National Sovereignty, Independence and the Impact of Treaties and International Standards

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1. *Introduction*

A major focus of public debate in Australia in recent times has been the issue of the extent to which treaties, or the decisions of international bodies established by treaties, detract from the sovereignty and political independence of Australia.

My professional responsibilities as an international law adviser to government regularly require me to provide advice on the incorporation of treaties into Australian law. Thus, when I recently holidayed in Tasmania, these issues were not far from my thoughts. I went bushwalking, according to the sign at the start of the track, in the "South West National Park — World Heritage Area". The only applicable law which made a direct impact on me was the Tasmanian law requiring me to purchase a permit from the Lands and Environment Department. Nevertheless, I was conscious of suggestions made in a national newspaper only a few days before that as a result of listing an area on the World Heritage List "power about land use in a substantial and increasing part of Australia has been irrevocably transferred from Australian governments to this United Nations Committee" (that is, the World Heritage Committee).[1]

Having stepped carefully along muddy tracks and clambered over fallen logs and up ridges, I eventually found myself at a beautiful, remote lake looking up at a mountain I aimed to climb. A wilderness experience! As a constitutional as well as international lawyer, I pondered whether this remote place would be regarded as 'in private' within the meaning of the recently enacted *Human Rights (Sexual Conduct) Act* 1994 (Cth).[2] [For further discussion of the Toonen complaint see Mathew below at 184.] This Commonwealth law had been passed after a finding by the United Nations Human Rights Committee, following an individual complaint made to it, that certain Tasmanian laws amounted to an arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.[3] I also

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1 *The Australian Financial Review* (*AFR*), 10 January 1994 at 13.

2 Toonen complaint, No 488/1992 CCPR/C/50/D/488/1992.

3 999 *United Nations Treaty Series* (*UNTS*) 171 at 177.

recalled the remarks of Senator Kemp during debate on the law as it passed through Parliament. He said:

> Let there now be no argument that the decisions of UN human rights committees can have a major impact on Australia ... the long term consequences of the sell-out of sovereignty of this nation will, I believe, haunt the ALP in the years to come.[4]

Kemp went on to incorporate in his speech a number of statements by commentators decrying the surrender by Australia to the Human Rights Committee of the power to pass on its domestic law and practices — a Committee of allegedly dubious membership.[5]

In that same debate, Senator Harradine referred to what I had said in evidence to the Senate Legal and Constitutional Affairs Committee to underline his concern that in interpreting the *Human Rights (Sexual Conduct) Act*, and expressions in it drawn from the International Covenant, an Australian court would have regard to international material. He said:

> The material will be the international jurisprudence, over which we have really no control ... the international material has had quite extraordinary results with regard to the question of privacy.[6]

In contrast to the criticism that has been made of the impact of international institutions in these two areas of human rights and environment, in Australia there has been little debate about the impact of decisions of international institutions on Australia's sovereignty as a result of Australia's acceptance of the new Uruguay round agreements and its membership of the World Trade Organisation. [For further discussion of GATT 1994 and WTO see Waincymer below at 321–33.] In the United States, on the other hand, there was considerable criticism of those agreements on the ground that they threatened United States sovereignty. The support of key senators to the agreements was only secured by an "escape hatch" whereby the United States reserved the right to withdraw from the new World Trade Organisation if the organisation's dispute settlement processes were considered consistently to violate United States rights under the agreements.[7]

Similarly, in the United Kingdom suggestions that a common European currency should be introduced, and that the United Kingdom should join such a system, are criticised by some members of Parliament as an attack on the Constitution and sovereignty of the United Kingdom. Lamont, a Conservative Member of the British Parliament, and former Chancellor of the Exchequer is reported recently as having said that Britain was rapidly ceasing to be a sovereign State, surrendering much of its power to make its own laws, determine its own taxation and control immigration: "The Government of Britain will have

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4 "Human Rights (Sexual Conduct) Bill 1994" *Hansard*, Senate, 8 December 1994, No 21 at 4333.

5 Ibid; see also Kemp, R, "Australian Disputes, Foreign Judgments" *IPA Review* (1993) 46.

6 Id at 4359.

7 See *Washington Post* 24 November 1994 at 1; *Kansas City Star* 26 November 1994 at 1. In Australia, see Senator Margetts, "Sales Tax (World Trade Organization Amendments) Bill 1994" *Hansard*, Senate, 1 December 1994 No 20 at 3715 for a rare expression of concern about the sovereignty implications of the Uruguay Agreements.

more resemblance to the state of Delaware than to a sovereign independent Government."[8]

In Australia economic agreements, which impose far reaching limitations on Australia's freedom to determine its own trade policies, appear to be regarded differently from agreements giving rise to perceived international intrusions into land management or human rights. Yet the issues are the same and in many ways the impact on Australian freedom to formulate economic policy is already much more significant as a result of international agreements like the General Agreement on Tariffs and Trade (GATT) and the Organisation for Economic Co-operation and Development (OECD) than any limitations applicable in other areas of government policy. In the case of many developing countries, the imposition of tough World Bank rescue packages has highlighted for many years the lack of economic independence enjoyed by many countries. What all this debate in Australia and elsewhere highlights is the important rhetorical role that the issue of "sovereignty" plays in political debate. The concept, however, also has a far more important substantive role in constitutional and international law theory. And it is with this aspect that this article is principally concerned.

A. The Issues

One can pose the issues in the form of several questions. Do the various treaties to which Australia is a party in fact impair Australia's sovereignty? What is meant, in any event, when references are made to sovereignty or independence? To what extent is Australian government constrained by actions of international organisations or committees? This article will seek to examine these questions, albeit necessarily not in great detail, and examine the international constraints Australia has accepted. Before doing that a few brief remarks about the general context in which these questions arise are appropriate.

It is now a truism that the countries and peoples of the world are increasingly interdependent. There is constant reference to the need for government to adjust to the growing globalisation of consumer tastes and the development of world communication networks with the relentless flow of information around the globe. This is reflected in the larger global economy, with major industrial enterprises cultivating global markets. Movement of people and money on a large scale across national boundaries is a fact of life. This clearly has major implications for the role of national governments — no longer is their role protection of their own people's interests by controlling threats from foreigners and foreign corporations. Today, their role is much more to enable their people to have access to the best and cheapest services from anywhere in the world, bringing economic prosperity by making their country part of the competitive global economy.[9] In Europe, the European Community has developed into a strong single market and trading bloc. In North America, the

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8 *The Daily Telegraph* 18 February 1995 at 2.

9 See generally Ohmae, K, *The Borderless World* (1990) esp at 13–16: see also *Globalisation: Issues for Australia*, Economic Planning Advisory Commission Paper No 5 (March 1995).

