



Australia's Engagement with Economic and Social Rights

A Case of Institutional Avoidance

Russell Solomon



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ISBN 978-981-16-0032-6 ISBN 978-981-16-0033-3 (eBook)
<https://doi.org/10.1007/978-981-16-0033-3>

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Cover illustration: Olivier Le Moal/Alamy Stock Photo

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The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

*This book is dedicated to the memory of my late father, Keith Solomon,
and in grateful appreciation of his wisdom, wit and love.*

ACKNOWLEDGMENTS

This book had quite a lengthy gestation period and I take this opportunity to thank the members of my family and friends who have endured hearing me discuss the importance of economic and social rights and their relative neglect in Australia. The book has been something of a ‘labour of love’ and I confess this probably meant there were times when I had not wanted to complete it. I would like to thank friends and colleagues who have offered pieces of advice, guidance and support around aspects of this book and, in particular, John Erik Fossum, Binoy Kampmark, Sean Coley and David Robertson. I also acknowledge my father, Keith Solomon, to whom this book is dedicated, who always had a keen sense of justice and who continuously engaged with me about the importance of rights and Australia’s shortcomings. He was bemused that the book took so long and sadly did not live to see its final production. Finally, the most important person I thank is my partner, Heather Lindsay, who has cheerfully endured the stresses and distractions that come with working on such a book and whose support has been vital to its completion.

CONTENTS

1	Introduction: Australia's Engagement with Economic and Social Rights	1
1.1	<i>General</i>	1
1.2	<i>Economic and Social Rights in International Law</i>	3
1.3	<i>Globalisation, Neoliberalism and Economic and Social Rights in Australia</i>	11
1.4	<i>Australia's Institutional Framework for Protecting Rights</i>	17
1.4.1	<i>Australia's Liberal Democracy and Economic and Social Rights</i>	17
1.4.2	<i>The Institutional Framework</i>	20
1.4.3	<i>Australia's Political Culture and Economic and Social Rights</i>	29
1.5	<i>The Argument</i>	31
	<i>References</i>	38
2	The Right to Health in Australia	47
2.1	<i>Introduction</i>	47
2.2	<i>International Law and the Right to Health</i>	48
2.3	<i>Australia's Institutional Arrangements and the Right to Health</i>	53
2.4	<i>Privatising Australia's Health Care System</i>	58
2.5	<i>Primary Health Care</i>	64
2.6	<i>Hospitals</i>	68

2.7	<i>Medicines and Their Affordability</i>	70
2.8	<i>Testing the Right to Health: Health Care Provision for the Vulnerable</i>	73
2.8.1	<i>Disabled Persons</i>	73
2.8.2	<i>Children</i>	79
2.8.3	<i>Asylum Seekers, Refugees and Visa Holders</i>	80
2.8.4	<i>Indigenous Persons</i>	82
2.8.5	<i>Regional, Rural and Remote Australians</i>	84
2.8.6	<i>Aged Persons</i>	86
2.9	<i>Concluding Comments</i>	87
	<i>References</i>	97
3	The Right to Housing in Australia	113
3.1	<i>Introduction</i>	113
3.2	<i>International Law and the Right to Adequate Housing</i>	114
3.3	<i>Australia's Institutional Arrangements and the Right to Housing</i>	118
3.3.1	<i>Overview of Housing Policy</i>	118
3.3.2	<i>Australia's Institutional Arrangements</i>	119
3.4	<i>Housing Affordability and Home Ownership</i>	120
3.5	<i>Housing and Security of Tenure</i>	127
3.6	<i>Social Housing and the Right to Housing</i>	129
3.7	<i>Testing the Right to Housing: Housing the Vulnerable</i>	132
3.7.1	<i>Disabled Persons</i>	132
3.7.2	<i>Older Women</i>	133
3.7.3	<i>Indigenous Persons</i>	134
3.7.4	<i>Homelessness</i>	137
3.8	<i>Concluding Comments</i>	142
	<i>References</i>	150
4	The Right to Work and Rights at Work in Australia	163
4.1	<i>Introduction</i>	163
4.2	<i>International Law and the Right to Work and Rights at Work</i>	164
4.3	<i>Globalisation, Neoliberalism and Labour Rights</i>	167
4.4	<i>Australia's Institutional Arrangements and Labour Rights</i>	170
4.4.1	<i>The Right to Work</i>	171
4.4.2	<i>Regulating Rights at Work</i>	173
4.4.3	<i>Discrimination Law and Labour Rights</i>	174

