Minister Rudd took a leading role in the UN-sponsored debate on global warming and in the debate at the Copenhagen Conference in December. In October 2012, Australia won a temporary seat on the UN Security Council, held that seat throughout 2013 and 2014 and made significant contributions.

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 contributed either military forces or police to 54 peacekeeping forces, two-thirds of these since 1991. In 1999–2000, Australia played a leading role in establishing order in 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.

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

Australia has also been engaged in peacekeeping efforts internationally outside the UN. In recent years, Australia conducted a peacekeeping operation in the Solomon Islands and committed federal police to many peacekeeping operations around the world.

Australia and international agreements

Australia has also been a part of many other international agreements to promote world order. Australia is a signatory to the Geneva Conventions (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*, the *UN Convention on the Elimination of All Forms of Discrimination against Women* and the UN Refugee Convention. 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 more easily target the funds into particular programs.

Review 16.5

1. Assess the role of NGOs 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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The Australian Government continues to be involved in conferences about common global problems and to sign up to international agreements when relevant to Australia.

The media

The media has an enormous influence on world order and that influence can be positive or negative. A free and unbiased media is an essential ingredient of the rule of law in the global sphere. We tend to see that the less democratic a country is, the more constraints there are on its media and its population's ability to freely access it.

Despite the immense technological advances in all areas of mass media, the question of ownership is a significant issue. For both print and broadcast media, the trend has been towards domination by a few large and powerful transnational corporations.

No matter who owns the media and controls its various aspects, the media today has a tremendous effect on how we view major events. One characteristic of modern media is the tendency to treat news as entertainment. This means that there is often little effort to provide a full and considered background to major problems and issues. Consequently, while people know of events taking place around the world, they often lack any real understanding of the issues involved. This is particularly the case when it comes to war.

Nevertheless, the media has played a significant role in drawing the world's attention to various disasters and political crises, and has the potential to influence political leaders through public opinion. Examples in the past decade include the ongoing crises in Zimbabwe and the Darfur region in Sudan. However, once such events are off the front pages of the newspapers and the evening television news, public interest in them tends to fade. This isn't so much about the media as about human nature and about 'donor fatigue', where the constant cycle of conflict tires out those who view it, despite the depth of suffering that is witnessed.

The rise of social media is challenging the role of traditional media. News happening anywhere in the world can be spread instantly without the global news networks being involved at all. Social media played a significant role in assisting the pro-democracy groups during the Arab Spring uprising in the Middle East in 2010. Due to the effectiveness of social media as a news source, authoritarian regimes (such as in Russia and China) are attempting to 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, it seems now that authoritarian-leaning leaders are using social media to weaponise information. President Duterte of the Philippines has used fake social media accounts to influence news and debate, and to savage his political opponents.

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.

Facebook hit the headlines again on 15 March 2019 when an Australian terrorist murdered 51 people and wounded 40 in a shooting-spree in two mosques in New Zealand. The killer live-streamed his killing-spree on Facebook and this was downloaded globally by many people. In May 2019, this led to a meeting between the leaders of seven nations with the leaders of the tech giants, Google, Facebook, Microsoft and Twitter.

Political negotiation

Political negotiation is the simplest and most frequently used means of working with other states and resolving disputes. Communication between states now occurs at many levels of government, and each state has a vast array of experts who can negotiate the details of international agreements. These changes in the means available for political negotiation have increased the scope for cooperation. When disputes cannot be solved through political negotiation, the next option is the use of persuasion.

States can also be encouraged to improve their behaviour by the prospect of membership of

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world organisations. For instance, China had to raise its trade standards in order to comply with the rules of the World Trade Organization (for example, it had to apply the same tariff rates to all member countries, and apply internal laws equally to domestic and imported products). Another example is Turkey's bid for membership of the EU. To be permitted to join the EU and receive the massive economic benefits of a large, successful market, Turkey has to improve its compliance with human rights. This type of persuasive power is described as 'soft power'. Soft power co-opts rather than coerces people.

Persuasion

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 UN can also use this tactic, through reports that it delivers on various issues and the deliberations of its human rights bodies. In 2013, the UN Human Rights Council began an inquiry into human rights abuses in North Korea. This was led by Australian former High Court judge, Michael Kirby. The committee brought down its damning report in 2014. However, it cannot force North Korea to end its human rights abuses and can only keep up the pressure on the dictatorial regime by highlighting the abuses that occur in that country.

Diplomatic pressure along with the threat of force were used to try and get North Korea to rid itself of nuclear weapons. The situation reached crisis point in August 2017 when President Trump threatened North Korea with 'fire and fury.' Then in June 2018, the President had a face-to-face meeting with Kim Jong-Un in Singapore. Two more meetings occurred in February and June 2019 but nothing was achieved towards the 'denuclearisation' of the Korean peninsula.

Persuasion and negotiation were used to achieve a landmark nuclear agreement with Iran in 2015. This was after many months of diplomacy between the P5+1 (the United States, United Kingdom, France, China, Russia and Germany) as well as the EU. The final deal known as the Joint Plan of Action is a plan to ensure that Iran does not acquire a nuclear weapon. In return, tough trade sanctions that had been holding back Iran's economy for years were lifted. However, in May 2018 President Donald Trump withdrew the United States from the deal and re-imposed sanctions and tensions rose towards the end of 2019 between the United States and Iran, particularly over the Strait of Hormuz.

Figure 16.9 On 30 June 2019, President Trump met with North Korean leader, Kim Jong-un, for the third time. They met inside the demilitarized zone that separates South and North Korea. These meetings were aimed at getting North Korea to get rid of its nuclear weapons in return for the United States lifting economic sanctions.

Legal Links

For further information about the concept of soft power, see Joseph Nye's article, 'Propaganda isn't the way: Soft power', on the Belfer Center website.

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Force

When political negotiations break down and persuasion and soft power have no impact, then there may be a resort to force.

The idea that force or the threat of force should not be the norm in international relations is enshrined in the UN Charter. Article 2(4) of the charter states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purpose of the United Nations.

However, the architects of the UN Charter realised that force would sometimes be used, so they sought to create a legal framework for it. Article 51 of the charter states that force can be used in self-defence. The United States argued that its invasion of Afghanistan in November 2001 was legal because it was carried out in response to the September 11 attacks by terrorists of Al Qaeda. At the time of the attack, Al Qaeda had bases in Afghanistan and was supported by the Taliban regime in that country. However, with a military commitment that has continued since 2001 with no end in sight, commentators, while conceding the invasion may have been legal, now question whether it was wise and whether the Bush Administration had given due consideration to the amount of political and economic commitment that would be required.

As well as providing a self-defence clause, the UN Charter was realistic enough to legitimise the use of force in circumstances other than self-defence. However, the constraint placed upon this use of force was that it had to be agreed to by the UN Security Council. Article 42 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'.

Multilateral action

In 1998, the threat of the use of the veto by two Permanent Five members was enough to stop the UN Security Council from intervening in the genocide that was taking place in Kosovo. Kosovo is a province of the state of Serbia, and has a majority Muslim population. In 1998, the Serbian Government, under the leadership of Slobodan Milosevic, began engaging in **ethnic cleansing** of the Muslim population of Kosovo. In this case, the UN Security Council was unable to immediately pass a resolution condemning Serbia's actions and sanction the use of force by the UN, because of the threat of a veto from China or Russia. Russia had traditionally backed Serbia's control of Kosovo, and China sided with Russia. However, the prospect of a humanitarian disaster caused by the acts of genocide perpetrated by the Serbian forces caused great concern in Europe and the United States. As a result, in March 1999, NATO successfully intervened in Kosovo. The UN Security Council, minus China, which abstained, then called for an international civil and security presence in Kosovo, thus retrospectively ratifying the NATO intervention in Kosovo and lending it greater legitimacy.

ethnic cleansing
a euphemism for genocide

Assessment for Learning 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 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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The NATO action in Kosovo invites questions about the circumstances that make the use of force legal under international law. The question is: was the NATO action legal under international law before it was retrospectively sanctioned by the UN Security Council? Scholars of international law would answer that the original NATO action in Kosovo was legal because it was carried out by a multilateral force (NATO).

As a general rule, multilateral or collective military intervention has the backing of international law if it is in response to a situation where the threat to peace is significant. **Unilateral** military intervention has been prohibited under international law since the end of World War II.

unilateral
undertaken by one state or body

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, former President of the International Crisis Group, in an interview with *Stiftung Entwicklung und Frieden News*, 2008**

The international community has repeatedly proven to be inadequate when it comes to preventing mass-atrocity crimes like genocide and war crimes. In response to this inadequacy, a new standard has been formed called the Responsibility to Protect. This principle arose from rising controversy over the conflicts in Rwanda, Bosnia and Kosovo: whether there was a 'right of humanitarian intervention' by the international community. On one side those who believe that humanitarian intervention is necessary claimed that the powers given to the UN Security Council in Chapter VII could be used to prevent more conflict. However, their opponents stressed the concept of state sovereignty, which doesn't allow humanitarian intervention according to Article 2.7 of the UN Charter. Thus, the Responsibility to Protect was created to narrow the division between these two perspectives of state sovereignty. It had its origin in the 2001 report produced by the International Commission on Intervention and State Sovereignty, called, the Responsibility to Protect. Following years of campaigning and negotiations, the heads of state attending the World Summit in September 2005 and unanimously accepted the Responsibility to Protect. The principle has also been accepted by the UN Security Council.

In January 2009, the UN Secretary-General released a report on implementing the Responsibility to Protect. In July 2009, the first UN General Assembly Debate on the Responsibility to Protect 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.

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 Responsibility to Protect. The UN Security Council has invoked the Responsibility to Protect in more than 65 resolutions since 2006. The Human Rights Council has also invoked the principle in 30 resolutions.


Video

Legal responses

The Responsibility to Protect 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 UN, and other international organisations, are responsible for alerting and informing, for developing effective preventative measures, and for mobilising military action when required.
- NGOs and individuals have the responsibility to draw the attention of the policy-makers to what needs to be achieved, by whom and when.

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Research 16.5

United Nations Office on Genocide Prevention and the Responsibility to Protect

Search the internet for the 'United Nations Office on Genocide Prevention and the Responsibility to Protect' website. Study the website and answer the following questions.

1. Identify the office's partner organisations.
2. Outline the five different aspects of the Responsibility to Protect and genocide-protection work.
3. Assess the usefulness of this website in helping you understand the role that the principle of the Responsibility to Protect plays in promoting world order.
4. Find five media articles that contain some debate about the effectiveness of the Responsibility to Protect principle. Start with Adom Getachew's article, 'Holding ourselves responsible' (*Boston Review*, 11 September 2019).
5. Make notes about each of the articles. Identify areas of agreement and areas of debate.
6. Describe your overall assessment of the Responsibility to Protect principle.

From the perspective of international organisations, which includes the UN, the Responsibility to Protect represents their responsibilities to alert and inform, to develop effective preventative measures and to initiate military action when necessary. For NGOs and individuals, the Responsibility to Protect indicates their responsibility to draw the attention of the policy-makers to highlight the public's expectations of when what needs to be achieved and by whom.

Overwhelmingly, prevention is the key response in the Responsibility to Protect 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 Responsibility to Protect requires the use of whatever measures are necessary to stop mass-atrocity crimes, whether those measures are economic, political, diplomatic, legal, security or, in the last resort, military.

Non-legal responses

Responsibility to Protect: Engaging Civil Society

NGOs have taken up the cause of the Responsibility to Protect. 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 Responsibility to Protect doctrine. The goals of this project were to engage civil society and educate other NGOs about Responsibility to Protect 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 Responsibility to Protect by governments and international organisations
- raising awareness about the Responsibility to Protect and building NGOs' advocacy skills
- promoting the UN's implementation of the Responsibility to Protect principle
- helping NGOs to develop strategies to implement the Responsibility to Protect 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 Responsibility to Protect principle and to

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Research 16.6

The Responsibility to Protect principle

Use the internet to find the article titled, 'The responsibility to protect in Africa' (by Gareth Evans, 24 May 2019). This article, written to commemorate Africa Day, provides an assessment of the successes and failures of the Responsibility to Protect principle nearly 15 years after its creation. The article is written by one of the doctrine's architects, Gareth Evans. Read the article and answer the following questions.

1. Recall the 'three distinct elements' of the Responsibility to Protect principle.
2. Describe in what ways Africa has been a part of the Responsibility to Protect principle since the doctrine's inception.
3. Outline the three significant failures of the Responsibility to Protect principle.
4. Examine how Evans views the future of the Responsibility to Protect principle.

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 Responsibility to Protect was established in 2008 to promote the effective implementation of the Responsibility to Protect 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 Responsibility to Protect principle to the world today, how the Responsibility to Protect principle is being invoked in various situations, and research to support those seeking to apply the Responsibility to Protect principle.

16.4 Contemporary issue: Regional and global situations that threaten peace and security – the nuclear threat

At the height of the Cold War there were 68000 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 a number of 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, 14000 nuclear weapons is still more than enough to destroy all life on Earth. Furthermore, according to the Bulletin of the Atomic Scientists' report in January 2019, the world was then closer to catastrophe than at any time since the beginning of the Cold War. So the question to be considered is: Can international law be used to further diminish and possibly remove this threat altogether?

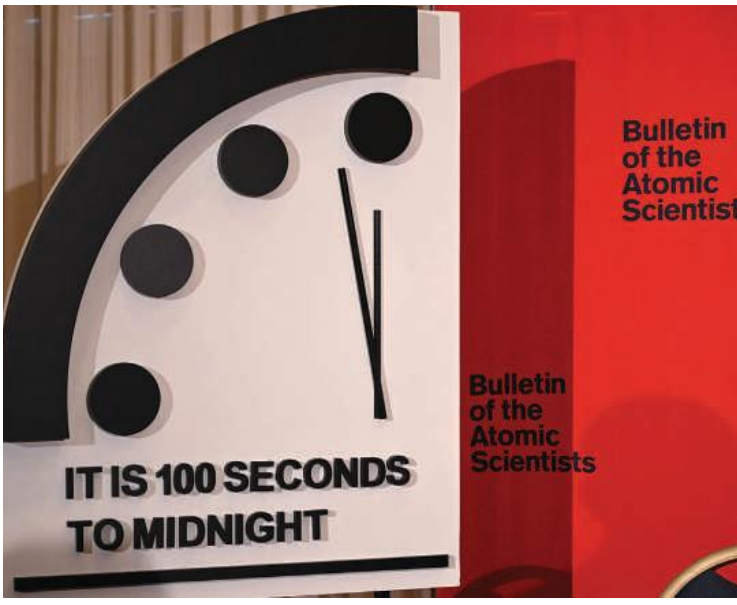

Figure 16.10 On 23 January 2020, the Bulletin of the Atomic Scientists held their annual conference in Washington DC and announced an adjustment to the Doomsday Clock: the clock now says it is 100 seconds to midnight. Rachel Bronson, the president and CEO of the Bulletin said: 'It is the closest to Doomsday we have ever been in the history of the Doomsday Clock'. The clock was created in 1947.

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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 a number 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. Overnight, there was a flowering of world federation movements around the world, many of them echoing Albert Einstein's statement that it's either 'one world or none'. 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 UN 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'. In 1946, it produced the first resolution of the UN General Assembly, which concerned nuclear weapons. Despite being debated for six months at the UN, the plan failed to achieve an outcome due to the growing atmosphere of mutual suspicion between the United States and the Soviet Union 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 UN. 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 decide 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, Britain 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 a sufficient number of states. This treaty is based on an agreement between the five states that had nuclear weapons at the time, and all the other states of the world that did not have them. The states lacking nuclear weapons (except for Pakistan, India and Israel) promised not to develop them if the five that did have them (the United States, Russia, China, Britain and France) agreed to gradually reduce the number of weapons they held. The treaty was to be renewed every five years, but in 1995 a positive step was taken when the parties to the treaty decided to extend it indefinitely. At this conference, they agreed to adopt a new treaty called the *Comprehensive 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 2015, there were 183 signatories and 164 ratifications, although the United States is not among the ratifications. Despite the fact that 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.

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However, since then North Korea has developed the atomic bomb. The rogue nation carried out its first nuclear test in 2006 and has carried out a number of nuclear tests since then.

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 USSR vastly expanded the numbers of their nuclear weapons in the years after signing, reaching a peak in the 1980s of 68000 weapons. 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.

Bilateral treaties

A series of bilateral treaties between the United States and 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. One peace march in New York in 1982 saw one million people protest against nuclear weapons. Thus, grassroots action by the nuclear disarmament movement put world leaders under constant pressure to do something to eliminate the threat of nuclear weapons.

Some of the key bilateral initiatives that resulted in massive cuts in nuclear arsenals are:

- **1986** – the United States and the USSR talks on nuclear weapons reductions with the Reykjavik Summit in October 1986. These talks eventually led to the ground breaking INF Treaty and further agreed reductions in nuclear weapons.
- **1991** – the United States and Russia signed START I and began to reduce their nuclear stockpiles. They aimed to cut their arsenals from about 58000 to around 5000 each. The total stores held by the two countries is about 11000 at present.
- **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.

The rejection of international law and preference for the use of force

In 2000 the nuclear weapons states declared their unequivocal desire to completely eliminate nuclear arsenals. However, 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', which targeted terrorist groups and certain nations which he labelled part of the 'Axis of Evil'.

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). There were high expectations that the world's leaders would agree to a strengthening of the treaty. However, despite five weeks of negotiations, nothing was achieved and no final document was produced. The despair created by this failure of the nuclear weapons states to meet their requirements under Article 6 of the treaty led to renewed efforts by anti-nuclear groups to work towards the elimination

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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 of the *Treaty on the Non-Proliferation of Nuclear Weapons* (1968) 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. 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 that possessed nuclear weapons refused to get rid of them, as stipulated under Article 6 of the treaty.

In Court

Article VI, *Treaty on the Non-Proliferation of Nuclear Weapons* (1968)

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.

Figure 16.11 US President, Donald Trump, delivers a speech during the seventy-second session of the UN General Assembly at the UN headquarters in New York, United States, on 19 September 2017.

Despite the fact that former President Barack Obama was awarded the Nobel Peace Prize in 2009 for his promise to rid the world of the nuclear threat, his presidency was a dismal failure in dealing with the growing threat of nuclear catastrophe. In fact, Obama, in his eight year term as President, dismantled fewer nuclear weapons in accordance with bilateral treaties with Russia than his predecessor, President George W. Bush had done. In February 2016, President Barack Obama committed the US Government to a US $1.7 trillion dollar modernisation program for nuclear weapons.

President Donald J. Trump's presidency has been 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 (Intermediate Nuclear Forces) Treaty with Russia. The INF Treaty of 1987 was one of the most significant bilateral nuclear treaties and played a key role in ending the Cold War. This signalled the beginning of a new nuclear arms race between the United States, Russia and China.

Meanwhile, most of the other nine nuclear weapons states had also embarked on their own nuclear modernisation programs in defiance of Article 6 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.

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.

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Legal Links

For further information about the movement to ban nuclear weapons, see ICAN Australia's website. ICAN Australia's website contains documentation, videos and photos on the history of ICAN since 2007. It also contains numerous resources and links that give the latest information (including media reports) in the campaign to abolish nuclear weapons. Also, the website provides the current status of the *Treaty on the Prohibition of Nuclear Weapons* (2017).

Non-legal responses

The 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 2017, ICAN had 468 partner organisations across 101 countries.

The humanitarian impact initiative and the *Treaty on the Prohibition of Nuclear Weapons*

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.

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. In these conferences, representatives from 158 countries attended to consider the humanitarian impact that nuclear weapons have had both in the conduct of nuclear testing in the past and the various scenarios of catastrophic harm that would occur if new weapons or large numbers of nuclear weapons were used again. Calls were made at these conferences to 'fill the legal gap' and outlaw the use of nuclear weapons in the same way that chemical and biological weapons are illegal under international law. The process of achieving such a goal was seen as being similar to the Ottawa Treaty (1997) banning landmines. One hundred and sixty-five countries signed the 'Austrian Pledge' calling for an elimination of nuclear weapons.