North American Free Trade Agreement involving Canada, the United States and Mexico provides another strong regional economic grouping.[10] And in Australia's own region, the countries of APEC — Asian Pacific Economic Cooperation — have committed themselves to free trade between the members by the year 2020.[11] These commitments are on top of the impact the Uruguay Round will have on global trade barriers. Australia has moved through the Closer Economic Agreement with New Zealand to free trade in goods and services between the two countries, but the agreement does not create a common market in the European sense.[12] It is as part of this world wide trend to more open markets that the Australian economy itself has been opened to the wider world in the last decade. This has transformed the nature of the Australian economy and its culture. The same has happened in many other countries.

It is not only in the economic area that increasing globalisation is occurring. As recent environmental treaties on climate change and biodiversity indicate, environmental problems increasingly demand international solutions. And along with economic changes come demands for greater uniformity in regulatory controls. And the time is long since past that human rights could be regarded as an issue solely of domestic concern. There is increasingly universal recognition of minimum human rights standards that all governments are expected to meet.

All these developments obviously lead to a growing internationalisation of law. And it is this which leads to concerns about the loss of sovereignty or independence. This article will seek to examine some of these concerns. Such an examination discloses that Australian sovereignty and its legal independence remains relatively untrammelled by outside legislative or judicial bodies — in contrast to the position, for instance, prevailing in the United Kingdom as a result of its membership of the European Union. There are, however, large areas of activity in Australia which are regulated in accordance with international standards, or which are subject to international scrutiny, by reference to international standards. This can be expected to be an increasing feature with the globalisation of the world economy and the establishment of regional economic arrangements. There are also areas, particularly human rights, where international committees exercise a monitoring and oversight role. In none of these areas, however, is Australian sovereignty directly affected. The choice whether to accept the standards or the views of international committees remains essentially one for Australia alone.

B. The Meaning of Sovereignty

One writer has said: "Sovereignty as a concept of international law has three major aspects: external, internal and territorial".[13] It is helpful to set out the distinctions in detail:

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10 (1993) 32 *International Legal Materials (ILM)* 289.

11 Bogor Declaration, 15 November 1994, referred to in Woodforde, J, "APEC free trade commitment a triumph: Keating", *Insight* 5 December 1994 at 16.

12 Original agreement is in *Australian Treaty Series* (*ATS*) 1983 No 2; (1983) 22 *ILM* 945; *Protocol on Trade in Services is in ATS* 1988 No 26.

13 Sorenson, M (ed), *Manual of Public International Law* (1968) at 523.

> The external aspect of sovereignty is the right of the state freely to determine its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence. It is this aspect of sovereignty to which the rules of international law address themselves primarily. External sovereignty of course presupposes internal sovereignty.
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> The internal aspect of sovereignty is the state's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respect.
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> The territorial aspect of sovereignty is the complete and exclusive authority which a state exercises over all persons and things found on, under or above its territory. As between any group of independent states the respect for each other's territorial sovereignty is one of the most important rules of international law.
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> Although the external aspect of sovereignty often appears to be the only one which is implied whenever sovereignty is discussed in international law, in fact, sovereignty in international law is the sum total of all three aspects. Sovereignty as so defined is the most fundamental principle of international law because nearly all international relations are bound up with the sovereignty of states. It is the point of departure in international relations.[14]

For present purposes, we are primarily concerned with the internal aspect of sovereignty: the right of a State to determine its own internal laws and institutions. However, neither the Charter of the United Nations nor customary international law recognise the absolute sovereignty of States. States do not exist in splendid isolation. Just as individuals in a society are not completely free to act in whatever way they like, so States as members of the international community of nations are constrained by international law in the way they can behave. This can be pursuant to treaty obligations voluntarily entered or pursuant to customary international law. These constraints do not just affect a State's external sovereignty, for example, the right to intervene in another State. They also affect a State's internal sovereignty. The way in which a State treats diplomats or aliens in its territory are long established areas subject to international law constraints. Now States are increasingly constrained in relation to the way they act towards their own citizens.

As one writer says:

> Modern discussions of sovereignty have often addressed the question of whether one can speak of "absolute sovereignty" for states, a power above international law. Few, if any, would support such a view today, and the very concept of the equality of states at least implies that the sovereign rights of each state are limited by the equally sovereign rights of others. "[S]overeignty" in its original sense of "supreme power" is not merely an absurdity but an impossibility in a world of states which pride themselves upon their independence from each other and concede to each other a status of equality before the law.[15]

The exercise of sovereignty by States is therefore subject to international law. In the rapidly changing world this law has itself become more complex and expanded. As one writer has said:

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14 Ibid.

15 Hannum, H, *Autonomy, Sovereignty and Self-Determination* (1990) at 15.

> Modern international law has expanded and become more ambitious in the course of the twentieth century. Resolutions and the secondary law of international organisations, unilateral declarations and different forms of spontaneous or instantaneous growth of law have becomes essential as sources of international law, as have treaties, custom and general principles of law. A multitude of subjects of international law have emerged. Foremost, the role of international and supranational organisations has grown conspicuously. Classical international law was more or less an inter-state law of peaceful coexistence, dealing with a few topics, which ranged from war and neutrality to the conquest and cession of territory, from external trade to diplomatic law. Modern international law, by contrast, endeavours to be a law of economic, social, cultural, technical and civilizing cooperation, sometimes even integration and subordination, which aims at regulating problems of development, human rights, communication and traffic, environment, education, labour, science and technology, nutrition and health, resources and energy.[16]

I recognise it is the need for closer international cooperation that has led to this increase in the content of international law. But the fact remains, it is States themselves that make international law and consent to the constraints it imposes on them. The independence and sovereign equality of States remain fundamental precepts of international law.

It is not possible, however, to ignore the internal constitutional arrangements of a State in determining its independent status. In formal constitutional terms, a State must be "master in its own house" if it is to be described as sovereign. This does not mean, however, that it must have a free internal hand.

> Quite apart from the limits which its own constitution imposes, other states or international organizations may have been accorded certain rights within the territory of the first state. But they are rights within someone else's establishment, and they flow, almost invariably, from the specific permission of the state concerned. In the absence of such permission no other state or body is entitled to make claims or demands in respect of what goes on in the state in question.[17]

It is a characteristic of an independent State that it has sole authority over its relevant territory. This is what distinguishes protectorates or dependent territories from fully fledged States. As Brownlie puts it:

> the state must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law.[18]

However, as Hannum reminds us:

> it is important to bear in mind that it is the authority or ability of a state to determine its relationship with outside powers that is significant; the actual delegation of certain powers to others — such as, for example, the retention

16 Wildhaber, L, "Sovereignty and International Law" in Macdonald, R and Johnston, D, *The Structure and Process of International Law* (1983) at 438.