4.4.4	<i>Equal Remuneration of Women and Men</i>	177
4.5	<i>Freedom of Association, Collective Bargaining and Trade Unions</i>	179
4.6	<i>The 'Right to Strike'</i>	186
4.7	<i>Testing Australia's Labour Rights: Rights of Those at the Margins</i>	191
4.7.1	<i>Australia's Embrace of Precarious Work</i>	191
4.7.2	<i>Casual Workers</i>	193
4.7.3	<i>Other Workers in Precarious Work</i>	194
4.7.4	<i>Asylum Seekers</i>	198
4.7.5	<i>Disabled and Older Persons</i>	199
4.7.6	<i>Low Paid Workers</i>	202
4.8	<i>Concluding Comments</i>	203
	<i>References</i>	213
5	The Right to Social Security in Australia	225
5.1	<i>Introduction</i>	225
5.2	<i>International Law and the Right to Social Security</i>	227
5.3	<i>Globalisation, Neoliberalism and the Right to Social Security</i>	232
5.4	<i>Australia's Institutional Arrangements and the Right to Social Security</i>	234
5.5	<i>The Unemployed and the Right to Social Security</i>	241
5.5.1	<i>The Breach Penalty Regime</i>	247
5.6	<i>Testing the Right to Social Security: Income Support for the Vulnerable</i>	249
5.6.1	<i>Indigenous Australians and Income Management</i>	249
5.6.2	<i>The Parenting Benefit</i>	252
5.6.3	<i>The Aged Pension</i>	254
5.6.4	<i>Disabled Persons</i>	254
5.6.5	<i>Asylum Seekers</i>	256
5.7	<i>Concluding Comments</i>	257
	<i>References</i>	264
6	Concluding Reflections on Australia's Engagement with Economic and Social Rights	275



Introduction: Australia's Engagement with Economic and Social Rights

1.1 GENERAL

This book aims to fill a gap in the literature by problematising how a liberal democracy engages with the international human rights regime through the implementation of its international economic and social rights (ESR) obligations. In examining the nature of Australia's implementation, or rather translation, of particular rights obligations that it has signed up to and ratified, this study will seek to reveal how and why Australia has enacted laws and made policies in particular areas of ESR often at odds with its international obligations. This study does not aim to be comprehensive across all policy areas covered by Australia's ESR obligations but discusses implementation in the four significant areas of health, housing, labour rights and social security. The aim is to contribute to the understanding of the country's approach to not only this often-ignored category of rights, but to human rights more generally.

The decision to write this book was influenced by a seemingly unbalanced focus of scholars in political science and law to see human rights protection in Australia in terms of civil and political rights with economic and social, and for that matter cultural, rights hardly rating a mention. Both sets of rights are equally important, as the United Nations (UN) has continued to articulate, and human rights should be seen both in terms of limiting what society can do to the individual and as 'claims to what society is deemed required to do for the individual' (Henkin 1990,

2). There have been a number of important book length contributions to the study of rights protection in Australia. Most of these have been by lawyers but *The Politics of Human Rights in Australia* by Chappell, Chesterman and Hill, albeit mainly focused on civil and political rights, remains a notable example from within the political science discipline.

As with that work, this book will seek to show that the protection of human rights is not only about legal processes and instruments but also about highly political ones. This study is not just about Australia's rights compliance with a particular category of rights but about the nature of Australia's liberal democracy and the dominant political culture that tends to present an outward image of rights compliance that is, more often than not, at odds with the reality of its legislative, judicial and policy approaches to rights. Australia has a limited form of egalitarianism, a written constitution that expressly or impliedly protects some civil and political rights (CPR) and even less ESR, representative government and a market-based economy based on private property rights. While laws and their adjudication are essential to understanding the nature and extent of rights protection, attention is given here to all those institutions that determine how power is exercised in Australia, influenced as they are, in turn, by dominant discourse/s.

International human rights law provides important guidance as to what signatory States Parties ought to do in regard to the fulfilment of ESR and seeks to clarify who has the obligations to fulfil them and how those with these obligations might be motivated to carry them out (Freeman 2013, 386). However, international law through its engagement within the international community of states does not provide individual states with the capacity to actually fulfil their obligations. These are essentially political issues dealt with at the domestic level and answers can be attempted by examining the institutional framework and how ideas and actors influence the translation of these obligations.