Vienna Conference on the Humanitarian Impact of Nuclear Weapons

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 UN 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 UN in which the treaty was

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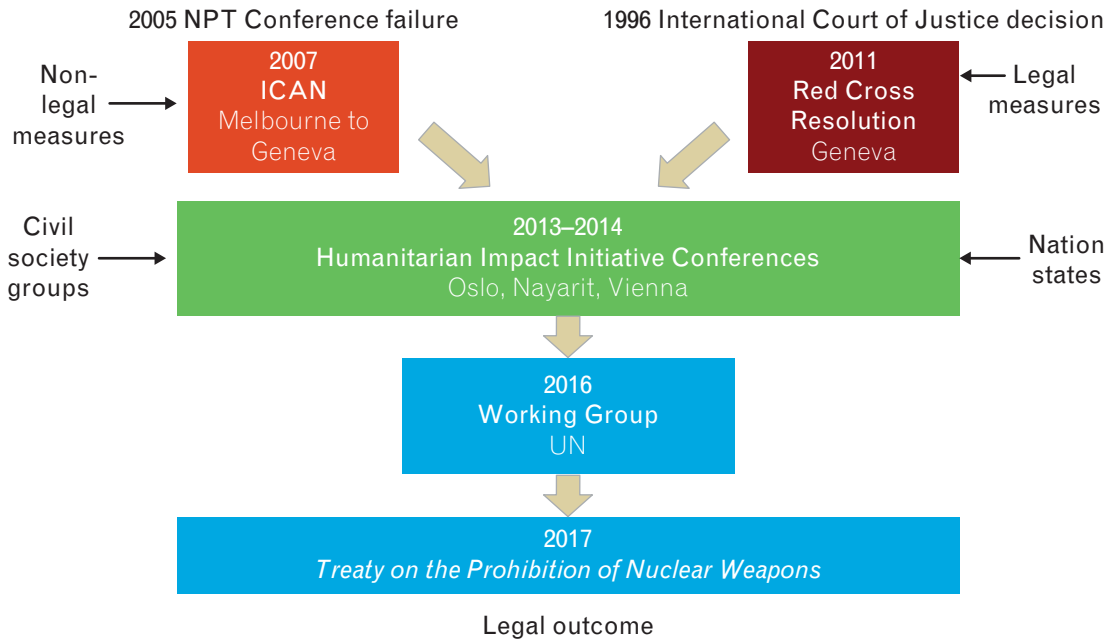

Figure 16.12 This diagram shows how the creation of the *Treaty on the Prohibition of Nuclear Weapons* (2017) was a result of the pursuit of legal and non-legal avenues between 2005 and 2017.

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. After 10 years of relentless and focused campaigning by ICAN, the *Treaty on the Prohibition of Nuclear Weapons* (2017) was a reality. With this major goal achieved, ICAN's campaign now shifted 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.

Figure 16.13 Beatrice Fihn, from the International Campaign to Abolish Nuclear Weapons, gives an acceptance speech during the award ceremony of the 2017 Nobel Peace Prize in Oslo, Norway, on 10 December 2017.

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The general public around the world was barely aware that a ground-breaking new treaty on nuclear weapons had been created. However, the Nobel Peace Prize changed that. 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* 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 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 time, as more and more countries become parties to the *Treaty on the Prohibition of Nuclear Weapons* (2017), that the nine nuclear weapons states will feel the pressure from global opinion, stop their nuclear modernisation programs and genuinely comply with Article 6 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*

At the time of writing, Scott Morrison's Coalition government was opposed to supporting the *Treaty on the Prohibition of Nuclear Weapons* (2017). However, many other Australian parliamentarians support Australia signing and ratifying the treaty. In December 2018, at the National Labor Party Conference, a resolution was passed committing a future Labor government to signing and ratifying the treaty. The Greens, some independents and two members of the Coalition also support the treaty.

Figure 16.14 Eighty-five-year-old Tanaka Terumi (left), a survivor of the nuclear bombing of Nagasaki, stands next to an anti-nuclear protester as they hold up a banner at a rally outside the Australian Government offices in Sydney on 5 February 2018.

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Research 16.7

ICAN report, *Choosing Humanity*, 2019

Go to the ICAN Australia website. On the 'Resources' page, find the report, *Choosing Humanity: Why Australia Must Join the Treaty on the Prohibition of Nuclear Weapons*. This report gives detailed information on the threat of nuclear weapons and all aspects of the campaign to eliminate nuclear weapons. The *Choosing Humanity* report gives information on:

- what the treaty says (pp. 8ff)
- the campaign to get the treaty (pp. 18ff)
- the danger and consequences of nuclear weapons (pp. 29ff)
- the impact of nuclear testing in Australia (pp. 37ff)
- Australia's approach to banning the bomb since the 1980s (pp. 45ff)
- momentum for change – the global support for the treaty (pp. 56ff)
- the actual text of the treaty (pp. 70ff).

Review 16.7

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).

16.5 Contemporary issue: The success of global cooperation in achieving world order – East Timor and the UN intervention

The UN intervention in East Timor in 1999 and in the years since is considered a successful example of global cooperation in world-order issues. In the case of East Timor, the issues were the illegal invasion of East Timor in 1975, the mass-atrocity crimes committed during the 25-year Indonesian occupation, and violence committed by pro-Indonesian militias in 1999. The international community's response to the crisis in East Timor in 1999 is a textbook case of the successful application of the guiding principles of the UN.

This intervention is an example of best practice being used at each stage of the process from UN intervention in 1999, the creation of Timor-Leste as a new nation in 2002, and the ongoing support of various UN agencies, along with the support of Australia.

Background

From the 1600s, East Timor was part of the Portuguese empire, while the rest of Indonesia was under the Dutch. In general, Indonesia has a mainly Muslim population, but East Timor is a mix of Malay and Portuguese, and the people are predominantly Catholic. In 1949, the Dutch gave independence to their colony in Indonesia, but it was not until 1975 that Portugal decided to withdraw from East Timor.

Indonesian invasion

With the departure of the Portuguese, there was dispute over who should be the ruling party in East Timor. The Indonesian Government was uncomfortable with this small, unstable state on its perimeter, fearing it might host groups antagonistic to Indonesia, such as communists. Because of this, the Indonesian Government decided to take advantage of the disorder in East Timor, and invade it. The international community viewed this as a clear case of the type of aggression that is outlawed by the UN Charter, but the

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Figure 16.15 East Timorese independence leader Xanana Gusmão (right), with Paul Stewart (left) on 11 October 1999. Paul is the brother of Tony Stewart, who was one of the five journalists killed in East Timor in 1975.

Australian Government, who were in the middle of an election campaign, decided to ignore the invasion. However, it damaged relations between Indonesia and Australia, and this was made worse when Indonesian soldiers murdered five Australian journalists on the border of East Timor and Indonesia – the 'Balibo Five'. The resulting tension between Indonesia and Australia lasted for at least the following two decades.

The UN never accepted Indonesia's annexation of East Timor, and it was debated repeatedly over the following 25 years in the UN General Assembly. Australian representatives to the UN did not openly criticise Indonesian rule of East Timor. Instead, Australia tried to ensure that Indonesia ruled the territory fairly, sending a number of missions to East Timor to research and report on conditions there. But in 1991, there was a massacre of civilians in the East Timorese capital, Dili, which happened to be filmed. When the film footage was aired, the world and the Australian public became more inclined to believe the stories of mass atrocities that refugees from East Timor had been telling for years. In addition, there was a growing number of politicians in Australia who felt that we had betrayed the people of East Timor by doing nothing about the 1975 invasion, and that now it was time we stood up for the rights of the East Timorese.

The UN-sponsored referendum

There had not been a true democracy in Indonesia since the Dutch withdrawal in 1949. In 1966, the country was ruled by General Suharto, who called himself President but ruled as a dictator. Suharto gave the Indonesian army (the TNI – Tentara Nasional Indonesia) many positions of power and even seats in the legislature. However, in 1999, widespread disturbances and protests led to Suharto's resignation. The new president, B.J. Habibie, committed his country to becoming a true democracy. In May 1999, the then Prime Minister John

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Howard wrote to President Habibie, asking him to let the people of East Timor vote on whether to remain part of Indonesia or become independent. Habibie agreed to allow the UN to conduct a referendum on the issue.

Legal responses

The UN Security Council and Resolution 1246

The matter was then referred to the UN Security Council, which unanimously adopted Resolution 1246: 'Ballot to Decide on Special Autonomy for East Timor'. The UN Security Council established the UN Mission in East Timor (UNAMET) and authorised the deployment of 280 civilian police to act as advisers to the Indonesian police (in East Timor) and 50 military liaison officers to keep the lines of communication to the TNI open. Despite the robust UN Security Council mandate, the force deployed to implement it was appallingly weak. None of the civilian police, many of whom were Australians, were armed. The Indonesian authorities in East Timor resented the UN-sponsored vote and were uncooperative, to the point of paying armed groups of thugs to disrupt the process. However, the force that the UN Security Council authorised was all that the Indonesians would allow. Under international law, the Indonesians still had sovereignty over East Timor and the UN Security Council was not willing to authorise the use of military force. The Indonesian Government was able to use its sovereignty to keep UNAMET as weak as possible.

The referendum and militia violence

The referendum was held in August 1999 and was overseen by UNAMET. Unarmed UN personnel worked courageously to administer the ballot despite constant threats and harassment from pro-Indonesian militia groups. The result was announced on 3 September 1999: 78.5% of the East Timorese voted for independence.

A violent reaction from pro-Indonesian militias ensued. Hundreds of independence supporters were killed, many buildings were destroyed and 250 000 people were forced from their homes. It is estimated that the militias destroyed over 70% of the infrastructure, leaving East Timor without utilities, health care, food or schools. Also, it was estimated that over the next few weeks between 1000 and 2000 people were killed while the TNI and Indonesian police stood by. Foreign aid workers also became targets of the militias. The TNI were seen giving guns to militias, and Kopassus (Indonesian special forces) were alleged to have been supplying the militias with money and drugs. Around the world, people were appalled by the violence that was filmed by the few remaining journalists before they fled the country.

UN Security Council Resolution 1264

At the UN Security Council in New York the violence was discussed for two days, and then the UN Security Council adopted Resolution 1264. Under this resolution, a UN peacekeeping force under Australian command was formed: INTERFET (International Force for East Timor).

Soon after, an Australian-led multinational force was dispatched, closely followed by humanitarian aid. The TNI left East Timor after a series of strained negotiations between Australian commanding officers and Indonesian leaders. Within a few weeks, INTERFET was able to establish control over East Timor, and the remaining Indonesian troops left by 1 November 1999. The decisive military action of the

Figure 16.16 On 21 October 1999, RAAF soldiers patrol the streets of Dili as part of INTERFET sent to East Timor under UN Security Council Resolution 1264.

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Research 16.8

Timor-Leste's independence

Search for the article titled, 'Video shows tender goodbye between dying former Indonesian president and Timor-Leste leader' (by Kate Lyons, *The Guardian*, 13 September 2019), then answer the following questions.

1 Deduce some reasons for the emotional death-bed reunion.
2 Describe the role the former Indonesian president had in Timor-Leste's independence.

Australian armed forces under a UN Security Council mandate were hailed as an outstanding success for the UN, for Australia and for global cooperation. Behind the scenes, significant diplomatic pressure had been put on the Indonesian Government not to attack the Australians.

UNTAET

The dramatic events of 1999 were only the beginning of the UN involvement in East Timor. INTERFET was replaced by the UN Transitional Administration in East Timor (UNTAET). UNTAET was established to administer the territory, exercise legislative and executive authority during the transition period and help East Timor prepare for self-government. It had an ambitious mission, including the exercise of judicial powers, assisting with social services and the delivery of humanitarian aid, providing security, and promoting sustainable development. Essentially, UNTAET's role was to lead East Timor to statehood and help build the foundation for democracy.

On 20 May 2002, East Timor, which is now known as Timor-Leste, became an independent country. The UN Mission of Support in East Timor (UNMISET), which was authorised by the UN Security Council Resolution 1410, took over from UNTAET in supporting administrative structures.

UN success in East Timor

Overall, the UN's role in East Timor has been generally considered successful, as it put a halt to the militia-led violence that followed the UN ballot. However, it has also been criticised for not anticipating that violence. Defenders of the UN's role in 1999 argue that there could not have been an intervention without the agreement of the Indonesian Government, and that taking action without that consent would have had even more disastrous results. In terms of its mission since 1999, the UN is viewed as having led to positive outcomes, chiefly the creation of East Timor as a nation.

East Timor's transformation to an independent nation was an enormous legal step, but it occurred relatively quickly due to the assistance of the UN. It was only a few months before Timor-Leste became the 191st member of the UN on 27 September 2002.

Non-legal responses

The media

Journalists and global media networks were able to broadcast real-time film footage of the murderous rampage of pro-Indonesian militia, as well as the lack of action to stop the violence by the Indonesian Army and police. This was highly influential in turning world opinion against the Indonesian occupation of East Timor and prompting decisive UN action.

Diplomatic pressure

UN Secretary-General Kofi Annan did everything he could, talking to all the parties involved in pursuit of an end to the violence that occurred after the referendum. He kept constant communication with the Indonesian and Portuguese governments, as well as other governments, such as Australia, that could be involved in the establishment of an international force.

In the meantime, the increasing violence in East Timor led to an expression of concern by the UN High Commissioner for Human Rights, Mary Robinson, who argued that the UN Security Council should consider deploying forces to East Timor, as a matter of urgency. In the weeks after the UN ballot, there was a great deal of communication between the UN and Indonesia, with the UN urging Indonesia to accept outside intervention. Former US President Bill Clinton also pressured the Indonesian President to allow UN intervention.

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Finally, the Indonesian Government conceded and the Australian-led INTERFET mission began moving into East Timor. US generals quietly warned their Indonesian counterparts not to attack the Australian peacekeepers. Again, in the area of diplomacy, global cooperation was an essential ingredient.

NGO expertise

Many NGOs are involved in Timor-Leste, working in a range of areas including education, health, women's rights and housing. There are also NGOs working in the area of peace and security. One notable NGO that has maintained a deep interest in Timor-Leste, particularly since the civil strife that arose in 2006, is the International Crisis Group. This group assists the Timor-Leste Government and the UN administration there by producing reports on issues that are of vital importance to Timor-Leste's future peace and security. For instance, the February 2009 report, *No Time For Complacency*, noted that the security situation had dramatically improved since 2008 but that there were still problems with security, the justice system was weak and corruption was still a concern. Assistance was still needed from the UN, Australia and the international community. The December 2009 report, *Handing Back Responsibility to Timor-Leste's Police*, also sounded a cautionary note. The report was very critical of the way in which the UN administration came in and took control of the Timor-Leste police. In short, work by NGOs such as the International Crisis Group is indispensable for the long-term success of nation-building in Timor-Leste.

UN nation-building

The UN has committed itself to the long-term future of Timor-Leste. It has learnt from past errors in leaving conflict zones too early, only to see the area slip back into anarchy. The UN is using all its experience and expertise while also seeking out support globally to ensure that Timor-Leste finally makes the transition to a strong, economically sustainable state characterised by the rule of law. To this end the UN Security Council passed a resolution in 2006 to shift the focus of the UN mission to nation-building. On 25 August 2006, Resolution 1704 established the UN Integrated Mission in Timor-Leste. Resolution 1867 in 2009 further extended UN operations into 2010. The UN began handing over responsibility for its operations to Timor-Leste in 2012.

Australian aid

Australia has assisted Timor-Leste since 1999 in numerous ways. Here are a few examples:

- providing $890 million in assistance between 1999 and 2009
- building partnerships with the World Bank and the UN to help with the coordination of development assistance
- training 800 police officers for the Timor-Leste police force
- providing medical aid in the form of 10000 operations and 15000 consultations by Australian medical personnel, and providing specialist training for people from Timor-Leste
- training and supporting thousands of civil servants
- providing 170 scholarships for Timor-Leste students to study at universities in Australia
- creating 32000 jobs through public works projects
- supplying aid, water, food and medicine for thousands of internally displaced people.

Australia has given strong political and moral support to the Timor-Leste Government. In 2006, thousands of additional Australian police officers and soldiers were rushed to the country to restore order and prevent further bloodshed. Then in 2008, Australian reinforcements were again sent when Timor-Leste's President José Ramos-Horta was shot in an attempted revolt by some rebels. Australia lent support by rushing the Timorese leader to hospital in Darwin and ensuring that Australian troops maintained peace and security in the country. In 2012, the success of the recent elections, held a mere 10 years after achieving nationhood, was a positive sign for the new nation.

Maritime dispute with Australian aid

In the years since, Timor-Leste was unhappy with the 2006 treaty signed with Australia regarding the maritime boundary between the two nations. The main reason being that it affected the share of proceeds from the Greater Sunrise gas and oil reserves in the Timor Sea. The boundary in the 2006 treaty was not set midway between the two countries, thus giving Australia a greater share of the oil and gas fields. The Timor-Leste Government believed this deprived them of much-needed revenue for nation-building projects that they had planned.

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Figure 16.17 Timor-Leste's Prime Minister, Taur Matan Ruak (right), meets Australian Prime Minister, Scott Morrison (left), at the government office in Dili on 30 August 2019. This was to mark the 20-year anniversary of East Timor's vote for independence in 1999.

In 2013, Timor-Leste learned that Australian agents had spied on them during negotiations for the 2006 treaty. As a result, the following year, Timor-Leste took Australia to the Permanent Court of Arbitration at The Hague for spying, but dropped the case when Canberra gave back the stolen papers. In 2016, Timor-Leste initiated further proceedings at the Permanent Court of Arbitration against Australia. In January 2017, Timor-Leste terminated its 2006 treaty with Australia. Finally, in September 2017, the Permanent Court of Arbitration announced that the parties had resolved the long and bitter dispute after reaching an agreement over the disputed maritime boundary.

Impoverished Timor-Leste and Australia signed a treaty in March 2018 ending a long-running dispute about their shared ocean border. In July 2019, the Australian Parliament approved a new treaty with Timor-Leste governing how the two nations carve up rich oil and gas deposits.

An authority will be established to act on behalf of Australia and Timor-Leste to facilitate joint management of the new area. Under the treaty, Timor-Leste will get the biggest share of revenue from exploiting Greater Sunrise. It will be split 80–20 if gas is piped to Australia for processing or 70–30 if it is piped to Timor-Leste.

Research 16.9

Maritime Treaty 2019

1 Find the website of the Australian Government Department of Foreign Affairs and Trade (DFAT). Search the website for information about the Australia–Timor-Leste treaty.
2 Study the DFAT account of this treaty.
3 Examine the map and detail what the main changes are.
4 Discuss how the DFAT account explains the treaty.
5 Search for Michael Leech's article about the treaty ('After a border dispute and spying scandal, can Australia and Timor-Leste be good neighbours?', *The Conversation*, 29 August 2019). According to this article:
   a Describe what has undermined the goodwill between Australia and Timor-Leste.
   b Discuss how Australia was implicated in spying on Timor-Leste.
   c Recall what international court Timor-Leste appealed to and under what treaty.
   d Outline what the outcome was in the international tribunal.
6 Find current media reports on relations between Timor-Leste and Australia and Indonesia and between Timor-Leste and its other Asian neighbours.
7 Discuss to what extent is Timor-Leste a secure and sustainable nation state, both economically and politically.
8 Assess the role that legal and non-legal means have played in Timor-Leste's quest for a just and sustainable future.

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Review 16.8

Thinking further – problems without passports

Search for Kofi Annan's article, 'Problems without passports' (*Foreign Policy*, 9 November 2009). Read this article.

1 Outline the key ideas that Kofi Annan discusses in this article.
2 Describe what role would international law play in Annan's vision for a better world.
3 Discuss what non-legal means need to be pursued to achieve Annan's aims.
4 Assess to what extent today's international community measures up to Annan's vision.

Review 16.9

1 Discuss why Australia did nothing to assist the East Timorese when Indonesia first attacked.
2 Explain why East Timor's 1999 referendum resulted in extreme violence from pro-Indonesian militias.
3 Explain why Australia has a sense of duty to Timor-Leste. Discuss the role the locations of the two countries play in this relationship.
4 Assess Timor-Leste's claims over the maritime boundary with Australia, and how this dispute was eventually resolved.

16.6 Contemporary issue: Rules regarding the conduct of hostilities – international humanitarian law

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
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 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 was appalled, and he abandoned his original trip to help care for them. Reflecting on this experience, Dunant came up with the idea of setting up a permanent organisation that would look after the wounded of both sides in wartime. His book, *A Memory of Solferino*, was published in 1862 and concluded with two appeals:

- that permanent relief societies should be established in peacetime, with nurses who would be available to treat the wounded in the event of war
- that these volunteers who give medical assistance in wartime should be protected by an international treaty.

In 1863, the International Committee for Relief to the Wounded (which later became the International Committee of the Red Cross) was established. International conferences in Geneva, Switzerland were held 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.

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Legal Links

Henry Dunant's book, *A Memory of Solferino*, can be downloaded for free as a PDF from the Red Cross' website.

Before the treaty, the treatment of people during wartime was random, with no agreed universal standards. All nations that signed the convention understood that it would afford protection to their own wounded or captured soldiers in the future. They all had a stake in agreeing to respect international humanitarian law.

Today we take the rules regarding the conduct of hostilities for granted. Warfare is still horrific and some soldiers commit atrocities in war. However, 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.

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 UN. Like the UN, the ICRC enjoys privileges and immunities, and its offices and facilities enjoy exemptions from taxation and duties, inviolability of documents and premises, and immunity from prosecution.

Treaties

The primary instruments governing international humanitarian law are the four Geneva Conventions (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.