17 James, A, *Sovereign Statehood* (1986) at 52.

18 Brownlie, I, *Principles of Public International Law* (4th edn, 1990) at 74.

> by some fully sovereign countries of judicial appeals to the British Privy Council — will not detract from the sovereignty of the delegating state.[19]

The Permanent Court of International Justice recognised in the *Wimbledon* case in 1923 that "the right to enter into international engagements is an attribute of State sovereignty". It, therefore,

> decline[d] to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[20]

Similarly, in the *Customs Union with Austria* case, Anzilotti J recognised that:

> restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.[21]

Sovereignty is, however, relative. While the power of entering treaties or joining an international organisation are regarded as attributes of State sovereignty, there may come a point where it is no longer appropriate to speak of a sovereign State. The states of Australia comprising the Commonwealth of Australia clearly lack the necessary capacity to be described as sovereign States in the international law sense.[22] The Constitution gives them no such capacity. At the same time, it is part of the Australian Constitution that federal legislative power is itself limited, both in terms of subject matter and in terms of its ability to single out or discriminate against or tax the property of the component states of the Australian federation. There are thus limitations governing the internal distribution of sovereignty within Australia which no international agreement can override.[23] But these do not detract from Australia's international sovereignty or independence.

However, there comes a stage when it is no longer appropriate to speak of an independent or sovereign State. Thus "a state which has consented to another State managing its foreign relations, or which has granted extensive extraterritorial rights to another state is not 'sovereign'".[24] In referring to the "sovereignty" of a State it is, therefore, necessary to distinguish the right of a State to decide what constraints it will accept over the exercise by it of its jurisdiction over its territory and people, and the situation where a State has given away such a high proportion of its powers that it is no longer properly described as sovereign.[25]

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19 Above n15 at 15.
20 (1923) PCIJ Ser A, No 1 at 25.
21 (1931) PCIJ Ser A/B No 41 at 58.
22 Burmester, H, "The Australian States and Participation in the Foreign Policy Process" (1978) 9 *FLR* 257.
23 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 191, 213, 225, 237–8.
24 Above n18 at 78.
25 Id at 79.

The extent to which a State can agree to the exercise of powers over it and still be regarded as a sovereign State is a matter of degree.[26] The scope of the powers transferred and the revocability of the transfer are relevant. The European Union involves the most extensive example of a transfer of powers. However, despite the considerable competence of the European Union, "the continued international statehood of its members is not in question".[27] The extent to which, and the terms on which a State limits its powers by reference to external constraints becomes largely a question of choice for the State involved. What are acceptable constraints for one community may differ from those judged acceptable by another. Thus, Norwegians by majority continue to reject membership of the European Union. Finland and Sweden, by contrast, recently voted by majority to join and accept the constraints such membership will bring. The members of the European Union certainly still regard themselves as sovereign States despite the considerable competences they have transferred to the European Union institutions.

The present debate in Australia focusses attention on the extent to which Australia has consented to be bound by international decision-makers beyond the direct control of Parliament or of the Executive, the way in which the decisions to accept such controls are taken and the impact of treaties on the division of powers between the Commonwealth and the states. Sir Ninian Stephen has spoken rather graphically of the likelihood of a "democratic deficit" in this regard.[28] A Senate Committee is also examining issues concerning the role of Parliament in the area of treaties. These are important issues for debate, related to the form of democratic government in Australia. This article is not, however, intended to address these issues. Rather, this article will focus primarily on an examination of the extent to which Australia is subject to decisions of international bodies or to international standards. This may provide useful information for use in the debate over "process" — the way in which decisions to accept these constraints are taken.

2. *The Role of International Standards*

Two particular issues need consideration. First, to what extent do international standards constrain national action? Second, to the extent that they do, are the constraints automatically part of Australian law or is Australia first required to accept the relevant international decisions or standards? [For further discussion of the role of Parliament in the acceptance process generally see Saunders below at 168–74.]

There are many areas of Australian law where international standards are adopted and applied as the relevant standard with little debate. One area where this is particularly the case is in the shipping area. Construction, design, manning and pollution standards set out in international agreements are regularly adopted as part of Australian law. The *Navigation Act* 1912 (Cth) is comprised of a number of Schedules setting out rules on safety of life at sea,

26 Compare with above n17 at 45–9.

27 Jennings, R and Watts, A, *Oppenheim's International Law* (9th edn, 1992) at 126.

28 See Stephen, N, "1994 Earle Page Memorial Lecture", an edited version of which is reproduced in *Quadrant*, January/February 1995 at 20ff.

regulations for preventing collisions at sea and load lines. The *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) implements the International Convention for the Prevention of Pollution by Ships (MARPOL Convention), setting out pollution standards from oil, packaged products, garbage and sewage. Most of the shipping standards are developed by the International Maritime Organisation (IMO). Because many of the rules are detailed, technical rules, a number of tacit amendment procedures have been developed in order to ensure changes can be introduced without undue delay.

Article VIII of the Convention for the Safety of Life at Sea 1974 is an example. It provides for amendments to be adopted by the IMO at a meeting of Contracting Governments present and voting in the Maritime Safety Committee by a two thirds majority. An amendment to the technical Annex (other than chapter 1) shall be deemed to be accepted at the end of two years from the date of adoption or at the end of a different period determined at the time of adoption of the amendment. An amendment enters into force with respect to all Contracting Governments except those which have objected to the amendment and which have not withdrawn such objections.

In order for Australia to be in a position to give effect to amendments to which it has not objected, the *Navigation Act* defines the Safety Convention as the Convention set forth in Schedule 1 to the Act "as affected by any amendment, other than an amendment objected to by Australia".[29] Similar definitions are included for other Conventions in that same section, to take account of similar tacit amendment procedures. In this way Parliament has ensured that Australian law can automatically adjust to take account of treaty amendments. Under treaties with such a provision, the onus is on the Executive to take action to notify the relevant organisation that it does not accept an amendment. Otherwise, silence will be deemed consent.

A similar amendment provision exists under the London Dumping Convention,[30] dealing with the dumping of wastes at sea. Article XV of that Convention provides for amendments to the Annex prescribing substances to be dumped to be made by a meeting of contracting parties by a two thirds majority. Amendments so adopted enter into force for parties immediately on notification of acceptance and 100 days after approval by the meeting of parties for all other parties except those who before then make a declaration that they are not able to accept the amendment at that time. Australia recently availed itself of this provision to notify IMO that it did not accept that part of an amendment dealing with the dumping of industrial wastes that would have led to a ban on the dumping of jarosite from 1 January 1996. Australia indicated it intended to retain the option of dumping such waste at sea after the 1996 deadline but in no circumstances beyond 31 December 1997. *The Environment Protection (Sea Dumping) Act* 1981 (Cth) gives effect to the Convention. It provides for amendments accepted by Australia to be incorporated into Australian law by regulation — see definition of the "Convention" in section 4.[31]

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29 *Navigation Act* 1912 (Cth), s187A.

30 "Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter" *ATS* 1985 No 16.