Australia has not fully incorporated the United Nations' *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (UN 1976) into Australian domestic law and there is no comprehensive domestic legal framework for the protection of human rights with Covenant rights not being justiciable or enforceable in Australian courts and tribunals. Australia has, in the main, good and fair working conditions and effective systems of social security, health and education. However, while this encourages the view that Australia has embraced ESR in the past and retains a positive attitude towards these rights into the future, serious

questions remain as to the extent to which such rights are effectively recognised and implemented.

Human rights are undoubtedly more than legal rights but with this book's focus upon the implementation of ESR, the legal adoption of rights standards, mainly through the mechanism of the law at the domestic level, remains an important indicator of rights protection. The focus of this contemporary study is on national institutions, particularly the federal parliament and the government though, with many ESR policy areas constitutionally shared with the states, some reference will be made to developments at the subnational level. Implementation and enforceability of rights remains largely subject to the political processes given Australia's lack of a national bill of rights. In a legal sense, there has been occasional progress made towards ESR recognition by legislatures at state rather than the federal level and the courts and specialist tribunals have occasionally felt compelled to address Australia's economic and social realities and make decisions that align with the ESR as ratified at the international level.¹ This level of compliance with international standards has been patchy and incomplete and is characterised as an approach of avoidance and neglect rather than one of serious engagement.

1.2 ECONOMIC AND SOCIAL RIGHTS IN INTERNATIONAL LAW

Economic and social rights were never given the same level of importance as civil and political rights in the Western liberal democracies over the post-war years, as opposed to the Soviet bloc. Even international human rights NGOs based in the West focused more on issues such as freedom of expression, state-sponsored torture or 'disappearance' rather than issues around homelessness or malnutrition or preventable disease.² The universality and indivisibility of all rights has been the mantra of the UN stating that the two sets of rights should be treated in a 'fair and equal manner, on the same footing, and with the same emphasis.'³ However, while this is found in the rhetorical flourishes of governments, the old post-war/cold war division and differential treatment of rights remains the prevalent view amongst most western states.

Many of the obligations arising from ESR are fundamentally about the redistribution of resources and addressing substantive inequalities and these 'rub up against' a dominant neoliberal discourse around limiting state intervention unless, of course, that distribution favours particular

private interests. At their core, social rights at international law can be considered to be about entitlements aimed at ensuring an adequate standard of living while economic rights are entitlements which aim at both ensuring an adequate standard of living and providing individuals with the basis upon which to secure independence and freedom (Eide 2001, 18). The justification for the consideration of ESR, as for any human right, derives from its moral importance which is based on it being a basic need of human beings, referencing either that human rights contribute to the good of society or the wrongfulness of its violation (Nickel 1993).

The ICESCR⁴ is the principal instrument for these rights which can be seen as an interrelated part of a comprehensive rights package at international law. The most important operational clause is Article 2(1) which states that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The UN High Commissioner for Human Rights has summarised economic, social and cultural rights (ESCR) as those rights which relate to ‘the workplace, social security, family life, participation in cultural rights, and access to housing, food, water, health care and education’.⁵ These rights, as with all rights, are not ontologically universal and while this does not mean they are culturally relative, they can be seen to be relative to the social structure of each particular state (Donnelly 2010, 32). Prompted by debates over what were the minimum core ESR, implementation principles (the Limburg Principles⁶) were articulated and these recognised, as had the ICESCR, the state (as signatory) as the principal duty holder. Importantly, amongst these Principles is Principle 19 that ‘[s]tates parties shall provide for effective remedies, including, where appropriate, judicial remedies’.

The state is seen as accountable to both its own citizens and the international community while increasingly private actors have also become an important, and sometimes the principal, duty holder to be held to account. The Limburg Principles considered a State Party to be in violation for any number of failures interpreted in terms of the triptych of

duties to respect, protect and fulfil rights⁷ and these failures can take many forms from simple cases of neglect or omission to deliberate instances of rights violations.⁸ The Principles were further developed by the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* in 1997 (The Maastricht Guidelines 1998). These three categories of duties include both negative and positive aspects with some requiring immediate realisation by the duty holder, such as the anti-discrimination provisions, while others seek to have States Parties achieve the fulfilment of the rights progressively as and when they are resource-capable.

