

Chapter 9

Law and Uses of International Thought

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The history of engagement by the Australian judiciary with international law and comparative or “foreign” law is marked by caution, ambivalence and, sometimes, outright hostility.¹ Over recent years the historical reluctance of judges to consider international materials has given way to an enlightened willingness to take account of treaties and customary law, and of the jurisprudence of nations with comparable legal systems.²

This collection of essays has been prompted by recognition that legal argument calls for interdisciplinary analysis and consideration of social, economic and moral values. The aim is to understand the possibilities, application and limitations of principles that bear upon, but do not derive from, legal reasoning. To this end, this chapter examines how international legal thinking might inform Australian law and jurisprudence as it evolves in the 21st century. Some general observations are made about the relationship between international and national legal systems before examining the constitutional and legal principles that govern the reception of an international rule into Australian law. While there is a risk of Australian isolation from human rights jurisprudence developed in North America and Europe, Australian judges, government officials and legal advisers are increasingly willing to employ international legal materials to inform their understanding of domestic law and to harmonise national law with internationally recognised norms. Courts have also applied traditional principles of administrative law and statutory interpretation to reach findings that accord

- 1 See, for example, JD Heydon, “Judicial Activism and the Death of the Rule of Law” (2002) 23 *Australian Bar Review* 110; cf R French, “International Law and Australian Domestic Law”, Annual Conference, Supreme Court of New South Wales, 21 August 2009; AF Mason, “International Law as a Source of Domestic Law” in B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997); M Kirby, “The Future of Appellate Advocacy” (2006) 27 *Australian Bar Review* 141.
- 2 AF Mason, “The Influence of International and Transnational law on Australian Municipal law” (1996) 7 *Public Law Review* 20; M Kirby, “The Growing Rapprochement Between International Law and National Law” in G Sturges and A Anghie (eds), *Essays to Honour Judge CJ Weeramantry*, 2009, <www.hcourt.gov.au/speeches>.

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