After World War II, the first Geneva Convention was updated and expanded, giving it a total of 64 articles. Three other conventions were also created. The four Geneva Conventions of 1949 specifically protect people who are not taking part in the conflict – civilians, medical personnel and aid workers – and those who once were but are no longer participating, such as the wounded, the sick, shipwrecked soldiers and prisoners of war.

In 1977, two additional protocols were drafted to supplement the Geneva Conventions, and another in 2015. The conventions and their protocols contain strict rules to deal with 'grave breaches', which include wilful killing of people protected by the conventions, torture and inhuman treatment, including biological experiments, unlawful deportation and forced service in the opposing side's military. People responsible for grave breaches must be located and tried or extradited, regardless of their nationality.

In brief, the content of the Geneva Conventions of 1949 is as follows:

- The first Geneva Convention protects wounded and sick soldiers, as well as medical and religious personnel, on land during war.
- The second Geneva Convention relates to people at sea during war. It protects wounded, sick and shipwrecked personnel, as well as medical staff and hospital ships.
- The third Geneva Convention protects prisoners of war. A central principle is that there be no delay in releasing and repatriating prisoners of war, once hostilities have ended.
- The fourth Geneva Convention protects civilians, including those in occupied territory. World War II brought the necessity of such a Convention into stark relief.

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- All four Geneva Conventions have a common article, 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 Israel and predominantly Jewish countries.)

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.

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 International Criminal Court. 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.

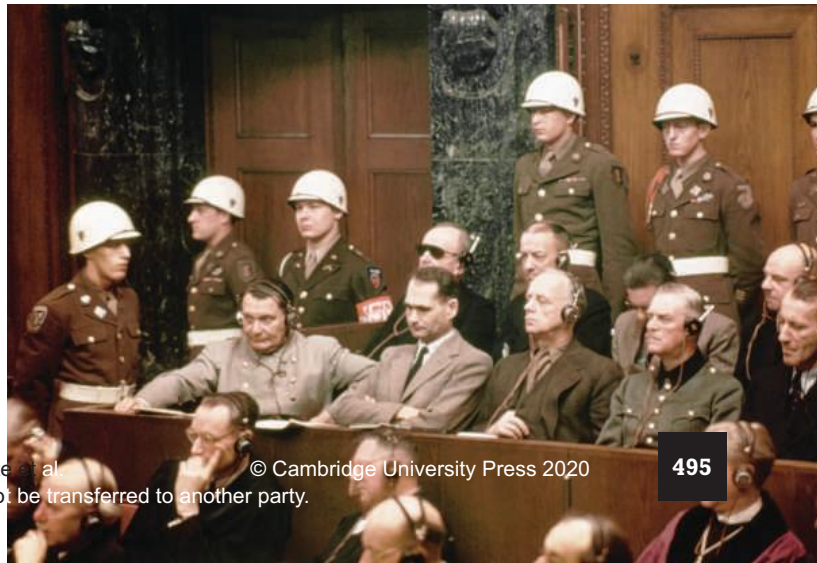
In 1945–1946, the Nuremberg Trials put top Nazi leaders on trial for war crimes and set a precedent of holding leaders accountable for their actions. In 1948, when the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted, the UN General Assembly asked the International Law 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 International Criminal Court 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 International Criminal Court for war crimes under the Geneva Conventions.

Abu Ghraib and Guantanamo Bay: The Geneva Conventions defied

Between 2001–2009, the administration of former US President George Bush openly defied the Geneva Conventions in the 'war on terror'.

Figure 16.18 This photo was taken on 1 January 1946 at the Nuremberg war crimes trials. 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.



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Research 16.10

Conflicts and international humanitarian law today

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 column on the right, also consult the ICRC website to see what action the ICRC is undertaking in these conflicts.

Conflict	Details	IHL response
Syria		
Myanmar		

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 and 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. Not only had many of the Guantanamo inmates, including Australian David Hicks, been held in detention for years without being charged, but other factors also made the practices thoroughly imprudent. For example, it was argued that terrorists could use photos showing the truth about Americans' treatment of Muslims to attract more recruits.

In 2009, the Obama administration announced that it would not use torture and would respect international laws in this regard. Discussions began in the United States about whether or not to conduct an inquiry into the actions of the people at the top levels of the Bush administration. The Obama administration also announced that it would close the Guantanamo Bay prison, but was unable to achieve this. Former President Obama could not get approval from Congress to totally close the facility at Guantanamo because it would not agree to the

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remaining prisoners being brought to prisons in the United States. However, Obama was able to greatly reduce the number of prisoners there by transferring them back to their countries of origin.

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 on-going conflicts in Afghanistan, Syria, Yemen, Myanmar and Libya to name 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 from civilians rather than soldiers and there are less interstate wars but more civil wars and terrorism.
- Violence is having a massive impact on the global economy accounting for 12.4% of global GDP.
- The number of refugees and displaced people in the world now equals one per cent of the global population.

International humanitarian law was designed to alleviate the affects 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 Syrian Civil War, which began in 2012, is a case in point. This is a complex civil war with a number of sides and a number of regional and global powers involved. It has caused untold suffering to the Syrian people. The ICRC does an enormous amount of relief work in Syria, as it does with other conflicts.

Non-legal responses

The International Committee of the Red Cross (ICRC) plays a significant role in educating the military forces of the world and the general public about the requirements of international humanitarian law. The ICRC has detailed guides designed for all the groups involved in wartime situations:

- victims
- journalists
- humanitarian workers
- UN peacekeepers
- soldiers.

Figure 16.19 A teacher conducts a class on mine awareness at a health clinic in Afghanistan. The class is sponsored by the International Committee of the Red Cross (ICRC), which conducts an on-going extensive mine awareness program in many villages in and around Kabul, Afghanistan.

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Review 16.10

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.

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.

Figure 16.20 ICRC officials attend an exchange of captives between Ukraine and the Donbass republics, December 2019.

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Chapter summary

- An ordered world is needed if states are to cope with globalisation and to counter global threats such as nuclear war, climate change and economic meltdown.
- Our system of international law is based on the concept of state sovereignty.
- Multilateral approaches are far more effective than unilateral action in dealing with the common problems that face the international community.
- Competition over access to resources such as fossil fuels and water is likely to become an even more serious source of conflict.
- The creation of the UN was a massive multilateral commitment to a global environment characterised by the rule of law.
- A growing number of international courts exist to enforce international treaties and conventions. These include the International Court of Justice, the International Criminal Court and *ad hoc* tribunals set up to hear matters arising from armed conflicts.
- Australia has been an enthusiastic contributor to the UN in the areas of the regulation of nuclear weapons, peacekeeping and humanitarian assistance.
- Chapter VII of the UN Charter sanctions the use of force if authorised by the 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 UN intervention in Timor-Leste (East Timor) from 1999 to the present has been a success, but this success has only been possible with the cooperation and support of the international community.

Chapter questions

1 Describe the main means of achieving world order that were put in place in the first five years after the end of World War II.
2 Explain the concept of state sovereignty and how states can use their sovereign powers to create treaties and promote world order, but can also use these powers as a barrier to international law.
3 Explain how access to resources can become a cause of conflict.
4 Assess the 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 the UN missions in Timor-Leste (East Timor) since 1999.

Review 16.11

1 Critically evaluate the effectiveness of multinational efforts to achieve world order over the past century.
2 Discuss the role of NGOs in limiting the harm 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 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 ICRC 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.
- NGOs use education and persuasion to encourage global cooperation.
- Multilateralism is an approach to world order that draws on the individual and collective strengths of the various parties, and is generally the most effective way to resolve conflicts.
- Peacekeeping has been strengthened since the 1990s by the willingness of the 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.
- The UN and the UN Security Council sought to secure compliance from Indonesia in 1999 by intervening in Timor-Leste (East Timor).
- International courts and tribunals seek to enforce individuals' compliance with international law by providing a means to bring people to justice when their countries either cannot or will not take action.
- Force, persuasion and political negotiation are generally used to obtain states' compliance with international law.
- Force alone is generally ineffective in producing long-term compliance with the law; hence the need for more measured, long-term approaches, such as are represented by R2P and the Peace Building Commission.

The effect of changing values and ethical standards on world order

- The UN Charter represents a fundamental change in world order; it declared war to be illegal except in specified conditions, and declared the protection of human rights to be one of the world community's main priorities.
- The Universal Declaration of Human Rights marked a fundamental change in the values of the international community and laid the foundation for a major new branch of international law.
- The UN Convention on the Prevention and Punishment of the Crime of Genocide declared that the international community would never again tolerate the sort of genocide carried out by the Nazis against the Jews in World War II.
- The Responsibility to Protect 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.

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The role of law reform in promoting and maintaining world order

- As the Responsibility to Protect 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 ICRC 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.
- NGOs use investigation, research, education and lobbying to promote the welfare of individuals and groups.
- Wise political leadership is always a necessary ingredient for promoting a just and stable world order.

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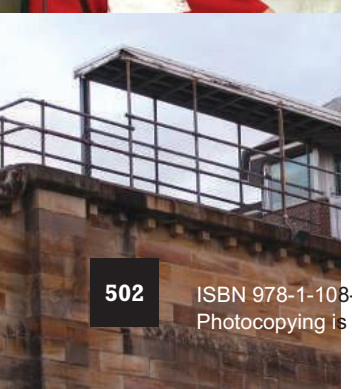

Answers to multiple-choice questions

Part I

Chapter 1

1 B 2 A 3 D 4 D 5 B

Chapter 2

1 A 2 D 3 A 4 C 5 A

Chapter 3

1 A 2 B 3 C 4 A 5 A

Chapter 4

1 A 2 D 3 C 4 C 5 C

Chapter 5

1 B 2 C 3 C 4 B 5 C

Chapter 6

1 D 2 C 3 C 4 C 5 D

Part II

Chapter 7

1 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

This glossary includes words from the digital version of the book.

407 visa
a temporary arrangement for overseas applicants wishing to undertake occupational training in Australia – this visa allows an employer to sponsor a worker in an occupation while they are partaking in a structured training program

abolitionism
a movement to end slavery in the early 1800s in both western Europe and North America 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 judgement that a person is not guilty of the crime with which they have been charged

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

ad hoc
for a particular purpose, usually exclusive and often temporary

adoption
the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

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

advertising
any action designed to draw the attention of consumers to the availability of goods or services in the marketplace

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

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

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

alternative dispute resolution
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 of 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

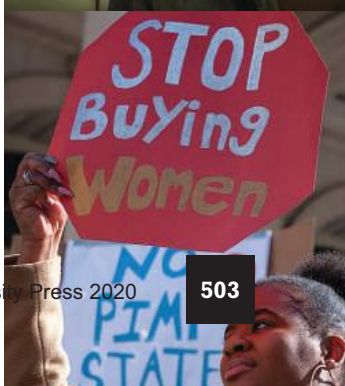
Apprehended Violence Order (AVO)
a court order that aims to protect the applicant from violence and other forms of intimidation or abuse by another person

arbitration
(industrial relations law) the process of resolving an industrial dispute, often after conciliation has failed, by a legally enforceable order of a court or commission

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





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

assimilation policy
a policy based on the idea that a minority group should adopt the language and traditions of the majority group

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)

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

autonomy
freedom of the will, self-government; the ability to act without outside interference

award
a legal agreement, made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

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

bait advertising
advertising goods or services for sale at a specified price with the knowledge that the company will not be able to offer them at that price for a reasonable period

better off overall test
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

bipartisan
having the support of the two major political parties

blended family
a family that is created when a parent remarries; it includes a stepmother or stepfather and stepchildren

bond
a compulsory condition imposed on an offender for a period of time, which the offender undertakes to comply with

breach
to fail to obey

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

built environment
all the buildings, transport routes and infrastructure, parks and other surroundings that have been made by people and constitute the setting for human activities

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

cartel
a group of companies that work together to control prices and markets; their behaviour is unlawful if it is found to be anti-competitive

casual employment
employment 'as needed', on an irregular basis, with no set schedule or guarantee of ongoing employment; generally paid at an hourly rate

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

caution (1)
a formal warning without charge issued by police for less serious offences

caution (2)
a formal, recorded alternative to prosecution where a young offender admits to the offence and consents to receiving a formal police caution; it can later be taken into account in the Children's Court, but not in an adult court

caution (3)
a statement issued by police to a suspect when they are detained to inform the suspect of their rights

caveat emptor
a Latin term meaning 'let the buyer beware'; it implies that consumers should use their own care and knowledge to protect themselves against exploitation

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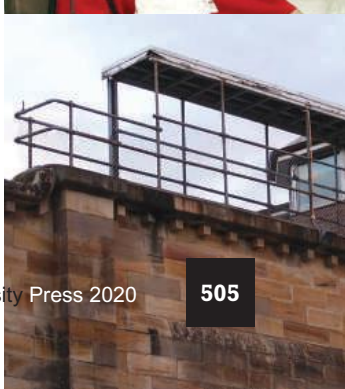

celebrant
a person who is authorised to perform a civil or religious marriage ceremony

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 Indigenous offenders where sentencing is conducted in a circle made up of local community members and a magistrate

codification
the spelling out of obligations in legislation

Cold War
the state of hostility, without actual warfare, between the USSR and its satellites and the United States and its allies in the Western world, which lasted from just after World War II until about 1991

collective right
a right belonging to a group or a people, as opposed to an individual right

collective security
the principle based on the agreement of a group of states not to attack one another and to defend each other from attack from others; the idea is that an attack on one is an attack on all

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

common law (or Old System title)
a system of registration and transfer of ownership of property in use in New South Wales; under this system an unbroken chain of title is required to be proven to establish title to the property

common property
the areas in a strata scheme building or property that are owned jointly by all the lot owners, rather than being part of an individual lot

communal violence
violence and killing within communities

community housing
secure and affordable rental properties for people who earn a low income and who have a housing need; homes are provided by not-for-profit community housing organisations

community service order
a penalty where an offender is sentenced to serve specified hours of work in the community

compensation
a monetary payment made to a person to make amends for any loss, injury or damage to property they have suffered

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes a more active role than in mediation, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for them

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

condition
(of a contract) a term of fundamental and essential importance; if a condition is breached by 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 Orders
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

conscription
compulsory enlistment in the military force of a state

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

consideration
something given, done or suffered by the promisee in return for a promise in a contract

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

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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 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

contract of service
an employment agreement under which a worker (employee) works for an employer; it imposes certain duties on each party and provides specific rights for the period of employment, which may be for a fixed term or ongoing

control order
similar to an adult sentence of imprisonment, except served in a Juvenile Justice Centre

convention
another term for a treaty: an international agreement between parties that are subject to international law (states and international organisations such as the UN and its bodies)

conveyancing
the legal process used to transfer title of ownership from one party to another

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
a widespread or systematic attack 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

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation

damages
(contractual) money ordered by a court to be paid to a plaintiff where a contract is breached, for the purpose of placing the plaintiff in the same situation as if the contract had been performed

debt bondage
a situation where a person is forced to repay a loan with labour instead of money, where the proper value of the labour is not applied towards repayment and/or the type or duration of services is not properly limited

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debt slavery
slavery in order to pay off a loan with forced labour rather than money

declaration
a formal statement relating to a particular issue or set of issues, agreed to by a group of states but without binding legal force

decree absolute
a final decree of the dissolution of marriage

decree nisi
a Family Court order that is made to signal the intended termination of a marriage

deed
documentary proof establishing ownership of a property

de facto relationship
a relationship where the partners act as a married couple but are not legally married

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

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

dictatorial
(of a government) having unrestricted authority or power

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

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of gender, race, national or ethnic origin, age, sexuality, etc.

discrimination
unfavourable treatment of a person or group relative to the way others are treated

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

division of powers
how powers are divided between the federal and state governments

divorce
the legal termination of a marriage by an official court decision

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'; 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 a certain purpose

ecological footprint
a measure of human demand on Earth's ecosystems, comparing human demand with the planet's ecological capacity to regenerate; a person's impact on the planet as a result of their lifestyle

ecologically sustainable development
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

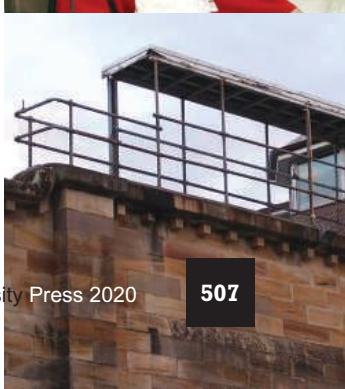
the Enlightenment
a European movement from the late 1600s to the early 1800s that transformed philosophy, science and politics by emphasising the superiority of reason over tradition and religion

enterprise
a business or company









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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, to eliminate factors that restrict groups' equality of opportunity in the workplace

equal employment opportunity legislation
laws requiring employers to ensure that people are not subjected to discrimination and to eliminate factors that restrict groups' equality of opportunity in the workplace

ethnic cleansing
a euphemism for genocide

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

ex aequo et bono
a Latin term meaning 'according to the right and the good'; on the basis of what is fair and just in the circumstances

exchange of contracts
when the vendor and the buyer of 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

ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born to parents who are not married

exploit
the act of using another person's labour without offering adequate compensation; often the work is not voluntary and is obtained through the threat (real or perceived) of violence

express rights
rights that are included (written) in a document

express term
a contractual term that has been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally

extended family
a family that includes individuals related through marriage or parentage and not limited to one couple and their children; in some cultures, close family friends are regarded as members of the extended family

external costs (externalities)
the effects of an activity (such as the production, transport and sale of goods) on people who are not directly involved in the activity, and that are not paid for by those who are involved (such as the producer)

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

fiduciary duty
where one person (the fiduciary) undertakes to act in the interests of a second person (the beneficiary) and has the power to affect the interests of the beneficiary; in the case of real estate, it is 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 or the other person involved

forfeit (also known as 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

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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

governance
a method or system of government

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

grave adult behaviour
where a young offender has acted like an adult in committing an offence, in terms of the seriousness of the offence and other factors surrounding the behaviour, such as premeditation

greenfields agreement
an agreement created to cover prospective employees of a new enterprise

guideline judgement
a judgement issued by the court, on 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

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

historical continuity
the existence of social, cultural, linguistic or spiritual links with past practices

holistic
taking into account all aspects; looking at the whole system rather than just specific components

home detention
an imprisonment sentence where the offender is confined to their home under certain conditions of monitoring

homicide
the unlawful killing of a human being

Housing Affordability Index
a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

human rights
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 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

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

inalienable right
a right that cannot be taken away

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

incorporation
the process by which a country incorporates a treaty into domestic law

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

indefeasible title
title that has been transferred to the new owner, and will not be changed except under very limited circumstances

independent contractor
someone who is paid for work done for another person without there being a contract of employment between them; instead, the parties will have a contract for services

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

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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

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

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

instrument
a document by which some legal objective is achieved; it may be binding (for example, statutes, treaties, conventions and protocols) or non-binding (for example, guidelines, declarations and recommendations)

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

interdependence
the interconnection of two or more states to such an extent that they are mutually dependent on each other for survival and mutually vulnerable to crises

intergenerational equity
fair and just behaviour of one generation towards subsequent generations; in terms of environmental issues, a concept that centres on preserving Earth's resources for future generations

intergovernmental organisation (IGO)
an organised group of two or more states, set up to pursue mutual interests in one or more areas

International Bill of Rights
this combines *The Universal Declaration of Human Rights* (1948) with the Twin Covenants

International Court of Justice
the primary judicial organ of the UN; has jurisdiction to hear disputes submitted by member states and issue advisory opinions

***International Covenant on Civil and Political Rights* (1966)**
the binding international treaty creating obligations on states to respect the civil and political rights of individuals

***International Covenant on Economic, Social and Cultural rights* (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 that has international origin or consequences, or a crime recognised by the international community as punishable

International Criminal Court (ICC)
an independent international court established by the Rome Statute 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 intelligence 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 (ILO)
an international agency of the UN, created with the aim of improving conditions for workers around the world

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

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

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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

journeyman
dating from the later Middle Ages, a worker who had completed his apprenticeship (period of training) and was then qualified to work for wages for a master

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

jus cogens
a Latin term meaning 'compelling law', also called a 'peremptory norm': a norm of customary international law that is indisputably accepted by the international community and is therefore binding on everyone regardless of whether or not a particular leader or state accepts it

juvenile justice
the area of law and policy concerned with young people and the criminal justice system

Juvenile Justice Centre
a detention centre housing young offenders subject to control orders

labour rights
rights at work, including the rights to safe working conditions, minimum wages, 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

Local Environment Plan (LEP)
a document prepared by a local council, and approved by the state government, to regulate the use and development of land within the council's control

licensee
licence holder

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group has a sufficient interest in the subject matter to be permitted to bring an action

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

Magna Carta
a document signed in 1215 which recognised the principle that everyone, including the king, was subject to the law; 2015 was this historic document's 800th anniversary

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) defined 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