These three categories of duties overlap and are understood in the following general terms. A breach of the duty to respect could be where a state fails to take a step which the ICESCR requires it to take to meet a certain standard or fails to implement without delay a right which the ICESCR requires it to provide immediately. An example would include where the state directly removes a person's right to work. A breach of the duty to protect could include where the state fails to promptly remove an obstacle which it is required to remove to permit the immediate fulfilment of a right. An example would include where the state fails to regulate certain aspects of privatised health care provision. A breach of the duty to fulfil could be where the state wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its power to meet or applies a limitation to a right recognised in the ICESCR in a manner not in accordance with that treaty. An example would be where the state fails to provide a basic level of social security for the destitute. A further example would be where the state deliberately retards or halts the progressive realization of a right, unless it is acting within a permitted limitation due to a lack of available resources or due to *force majeure* (Symposium 1987, 131).

While the vague language of the ICESCR has been much criticised, the Committee on Economic, Social and Cultural Rights (CESCR)⁹ has sought to provide explanations as to how the treaty should be interpreted. Any discussion of human rights needs to take account of obligations and duties corresponding to the rights claimed by people and these obligations and duties are considered to be fundamental and cannot be removed at the behest of a duty holder. However, the operational provision of the ICESCR, Article 2(1), includes the evolutionary language of 'progressive realisation' and subject to 'available resources' and seen as somewhat open-ended and serving to weaken the implementation of the rights

provisions by allowing states to avoid constraints on their behaviour and thereby escape their obligations (Steiner et al. 2008, 275).

The CESCR has articulated General Comments on Article 2(1) as well as on particular rights to provide some clarification as to the contents of specific rights and as an aid to the implementation of obligations. General Comment 3 of 1990¹⁰ described the general legal obligation of Article 2 (1) as involving obligations of both *conduct* and of *result*. As to obligations of conduct, member states were to begin to take steps immediately that should be ‘deliberate, concrete and targeted’ and not ‘qualified or limited’, and in a manner that ‘constantly and consistently’ advances the full realisation of these rights (CESCR 1991, para 1, 2). While the Maastricht Guidelines also stipulate that all states are allowed a ‘margin of discretion’, the ‘burden is on the state to demonstrate that it is making measurable progress towards the full realization of the rights in question’ and that the progressive realization provisions (ICESCR Article 2) are not to be used as a pretext for non-compliance. It is significant that the Guidelines refer to the ‘obligation of conduct’ as requiring action to be taken that is ‘reasonably calculated to realise the enjoyment of a particular right’ (The Maastricht Guidelines 1998, 694). This might include, for example, the development of a plan of action to combat a particular poor health result.

As to obligations of result, some obligations are expected to take immediate effect including that any action taken must be without discrimination. These steps are to be ‘expeditious and effective’, and with legislation can include administrative, financial, educational and social measures (CESCR 1991, paras 2, 7) with states expected to take positive steps, to the maximum of their available resources, towards the realisation of ESR. It further articulated a clear obligation upon states parties ‘to move as expeditiously as possible towards the realization of these rights’.¹¹

States were considered to have a presumptive immediate obligation to provide for the satisfaction of the minimum core, that is the ‘minimum essential levels’ of each ICESCR right.¹² Middle and high income countries will probably easily meet those standards but this should not mean that the focus shifts to developing states as it should also remain on those in need in these higher income countries who cannot attain the ESR standards (Young 2008, 114). In discussing the implementation of each right discussed in this book, some attention will be devoted to how vulnerable groups have been impacted.

Even the minimum core standards need to allow for different approaches to the realisation of rights with the duty to protect depending on the specific requirements in each country and the duty to fulfil very much depending on the resources available to the state to meet its obligations (Eide 2001, 24). The enjoyment of these rights is almost totally contingent on law and policies, and indeed the practices, of the particular state within which a person happens to live. The implementation of such rights is thus dependant on local context but that context-driven process cannot be seen in isolation from 'norms and global networks of action' (Stuttaford 2012, 1). While a state's obligations drawn from the international rights treaties must be given meaning within the domestic legislative and policy context, these treaties are nonetheless important in that they can raise the expectations of domestic political actors in new ways while the 'publicness and the explicitness of international law can potentially provide the [legitimizing] anchor' (Simmons 2009, 7, 8).