31 Another similar example is the *Ozone Protection Act* 1989 (Cth), s69A.

In these examples, international standards can be amended and become binding on Australia by tacit consent by the Executive. The legislative response to deal with this varies from automatic incorporation of such binding amendment in Australian law or provision in the legislation of a power for the Executive by regulation to incorporate the necessary changes as part of Australian law.

In the 1982 Law of the Sea Convention a number of the marine pollution articles require States to adopt laws and regulations that are no less effective than, or which give effect to, generally accepted international rules and standards.[32] These provisions reinforce the requirement on States in this area to give full effect to international standards. For a State like Australia that has generally accepted the relevant standards such a commitment poses no problems and no new legislation has been enacted to enable compliance with these particular Law of the Sea Convention obligations.

There are a number of other areas of activity where international standards are relevant, if not obligatory. These include food standards and broadcasting standards. Legislative responses to deal with these areas vary, but in these areas the need for Australia to conform to international standards is reflected in the legislative charters given to relevant statutory authorities. However, the standards in these cases do not operate automatically as part of Australian law, but form part of the relevant material the authorities are required to have regard to in discharging their functions.

In the case of food standards, there is an international Codex Alimentarius Commission, jointly established by the World Health Organisation and the Food and Agriculture Organisation. This body makes recommendations to States. Pursuant to the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures,[33] to which Australia is a party, there is a commitment to harmonise sanitary and phytosanitary measures, based as far as possible on international standards. Measures which conform to the international standards shall be deemed necessary to protect human, animal or plant life or health and shall be presumed consistent with GATT 1994. Member States may introduce higher measures of protection if there is a scientific justification, provided such measures are not otherwise inconsistent with the Agreement. Members are obliged to play a full part in international organisations, including the Codex Commission, to promote the development and periodic review of standards.[34]

The *National Food Authority Act* 1991 (Cth), is one of the relevant domestic laws to which the Codex standards are relevant. The Act sets out in section 10 a number of objectives to which the Authority must have regard. These are set out in descending order of priority. The first priority is the protection of public health and safety. The fifth and last priority is: "(e) the promotion of consistency between domestic and international food standards where these are at variance, providing it does not lower the Australian standard." This represents an example of a case where international standards have a limited significance in

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32 For example, "United Nations Convention on the Law of the Sea" *ATS* 1994 No 31; Arts 210, 211, 212.

33 *ATS* 1995 No 8.

34 Article 3.

domestic law. In the light of the Uruguay Round Agreement this provision may need to be revisited, although health and safety are recognised as legitimate grounds for restrictions on trade. There is, however, clearly a tension between such grounds and free trade that will no doubt increasingly face the Food Authority in carrying out its functions.[35]

In the broadcasting area a different approach is adopted. The *Radiocommunications Act* 1992 (Cth) provides in section 299 as follows:

> 299. (1) A person or body exercising a power conferred under this Act (other than Part 4.4 or 5.5) must have regard to:
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> (a) any agreement, treaty or convention, between Australia and another country or countries, that makes provision in relation to radio emission; and
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> (b) any instrument or writing specified in the regulations.
>
> (2) Nothing in subsection (1) limits the kinds of matters to which the person or body may have regard in exercising those powers.

In this case, the person or body is required to "have regard to" relevant international agreements but this is not to the exclusion of other matters. One of the objects of the Act, but the last in the list, in section 3(h) is to "promote Australia's interests concerning international agreements, treaties and conventions relating to radiocommunications or the radiofrequency spectrum". International agreements are relevant but the way in which they are incorporated into relevant Australian radio frequency or spectrum plans is left to the relevant decision-maker to determine.

In the area of broadcast program content standards, as opposed to technical standards, there is also reference to international agreements. In the *Broadcasting Services Act* 1992 (Cth) section 160 provides that:

> the ABA is to perform its functions in a manner consistent with: ... (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

The Act does not spell out any priority between this and the other requirements imposed on the Australian Broadcasting Authority (ABA). For instance, there is no reference to international agreements in the objects clause of the Act (section 3), the statement of regulatory policy (section 4) or the section setting out the role of the ABA (section 5). It is not altogether surprising, therefore, that in the development of "Australian content" standards and in the requirements to develop and reflect "Australian identity, character and cultural diversity", the ABA finds it difficult easily to accommodate the requirements of international agreements such as the Closer Economic Relations (CER) Trade in Services Protocol with New Zealand.[36] That agreement requires national treatment to be accorded by Australia to New Zealand nationals and residents in the provision of, amongst other things, broadcasting and television programs. These legislative provisions highlight the difficult task that arises when determination of how to accommodate or interpret international obligations is left to statutory authorities with independent statutory charters.

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35 See Wright, E J, "Australian Food Standards and GATT" (1994) 46 *Food Australia* at 450–1.

36 (1994) 7 (3) *Intergovernmental News* 15.

In addition to areas where international standards are increasingly relevant, Australia has recognised that in order to deal effectively with problems that cross boundaries, uniform laws and mutual cooperation among nations are necessary. [For further discussion of uniformity and harmonisation see Waincymer below at 299–306, 333.] Australia sees increasing uniformity in laws governing business transactions, rules governing bankruptcies and extradition of criminals as important and necessary consequences of the growing globalisation of markets. This effort to achieve uniformity does not detract from sovereignty. It is a further example of the need for international cooperation between sovereign States in order to achieve effective outcomes in areas of transnational activity.

Among the uniform standards that have been supported by Australia are the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration[37] and the United Nations Convention on Contracts for the International Sale of Goods.[38] There have also been initiatives on the edge of APEC to encourage Australia's major trading partners in Asia to adopt core international rules governing international business transactions. There have also been efforts to secure model insolvency cooperation legislation in recognition particularly of the transnational problems caused by large corporate insolvencies.[39] Little progress has been made so far in this area. One area where considerable effort has been expended on harmonisation is in the area of the internationalisation of crime. A wide network of treaties on extradition and mutual assistance in criminal matters has been put in place by Australia. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was developed to address narcotics trafficking.[40] The Financial Action Task Force on Money Laundering seeks to develop cooperative measures to combat money laundering throughout the world. None of these various measures, however, detract from the sovereignty of each State.[41]

More recently, initiatives have been taken within Australia to secure mutual recognition of standards in relation to goods and services between Australian political units.[42] Mutual recognition, unlike harmonisation, continues to allow different standards to exist but provides for reciprocal recognition of those standards. This approach is being extended to the international arena. For instance, negotiations have begun with New Zealand for mutual recognition of food standards, and in relation to goods and professional qualifications.[43] There is already an agreement between the two countries establishing

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37 *International Arbitration Act* 1974 (Cth), Pt III.

38 *ATS* 1988 No 32. This Agreement is implemented by state and territory laws, eg, *Sale of Goods (Vienna Convention) Act* 1986 (NSW).