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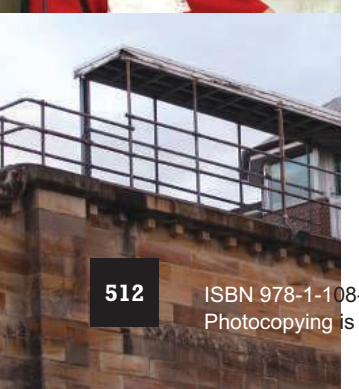

maximum penalty
set by parliament, this is the maximum sentence available to a court to impose for an offence; the maximum penalty is rarely handed down

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

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

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

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

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

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

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

monist system
a legal system that deems treaties enforceable in domestic law as soon as they have been signed

monopoly
exclusive control of a market by one company, which generally results in increased prices because there are no alternative suppliers

mortgage
a type of loan whereby the property being purchased is used as collateral in case the borrower fails to meet the repayment obligations as set out in the home loan contract

multilateralism
cooperation between multiple states for mutual benefit or protection from common threats

multilateral treaty
an international agreement involving three or more parties

murder
the deliberate killing of a person

nation
a people that share common heritage, language or culture and sometimes a common race

nation-state
an independent state where the population is all of one nationality

native title
recognition under Australian law of the traditional laws and customs of Aboriginal and Torres Strait Islander people, as they apply to their interests and rights in land and waters

natural environment
all the elements that surround and influence life on Earth, including atmospheric conditions, soil, plants, animals, micro-organisms, the water cycle and the systems in which these elements interact

natural law
the theory that certain laws come from an unchanging 'natural' body of moral principles that are the basis for all human conduct, and so have validity everywhere

neglect
ongoing failure by a parent to provide a child with the basic requirements for proper growth and development, such as food, shelter, medical care, hygiene and supervision

negligence
a breach of the duty of reasonable care owed by one party to another, and damage to the plaintiff resulting from this breach

negotiation
discussion aimed at reaching an agreement

Non-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 that often plays an important role in advocating, analysing and reporting on human rights worldwide

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

nullify
to declare legally void or invalid

nuptial
a Latin term meaning 'marriage'; a nuptial child is a child born within a marriage

Nuremberg trials
a series of military tribunals that took place in Nuremberg, Germany after World War II (from 1945 to 1946); they were organised and run by the victorious Allied powers, and are famous for their prosecution of prominent leaders of defeated Nazi Germany for crimes against humanity and war crimes

observer status
in the UN General Assembly, 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

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offer
a firm proposal to form a binding contract, made with a willingness to be bound by its terms

offeree
the person to whom the offer of an agreement is made

offeror
the person making an offer of an agreement

Office of the High Commissioner for Human Rights (OHCHR)
the UN human rights office responsible for monitoring and reporting on human rights worldwide

Old System title
a system of registration and transfer of ownership of property in use in New South Wales; under this system an unbroken chain of title is required to be proven to establish title to the property

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

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

owners' corporation
a group consisting of all the lot owners within a strata scheme

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

pastoral lease
a government lease that allows Crown land to be used, generally for farming; exists under Australian Commonwealth law and also under state jurisdictions

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

peak body
an association made up of a number of organisations that have similar interests and aims; it sets policy and coordinates common activities for its member organisations

penalty unit
a specified unit of money used in legislation to describe the fine payable; currently 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

point of law
a question which must be answered by applying the relevant legal principles and by an interpretation of the law

police prosecutor
a 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

polygamous
having more than one wife or husband at the same time

positivism
the theory that laws are valid simply because they are enacted by an authority or from existing decisions, and that moral and ideal considerations do not apply

precautionary principle
the principle that if an activity or policy may cause serious harm to people or to the environment, the best course is to halt or modify that activity or policy, even when there is no proof of the probability of the risk or the seriousness of the harm

press-ganging
the act of forced conscription used in England during the 1800s; groups of men known as 'press gangs' were employed by the government to recruit people forcibly into lifetime service with the armed forces

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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probation
a type of good behaviour bond where the offender is released on condition of good behaviour but placed under some form of supervision, such as daily reporting to a probation officer

procedural fairness
the body of rules that ensure that decision-makers act fairly, in good faith and without bias when resolving disputes

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

product warranty
a manufacturer's promise or assurance that it will repair or replace or otherwise compensate for defective goods; breach of a warranty entitles the aggrieved party to sue for damages but not to end the contract

profit
financial gain; money remaining after expenditure has been subtracted from total income

prosecute
when the Crown or state takes action against an 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

ratified
the process of a state formally approving a treaty, making it legally binding

reactionary
responding to a situation after it has occurred

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

rebuttable presumption
a legal presumption in favour of one party – it can be rebutted by the other party if they can show sufficient evidence to disprove it

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

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

referendum
the referral of a particular issue to the electorate for a vote

referral of powers
the giving up of a state's legislative powers in a certain area to the Commonwealth by passing an Act, pursuant to 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

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restorative justice
a form of sentencing involving a voluntary conference between the offender and the victim of the crime

retrenchment
the loss of a job because there is no longer a job for the employee to do

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

right to peace
the right of citizens to expect their government to do all in its power to maintain peace and work towards the elimination of war

right to 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
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

self-identification
the principle that indigenous people themselves perform the determination of their indigenous identity

sentence appeal
an appeal against the severity or leniency of a sentence

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

separation of powers
preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary

settlement
when final payment for 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 to

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

sexual slavery
repeated violation or sexual abuse or forcing 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

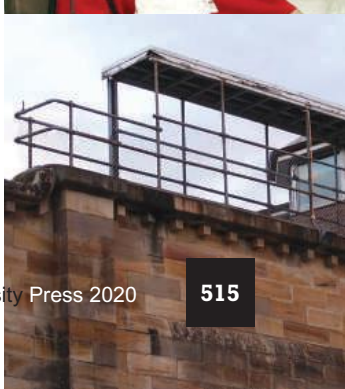
standard of proof
the level of proof required for a party to succeed in court

state
a government and the people it governs; a country









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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 enter treaties with foreign states)

Stolen Generations
Indigenous Australian children who up until the 1960s were removed from their families and tribal lands by federal and state governments and church missions under Acts of the respective parliaments

strata scheme
a detailed pictorial description of lots within a strata complex; this includes the outlines of the buildings, the dimensions of each lot, the details of each unit entitlement and the common property

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

strike
employees' organised withdrawal of labour

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

suffrage
the legal right to vote in a democratic election

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

suspended sentence
a sentence of imprisonment imposed but suspended on condition of good behaviour

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

testator
a person who makes a will

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

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

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 UN 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)

unconscionable conduct
one party's exploitation of the vulnerability of another party to a contract; the victim may have been impaired by some external factor (such as age, disability or lack of education) or may have been deceived or threatened by the stronger party

unfair dismissal
under the *Fair Work Act 2009* (Cth), termination of employment for reasons that are 'harsh, unjust or unreasonable', as found by the Fair Work Commission

UN General Assembly
the UN organ representing all UN member states; acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council
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; contains the departments and offices of the UN

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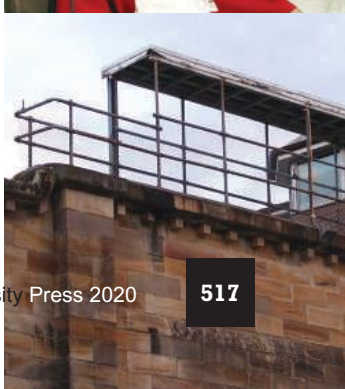

UN Security Council
the UN organ responsible for the preservation of international peace and security; it has the power to authorise military action and other measures

unilateral
undertaken by one state or body

union
a united group of workers who are able to use the power of numbers to negotiate with their employers, usually for better wages and conditions

***The Universal Declaration of Human Rights* (1948)**
a declaration of rights adopted by the UN in 1948; the first universal acceptance of the idea of human rights and the reference point for all subsequent human rights treaties; in 1948, *The Universal Declaration of Human Rights* was hailed as being 'a Magna Carta for all humanity'

universal education
free and compulsory education for all children

universal jurisdiction
where a state claims a right to prosecute a person for actions committed in another state, based on the common international opinion that the alleged crime is so serious that normal laws of criminal jurisdiction do not apply

universal suffrage
the right of all citizens to vote in political elections, regardless of status, gender, race or creed

vicarious liability
legal liability of an employer for the wrongful act of another

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

voluntary manslaughter
the killing of a person where the accused 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

world order
the activities and relationships between the world's states, and other significant non-state global actors, that occur within a legal, political and economic framework; an international set of arrangements for promoting stability and peace

wrongful dismissal
termination of employment that constitutes a breach of the employment contract, an award or a statute

youth justice conference
a measure under the *Young Offenders Act 1997* (NSW) to divert young offenders from the court system through a conference that addresses the offender's behaviour in a more holistic manner

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full article go to https://theconversation.com/gillian-triggs-how-the-fair-go-became-the-last-bulwark-for-australias-freedoms-49743, p.212–214; *'George Calombaris underpayment scandal blows out to $7.8 million'* By Cameron Houston, Chris Vedelago and Hanna Mills Turbet July 18, 2019 © The Age, p.248 (1); *'Luxury Blue Mountains hotel group clawing back wages from migrant workers'* By Anna Patty, July 7, 2019, p.248 (2); *'88daysaslave: backpackers share stories of farm work exploitation'* by Sarah Martin 26 Sep 2019 © The Guardian© SMH, p.248 (3); 'Such brutality': tricked into slavery in the Thai fishing industry by Steve Dow 22 Sep 2019 © The Guardian, p.250; *'The 'free to roam' case – why perceptions matter for misleading claims by business'* July 9, 2013 by Stephen King CC BY ND, The Conversation, p.274–275; *'Thermomix fined for failure to report burns'* reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2010 ABC, p.296–297; *'Sydney parents who fed daughter 'conservative' vegan diet escape jail'* By Jamie McKinnell 22 Aug 2019. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2019 ABC, p.365–364; *'Jail for man who beat young stepson until skin turned blue'* by By Adam Cooper Oct 10, 2018 © The Age, p.366–367; *'MPS get conscience vote on gay adoption'* by Mark Tobin. 25 June 2010. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2010 ABC, p.371–372; Fathers vow to unite and fight family law reversal by Adele Horin Jan 30 2010 © SMH, p.388–389; *'High Court rules sperm donor is daughter's legal father, stopping her moving overseas with mother'* By Elizabeth Byrne 19 Jun 2019. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2019 ABC, p.390–391; *'Sydney dentist Preethi Reddy's body found in suitcase, ex-boyfriend dies in fiery car crash'* By Cameron Gooley and Selby Stewart Updated 7 Mar 2019. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2019 ABC, p.380–381; *'Have Australia's right to strike laws gone too far?'* By Stephen Long 21 March 2017. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales © 2017 ABC, p.22 (Ch 15); *'The changing face of trade unions'* By Anna Patty, Workplace Editor 13 Nov 2017 © SMH, p.31–32 (Ch 15); *'Forget blue or white collar. Society is now about the mortgage'* By Shane Wright 13 Sep 2019 © SMH, p.435–436.

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Stage 6 Year 12

Fifth Edition

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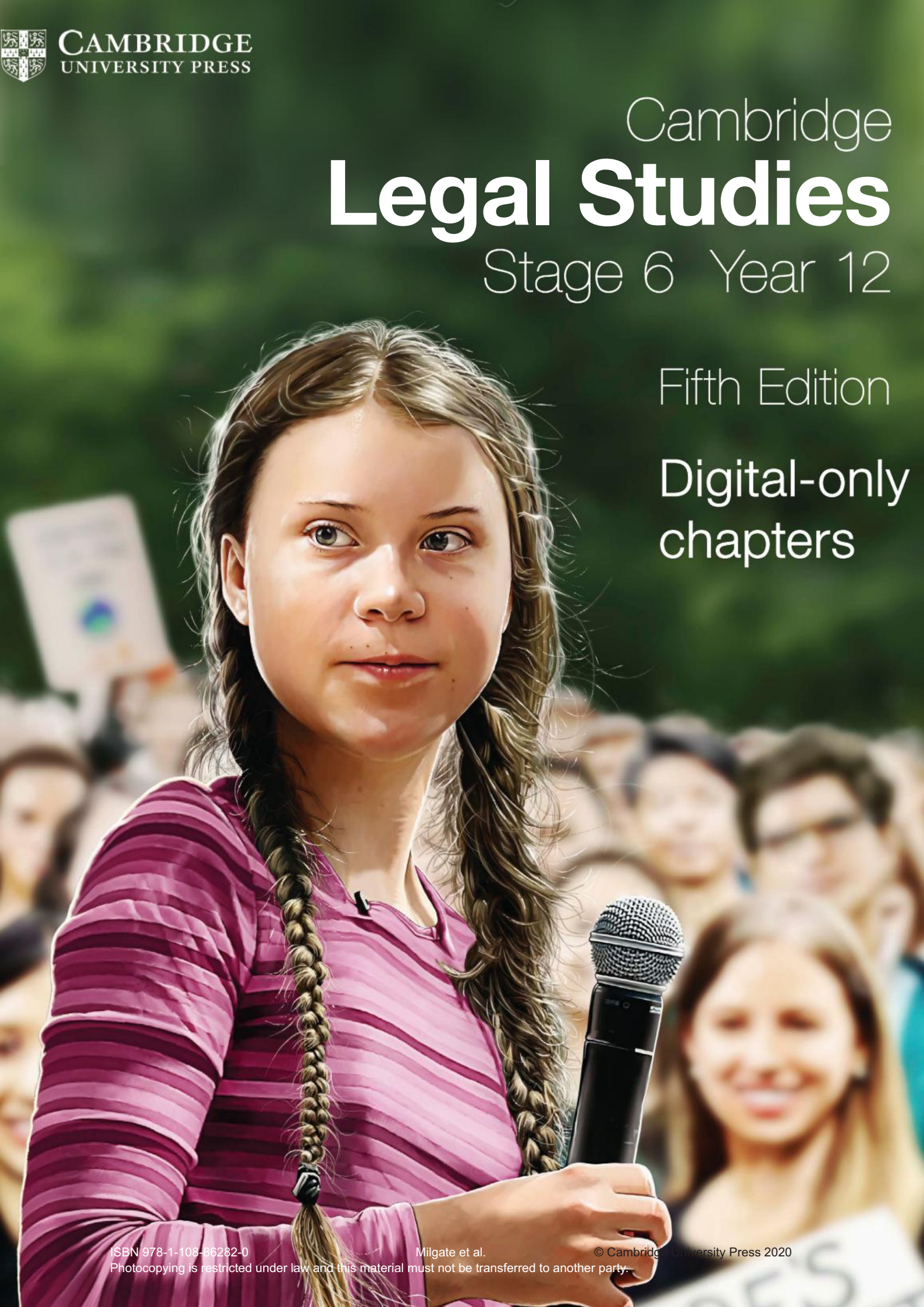

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Chapter 13 (Digital-only chapter)
Option 4: Indigenous peoples

25% of course time

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.

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 people 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 indigenous peoples
- name and research contemporary issues affecting the rights of indigenous peoples and assess the effectiveness of legal and non-legal responses to these issues.

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Relevant law

IMPORTANT LEGISLATION

Aboriginals Ordinance 1911 (Cth)
Constitutional Alteration (Aboriginals) Act 1967 (Cth)
Native Title Act 1993 (Cth)
Stronger Futures in the Northern Territory Act 2012 (Cth) – which replaced the *Northern Territory National Emergency Response Act 2007* (Cth)

INTERNATIONAL TREATIES, PROTOCOLS AND CONVENTIONS

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)

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
Case of the Mayagna (Sumo) *Awas Tingni Community v Nicaragua*, judgment of 31 August 2001 (Merits, Reparations and Costs)
Sesana v Attorney-General (52/2002) [2006] BWHC 1
Kaliña & Lokono Peoples v Suriname, IACTHR (2015) Series C, No 309
Masig Island case – United Nations Human Right Committee 2019

Legal oddity

Britain ruled the Indian sub-continent between 1858 and 1947 and during this time established a penal colony on the Andaman Islands in the Bay of Bengal. There were 10 indigenous tribes on this archipelago including the Great Andamanese, the Onge and the Sentinelese, all of which had an isolated Stone Age culture. British administrators attempted to 'civilise' the Great Andamanese and the Onge but both groups were soon decimated by diseases. In the 1860s, it was estimated that 3500 Great Andamanese were still alive; however, by 1927, there was as few as 100 left. In 1949, the remaining Great Andamanese were relocated to a small island to protect them from disease; in 2010, there were 52 Great Andamanese left. The Onge population has shrunk from 670 to about 110 today. After witnessing this devastation, the Indian Government passed a law that prohibited access to outsiders for the Sentinelese people. They are one of the last isolated indigenous peoples left on the planet.

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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, the Yanomami tribes live in the Amazon jungle; the Chittagong hill tribes live in Bangladesh; Canada is home to the First Nations, Métis and Inuit peoples; the Aboriginal and Torres Strait Islander peoples live in Australia; the Ainu people live on the island of Hokkaido; the 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 homepage:

> 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.

Figure 13.1 In the 1860s, there was an estimated 3500 Great Andamanese; by 1927, there were as few as 100.

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The NGO Cultural Survival estimates that there are approximately 370 million indigenous peoples belonging to over 500 groups in over 90 countries. 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 Sámi of northern Europe, the Aborigines and Torres Strait Islanders of Australia and the Māori of New Zealand. These and most other indigenous peoples have retained distinct characteristics that are clearly different from those of other segments of the national populations.

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 Aboriginals, 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). There are other terms that reflect the location or occupation of indigenous peoples, such as hill people, nomads and hunter-gatherers.

The UN hasn't adopted an official definition of 'indigenous' because of the enormous diversity of indigenous groups worldwide. Instead, the UN has provided the following list of factors that may indicate that a person or people are indigenous; the people:

- self-identify as indigenous peoples 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 link 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 pragmatic importance than any of the other criteria. Without such resolve, an indigenous person or people would not be able to pursue any of the legal remedies or redresses available to them.

Figure 13.2 A mummy from the Aymara, the indigenous peoples of Bolivia.

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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. 28) and the 'learn to' activities (pp. 28–9) 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.

Review 13.1

Outline the key characteristics of 'indigenous peoples' from across the world.

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 is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives.

This definition was 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 indigenous identity. Ideally, an indigenous organisation would make these decisions.

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:

> … two very different definitions are concurrently in use. One, predominating in legislation, defines an Aboriginal 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 as someone 'who is a member of the Aboriginal race of Australia, identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal'.

The Australian Institute of Aboriginal and Torres Strait Islander Studies provides a guide on its website to assist people who are attempting to 'prove their Aboriginality'. The guide describes tracing family histories and contacting relevant indigenous organisations.

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 over-consumption 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.

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colonisation
the establishment of settlement and control in a foreign territory, as in 'the British colonisation of Australia'

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. For example, the Inuit peoples survived by following the migration patterns of the bowhead whale, the fur seal and the fish species of the Arctic. Desert peoples – like many of the indigenous peoples of Australia and the San people of the Kalahari Desert – survived by developing a detailed knowledge of the plants, animals, sources of water and sources of shade in their territory. Some of this knowledge is only now being understood, appreciated and used globally. In the Australian Capital Territory, indigenous people are working with the fire authorities to carry out hazard-reduction burns using Aboriginal burning practices.

sovereignty
complete legal and political control; supreme authority

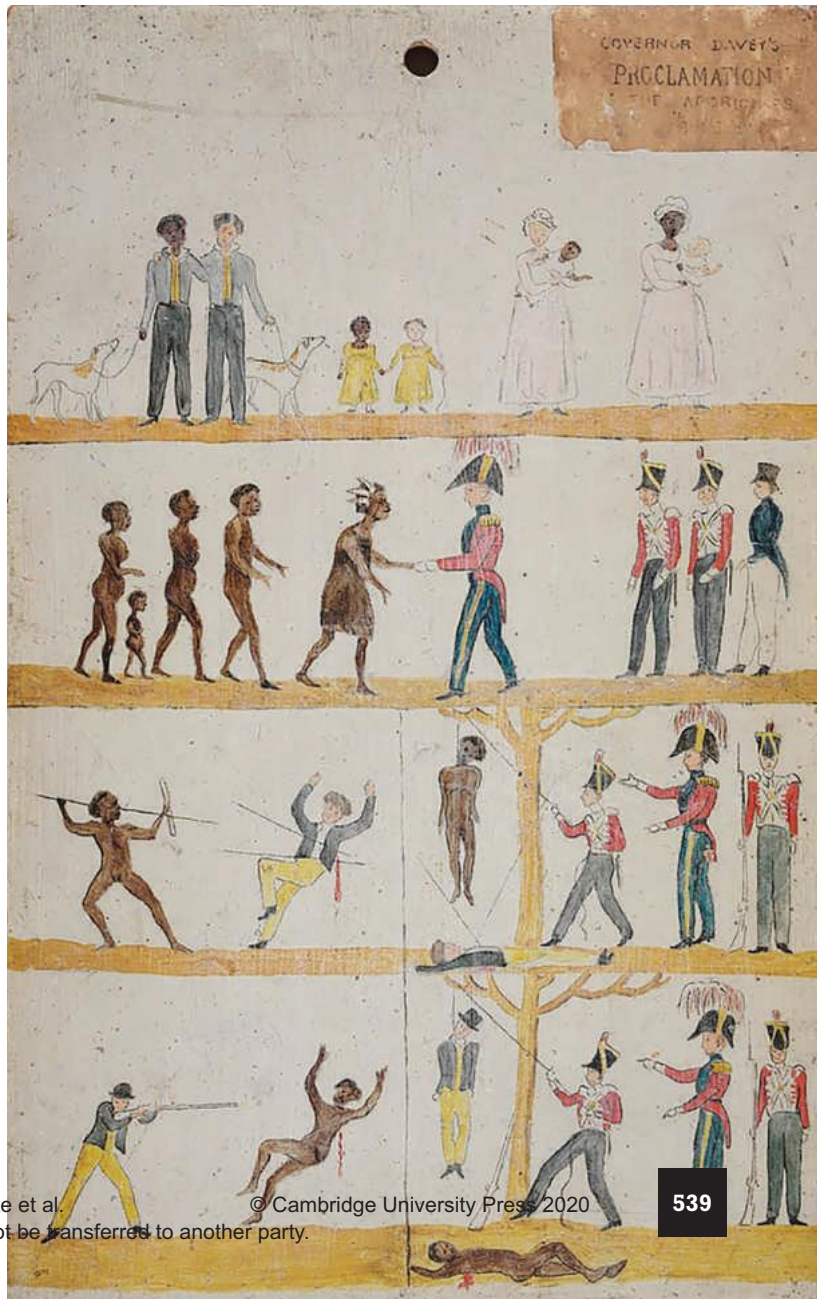
Many indigenous peoples developed legal and political traditions in line with the demands of their environment. The Yanomami tribe, in the remotest reaches of the Amazon, lived in a complexly communal society; Australian indigenous peoples had their own legal systems and their own systems of crime and punishment; and the Iroquoian-speaking tribes, in the north-east of what is now the United States, formed intricate inter-tribal alliances and arrangements 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 UN. 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 ***terra nullius*** applied to white settlement. Since Federation, the *Australian Constitution* has provided the legal framework

Figure 13.3 An 1830 Tasmanian proclamation to Aboriginal people illustrating the supposed equality of people before the law.