The nature of the problem/s in relation to addressing the realisation of particular rights is, of course, germane to each state but the formulation of these rights, and their concomitant international legal obligations, is such that 'common principles can be applied within each state despite its unique characteristics' (Leckie 1989, 540). A state may yet be unwilling to apply the necessary resources to fulfil a particular ESR obligation, but it will still need to demonstrate to the UN that it has made efforts and be so judged when it next appears before the CESCR's *Universal Periodical Review* (UPR). The Limburg Principles consider that the covenant's directives to take steps to achieve goals progressively '[u]nder no circumstances shall be interpreted as implying for all states the right to defer indefinitely efforts to ensure full realisation' (Symposium 1987, 122–125) though special measures are allowed for certain groups of individuals so long as these do not lead to separate rights for different groups (ESC 1987, Principles 14, 39).

A General Comment in relation to the right to water has provided operational guidelines for use in relation to ESR such as health, education and social security. This General Comment expanded upon what a state must do to comply and stipulates that legislation addressing implementation needs to include targets and goals; the means by which the purpose is to be achieved; the intended collaboration with others such as civil society, international organisations and the private sector; institutional responsibility for the process; national mechanisms for monitoring progress and; remedies and recourse procedures (CESCR 2003, para 50).

While the ICESCR differs from the ICCPR in not stipulating an immediate obligation to respect and ensure all of the relevant rights, it does impose an ‘obligation to move as expeditiously and effectively as possible towards that goal’ and any deliberately regressive measures need to be carefully considered (CESCR 1991, para 9).

In terms of the domestic application of the ICESCR, the CESCR has explained that, while the Covenant provides a ‘broad and flexible’ approach, there is an obligation to recognise the right in the most appropriate form and a State Party may not use domestic law as a justification for failing to perform an international obligation.¹³ As well, it provides that everyone has the right to an effective remedy by the competent national tribunal for any acts violating fundamental rights (CESCR 1991, para 2).¹⁴ In contrast to the ICCPR, the ICESCR fails to provide for judicial remedies though the CESCR has stipulated that should a state use means other than judicial ones to remedy violations of these rights, it would need to show why judicial remedies were not necessary and it may be that the other non-judicial means may need to be ‘reinforced or complemented by judicial remedies’ to be effective (CESCR 1998c, para 3).

The States Parties who have ratified the ICESCR are presumed to be capable of satisfying the minimum core obligations and therefore it is reasonable that they can be expected to provide these minimum levels and bear the burden of proving that they are unable rather than just unwilling to do so. These international standards are not to be seen as prescriptive, but provide guidance as to whether laws, policies and practice are rights-based. International legal universality should be seen to be of great practical as well theoretical importance and judging what goes on within a state, in terms of law, policy and practice, against its international rights endorsements can be a critical self-check for the policy actors as well as empowering for citizens and their advocates concerned at possible transgressions. In respect of each of the ESR considered in this book, examples of what this minimum core content might look like has been provided by the UN High Commissioner for Human Rights and the CESCR and States Parties will be expected to provide suitable legislative frameworks as well as policy measures that are appropriate and adequate to meet the goals.

As with the *International Covenant on Civil and Political Rights* (ICCPR), an Optional Protocol to the ICESCR has been adopted by the United Nations. This procedural opportunity for complaints to

the CESCR once domestic remedies have been exhausted assists each State Party to clarify the scope and content of their rights obligations under the ICESCR (Ssenyonjo 2010, 85). While Australia adopted the ICESCR relatively early, it has still not adopted that Covenant's Optional Protocol¹⁵ a decade after it came into existence.

ESR have been subjected to greater scrutiny than CPR and attracted much controversy. The difference in recognition of, and support for, the two sets of rights was acknowledged by CESCR in its statement to the 1993 *Vienna World Conference* that:

states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke horror and outrage and would lead to concerted calls for immediate remedial action.¹⁶

The key debate around ESR has been over what are the limits of states' obligations or 'minimum core', whether they are justifiable, and what is actually meant by the 'progressive realisation' of these rights. A particular criticism has been that ESR are mere aspirations and wishes lacking universality and incapable of being defined in justiciable terms or of clearly identifying who has the duty to fulfil such obligations.¹⁷ A widespread criticism against ESR that they are not justiciable or capable of judicial enforcement has been that they are too indeterminate (Davis 1992). Another common criticism has been that the wording in Article 2 of the ICESCR of 'progressive realisation' and subject to a state's 'available resources' means that these rights are really only 'principles and programmatic objectives rather than legal obligations that are justiciable' (Ssenyonjo 2009, 10). If they were justiciable, so this argument goes, this would mean courts were moving into areas where the legislature, representing the democratic process, ought to prevail.