39 Keay, A, "International elements in Bankruptcy: Problems and Solutions" (1992) 14 *Adel LR* 245; "Model International Insolvency Co-operation Act" (1989) *International Business Lawyer* 323.

40 *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act* 1990 (Cth).

41 For a summary of the issues see Sherman, T, "The Internationalisation of Crime and the World Community's Response", paper delivered at 1993 Oxford Conference on International and White Collar Crime.

42 *Mutual Recognition Act* 1992 (Cth).

43 Discussion Paper on *A Proposal for the Trans-Tasman Mutual Recognition of Standards for Goods and Occupations*, circulated by Council Of Australian Governments (April 1995).

a Joint Accreditation System (JAS-ANZ) to establish procedures to ensure that goods and services conform to certain specified national or international standards.[44] There have also been agreements in certain fields to secure European Union recognition of Australian standards.[45] Negotiations are underway to secure recognition of national testing and certification bodies.

As these few instances show, in order to achieve harmonisation or mutual recognition, treaty commitments are often required. In exercising its sovereignty in this way, Australia may be limiting its freedom of action, by accepting standards or certificates issued by foreign authorities. But the decision to accept the constraints resulting from an obligation of mutual recognition, or to apply some uniform set of rules to a transaction is another example of a choice by a sovereign State, in the same way as any other treaty commitment. The basis for such decisions no doubt is an assessment that acceptance of such commitments provides economic and other benefits that would not be enjoyed by maintenance of a system of purely domestic rules and standards not attuned more closely to international needs and expectations.

Within Australia, commitment at the executive level by heads of government to implement mutual recognition or agreed national standards has attracted criticism, particularly from the Western Australian Parliament as an infringement of the sovereignty of state parliaments. The argument is that the parliament has no choice but to accept the fait accompli.[46] Ultimately, however, state parliaments have recognised the advantages to be gained and accepted the various schemes.

3. *The Role of International Decisions*

International decisions that can have an impact on a State's internal governance include decisions of international adjudicatory bodies, decisions of monitoring or complaints bodies, and decisions of international organisations taken in exercise of their functions. Each needs separate examination.

A. *International Adjudication*

The fundamental rule of international adjudication is that a State can only be compelled to submit a dispute with another State to arbitration or any other form of peaceful settlement with its consent.[47] Article 33 of the United Nations Charter requires parties to any dispute which is likely to endanger international peace and security to seek a solution by peaceful means of their own choice. But the Security Council cannot compel a State to submit to any form of international adjudication.[48]

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44 "Agreement between Australia and New Zealand Concerning the Establishment of the Council of the Joint Accreditation System of Australia and New Zealand (JAS-ANZ)" *ATS* 1991 No 44.

45 "Agreement Between Australia and the European Community on Trade in Wine, and Protocol" *ATS* 1994 No 6.

46 See Western Australia Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, 1994, 1st, 2nd and 3rd Reports.

47 *Status of Eastern Carelia* case (1923) PCIJ Ser B No 5.

48 The Charter of the United Nations and the Statute of the International Court of Justice are reproduced in the Schedule to *Charter of the United Nations Act* 1945 (Cth).

The Statute of the International Court of Justice provides that States may accept the jurisdiction of the Court by provisions in treaties or by unilateral declarations by States accepting the Court's jurisdiction (the optional clause).[49] Australia has made such a declaration. The current declaration, dating from 1975, accepts the Court's jurisdiction without any reservation except in relation to disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement.[50] It is pursuant to this declaration that Australia has found itself a party to cases brought against it by Nauru and Portugal. This declaration replaced an earlier 1954 declaration that had a number of reservations, including one in relation to continental shelf rights.[51]

Under Article 94 of the United Nations Charter, Australia is obliged to comply with any decision of the International Court in any case to which it is a party. If a party "fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council".[52]

Australia has agreed in numerous treaties to accept the jurisdiction of the International Court or other dispute settlement body for purposes of interpreting those treaty provisions. These include the 1982 Law of the Sea Convention, recently ratified by Australia.[53] This Convention contains an elaborate set of dispute settlement provisions, including an obligation on States to accept recourse to arbitration or the Law of the Sea Tribunal in relation to certain maritime disputes and to give effect to any decisions to which they are party.[54]

The recent Uruguay Round agreements establishing the World Trade Organisation also contain detailed dispute settlement provisions, which elaborate on provisions in the earlier GATT and its associated Codes. The principal document is the Understanding on Rules and Procedures Governing the Settlement of Disputes.[55] This Understanding is a:

> detailed document embodying a complex system of rules for the settlement of disputes, subject to specified qualifications, under a range of Multilateral Trade Agreements annexed to the WTO text. Although it was developed on the basis of the GATT dispute settlement system, it is more detailed than any other procedure employed for the settlement of international trade disputes in the past.[56]

The Understanding establishes a Dispute Settlement Body (DSB) to administer the consultation and dispute settlement provisions of the various agreements. However, in keeping with the traditional mode of dealing with trade disputes the emphasis is not on legalistic approaches to settlement of the dispute. Article 3(7) of the Understanding says in part:

> The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a

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49 Article 36(2).
50 For text see International Court of Justice, *Yearbook 1993–94* No 48 at 83.
51 For text see Holder, W and Brennan, G, *The International Legal System* (1972) at 922.
52 Above n47.
53 Above n32.
54 Article 188; id at 86.
55 (1994) 33 *ILM* 1226.
56 Kohona, P T B, "Dispute Resolution under the World Trade Organisation" (1994) 28 (2) *J World Trade* 23 at 46.

> mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-a-vis the other Member, subject to authorization by the DSB of such measures.[57]

It remains to be seen what the impact of the new procedures will be. It is worth noting, however, the Understanding reached on Article XXIV(12) of GATT.[58] This clarifies that a GATT member is required to "take all such reasonable measures as may be available to it" to ensure the observance by regional and local governments within its territory of all the provisions of GATT 1994.[59] The Dispute Settlement Understanding may be invoked in respect of measures taken by regional governments which another country considers infringe the GATT as amended by the Uruguay Round. Where there has been a ruling that a provision has not been observed by a regional government and the relevant Member State has not been able to secure observance, "[t]he provisions relating to compensation and suspension of concessions or other obligations apply".[60]

As a result of these provisions, industry assistance policies not just of the Commonwealth Government but also of the Australian state governments are potentially liable to international scrutiny and findings by GATT Panels, if another Member State considers such policies contrary to GATT obligations.