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upon which governments could legislate about Aboriginal and Torres Strait Islander 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 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, the 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 territory of indigenous peoples. This accelerated the effective destruction of the sovereignty of indigenous peoples. In Australia, farmers pushed the frontier further and further north, stripping the indigenous inhabitants of the ability to hunt and live off the land, and severing their cultural and spiritual connection to the land.

Ideological differences

In addition to environmental destruction or appropriation, ideological differences – differences in legal, political, commercial and ethical systems – have led to conflict and injustice for indigenous peoples. The settler/colonial societies were, with occasional exceptions, essentially commercially focused, mercantile, capitalist empires. Think of, for example, the industrialised United Kingdom of the 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 culture.

Another example is the early contact between the Māori people of New Zealand and European settlers. The Māori, living in communal organisations known as *iwi*, owned all property communally. The British, as they bought property or land from the Māori owners, sought to assign property rights by dividing them up among individual members of the *iwi*, as is customary under British law. However, as the *iwi* weren't set up for this kind of property arrangement, it led to the Māori being in a far worse bargaining position than they would have been had the British recognised their system of property ownership. Similar situations have occurred in many other places – notably among the communally living Yanomami tribe in the Amazon and among the San people of the Kalahari Desert.

Remote regions

In the early history of the interaction between settler and colonialist 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 had been allowed to live and govern themselves, essentially 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 indigenous peoples lost 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 through the intervention of settler societies. In this section, we examine how the law has dealt with the issue of the loss of indigenous rights, and how legal recognition has changed over time. Initially, laws supported the political and ideological programs of settler cultures. Whereas, in recent times, the law has changed to act as a form of protection for indigenous peoples against further loss of rights.

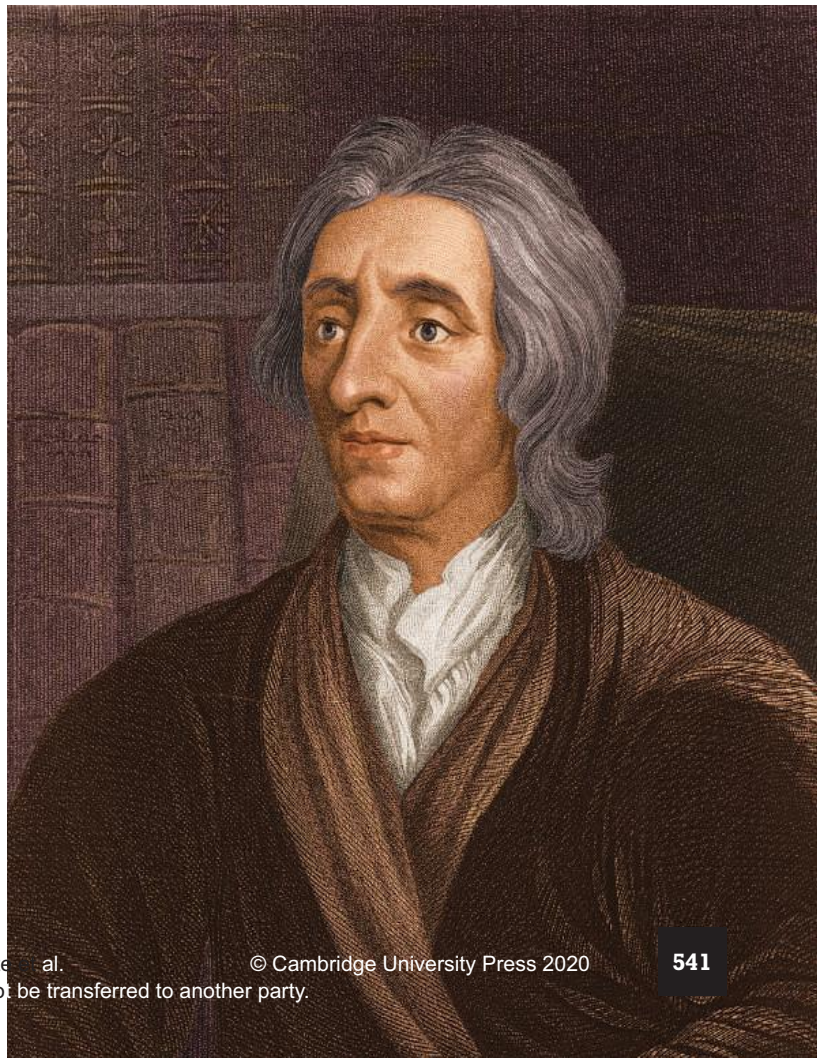
Views of the early European legal scholars

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 Aboriginal and Torres Strait Islander peoples as it was the justification for the application of *terra nullius* to Australia.

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,

Figure 13.4 The philosopher, John Locke (1632–1704).



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as the British were used to doing. However, a legal issue lay in how 'cultivation of the land' was defined.

The Spaniard, Francisco 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

King George III's instructions

In the 1760s, before Captain James Cook set sail on his first voyage of discovery to the Pacific, British King George III gave specific instructions regarding the discovery of land. These instructions provided Cook with his responsibilities concerning British law, should he discover land that was either occupied or uninhabited. Should the land be occupied, Cook was required to **negotiate** with the indigenous peoples he encountered, before claiming the land in the name of the King.

negotiation
discussion aimed at reaching an agreement

Two colonisation case studies

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.

Australia

The treatment of Australia by the British partially resulted from a meeting of two very different systems of land management: one developed on the rainy meadows of England, and the other in the much hotter and drier Australian climate. To the British, 'cultivation' meant clearing the land to make way for farming and towns based upon ownership of property and land (property rights). But to the early indigenous Australians, cultivation of the land meant managing the land in such a way that it was not overused and was maintained in trust for future generations. The nomadic lifestyle of the indigenous Australians was part of this process. Their choice to live in a certain area for only a limited time gave the land a chance to rejuvenate itself and not have lasting damage.

The stark difference between the way indigenous Australians 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

Figure 13.5 Captain James Cook.

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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 nomadic lifestyle of the indigenous Australians was very different from the British notion of **governance** and law, leading to an argument that they were not capable of – or at least had not enacted – self-government.

governance
a method or system of government

Thus, Captain Cook did not recognise the indigenous Australians' sovereignty over the land, even though he was aware of their presence. On 22 August 1770, he took possession of the entire eastern half of the continent, claiming it in the name of King George III without seeking or obtaining the consent of the indigenous Australians. Cook's act was followed in 1788 by the settlement of Sydney Cove by Captain Arthur Phillip. Ninety years later, the British colony of Queensland would claim the Torres Strait Islands.

These three land claims by the British represent significant points in the history of Australia. The first land claim dispossessed indigenous Australians 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 Island peoples of their lands.

At the time of the arrival of Captain Phillip and the First Fleet, there was no uniform standard of land law in the new colony, and as the British colonists spread out from Sydney to other parts of the continent, *ad hoc* land negotiations were carried out between the colonists and the indigenous inhabitants. One famous example of this is John Batman's 'purchase' of the land around Melbourne and the Bellarine Peninsula in exchange for some axes, handkerchiefs, looking glasses and other sundry items. Seeking to quash these precedents, the governor of New South Wales at the time, Richard Bourke, issued a proclamation that determined that no-one owned the land before British possession, thus establishing the notion of *terra nullius*. This proclamation was later followed by a British Colonial Office proclamation to the same effect.

This legal position 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 settlement and as a result ruled that the doctrine used to claim the land – *terra nullius* – was a fallacy. Therefore, it could be argued that an indigenous Australian legal and governance system was in place when the British arrived, even though the invading British failed to recognise the sovereignty of indigenous Australians.

New Zealand

Before reaching Australia, Captain Cook had mapped the complete coastline of New Zealand, and had also encountered the Māori people. To the European eye, the Māori society seemed organised, unlike that of the nomadic indigenous Australians. Thus, in terms of the King's instructions, Cook could not simply claim this land for Great Britain.

The initial settlement of New Zealand by Europeans after Captain Cook's survey of the islands occurred at a very slow pace, and was limited almost completely to rogue soldiers and sailors. However, in 1839, after a campaign by an organisation known as the New Zealand Company, the British Captain William Hobson went to New Zealand to convince Māori chiefs to grant sovereignty to the British. Spurred by the desire to protect themselves from other European powers, the Māori chiefs signed the *Treaty of Waitangi*,

Figure 13.6 The Waka are welcomed onto the beach at Waitangi, New Zealand, on 6 February 2019. The Waitangi Day national holiday celebrates the signing of the *Treaty of Waitangi* on 6 February 1840.

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In Court

***Love v Commonwealth of Australia* [2020] HCA 3**

In February 2020, the High Court of Australia – in a 4 to 3 decision – held that indigenous people cannot be considered to be '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 indigenous heritage. Both men live 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 this about the Aboriginal men's claim:

> 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), indigenous commentator, Stan Grant, emphasised the High Court's *obiter dictum* that:

> Indigenous Australians don't enjoy the same political sovereignty as Native Americans or New Zealand Māori.

Grant notes that while Mabo provided Native Title in 1992, how this decision confirmed that indigenous peoples cannot be aliens under the *Migration Act 1958* (Cth) had not yet been resolved. The Uluru Statement has 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'.

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 the Māori with the ability to access legal redress and compensation for the wrongs they have suffered at the hands of European settlers – which the Māori have been doing since the second half of the twentieth century.

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 Land Wars, which were caused by illicit land grabs made by European colonialists. Although the Māori population suffered many abuses at the hands of the European, the existence of the *Treaty of Waitangi* has provided the Māori with the ability to access legal redress and compensation for these wrongs, which they have been doing since the second half of the twentieth century. 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.

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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 the great European empires (the Hapsburg and Ottoman empires) and sowed the seed for the fragmentation of the overseas empire of Great Britain. In the years after World War I, the British Government passed the *Statute of Westminster 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 UN was the critical factor in promoting the legal recognition of indigenous peoples globally. The main organs of the UN (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 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.

Research 13.1

1 Research claims of *terra nullius* in another country. Write a summary of your findings.
2 Discuss how the 2014 book, *Dark Emu*, by Bruce Pascoe challenged the view that there was no evidence of pre-colonial agriculture.

Greater detail about the UN's responses to the needs of indigenous peoples will be addressed later in this chapter. The UN has been the major driving force in the legal recognition of indigenous peoples and in the promotion of their right to self-determination.

United Nations Permanent Forum on Indigenous Issues

Figure 13.7 The logo of the UN Permanent Forum on Indigenous Issues.

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. 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 UN stresses that the right to self-determination is a fundamental right.

self-determination
the right of people to determine how they will be governed, or their political status based on territory or national grouping

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In 1960, the UN General Assembly passed Resolution 1514 (the *Declaration on the Granting of Independence to Colonial Countries and Peoples*), which declared that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights', that '[a]ll peoples have the right to self-determination … they freely determine their political status and freely pursue their economic, social and cultural development' and '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

Although the UN has declared in 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 culture is well established, as in Australia (also Canada, the United States, Norway and Chile, among others), self-determination is complicated by various factors. The first and most obvious is the sheer diversity of indigenous peoples. In Australia, for example, there are many indigenous groups that are both culturally and linguistically distinct. Any law or international agreement made in relation to these peoples must take into account this diversity. Despite this great variety, what all these indigenous peoples have in common is that they existed – and had formed a close relationship with their land – before the arrival of settler or colonial societies.

Figure 13.8 In Australia, there are many indigenous groups that are both culturally and linguistically distinct.

Two of the UN's factors to consider with indigenous groups are particularly pertinent in the context of self-determination: self-identification and historical continuity.

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, the indigenous peoples of Australia have been settled on the continent for tens of thousands of years, but the indigenous people of New Zealand, the Māori, are estimated to have arrived in that country in the thirteenth century CE. Similarly, the Inuit 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, living in the flatlands of the country, for centuries.

Deliberate or inadvertent attempts to disrupt historical continuity – whether demonstrated by the continuation of cultural practices and indigenous languages, or continued traditions of food production – have been made by many settler societies. One of the most well-known 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 Generation' policies. These policies resulted in indigenous children being forcibly removed from the families between 1910–1970.

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Figure 13.9 An Inuit fisherman and his family on an island near the village of Ilimanaq, Greenland.

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 people 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 the 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.

Unfortunately, these instances of indigenous children being separated from their families and communities, and indigenous people being dislocated from their land and country, are all too familiar for indigenous peoples around the world. In global history, there are many cases of indigenous people being displaced and forcibly relocated by settler societies.

Review 13.4

1. Define 'self-determination' in international law. Identify which international conventions enshrine self-determination.
2. Define 'self-identification'.
3. 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.

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sovereignty
complete legal and political control; supreme authority

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. If a group of people living within the borders of a country effectively leave the political administration of that country and form their own self-determined government, this questions the territorial integrity of that country. The state provides administration and services (such as hospitals and roads), as well as a legal system that generally does not encompass 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 state's borders, they cannot form their own sovereign state. For this reason, the concept of self-determination for indigenous peoples has come to have a limited meaning. Contemporary examples of this situation are the Kurdish people in Syria and the Rohingya people in Myanmar.

In Australia, the autonomy granted to indigenous Australians has waxed and waned since the 1970s, when many indigenous people formally petitioned the government for decision-making power over their own communities. This eventually led to the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC), which facilitated the sharing out of federal funds and coordinated negotiations between the federal government and Australia's indigenous communities over funding priorities. However, ATSIC was plagued by difficulties over funding concerns, and the Howard Government, responding to this, passed the *Northern Territory National Emergency Response Act 2007* (Cth) (NTER Act).The NTER Act was criticised because it takes away autonomy, and therefore the limited level of self-determination that had been available, from indigenous communities.

Consequently, 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, 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. 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 an advisory body of First Nations traditional owners that would advise the Australian Parliament on policies affecting Aboriginal and Torres Strait Islander people. The Uluru Statement also proposed that the Voice be enshrined in the *Australian Constitution*, thus giving indigenous Australians a constitutional guarantee that they will have a say in their own affairs. The pressure for such change was evident during the 2019 State of Origin rugby league series where some indigenous players refused to sing the national anthem as they felt it had links to the racist White Australia Policy and did not represent their people.


Video

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. 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 parliament's budget is much smaller and it functions simply to advise the Swedish Government. The Swedish Sámi

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Case Study

The death of John Chau on 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 the 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.

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.

In North America, the Canadian Department of Indian and Northern Affairs introduced self-government for First Nations people in 1995. This policy crucially recognised that the form of self-government should vary according to the needs of each indigenous people.

Figure 13.10 The Sámi Parliament of Norway in Karasjok, Norway.

The role of the UN and international instruments

The UN was established after the chaos and devastation of World War II. In its early years, the UN developed a series of conventions, charters and declarations to safeguard the rights of first people 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 UN 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 wasn't until 2007 that the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) was adopted by the UN General Assembly.

The UN established the Permanent Forum on Indigenous Issues (UNPFII) in 2000. The UNPFII:

- 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 UNPFII's meeting in May 2019 had a theme of 'indigenous peoples' traditional knowledge: generation, transmission and protection' and looked at protecting indigenous knowledge and traditional legal systems to foster sustainable climate solutions and good governance. The UNPFII Chair (Anne Nuourgam) noted:

> Indigenous peoples' traditional knowledge is often unrecognized, along with their rights to land, education and resources.

The UN has established two other bodies to deal specifically with indigenous issues. These are the:

- **Expert Mechanism on the Rights of Indigenous Peoples**, which 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 UN.
- **Special Rapporteur on the rights of indigenous peoples** that, 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 indigenous peoples' human rights and recommends solutions and undertakes follow up on these cases.

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 indigenous 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 Islanders.

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 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. 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.

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The most significant hard and soft international laws affecting indigenous peoples are outlined below.

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted on 10 December 1948, states that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. This declaration is not a treaty, and so it is not legally binding on countries (that is, it is 'soft' law). However, it was the precursor to a number of treaties that are legally binding.

In the text of *The 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 legal sense. 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

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. This convention was updated in 1989 with the *Indigenous and Tribal Peoples Convention* (1989) ('Convention 169') to include the concept of self-determination. This convention covers a wide range of issues such as employment, right to natural resources, discrimination and land rights.

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.

If this is not successful, then an International Labour Organization 'Commission of Inquiry' can

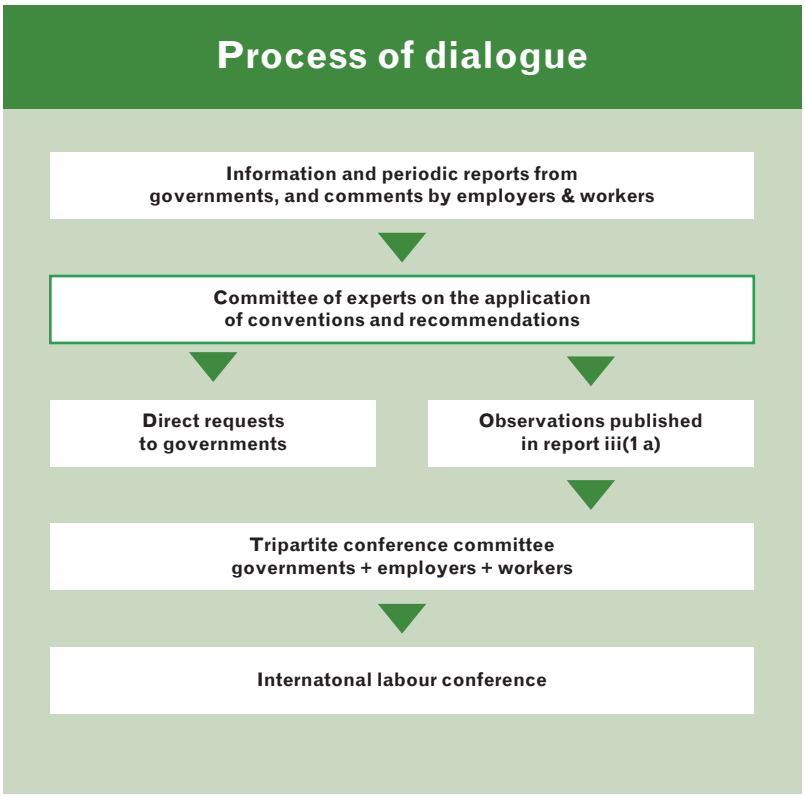

Figure 13.11 The 'process of dialogue' to resolve disputes under the *Indigenous and Tribal Peoples Convention* (1989).

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be established. In 2018, the Myanmar Government was subject to this over its using 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.

International Labour Organization Convention 107

The International Labour Organization instrument – the *Indigenous and Tribal Populations Convention* (1957) ('Convention 107') – responded to the needs of indigenous peoples in situations where they were being used as slave labour or being paid wages not equal to those of the non-indigenous population. However, the International Labour Organization convention didn't pay any attention to the issues of self-determination, autonomy and self-government. 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 doesn't 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.

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 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.

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The Working Group on Indigenous Populations

In 1994, the UN founded the Working Group on Indigenous Populations. This is one of the most accessible bodies for indigenous peoples as it enables them to share their concerns and experiences with the UN. With the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), the Working Group on Indigenous Populations declared that it had achieved its major goal. This working group met for the final time in July 2007.

Coming out of the working group were the First and Second International Decades of the World's Indigenous People – the first from 1994 to 2004 and the second from 2005 to 2015 – which played a tremendous role in raising awareness of indigenous issues. During these two decades, the UN initiated projects that addressed a wide range of concerns, including education, employment and health.

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 adapt the principle of self-determination for indigenous people. 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 subsequently signed the declaration, with the federal Australian Rudd government doing so in 2009.

However, the declaration is soft international law. The states that have signed the declaration are morally bound but not legally bound to follow it. A good future step would be to use this declaration as the basis of a treaty, thus making it legally binding, hard law. However, the effectiveness of such a move would depend on the nature of the enforcement mechanisms attached to the treaty. Often such mechanisms are aimed at encouraging compliance rather than punishing breaches.

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.

Review 13.5

1. Outline the powers of the two UN bodies created to deal with 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 regards to protecting the rights of indigenous peoples.
5. As a class, investigate the UN's 'Indigenous Peoples at the UN' webpage at: https://cambridge.edu.au/redirect/8762.

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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 UN is the International Court of Justice. However, as only states can be parties to a case before the International Court of Justice, it is not an avenue that indigenous peoples can use to attain justice.

Also, the International Court of Justice only has the power to decide a case when the parties to a dispute (sovereign states) have consented to the court's jurisdiction.

The legal concept of sovereignty means that indigenous peoples have no legal standing to go to the International Court of Justice. 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 International Court of Justice is not the forum to achieve justice for indigenous peoples. There are other UN agencies and courts that are appropriate avenues.

Several enforcement mechanisms have been established through the UN that aim 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' box below illustrate indigenous peoples taking legal action within their own nations to gain justice.

In Court

***Sesana & Setlhobogwa v the Attorney General of the Republic of Botswana* (2006) BWHC 1 (52/2002)**

Figure 13.12 Indigenous people of the Kalahari, Botswana.

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.

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.

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In Court (continued)

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 UN. Furthermore, the San people have been forced to fight further for their rights, winning another High Court battle in 2011 over access to vital wells. In 2013, the San people were forced to 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.

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.

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'.

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.

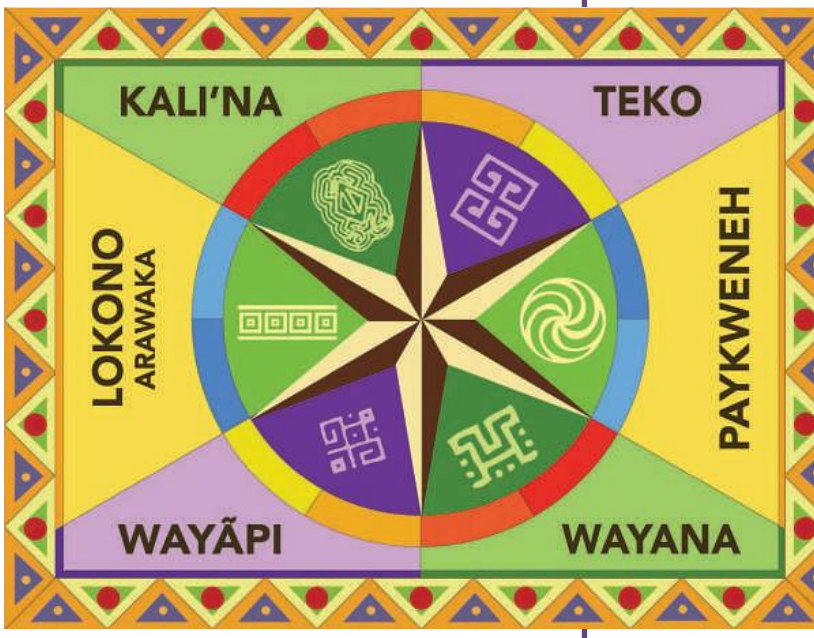

Figure 13.13 The flag of the indigenous peoples of French Guiana with the Lokono and Kaliña peoples represented.

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In Court (continued)

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'.

The role of intergovernmental organisations

There is a substantial number of intergovernmental organisations (IGOs) 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 UN, 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:

- **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.

Case Study

The Masig Island Case, 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 is being 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 are requesting $20 million from the Australian Government to build a sea wall.

Sophie Marjanac, a lawyer from ClientEarth, an NGO representing the islanders, noted:

> If indigenous people are disposed of their homelands, then they can't continue to practice their culture.

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Case Study (continued)

It is important to note that the UN 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.

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:

- **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 homepage 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 it has 'consultative status' with the UN.

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.

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 and their issues. 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

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Figure 13.14 Cultural Survival's media campaign launch.

declaring that the Kalahari Bushmen are like 'Stone Age creatures' who 'must change or otherwise, like the dodo, they will perish'. Roy Sesana, a Bushman 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.'

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, *The Koori Mail* and the SBS current affairs program, *Living Black*.

The role of 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 *Constitution* provides for certain powers to be allocated to the federal government, with all legislative power granted to the states. This structure of government has had enormous ramifications for Australia's indigenous peoples.

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*.
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 NGOs support indigenous peoples.

Research 13.2

1. Visit the website of the NGO, Cultural Survival, and explore their latest campaigns.
2. Watch some YouTube clips about the Sentinelese people.
3. Write a report about the effectiveness of the NGO, Cultural Survival, in achieving justice for indigenous peoples.

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At Federation, the most significant sections of the *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 indigenous peoples varied dramatically from state to state. This section of the *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.'

Three key Australian Government responses to indigenous peoples

In this section we consider three key events in the history of the Australian Government's response to the needs of Indigenous peoples:

- the 1967 referendum
- the Stolen Generations
- the Northern Territory intervention.

The 1967 referendum

In the 1960s, the general public grew increasingly aware of the plight of indigenous Australians and activists campaigned determinedly for change. On 27 May 1967, a federal referendum was held to decide whether the two references in the *Australian Constitution* (ss 51(xxvi), 127) that discriminated against indigenous Australians should be removed. Because indigenous Australians were exempt from these sections of the *Constitution*, the federal government was not able to amend legislation to improve their situation. The removal of sections 51(xxvi) and 127 of the *Constitution* also had great symbolic importance. It meant there was now no legislative difference between indigenous Australians and non-indigenous Australians. It also drew the attention of the majority, European, urban population of Australia to the plight of indigenous Australians.

The referendum was greeted with a resounding 'yes'. In fact, it is the highest 'yes' vote in any Australian referendum held so far, with 90.77% of people supporting the amendment. The changes were brought into effect on 10 August 1967 by the *Constitutional Alteration (Aboriginals) Act 1967* (Cth). While the day-to-day lives of indigenous Australians 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 indigenous aspirations. Indeed, the *Constitution* still permits the parliament to enact laws that discriminate based on a person's race.

In July 2019, Ken Wyatt, the federal Minister for Indigenous Australians, announced he would like to see a referendum take place within three years to entrench recognition of indigenous peoples in the *Constitution*.

The Stolen Generations

It is estimated that approximately 100 000 indigenous Australian children were removed from their parents and traditional lands under state and federal policies of assimilation. This process did not end in Australia until the 1960s. Most of these children were placed in government or church-run institutions while others were adopted or placed into the care of white families. There was an assumption that the children would be better cared for living in dormitories on missions and reserves. But for most, the loss of their culture and identity was worse than poverty and living in substandard housing with their families. It can be seen as even more traumatic when considered within the context of indigenous Australian traditions and kinship ties.

The removal – by various governments throughout Australia – of indigenous Australian children from their families because of their race and culture was allowed under a range of laws that were passed by the respective parliaments. The *Aboriginals Protection Act 1869* (Vic), for example, gave the Aborigines Protection Board lawful authority over the care and control of any

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Figure 13.15 Members of the Stolen Generations were deprived of having relationships with their elders.

indigenous Australian 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 indigenous Australian. 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 indigenous Australians. 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 https://cambridge.edu.au/redirect/8763).

The issue of the Stolen Generations was presented in the 2002 film, *Rabbit-Proof Fence*, which was based on the true story of three Aboriginal girls who, in the early 1930s, were forcibly removed from their families in Western Australia.

In 2008, then Prime Minister Kevin Rudd delivered a national apology for the wrongs of Australia's past. This apology symbolised the changing values of the Australian Government, which had previously refused to accept responsibility for this dark past.

The Northern Territory Intervention

As health, education and crime continue to be major issues for large numbers of indigenous Australians, governments of recent years have introduced and supported legislation that attempts to resolve some of these issues. One of the most well-known is the Howard government's *Northern Territory National Emergency Response Act 2007* (Cth) (repealed), commonly referred to as 'the Intervention'. This Act introduced measures such as additional police officers in indigenous Australian communities, restrictions on alcohol, and the provisioning of welfare payments to parents based on their child's school attendance.

Figure 13.16 The Northern Territory Intervention purportedly had the improvement of the welfare and future of indigenous children as one of its primary goals.

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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 indigenous Australian communities. However, only two of the 97 recommendations in the report were implemented. Because of this, some feel that launching the Intervention as a response to the report was disingenuous. Many indigenous Australian leaders, the Northern Territory Government and the Australian Human Rights Commission have all expressed criticism of the program, stating concern that it demonstrates further discrimination against indigenous Australians. Action groups such as 'Stop the NT Intervention' work hard to show the true damage and statistics associated with the government initiative. On the other hand, the Intervention has received support from some indigenous Australian leaders and community welfare groups, and the legislation received bipartisan support in federal parliament.

Review 13.7

1 Identify the recognition given to indigenous Australians in the 1967 referendum.
2 Evaluate why a compensation scheme is necessary for victims of the Stolen Generations.

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), which states:

> 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. The UN Human Rights Committee has yet to hear a case specifically involving the linguistic aspects or loss of language of an indigenous people.

According to the UN, 90% of all indigenous languages will be lost within 100 years. While most governments are aware of this language crisis, few have funded language preservation. The year 2019 was the International Year of the Indigenous Language and the United Nations Educational, Scientific and Cultural Organization has developed an action plan to preserve indigenous languages.

Aboriginal and Torres Strait Islander peoples

When we talk about Australia's indigenous peoples, it is important to remember that we are not talking about one unitary people, but an enormous number of cultures, traditions, histories and languages. Sadly, the long history of violence suffered by indigenous Australians 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) (the Stolen Generations) has meant that many indigenous Australians have lost contact with their native

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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.

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 at https://cambridge.edu.au/redirect/8764.

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 in 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'. 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.

Research 13.3

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. Read the article, '2019 International Year of Indigenous Languages' (12 January 2019) on the UN's website (see https://cambridge.edu.au/redirect/8765). Outline the initiatives to protect indigenous languages described in the article.
4. Investigate other indigenous cultural rights that have suffered; for example, social arrangements and spiritual beliefs.

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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.

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.

Aboriginal and Torres Strait Islander peoples

When the British settlers first arrived in Port Jackson in 1788, they did not sign any sort of treaty with the indigenous inhabitants of the area. Although the reasons for this are unclear, it may have been because the indigenous inhabitants of those areas did not have a form of government or political administration that the British settlers could recognise as analogous to their own. There was, at this stage, no attempt at a legal legitimisation of British settlement. However, after Batman attempted to 'purchase' the land that would become Melbourne and the Bellarine Peninsula from the Kulin nation, Governor Bourke and the British Colonial Office firmly established the notion of *terra nullius*. 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 indigenous inhabitants 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 indigenous inhabitants could not sell, transfer or acquire land, except when granted it by the Crown. It wasn't until 1971 that formal land rights litigation by an indigenous group was pursued in Australian courts. This case, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, otherwise known as the 'Gove land rights case', concerned the 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.

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 Islanders, 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 indigenous Australians have sovereign power over their lands? If so, was the doctrine of *terra nullius,* which had been used to settle the country,

Figure 13.17 The grave of land rights plaintiff, Eddie Mabo, on Murray Island in the Torres Strait in Queensland.

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In Court (continued)

incorrectly applied? Specifically, was there a form of indigenous ownership of the land that meant the Torres Strait Islanders 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 Islanders 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 indigenous Australians, and that the doctrine of *terra nullius* had not extinguished that title, it was not until the introduction of the *Native Title Act 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 treat with the First Nations peoples of the lands within Victoria's borders. Furthermore, constitutional recognition and a treaty were called for by the Uluru Statement (2017) and are under consideration by a federal parliamentary committee.

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 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 indigenous Australians 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.

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For a native title claim to be recognisable under Australian law, there must be a continuous acknowledgement and observance of the indigenous Australian clan or tribe's traditional laws and customs since British sovereignty. Whereas native title may be surrendered to the Crown voluntarily, it is not available to people who are not members of the particular clan or tribe claiming native title over an area of land – put simply, you must belong to, and have a kinship tie to, the clan or tribe. The land claimed must be of traditional and cultural significance to that clan or tribe.

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 13.4

1. Explain the effect the landmark decision of *Mabo v Queensland* (No 2) (1992) HCA 23 had on all indigenous Australians.
2. Research the *Native Title Act 1993* (Cth). Explain how this Act protects indigenous people 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 indigenous Australians of how to use the Australian legal system to obtain justice? Use evidence to justify your answer.
4. Who is 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 song, 'From Little Things Big Things Grow'.

Figure 13.18 Pastoral leases allow Crown land to be used, generally for farming.

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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.

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 to that of Australia's indigenous peoples. Unlike the European settlers of Australia, who did not acquire the land through treaty, Spanish colonists actually did contract an agreement with the Mapuche 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,

Figure 13.19 Mapuche people in Chile, circa 1890.

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 the 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 anti-terrorist legislation against the Mapuche people. This situation continues despite UN requests for the two parties to negotiate a settlement.

Review 13.8

1 Compare and contrast the differences between Australian and Canadian native title law.
2 Read the article, 'In Chile, the Mapuche are battling for their land' (by Alberto Barba Pardal, *Equal Times*, 29 June 2018), available online at https://cambridge.edu.au/redirect/8766. Assess if the Mapuche people had to resort to destroying buildings, fields and other facilities after the persistent refusal of the Chilean Government to grant land rights.

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Research 13.5

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.

Article 1.2 of the *International Covenant on Civil and Political Rights* (1966) states:

> 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 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 the Indonesian settlement of Papua by the Free Papua Movement. Attacks by this group have cost many lives (an estimated 500 000 to date) and tens of millions of dollars in damages to the mining operation. The protests and attacks have taken place against a background of enormous profits

In Court

***Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001)**

Nicaragua had granted a right for a company to log 62 000 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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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 destruction of their environment. There is also the issue of the human rights of all the innocent victims who have been killed, kidnapped and tortured by Indonesian security forces.

Aboriginal and Torres Strait Islander peoples

Australia's strong economy over the past decade has been driven by strong demand for the natural resources lying in the rocks of Western Australia, the Northern Territory, Queensland and South Australia. The enormous mines that are digging up these resources are built on the ancestral lands of the traditional landowners, indigenous Australians.

When the Australian mining industry first boomed in the 1960s, it had very poor relations with indigenous communities – there was no recognition of traditional owners, widespread racism, exploitation and ignorance. Indigenous workers, if employed (which they usually weren't), were paid far less than their European counterparts, and indigenous 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 changed their behaviour regarding indigenous communities and traditional landowners. For example, mining companies now pay royalties to communities, offer training and employment opportunities to indigenous people, and involve communities in land-use decisions.

However, different companies have different standards, and remote indigenous communities are vulnerable to economic downturn. Any change in prevailing economic conditions could devastate these communities – it is likely that legislation offers the only hope for the long-term economic stability of these Indigenous communities.

Figure 13.20 Enormous mines in areas such as Western Australia are built on the ancestral lands of the traditional landowners.

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Research 13.6

1 Evaluate the current protection for rights to natural resources. Suggest law reform initiatives for the government to better protect these rights for indigenous peoples.
2 Compare and contrast the relationship between mine operators and indigenous 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.

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 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.

> The declaration states:
> … 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 indigenous artists has become very popular. Paintings by artists such as Emily Kame Kngwarreye, Clifford Possum Tjapaltjarri and Rover Thomas have become

Indigenous peoples' intellectual property rights

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007)

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.

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Figure 13.21 This QANTAS Dreamliner was named the Emily Kame Kngwarreye and some of her famous artwork was printed on the plane.

renowned throughout the world and have been sold for prices in excess of one million dollars.

However, as the prices fetched by paintings by indigenous Australian artists grow ever higher, the issues start to increase for the artists themselves. Indigenous artists, who are often vulnerable because of their age, remote location and linguistic difficulties, have been preyed upon by 'carpetbaggers'. Carpetbaggers are people who exploit the vulnerability of these artists by offering trivial cash payments, cars (that turn out to be wrecks), food and alcohol for art that they then on-sell for a much greater amount of money, keeping the profits. One of the most well-known indigenous artists, 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 indigenous artists. Recommendations from this inquiry have led to increased government funding for community art centres, which act as disinterested collectives for indigenous artists, and the shutting out of private dealers from the market. Although some fear that these policies will lead to the oversupply and devaluation of indigenous art, this may be the only way to prevent vulnerable indigenous artists from being exploited.

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 indigenous artists, but also damage the value of the indigenous 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

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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 their logo 'Chief Wahoo'.

Challenges to acts of cultural appropriation may be successful. In 2001, Lego agreed to change some of the names in its 'Bionicle' line of toys, after conceding that the names had been appropriated from the Māori culture.

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 (see https://cambridge.edu.au/redirect/8767).

Figure 13.22 'Chief Wahoo' is the logo of the professional baseball team, the Cleveland Indians.

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 UN hasn't 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 indigenous Australians, who lost their ability to hunt and live off the land, and the indigenous people of South America, where loss of land disrupted their food supply and caused inter-tribal conflict.
- Ideological differences have led to conflict and injustice for indigenous peoples. For example, the 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 suffered loss of rights 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.
- 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 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 the rights they have lost. Examples include the Mabo and Wik decisions in Australia, *Sesana v the Attorney-General 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 lost contact with their language and, therefore, 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, the First Nations people in Canada, the Mapuche people in Argentina and Chile, the Sámi people in Sweden, and the Māori people in New Zealand.
  In Australia, the Mabo decision (1992) led to the introduction of the *Native Title Act 1993* (Cth), which was followed by the Wik decision (1996).
- Many indigenous peoples have had their connection to the land interrupted by the exploitation of natural resources by other parties. Examples include the Grasberg gold mine in Papua and the mines built on the ancestral lands of indigenous Australians. A contrast is the San people of the Kalahari Desert, who reached a profit-sharing agreement with a pharmaceutical company.
- The *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.

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Chapter questions

1 How does the UN describe 'indigenous peoples'?
2 Identify the three key events in the history of the Australian Government's response to the needs of indigenous 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.

Review 13.10

1 Explain the issues with giving indigenous people sovereignty when they live 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 NGOs.
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 regards to land rights and rights over natural resources.

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.

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

The themes and challenges should be integrated throughout the teaching of this topic. The following are some suggestions as to how the content covered is related to themes and challenges.

The role of the law in encouraging cooperation and resolving conflict regarding indigenous peoples

- International law sets international benchmarks with respect to the rights of indigenous peoples and encourages states to work proactively in providing adequate support and cooperation.
- The legislative framework that exists with respect to indigenous peoples is aimed at encouraging cooperation and resolving conflict. Within certain jurisdictions legally binding Court decisions can resolve conflicts but this is not the case at the International Court of Justice.
- The UN 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.

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- The growing awareness of the plight of indigenous Australians was brought to light by the 1967 referendum in which the *Australian Constitution* was amended to reject any form of discrimination against indigenous Australians.
- International mediation in the form of the *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 in relation to indigenous peoples is supported by the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960). The UN 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.

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 indigenous Australian children to be forcibly removed from their parents or kin under the assumption that this was in the best interest of the child. In Canada and America, indigenous children were removed from their families and sent to boarding schools.
- The 'Norwegianisation' policy, which lasted until the outbreak of World War II, prohibited the Sámi language from being used in public schools and in churches, and Sámi culture was denigrated as inferior.
- In 1953, the Danish Government forced many Inuit to relocate from their traditional lands, to make way for the building of a United States air base. In Canada, the High Arctic relocation saw Inuit families transported to islands far north of where they had previously lived.
- The late 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:
  - 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, the 2008 apology to the Stolen Generations and the 2010 apology for the High Arctic relocation.