Despite the constraints the existence of these international dispute mechanisms may impose, they also bring benefits — they provide a potential recourse for Australia as a plaintiff or complainant State. Australia has thus, on occasion, availed itself of international dispute settlement provisions in order to seek to protect its perceived rights. The most recent example was its initiation of arbitration against the United States in relation to a dispute over the entitlements of North West Airlines on the North Pacific route under the bilateral Air Transport agreement. That dispute was settled by negotiation before the arbitration took place.[61] One feature of that dispute was that North West Airlines also commenced proceedings in the Federal Court which would have required that Court to pronounce on many of the same treaty issues as would have arisen before the arbitration panel. But the initiation of arbitration was an important weapon in Australia's defence of its rights.

The existence of these various international dispute settlement mechanisms has generally attracted little criticism. They expose Australia to international

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57 Above n55 at 1227.

58 "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade" (1994) 33 *ILM* 1161.

59 Id at 1163.

60 Ibid. [For further discussion of GATT obligations see Waincymer below at 298ff].

61 Campbell, B, "Aviation Arbitration between Australia and United States" (1993) 4 *Pub LR* 212; "Settlement of Aviation Dispute Between Australia and the United States of America" (1994) 5 *Pub LR* 139.

claims. However, as a middle ranking power with a high regard for international law, Australia considers its interest are best served by accepting the risks of action being brought against it in return for being able by its commitment to the process to enhance its status as a good international citizen and being able to invoke, or threaten to invoke, the mechanisms itself when it considers that appropriate. As the actions brought by Nauru and Portugal demonstrate, however, Australia's open ended unilateral acceptance of the International Court's jurisdiction does make it vulnerable to what might be described by some as opportunistic claims being made against it.

The right of other States to resort to international dispute settlement remedies against Australia should not be overlooked as a factor at work in the development and application of Australian policy in the wide range of areas to which international law relates. It serves as an incentive for Australia in determining its policy both domestically and internationally to act in a way that will not provide a basis for a claim by another State that Australia has breached its international obligations. This same incentive arises from Australia's acceptance of reporting and complaints procedures under a number of treaties. These do not lead to binding decisions as in the case of a judgment by a court or tribunal. Nevertheless, resort to these mechanisms is increasingly attracting attention, particularly as evidence of attacks on Australian sovereignty.

B. International Reporting Mechanisms

Periodic reporting mechanisms are one way in which international scrutiny of a State's implementation of its international commitments can be monitored and pressure brought to bear on the State concerned to explain or justify particular policies.

The principal way in which compliance by States with the various human rights treaties is supervised is by a mechanism of regular reporting to an international committee established under the relevant treaty. This reporting obligation is taken seriously by Australia and detailed reports are provided periodically to the various committees. The requirement is onerous if comprehensive reports are to be submitted. There has, in consequence, been some delay in the provision of reports by Australia due to the need to deal in detail with state and territory laws. This reporting mechanism is supplemented in the case of certain Conventions with individual complaint mechanisms.

Thus, under the International Covenant on Civil and Political Rights, there is a Committee of 18 members elected by States Parties to the Covenant. The members serve in a personal capacity. The monitoring process undertaken by this Committee involves four tasks:

- to examine the reports, produced every five years, by States which are a party to the Covenant on what they have done to implement their obligations;
- to interpret the provisions of the Covenant and to make suggestions on better ways to meet obligations through laws and practices (the "General Comments" adopted on various Convention provisions[62] are one example of this);
- to receive complaints from one State about the performance of another; and

62 UN doc HRI/Gen/1.

- to receive complaints, under the First Optional Protocol, from individuals who claim human rights abuse.

Despite the important role played by these committees, they:

> do not have powers of enforcement. They do not send in the troops. They work by standard setting, by discussion, by information gathering and dissemination, by suggestion and persuasion and by exposure.[63]

This reporting mechanism was originally introduced in relation to International Labour Organisation (ILO) Conventions. The ILO Constitution has detailed provisions requiring States to report on steps taken to accept a new Convention, and then to provide regular law and practice reports in relation to ratified ILO Conventions.[64] A Committee of Experts considers the reports of governments and may make direct requests to particular governments for clarification of the way in which a particular Convention obligation is being met. The Committee also publishes observations and general surveys on the implementation of Conventions.

Under the various environmental treaties, similar reporting mechanisms provide the principal way in which compliance with the Conventions is secured. For instance, under the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal, parties are required to provide annual reports on measures they have taken to implement the Convention.[65] Under the Vienna Convention for the Protection of the Ozone Layer, parties are required to transmit information in such form and at such intervals as determined by meetings of the parties.[66] Similar provisions exist in the Convention on Biological Diversity.[67] Under the Framework Convention on Climate Change, each party is required to communicate periodically detailed information on policies and measures adopted to mitigate climate change as well as on its projected emission of greenhouse gases.[68] A subsidiary body is established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention.[69] These international reporting mechanisms impose a substantial burden on States but so far provide the most effective way to encourage States to live up to their commitments.

A less formal reporting system on the economy operates in the context of the Organisation for the Economic Co-operation and Development (OECD). This organisation regularly reviews and reports on the economic policies of its member States (the most industrialised States). Unlike reporting under the human rights and ILO Conventions, this review is not done against any specific treaty

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63 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (Dec 1992) at 18. See also Thomson, P, "Human Rights Reporting from a State Party's Perspective" in Alston, P (ed), *Towards an Australian Bill of Rights* (1994) at 329.

64 Articles 19(5) and 22 of ILO Constitution, set out as Schedule to the *International Labour Organisation Act* 1947 (Cth). See also *Manual on Procedures Relating to International Labour Conventions and Recommendations* (1984) ILO Office, Geneva.

65 Article 13(3) *ATS* 1992 No 7; (1989) 28 *ILM* 657.

66 Article 5 *ATS* 1988 No 26; (1987) 26 *ILM* 1529.

67 Article 26 *ATS* 1993 No 32; (1992) 31 *ILM* 818.

68 Article 4(2) *ATS* 1994 No 2; (1992) 31 *ILM* 849.

69 Article 8 at 11; id at 862–3.

based standards — it is done against broad good economic management criteria accepted by the organisation.

C. *Individual Complaints Mechanisms*

Australia has accepted a number of individual complaint mechanisms under human rights treaties. These mechanisms enable individuals, as opposed to States, to complain that Australia is not acting in conformity with particular obligations under the relevant treaty to which a mechanism relates. Because any complaint is from an individual, it inevitably relates to domestic laws or administrative practices. In this way, such mechanisms intrude much more directly into Australian domestic law making. They are seen as mechanisms similar to domestic courts or tribunals in form and, for this reason, are seen as the introduction of a "foreign" court into Australia's legal system. This is, however, fundamentally to misunderstand the role and status of the bodies established under the complaints mechanisms.

There are three United Nations human rights committees to which Australians can now take complaints. [For further discussion of these human rights mechanisms see Mathew below at 184.] These are:

a) the Human Rights Committee, pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights;

b) the Committee on the Elimination of Racial Discrimination, established under the Convention on the Elimination of All Forms of Racial Discrimination; and

c) the Committee against Torture, established under the Torture Convention.