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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 NGOs.
- 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 NGOs) need to be discussed in the light of their ability to pressure governments, highlight issues, undertake research and publicise issues concerning indigenous peoples. These measures can promote greater compliance, initiate law reform, educate the wider community and promote indigenous rights.
- Non-legal measures can be ignored, in particular, if mainstream society is uninterested in the area of focus they are promoting. Governments are more likely to respond, depending on how the issue is tracking in the electorate.
- The media plays an important role in communicating the often-ignored difficulties faced by indigenous peoples, particularly those in remote locations. It also plays a key role in framing public discussion and influencing public perception of indigenous peoples and their issues.

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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. The 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:

- outline the increasing need for workplace law
- outline where workplace regulations come from
- describe the rights and responsibilities employees and employers have in the workplace
- examine workplace law and the legal framework behind it
- evaluate the effectiveness of dispute-resolution processes
- assess 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.

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Relevant law

IMPORTANT LEGISLATION

Commonwealth Conciliation and Arbitration Act 1904 (Cth) (repealed)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Workers Compensation Act 1987 (NSW)
Disability Discrimination Act 1992 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Industrial Relations Act 1996 (NSW)
Workplace Relations Act 1996 (Cth)
Age Discrimination Act 2004 (Cth)
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)
Fair Work Act 2009 (Cth)
Work Health and Safety Act 2011 (Cth)
Fair Entitlements Guarantee Act 2012 (Cth)
Workplace Gender Equality Act 2012 (Cth)
Fair Work Amendment Act 2015 (Cth)

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
Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd (2000) 175 ALR 173
Hollis v Vabu Pty Ltd (2001) 207 CLR 21
Russell v Trustees of the Roman Catholic Church [2007] NSWSC 104
Commonwealth Bank of Australia v Barker [2014] HCA 32

Legal oddity

In 2016, a Sydney taxi driver, Pierre Chahoud, was approached by a police officer who brought up the colour of his shoes. According to the taxi driver, the police officer said: 'You're not in your proper uniform … and you are in a no-stopping zone. If you have a good record, I will only give you the smaller fine for the shoes'. The taxi driver received the one fine, for the shoes, amounting to $100. But when he decided to pursue the matter, NSW Police withdrew the footwear fine.

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15.1 The nature of workplace law

The changing nature of workplace law over time

The main subject of workplace law is **employment**. To be employed means to have a particular type of contract with another person (a contract of service), under which the employee receives monetary payment and other benefits in exchange for doing work. It is also possible to have a contract for work that does not involve an employer–employee relationship. The person doing the work in such a situation is usually called an **independent contractor**.

employment
the contractual relationship between an employer and an employee, involving work performed for monetary payment and other benefits

independent contractor
someone who is paid for work done for another person without there being a contract of employment between them; instead, the parties will have a contract for services

Laws about employment have changed over the centuries due to changes in economic conditions, attitudes and technology, and the influence of trade unions. Australian workplace laws were originally based on British industrial laws, but over the past 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. The majority of 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, the law relating to employment from medieval times to the eighteenth century was limited, due to the nature and type of employment available. Employment law also 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.

guilds
a medieval association of craftsmen or merchants

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.

Industrial Revolution
the rapid development of industry in the eighteenth and nineteenth centuries, characterised by changes in manufacturing, agriculture and transport

With the increased use of machines, employees became specialised or skilled in only a few aspects of the production of an item. Clothing factories

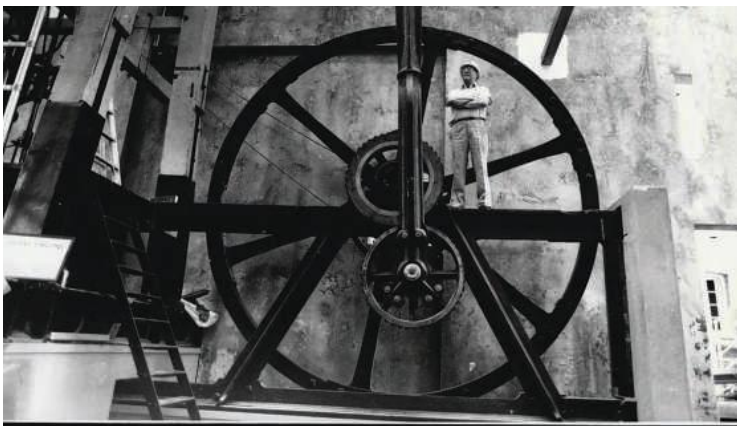

Figure 15.1 The world's oldest surviving rotative steam engine – the kind that powered the Industrial Revolution.

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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. 32) and the 'learn to' activities (pp. 32–3) 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.

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, and identify the advantages they obtained.
5. Discuss how the nature of employment changed during the Industrial Revolution.

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 the profit.

The changing nature of employment in Britain during this time also resulted in changes in labour laws. Factory owners (who were usually wealthy men who had some 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', 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.

trade union
an organisation of workers created to preserve and further their rights and interests

Laissez-faire economy and state intervention

Employment in the nineteenth century was based on the concept of **freedom of contract**, which is individuals' 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.

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

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.

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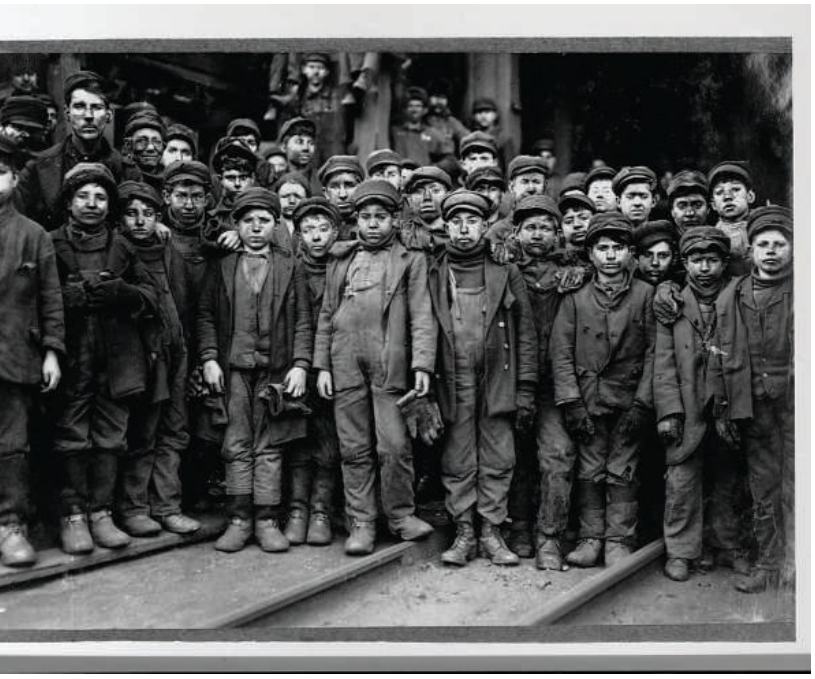

Figure 15.2 In 1819, an Act was passed that prohibited the employment of children under nine years old, and limited children's working hours to 12 hours a day.

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.

These substandard working conditions were highlighted in the newspapers by writers such as Charles Dickens (who had worked in a factory as a child). This 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

Industrial relations in Australia

Due to white Australia's unique history, the concepts of craftsmen, artisans, guilds and trade unions were already well known in this country; as the Australian economy grew, so did worker collectives agitating 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.

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.

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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).

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes a more active role than in mediation, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for them

arbitration
(industrial relations law) the process of resolving an industrial dispute, often after conciliation has failed, by a legally enforceable order of a court or commission

The 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, 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.

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.

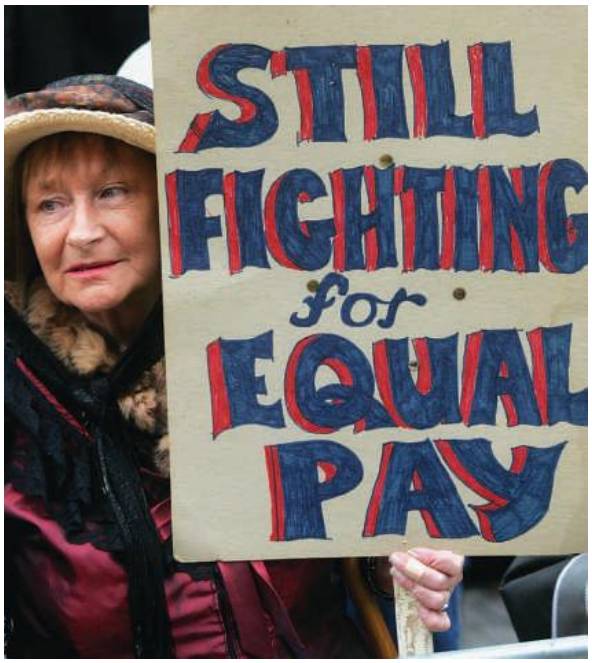

Figure 15.3 In 2009, the AIRC was replaced by the Fair Work Ombudsman. Fair Work Australia was renamed the Fair Work Commission.

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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.

Contracts

Types of work contracts

When parties enter into a contract for work to be done, it will generally be either a **contract of service** or a **contract for services**.

contract of service
an employment agreement under which a worker (employee) works for an employer; it imposes certain duties on each party and provides specific rights for the period of employment, which may be for a fixed term or ongoing

contract for services
an agreement between a contractor and a client under which the contractor performs agreed tasks for an agreed fee but is not employed by the other party

Both types of contract are legally binding, and both 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 recently carried out a two-year investigation (which concluded in 2019) into the working conditions of Uber drivers and found them to be independent contractors.

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

Figure 15.4 A contract for services arises when a person agrees to do one or more specific tasks for another person, without being employed by them.

Review 15.2

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. Describe how the conciliation and arbitration process has changed in Australia.

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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 taxes and must charge fees that will take account of their future retirement needs.

Permanent employees (employees who are not casual employees) are entitled to annual leave, sick leave and long service leave. While an independent contractor has the flexibility of arranging their own working hours, they must negotiate both fees and work schedules that will allow time off for holidays, illness, family commitments and so on.

One reason why it is significant whether someone is employed under a contract of service or works under a contract for services is that it is relevant in determining **vicarious liability**. An employer can be held legally responsible for the conduct of an employee as long as the employee was acting 'in the course of employment' – in other words, the employee was carrying out the duties that they were contracted to perform. This is often justified on the basis that the employer gains value from the work done by employees, and so should also bear the risk of employees' behaviour at work.

vicarious liability
legal liability of an employer for the wrongful act of another

In Australia, temporary positions (part-time jobs) are becoming more common. Businesses contract independent workers (freelancers) for short-term engagements. Freelance workers are independent and have to find their own employment. Freelances 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.

One of the reasons temporary positions are becoming more common is technology. Smart phone apps have enabled 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 as workers can enter a contract by clicking 'agree' on a screen. Contract law favours the person who decided 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.

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Figure 15.5 Contract law favours the person who decided what terms to put into the contract.

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.

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.

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Review 15.3

1. Distinguish between a 'contract of service' and a 'contract for services'. Provide an example of a type of worker who would enter into a contract for services.
2. 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. 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.

express term
a contractual term that has been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally

casual employment
employment 'as needed', on an irregular basis, with no set schedule or guarantee of ongoing employment; generally paid at an hourly rate

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.

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
- 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.

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

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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; Raiser 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 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 side-step the FWC's protections by engaging workers in ways other than traditional employment. Uber considers drivers to be 'partners' or 'micro-entrepreneurs' who can decide how much money they want to make and when they want to work.

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 her 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.

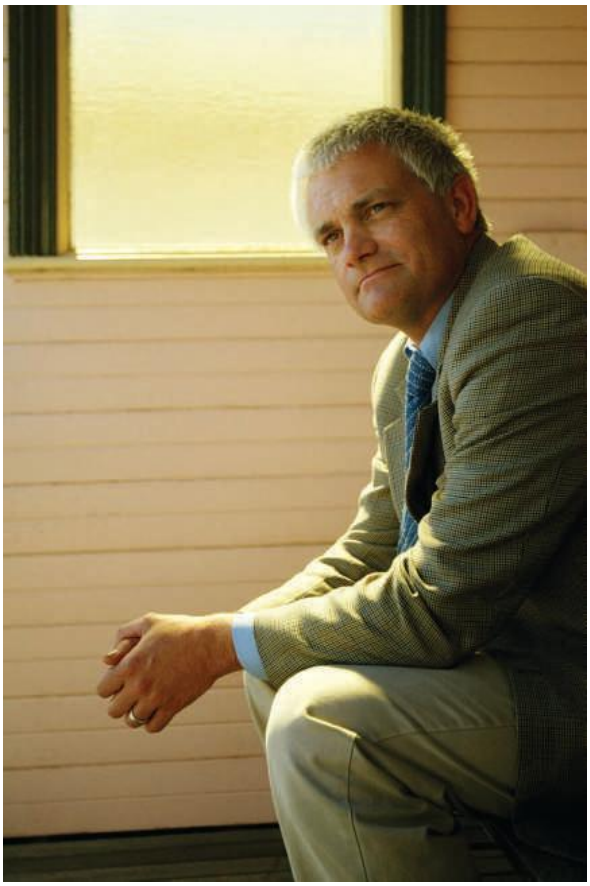

Figure 15.6 Dr Matthew Nott, an orthopaedic surgeon from Bega Hospital. Employers have the duty to provide work for the purposes of the employment contract.

Duties of employees

Employees have the following duties:

- Employees have a duty to obey lawful directions given by the employer.

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- 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 employees who are faced with redundancy and who are denied redeployment opportunities cannot sue their employer for damages as a result 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.

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.

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

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.

Review 15.4

1. Define 'express terms' and 'implied terms'.
2. Identify the rights of employers and employees that come from implied terms. Assess if these rights and responsibilities should be written into employment contracts.
3. Discuss if employees should have an automatic right to redeployment.

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In Court

***Ex parte HV McKay* (1907) 2 CAR 1 ('Harvester case')**

A federal Australian Act, the *Excise Tariff 1906* (Cth), that was designed to provide better pay to workers, 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 union the workers belonged to opposed the application.

Justice Henry Bourne Higgins ruled that McKay was obliged to pay his employees a 'fair and reasonable wage', and defined this as an amount sufficient to 'support the wage earner in reasonable and frugal comfort'. 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.

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. 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 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)**.

Australian Workplace Agreement (AWA)
an individual workplace agreement between an employer and an employee under the *Workplace Relations Act 1996* (Cth); an AWA overrides and takes the place of any award or collective agreement

The *Fair Work Act 2009* (Cth) replaced WorkChoices. In late 2009, all states except Western Australia referred their industrial powers to the Commonwealth, which then created a national workplace relations system. As a result, all employers and their employees (except state governments and their employees) who were previously covered by state industrial relations systems moved to the federal Fair Work

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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.

system in 2010, and existing state awards were replaced by federal 'modern awards'. State awards covering employees of organisations that are not **constitutional corporations** (such as sole traders, partnerships and unincorporated associations) were permitted to remain in force for a transitional period of 12 months from 1 January 2010 before being replaced by modern awards.

constitutional corporations
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)

Agreements

Enterprise agreements

In 1991, **enterprise bargaining** was introduced as an alternative to awards, and **enterprise agreements** became the primary means of setting wages and conditions. This was 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 nation-wide or within a state. In 2009, enterprise agreements replaced all existing individual and collective workplace agreements.

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 agreements
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

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 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.

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

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.

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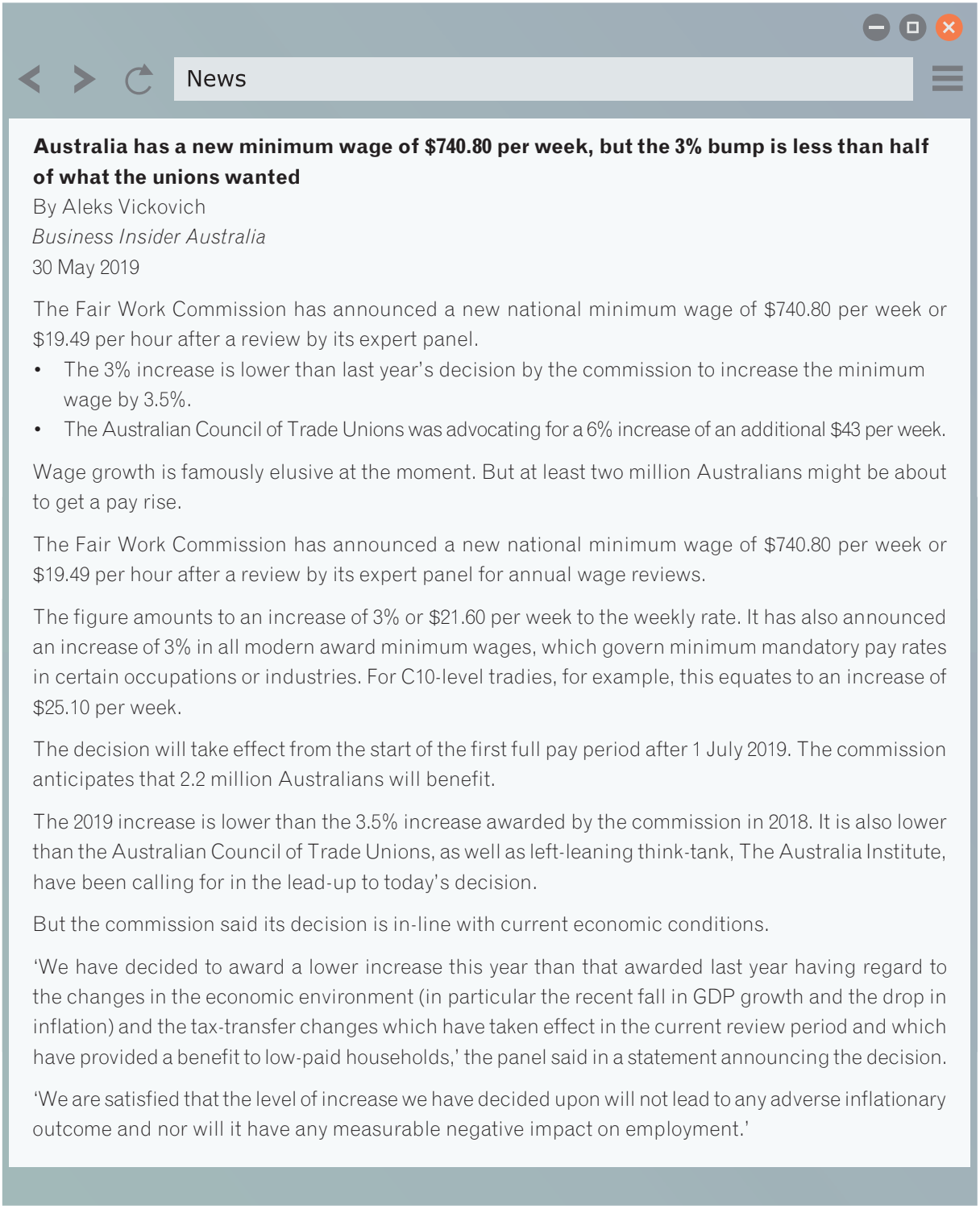
Individual agreements

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**.

Employees had no statutory right to collective bargaining, and while an AWA was in operation, it overrode any award or collective agreement. WorkChoices introduced five minimum statutory entitlements, which replaced the 'no disadvantage' test. Both collective agreements and AWAs had to pass this test to ensure that employees would be no worse off under the agreement than under the relevant award.

duress

coercion or pressure used by one party to influence another party



News

Australia has a new minimum wage of $740.80 per week, but the 3% bump is less than half of what the unions wanted

By Aleks Vickovich

Business Insider Australia

30 May 2019

The Fair Work Commission has announced a new national minimum wage of $740.80 per week or $19.49 per hour after a review by its expert panel.

- The 3% increase is lower than last year's decision by the commission to increase the minimum wage by 3.5%.
- The Australian Council of Trade Unions was advocating for a 6% increase of an additional $43 per week.

Wage growth is famously elusive at the moment. But at least two million Australians might be about to get a pay rise.

The Fair Work Commission has announced a new national minimum wage of $740.80 per week or $19.49 per hour after a review by its expert panel for annual wage reviews.

The figure amounts to an increase of 3% or $21.60 per week to the weekly rate. It has also announced an increase of 3% in all modern award minimum wages, which govern minimum mandatory pay rates in certain occupations or industries. For C10-level tradies, for example, this equates to an increase of $25.10 per week.

The decision will take effect from the start of the first full pay period after 1 July 2019. The commission anticipates that 2.2 million Australians will benefit.

The 2019 increase is lower than the 3.5% increase awarded by the commission in 2018. It is also lower than the Australian Council of Trade Unions, as well as left-leaning think-tank, The Australia Institute, have been calling for in the lead-up to today's decision.

But the commission said its decision is in-line with current economic conditions.

'We have decided to award a lower increase this year than that awarded last year having regard to the changes in the economic environment (in particular the recent fall in GDP growth and the drop in inflation) and the tax-transfer changes which have taken effect in the current review period and which have provided a benefit to low-paid households,' the panel said in a statement announcing the decision.

'We are satisfied that the level of increase we have decided upon will not lead to any adverse inflationary outcome and nor will it have any measurable negative impact on employment.'

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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.
5. Read the media article, 'Australia has a new minimum wage of $740.80 per week, but the 3% bump is less than half of what the unions wanted'. Outline the arguments for and against raising the minimum hourly wage rate.

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.

Federal statutory framework

Overview

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 employment (minimum of 38 hours of work a week) 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.

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Research 15.1

Use the internet to research the FWC's role in creating fair workplaces through the National Workplace Relations Systems, including 'aspects of a fair workplace' and the internal resolution of disputes.

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.

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.

An enterprise agreement, made with or without union involvement, may apply to workers in a specific workplace (single-enterprise agreements) or at an industry level (multi-enterprise agreements). A single-enterprise agreement requires a majority of employees to endorse it, and a multi-enterprise agreement requires a majority of employees of at least one of the employers to do so. The FWC can help certain low-paid employees and their employers negotiate a multi-enterprise agreement, if it is in the public interest to do so. These include people working in child care, aged care, community services, cleaning and security who have often lacked the bargaining power to negotiate for better wages and conditions at the single-enterprise level.

A third type of enterprise agreement is a **greenfields agreement**, which covers future employees of a new enterprise to be established by one or more employers. The agreement is made when it has been endorsed by each employer and by the trade union(s) that cover the prospective employees.

greenfields agreement
an agreement created to cover prospective employees of a new enterprise

Once the agreement has been approved by the parties, it is then submitted to the FWC. The agreement must meet certain conditions to be approved by the FWC. These include:

- The parties have come to a genuine agreement.
- The agreement has a specified expiry date, not more than four years after approval.
- The agreement contains a dispute settlement procedure, a flexibility term, and a term outlining the consultation procedure to be undertaken by the employer upon deciding to make a major change to the enterprise that affects employees.

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- 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.

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) 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, 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.

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.

industrial relations
the relationship between employers, employees, the government and trade unions

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.

stand down
to suspend an employee from the workplace without pay, usually temporarily

strike
employees' organised withdrawal of labour

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Figure 15.7 Security staff attended a four-hour strike at Berlin's Tegel airport on 7 January 2019.

picket line
a line of striking union members forming a boundary outside or near their place of employment, which they ask others not to cross

When employers and employees enter into negotiations to create a new enterprise agreement, they can engage in protected industrial action. Protected industrial action is lawful and can be taken when an existing agreement has expired; or 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 an 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 threatens 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.

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News

Have Australia's right to strike laws gone too far?

By 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.

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.

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(Continued)

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.

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

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(Continued)

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.

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.

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(Continued)

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.

Review 15.8

Read the article, 'Have Australia's right to strike laws gone too far?', and answer the following questions.

1 Identify the 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.

Review 15.9

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 industrial action that is protected under the *Fair Work Act 2009* (Cth).
4 Explain why the FWC will stop a protected action or an unprotected action.

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 are therefore better able to achieve their desired results. Enterprise agreements reached through collective bargaining by employees or their union representatives often contain conditions that are more generous than the conditions in awards.

When an individual employee is hired, the employer usually presents a contract of employment – to be signed by both parties – that specifyies working hours, pay rates, leave entitlements and so on. The terms of the contract cannot be less favourable than the wage rates or conditions set out in the modern award for that occupation or the applicable enterprise agreement (if the workplace has an enterprise agreement). The employer should tell the employee which award or agreement they will be working under. Most, but not all, employees are covered by a modern award. However, no employment contract can provide for entitlements less favourable than the 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

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- 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

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.

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

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.

Figure 15.8 In dispute resolution, conciliation and mediation are favoured over arbitration.

The effectiveness of consensual forms of dispute resolution depends on the nature of the relationship between the parties. If the relationship is built on mutual respect, then consensual forms of dispute resolution will be more successful than arbitration.

Consensual forms of dispute resolution are less costly to all 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.

Fair Work Commission

The Fair Work Commission (FWC) is an independent body that has a wide range of powers: dispute resolution, enterprise bargaining, industrial action, determining the safety net for minimum wages and employment conditions, termination of employment and any other industrial matters. When parties to a dispute cannot resolve the dispute, they may take the matter to the FWC. The role of the FWC is in each case determined by the dispute resolution

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Legal Links

Search online for media releases about current workplace investigations by Fair Work Inspectors.

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.

Fair Work Ombudsman

The Fair Work Ombudsman (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.

New South Wales Industrial Relations Commission

The NSW Industrial Relations Commission (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.

Research 15.2

Go to the website of the NSW IRC, then 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. Write a summary about who was involved, why they were involved, and the outcome.

Review 15.10

1. Explain why there is an emphasis on consensual forms of dispute resolution rather than arbitration.
2. In a table like the one below, 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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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, hence 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. It can resolve disputes including those arising in the course of enterprise bargaining and industrial action, and can adjudicate matters involving breaches of the law.

Federal Court and Federal Circuit Court

The Industrial Relations Court of Australia was established in 1993 as a superior court 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.

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 $20 000) 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 has an appellate jurisdiction (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), which replaced the *Occupational Health and Safety Act 2000* (NSW) (repealed).

Government organisations

New South Wales Industrial Relations Commission

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.

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Review 15.11

1 Briefly outline the role of courts and tribunals in governing industrial relations.
2 Explain the judicial role of the FWC and the NSW IRC and how they act to protect employee entitlements.

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.

Fair Work Commission

The role of the FWC is to oversee the federal industrial relations system. In addition to its judicial functions, the FWC 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.

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.

Figure 15.9 Section 682(1)(a) of the *Fair Work Act 2009* (Cth) states that the functions of the Fair Work Ombudsman are to promote 'harmonious, productive and cooperative workplace relations' and to ensure compliance with the Act, awards, agreements and orders.

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

Research 15.3

Go to the 'Minimum wages and conditions' page of the FWC's website (see https://cambridge.edu.au/redirect/8768), then complete the following tasks.

1 Investigate the national minimum wage orders.
2 Investigate how the FWO can help employees and young employees starting work for the first time.

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The FWO has the power to investigate breaches of the *Fair Work Act 2009* (Cth) and of awards, agreements and orders. For example, Fair Work Inspectors can inspect and copy documents at an employer's premises.

The FWO can represent employees or outworkers in proceedings before a court or the FWC.

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.

Figure 15.10 Unions have been instrumental in achieving better workplace safety, superannuation, a 38-hour working week, penalty rates, rest breaks and other benefits for employees.

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.

peak body
an association made up of a number of organisations that have similar interests and aims; it sets policy and coordinates common activities for its member organisations

The Australian Council of Trade Unions (ACTU) is the national peak body for all Australian unions. It was formed in 1927. The ACTU represents Australian labour organisations internationally, advocating and articulating positions on human rights and other issues. The ACTU has been influential in campaigns to further the rights of workers within Australia.

Unions may act as lobby groups to exert pressure 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).

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.

Non-government organisations

Non-government organisations (NGOs) may provide training and education to raise awareness of issues involving industrial relations, employment

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conditions and workplace safety. They may also engage in research and make submissions to government and other appropriate bodies on 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), *Disability Discrimination Act 1992* (Cth), *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.

Video

The Human Rights Council of Australia is a private organisation that monitors and publicises the performance of governments, and provides links between Australian human rights activists and those in other countries. It works to promote the development of Australian policy in human rights, which includes workplace issues such as discrimination and safety.

The National Women's Justice Coalition promotes women's equality before the law through education and lobbying.

The International Labour Organization is a United Nations (UN) 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.

News

The changing face of trade unions

By Anna Patty, Workplace Editor

The Sydney Morning Herald

13 November 2017

As part of a new breed of union leaders reversing the tide of declining membership, 33-year-old Natalie Lang spends more time campaigning in favour of marriage equality and paid domestic violence leave than she does on bargaining with employers on wages and conditions.

The union is not just concerned about 'workplace, working conditions and wages, but also about housing affordability, marriage equality and refugee rights'.

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(Continued)

'A lot of the growing membership of younger members are wanting to campaign on progressive issues,' she said. 'We've really branched out in the work that we do. Bargaining is a very small part of our work and I guess it's what most people traditionally expect to see the union doing.'

As the secretary of the Australian Services Union NSW and ACT branch since 2015, Ms Lang said she has seen her membership grow 5.5% in the past year – a net increase from 11 681 to 12 298 members. The union represents a broad range of industries to cover Sydney Water, airline check-in staff, IT workers, community and disability services.

It has created an army of 300 organisers in workplaces in two years. But that growth is anything but typical.

Across the country, union membership has plummeted to an all-time low of 13.3% with 800 800 female members and 746 400 male members. Nurses unions are well-organised and among female-dominated unions experiencing spikes in membership as employment opportunities in the health industry grow.

New South Wales and South Australia are the only states that increased membership between August 2014 and August 2016. The numbers grew from 498 100 and 525 400 in New South Wales, an increase from 15.3% to 15.5%. In South Australia, the increase was from 112 600 to 113 600, taking the percentage from 15.7% to 15.8%. Ms Lang said her members in community and disability services were growing most rapidly. The union has campaigned on funding for the National Disability Insurance Scheme, minimum standards of service delivery and job security.

'Bargaining against employers in the community sector doesn't really make a lot of sense because they don't control the purse strings, government does,' she said. 'It's actually been about campaigning to change how governments fund the sector, how they value and regulate the sector to drive professionalism and standards.'

Recovering numbers

In New South Wales, even unions gutted by corruption scandals have managed to recover numbers.

Health Services Union New South Wales secretary, Gerard Hayes, was tasked with cleaning up the union after Kathy Jackson and Michael Williamson tarnished its reputation through alleged corruption. The union lost 6000 members in just six months in 2011.

The privatisation of hospital services and loss of death and disability protections are among issues that have galvanised members.

Review 15.12

Read the article, 'The changing face of trade unions', then answer the following questions.

1. Identify the general trend in union membership across Australia and the reasons for this trend.
2. Identify which states have reversed this trend.
3. Identify which workers are joining unions.
4. Outline the reasons why some unions have been able to attract members.

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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.

sexual harassment
unwelcome and uninvited behaviour of a sexual nature, which is likely to intimidate, humiliate or offend the person it is directed to

Employees using the internet at work for private correspondence and web browsing may not be aware that their activity may not be protected from scrutiny by their employer. There is no common law right to privacy in Australia. The federal Office of the Privacy Commissioner has developed guidelines for employers, so that they can ensure that their staff understand the employer's expectations and what is permitted at work, and what will be done with any personal information collected as a result of monitoring.

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.

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

Review 15.13

1. Briefly outline the roles played by government organisations, unions, industry groups and NGOs 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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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 are subject to tax.

Figure 15.11 It is unlawful to discriminate between employees on the basis of gender, race, pregnancy, national or ethnic origin, marital status or sexual orientation.

15.3 Contemporary issue: Discrimination

About the issue

The ideal of equality implies that all people should be treated equally before the law. The notion of equality in workplace law centres on equality of opportunity.

The 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.

discrimination
unfavourable treatment of a person or group relative to the way others are treated

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of gender, race, national or ethnic origin, age, sexuality, etc.

indirect discrimination
a practice or policy that appears to be neutral or fair because it treats everyone in the same way, but which adversely affects people with a particular characteristic

Legal responses

The *Anti-Discrimination Act 1977* (NSW) initially prohibited discrimination only on the grounds of race, gender and marital status. Over the following years, 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

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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 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 (below) do not make discrimination illegal. Rather, they provide that workplaces have to 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.

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 gay, lesbian or bisexual. 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.

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.

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

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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 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 employment opportunity legislation
laws requiring employers to ensure that people are not subjected to discrimination and to eliminate factors that restrict groups' equality of opportunity in the workplace

Equal pay for equal work

Two test cases, the *Equal Pay for Equal Work Case* (1969) 127 CAR 1142 and the *Equal Pay for Work of Equal Value Case* (1972) 147 CAR 172, established certain principles with respect to wages for women. In the first, the court held that women doing the same work as men should receive the same pay. In the second, it held that different jobs of the same worth warrant the same minimum wage. This decision was intended to address

Figure 15.12 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.

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 less than men. In 2013, the gender pay gap was 17.1%, 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%. In 2018, women earned an average of $1099 per week and men earned an average of $1594 per week (figures sourced from the *Australia's Gender Pay Gap Statistics* report, published by the Australian Government's Workplace Gender Equality Agency, 15 August 2019).

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

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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, this gender pay inequity is also found within the same industry. In 2019, the highest gender pay gap could be found in the Financial and Insurance Services industry (26.9%), while the pay gap in the Accommodation and Food services industry was 8.4%.

In a discussion paper released by the ANZ Bank in 2015 (*Barriers to Achieving Financial Gender Equity*), it was noted that women's workforce participation had increased by 25% but that women in 2015 were paid on average 18.8% less than men. Over the working life of women they would be earning substantially less than their male counterparts and this would continue to have a detrimental impact on their superannuation.

Non-legal responses

Numerous independent bodies and NGOs are involved in investigating and researching discrimination issues, and in making recommendations to government or providing policy advice to relevant departments. These organisations usually concentrate their efforts in particular areas. The NSW Council of Social Services and the Federation of Ethnic Communities' Councils of Australia are examples. Each seeks to represent the interests of disadvantaged people and modify government policy to support social justice issues. National Disability Services, the peak body for non-profit organisations that provide services to 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. Later Australia became a party to several UN 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 obligated 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 child care in a family.

Although the legal system has acted to remove discriminatory practices within the workplace, it has not been entirely successful. For example, more than 30 years after the *Equal Pay for Equal Work Case* and the passing of numerous Acts making discriminatory pay practices illegal, there are still pay and promotional disparities between men and women. In addition, those who have family or carer responsibilities continue to face inequities in the workplace, such as lack of professional development and promotion and overtime opportunities.

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Figure 15.13 Although the legal system has acted to remove discriminatory practices within the workplace, it has not been entirely successful.

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 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 PricewaterhouseCoopers* (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% of working women and 16% of men claiming to have been sexually harassed in the past five years. The commission also noted in the report that when individuals had made a complaint they were in turn subjected to 'negative consequences', namely victimisation.

In 2011, the Commonwealth Government amended both the *Age Discrimination Act 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 turned 65 successfully sued his employer.

Review 15.14

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.

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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 to what is safe on a naval destroyer carrying nuclear weapons.

Safety in the workplace is critically important. According to Safe Work Australia, in six years (2012–2018), 1370 people died at work in Australia (see Table 15.2). Furthermore, in 2014–2015 nearly 107 355 workers were seriously injured at work (these were accepted compensation claims and involved at least one week absence for work). The following year, 531 800 workers were injured at work. However, since 2001, the incidence rate of serious injuries per 1000 employees has steadily fallen (see Table 15.3).

For employers, when workers are injured, there is an enormous loss of production and profit; for the workers, there is the financial cost of medical treatment and lost wages and the emotional 'costs' associated with a serious illness or injury; for the government and the community, there are additional costs to the health and welfare system, and losses to skills and productivity. Safe Work Australia estimated that the cost of workplace injuries, disease and death in 2012–2013 was $61.8 billion or 4.1% of Australia's gross domestic product.

TABLE 15.2 Deaths resulting from work-related traumatic injury

Year	Number of worker fatalities
2012	231
2013	202
2014	197
2015	211
2016	182
2017	190
2018	157

Source: Safe Work Australia, https://cambridge.edu.au/redirect/8769).

TABLE 15.3 Incidence rate of serious injuries at work

Year	Serious injuries per 1000 employees
2000–2001	16.3
2006–2007	13.6
2012–2013	11.1
2014–2015	9.8
2016–2017	9.3

Source: Safe Work Australia.

One issue of growing concern is the increase in workers' compensation claims that are related to stress and mental health. Safe Work Australia's report, *Work-related Mental Disorders Profile 2015*, showed that six per cent of all workers' compensation claims were for work-related mental disorders. According to Safe Work Australia's 2015 report, on average, each year:

- 7820 Australians are compensated for a work-related mental condition
- $480 million in total is paid in compensation
- $23 600 is the typical compensation payment per claim
- 14.8 weeks is the typical time off work.

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.

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

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

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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).

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.

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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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 WorkCover premiums paid by an employer cover the costs of the compensation provided to an employee if they are hurt or become ill because of their job. WorkCover NSW is a statutory body that administers the scheme and also investigates and monitors work health and safety issues. Under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), another role of WorkCover is to oversee the development of appropriate injury management programs. All employers are required to take out a WorkCover policy if their annual payroll is $7500 or more. All employers must assist an injured employee to manage their injury and support the injured employee when they return to work.

Figure 15.14 A huge explosion rocked a chemical plant in eastern China on 21 March 2019. The explosion killed at least six people and injured dozens as it knocked down factory buildings and sent a huge plume of smoke skyward.

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:

- *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

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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).

codification
the spelling out of obligations in legislation

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 with one another. To help facilitate this process, workers may elect a health and safety representative or create a committee. The role of the committee and/or representative is to consult with the employer about risks to health and safety, and participate in decisions about appropriate measures to be taken. Failure to consult can result in fines of $20 000 per individual or $100 000 for a body corporate.

The committee can investigate any matter that may be a risk to health and safety in the workplace. A 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 $50 000 (individual) or $250 000 (body corporate) (see s 193). Inspectors from WorkCover NSW 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.

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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.

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 changing 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).

Figure 15.15 The *Work Health and Safety Act 2011* (Cth) can impose heavy penalties for non-compliance of orders and provides the regulator with sweeping powers to investigate possible breaches of the Act.

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 safety breaches. There have also been very few prosecutions that have resulted in the maximum penalties being imposed: $600 000 (individuals) and $3 million (companies) (see s 32).

Also, while other states (such as Queensland and the ACT) have introduced industrial manslaughter laws to use against grossly negligent employers, New South Wales is yet to go down this road.

Further information about prosecutions can be found at the SafeWork NSW website (see https://cambridge.edu.au/redirect/8770).

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

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Review 15.15

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.

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% 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.

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**.

Figure 15.16 Britain's former Prime Minister, Theresa May, announced her resignation outside 10 Downing Street, in London, on 24 May 2019.

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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). 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 the 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. 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 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 temporary 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

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- 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.

Retrenchment

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.

retrenchment
the loss of a job because there is no longer a job for the employee to do

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

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Figure 15.17 People exit Deutsche Bank's Manhattan headquarters with some of their belongings following the bank's announcement that it would reduce its workforce by 18000 people in Asia, Europe and America.

(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.

Non-legal responses

Industry interest groups lobby governments to influence policy direction or legislation, other groups act on behalf of their members to promote the objectives of their group, and yet other groups are motivated by concerns for the general welfare of workers and their families and the protection of workers' rights.

Groups that lobby on behalf of their members include the ACTU and the major industry associations representing employers' interests, such as the Australian Chamber of Commerce and Industry. One role that all kinds of groups perform is presenting arguments in test cases that may affect legal entitlements and obligations of employees and employers. Other groups, such as the Equal Opportunity for Women in the Workplace Agency, work with employers to advance the interests of particular groups of workers and to address inequities in legal entitlements. NGOs such as the Salvation Army provide training and education opportunities as well as counselling and welfare support to those struggling to find employment.

Responsiveness of the legal system

A number of factors influence the ways in which the 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

Review 15.16

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. Outline how the *Fair Entitlements Guarantee Act 2012* (Cth) protects the rights of redundant employees and assess if this is adequate protection.
5. Go to the FWO's website and find a registered agreement from two separate industries. Compare and contrast the two agreements.

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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.

15.6 Contemporary issue: Leave

About the issue

Leave is a fundamental right of employees, and can be found within the International Labour Organization's conventions and within UN 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** – 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 and paternity), family and adoption leave.**

De facto couples, which includes same-sex couples, are also entitled to minimum statutory entitlements to various kinds of leave, including carer's, compassionate and parental leave.

Legal responses

Annual and personal leave

Under the 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. 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.

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

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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 at 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 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 UN's *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 one year's unpaid parental leave for another 12 months, or 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

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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.

The World Health Organization recommends a minimum of 16 weeks' paid parental leave; the International Labour Organization now encourages governments to provide 18 weeks. However, even though Australia has moved to 18 weeks paid parental leave at the minimum wage, it 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% of the employee's wage. In contrast, the rate payable in Australia is the current federal minimum weekly wage: $740.98 or approximately 41% of the average weekly wage.

Periods of paternity leave are still much shorter than for maternity leave worldwide. On average, OECD countries provide 17 weeks' paid maternity leave (paid at 77% of the average weekly wage) and nine weeks' 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 return to their previous jobs or comparable ones (see https://cambridge.edu.au/redirect/8771).

Review 15.17

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 PPL scheme.

Figure 15.18 Worldwide, paternity leave is still much shorter than maternity leave.

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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 FWC and the NSW 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 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.

Chapter questions

1 Discuss the reasons for the preference for consensual forms of dispute resolution rather than arbitration.

2 What are 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.

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Review 15.18

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.

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.

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

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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.

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 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 PPL scheme recognises that employees need financial support when they have children.

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- 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.

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.
- 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 organisation 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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