Members of the various Committees are elected by State Parties to the relevant Conventions. The members are elected in their individual capacities. One of the criticisms made about the Committees is that the members do not necessarily come from countries that have accepted the jurisdiction of the Committees in relation to individual complaints. The reason that membership is not so confined is because these Committees have dual roles — as well as receiving individual complaints, they also are the bodies responsible for consideration of the periodic reports by State Parties on their compliance with the relevant Convention.

The Committees are not Courts. In this the United Nations human rights system differs from the European system. Under the European Convention on Human Rights a European Court of Human Rights is established, in addition to a Commission on Human Rights. Under this system, individual petitioners go first to the Commission, which if a friendly settlement is not achieved, submits a report to the Committee of Ministers. The Commission or any concerned State Party may bring a case before the Court provided the State from which the complaint has come has accepted the jurisdiction of the Court.[70] Individual complainants have no direct right of access to the Court. The requirement of the consent of a State before it can be subject to international

70 Merrills, J G, *The Development of International Law by the European Court of Human Rights* (1988) at 2–5; Jacobs, F, *The European Convention on Human Rights* (1975) at 7–9, 259–71.

adjudication is maintained. Nevertheless, a significant number of the States party to the European Convention have accepted the Court's jurisdiction. There have, in the case of the United Kingdom, been a number of significant decisions of the Court which have affected English law, including the law of contempt, and child care and treatment of prisoners.

The fact that certain of these decisions have been at odds with decisions of the English courts, including the House of Lords, has led to suggestions for inclusion of a Bill of Rights in English law. It has also led the courts increasingly to have regard to the possible impact of the European Convention in developing and interpreting the common law.[71]

Australia's human rights record is not subject to the same international judicial scrutiny. The Human Rights Committee of the United Nations can only "forward its views to the State Party concerned and to the individual".[72] The views of the Committee are significant, being those of a Committee composed of experts from a wide range of countries. They are not, however, binding decisions which a State is obliged to implement. They have no direct impact on Australian domestic law.[73] [For further discussion of human rights in Australia see Mathew below at 181–7.] The complaint mechanism is essentially a mechanism of last resort — the Committees can only hear complaints where the individual bringing the complaint has exhausted all available domestic remedies.

The Second Reading Speech on the Human Rights (Sexual Conduct) Bill put it this way:

> It has been argued that the ability of Australian citizens to take a complaint to the Human Rights Committee is a transfer of judicial power to a foreign body; similar to when there were appeals to the Privy Council and Australian law was being determined outside this country.
>
> Such an argument is totally flawed. It is of course the case that up to 1986 when some appeals from the Australian superior courts were permitted to the Privy Council, the law of this country was directly affected by such decisions.
>
> The resource to the Human Rights Committee permitted under the First Optional Protocol to the International Covenant on Civil and Political Rights bears no resemblance to Privy Council appeals.
>
> The Human Rights Committee is not a court. It does not make binding decisions. It has no power of enforcement. Its decisions do not oblige any action from Australia to change our laws or alter our practices.
>
> While the Government does believe the views expressed by the Committee have weight and should be regarded seriously, this Committee cannot alter Australian law.
>
> By allowing complaints to the Human Rights Committee, Australia affords its citizens an avenue to explore whether our good record on human rights is being

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71 For example, *Derbyshire County Council v Times Newspapers* [1993] AC 534.

72 Article 5(4) Optional Protocol 999 *UNTS* 302 at 303.

73 Alston, P (ed), *The United Nations and Human Rights* (1992) at 421; McGoldrick, D, *The Human Rights Committee* (Rev edn, 1994) at 54–5.

> maintained. It displays our confidence in our capacity to meet the same standards which Australia contends internationally should be met by all nations.[74]

The ILO, as well as the mechanisms for regular reporting by States, has a number of complaints mechanisms. Article 24 of the Constitution of the ILO allows a representation to be made by an organisation of workers or employers that a Member State has failed to secure the effective observance within its jurisdiction of any Convention to which it is a party. Such representation is communicated to the Government and the Governing Body may invite the Government "to make such statement on the subject as it may think fit".[75] This provision has not, however, been much used. There are also provisions in the Constitution for complaints by Member States.[76]

By far the most significant ILO complaints procedure is that concerned with freedom of association. A tripartite Committee on Freedom of Association was established in 1950 to hear complaints based not necessarily on ratified Conventions but on the basis of one of the fundamental principles of the ILO Constitution. Its significance since then has grown enormously.[77] There have been a total of 12 complaints made against the Australian Government to this Committee.[78] These complaints have been made by unions and employer organisations. They include complaints as to minimum membership requirements for union registration and secondary boycotts. There is little publicity given to the complaints outside the specialist industrial relations community. Nevertheless, decisions of the Committee have been used to support changes to Australian law, for example, that on minimum membership for union registration. However, the decisions are not binding and have no direct operation in Australian law.

D. Decisions of International Organisations

Decisions of international organisations or bodies are not normally binding on Australia unless it consents to them. This is reflected in provisions of the various constituent instruments of the organisations. Thus, in the OECD Constitution it is provided in Article 6 that decisions shall be taken and recommendations made by mutual agreement of all the members.[79] However, abstention shall not invalidate a decision, which shall be applicable to other members but not to the abstaining member. Nevertheless, if Australia votes for a decision which is adopted (that is, if there are no votes against), the decision is binding. However, Article 6(3) of the OECD Constitution provides:

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74 "Human Rights (Sexual Conduct) Bill 1994" *Hansard*, Senate, 7 November 1994, No 18 at 2479.

75 Article 24, above n64.

76 Articles 26–34, ibid. See summary of procedures in *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III Pt 4A (81st Conference 1994) at 12–4.

77 Ibid.

78 Information provided by Department of Industrial Relations. The Reports of the Committee are published in the Official Bulletin of the ILO. The numbers of the 12 Australian complaints are Nos 757, 846, 901, 1180, 1241, 1324, 1345, 1371, 1415, 1511, 1559, 1774.

79 "Convention on the Organisation for Economic Co-operation and Development and Supplementary Protocols" *ATS* 1971 No 11.

> No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them.[80]

It is not clear that this provision has any relevance to Australia given the absence of any relevant constitutional procedures. Australian practice has generally been to abstain on decisions which it is not in a position to implement or which it is envisaged will be implemented by measures at the state and territory level, where there may not have been an opportunity for adequate consultation with the relevant state and territory authorities.

Another example of the recognition of the sovereignty of a State is the decision to list a property on the World Heritage List. Such a decision can only be taken by the World Heritage Committee with the consent of the State concerned.[81] In a federal State like Australia, the listing of a property over the objection of a territorial component does raise issues concerning federal/state relations. But on the international level, the consent of a State is a prerequisite for listing and for the establishment of the consequential obligations to protect and conserve the property and to decide on the appropriate measures to give effect to these obligations.

In the United Nations, the power of the General Assembly and Security Council to adopt binding decisions must be considered separately. By virtue of Article 25 of the Charter, States agree to accept and carry out Security Council decisions "in accordance with the present Charter". The primary decision making power of the Council, as opposed to recommendatory power, is that contained in chapter VII to decide on measures to maintain international peace and security. The Council can "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures". It is pursuant to these provisions that the Security Council has imposed mandatory sanctions against a number of States including Iraq, South Africa and Serbia. These sanctions in recent years have been quite detailed in the requirements they have imposed on States.

In order to give the Commonwealth the power to implement these sanctions which it might not have had under existing legislation, the *Charter of the United Nations Amendment Act* 1993 (Cth) was enacted. By regulation, the Executive is given power to override existing law or introduce new legislative measures. The power is, however, limited to giving effect to binding decisions of the Security Council adopted under chapter VII of the Charter. Prior to enactment of this law, Australia sought to give effect to sanctions decisions by regulations under the *Customs Act* or the *Migration Act*. These powers were not adequate for giving effect to some of the recent sanctions decisions which involved imposition of financial and other restrictions.[82]

By contrast, General Assembly resolutions are generally not binding on States as such. This is not to say that certain resolutions may not contribute to

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80 Id at 3.

81 Article 11(3) "Convention for the Protection of the World Cultural and Natural Heritage" *ATS* 1975 No 47. Also set out in the *Schedule to the World Heritage Properties Conservation Act* 1983 (Cth).

82 Charter of the United Nations (Sanctions) Regulations, SR 279 of 1993.

or reflect rules of international law which will otherwise be binding on States. For instance, it is generally accepted that United Nations resolutions developed the principle of self-determination for colonial territories which has had such a marked impact in the post World War II era. Similarly, certain significant General Assembly declarations such as that on Principles of International Law concerning Friendly Relations and Cooperation among States in Resolution 2625(xxv) of 24 October 1970 are acknowledged to contain significant statements of international law principles. But it is not the declaration per se that is binding on States. It can only be in their capacity as statements of international practice and opinion that certain declarations may represent customary international law. For the most part, declarations are hortatory. They are not legally binding instruments. More so, this is the case with ordinary resolutions, even unanimously adopted ones.[83]

Certain interest groups have sought to portray selected passages from declarations of international organisations as having binding effect. There is no basis for this. For instance, the Lima Declaration and Plan of Action on Industrial Development and Cooperation is alleged to amount to a commitment to de-industrialise Australia and destroy its manufacturing industry. This declaration was adopted by the Second General Conference of the United Nations Industrial Development Organisation (UNIDO) in 1975 by a vote of 82 in favour, 1 (United States) against, and 7 abstentions.[84] Australia was among those who voted for it. It was a general set of conclusions about how to address the need for development in the Third World. It was no more than a set of general policies and commits Australia to no particular actions. To portray this or other such declarations as detracting from Australia's sovereign right to decide its own economic policies is entirely misleading.

This is not to discount the significance of such declarations as relevant in the elaboration of Australian domestic policies. For instance, United Nations Rules on the Minimum Standards for the Treatment of Prisoners provided a basis, but with modifications, for the development of Australian standards for use by prison authorities.[85] Many of the human rights treaties were preceded by declarations that established the commitment of States to basic principles that were then enshrined in binding treaty commitments. For instance, the Declaration on Rights of the Child was adopted in 1959, followed by adoption of the Rights of the Child Convention in 1990. Most recently, the United Nations General Assembly has adopted a Declaration on the Elimination of Violence against Women.[86] Such declarations may influence the development of policy by governments. They do not, however, detract from the sovereignty of Australia to make its own internal process.

Arising out of the various World Summit Conferences such as that on Human Rights in Vienna in 1993, that on Social Development in Copenhagen in 1995 and that on Women in Beijing also in 1995, will be wide ranging general declarations. For instance, the Human Rights Conference adopted an Action

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83 Above n27 at 48–9.

84 (1975) 14 *ILM* 826.

85 Standard Guidelines for Corrections in Australia (1994), adopted by the Corrective Services Ministers' Conference, May 1994.

86 Resolution 48/104, reproduced (1994) 33 *ILM* 1049.

Plan, which envisaged National Action Plans.[87] Australia has adopted such a plan pursuant to the Vienna Conference declaration. Such action is, however, a voluntary act on the part of Australia. Implementation within Australia of the various broad commitments remains a matter for Australia alone to decide. There is no intrusion into Australia's sovereignty.

4. *Conclusion*

A recent comment about the world today:

> From John Locke and Immanuel Kant to our days, the greatest philosophers have urged humans along a dual path, to democratically constitute their national polities and to redesign the international arena so that it will be an arena of peace. They recognised that to do so there had to be three things: the will to achieve peace, an appropriate political culture that could promote and sustain peace, and appropriate institutions to secure peace, justice, and liberty. In the past these philosophers could speak only of the promise of a distant future. Today events have made that future a growing reality — a single world economy to which even the most powerful nations are bound; a growing international communications network, which is no respecter of State boundaries and which cannot be controlled by governmental fiat, a network that increasingly links individuals and all peoples, whether those in power wish it or not; a shared world popular culture, for better or for worse; and a growing recognition that in matters of environment, even more than in matters of economy, our planet is one small spaceship in a vast universe and all humans are affected by what occurs to its environment.[88]

If this is an accurate picture, as I believe it is, then an acknowledgment that Australia is increasingly subject to international constraints in terms of its internal governance seems necessary. To acknowledge this is not, however, to accept that as a consequence Australia is no longer an independent, sovereign State. For it is. To the extent its decision making is constrained by international obligations this is a result of voluntarily chosen constraints. The constraints it has accepted, while superficially they may appear considerable, are on closer analysis shown not to be so. Australia retains the ability to reject particular international standards or decisions. If it does reject them, however, it may be subject to criticism, and there may even be economic costs. But as an independent State, Australia retains the right to make that decision.

However, one should not focus simply on the various external constraints. Ultimately, it is only if one can ascertain that a State is independent in terms of its internal constitutional law that to talk of a sovereign State makes sense.[89] An important question, therefore, is who makes the decisions within a State about which treaty commitments to accept. It is also relevant to examine the impact of international standards and growing globalisation on the internal constitutional arrangements within the Australian federation.[90] It is principally these questions which need debate rather than the question whether Australia has or has not lost its sovereignty.

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87 "Vienna Declaration and Programme of Action" (1993) 32 *ILM* 1661.
88 Mullins, A and Saunders, C, *Economic Union in Federal Systems* (1994) at 35.
89 Above n17 at 40.
90 Friedman, B, "Federalism's Future in the Global Village" (1994) 47 *Vanderbilt LR* 1441.