Arguments against treating ESR as being equally as important as CPR have, over time, been shown to be spurious with courts in various countries addressing ESR and related issues, such as India and South Africa, while a number of liberal democracies, and the European Union, have accepted the need to take their responsibilities in this area more seriously. The differing emphases between ESR and CPR as sets of rights has much to do with the role of the state and what expectations are upon a state with regard to not only protecting its citizens from harm, be that caused by the state or private actors, but in also actively providing for the welfare

of its citizens (Eide and Rosas 2001, 5). Where historically and potentially the absolute and arbitrary power of the state came to determine much of the CPR agenda, so the insecurity of the unfettered market economy as well as health threats from widespread urbanisation and industrialisation have determined much of this ESR agenda (Beetham 1995, 47).

Other important arguments that CPR are *negative* rights and thus less resource intensive than the *positive* ESR can be rejected given the obvious resource implications of a state complying with its CPR obligations, such as with the establishment of courts and prisons. The perceived need for state action to realise these rights underlies the view that they are also positive rights requiring various levels of state intervention. ESR may well be more susceptible to government policies and programs for their fulfilment but any call for some redistribution of power and resources such as the provision of hospitals and social security benefits does not mean that ESR are more resource intensive than CPR. States obviously have positive duties as well as duties of restraint and these duties require states to reject the neoliberal view of the state's role as one that threatens the autonomy of the individual while, at the same time, seeing the state positively enabling people to exercise their rights (Fredman 2008, 13).

ESR are also seen as important in providing people with the freedom to develop: to develop their inherent capability to be someone and to do things that they would judge to be worthwhile. As Sen argues, 'what people can achieve is influenced by economic opportunities, political liberties, social powers and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives' (Sen 1999, 5). Nussbaum takes this further and refers to the positive duty upon the state to provide so that people can get beyond the capability threshold to function adequately (Nussbaum 2000, 5–6).

One problem for ESR is that they are ideologically seen as being about social policy, benefits and welfare with breaches seen as matters of social injustice and less likely to be accepted as legal entitlements for immediate realisation (Ssenyonjo 2009, 4). Traditionally, the concept of human rights was about limiting the power of governments over individuals but ESR have moved human rights beyond this concept to being very much about the economy. Rights can now be seen to be about the redistribution of resources and ratification of ESR reinforces the idea that social welfare and social policy are important aspects of governmental responsibility. Their incorporation means that governments are expected to address economic and social power (Hausermann 1992, 50) and the extent to

which this occurs tells us much about a government's compliance with these international standards. There has been ideological resistance to the implementation of ESR by states, including in Australia, and this has been largely due to the dominance of economic liberalism, particularly its neoliberal variant, in both domestic economic policy-making and within influential international financial institutions, such as the World Bank and the International Monetary Fund.

1.3 GLOBALISATION, NEOLIBERALISM AND ECONOMIC AND SOCIAL RIGHTS IN AUSTRALIA

An examination of Australia's engagement with its ESR obligations derived from its international treaty-making and the nature and extent of the translation of these rights into law, policy and practice must include consideration of the two contemporary dominant and related concepts of globalisation and neoliberalism. The concept of globalisation remains a contested one¹⁸ and while an elusive concept, it is a process or set of processes and a deliberate move by political actors to liberalise and deregulate markets (Kaufmann 2007, 6). It is an acknowledged fact that telecommunications and transportation technologies have made the world a 'smaller' place. As political, economic and social interactions have transcended national borders and regional spaces, so the territorial principle and with it control by the state of activities within its space has been profoundly challenged. Globalisation has meant that the world economy has become integrated with implications for all states and, as Stiglitz argued in reference to the global financial crisis of 2008, markets are not self-regulating and an understanding of the limitations of both markets and governments is an essential part of developing appropriate policy frameworks (Stiglitz 2009, 7).

Globalisation as a concept has been misused to justify and legitimize the neoliberal global project to help discipline people to acquiesce to the requirements of the global marketplace (Held and McGrew 2002, 4). Globalisation has indeed seen 'the inexorable integration of markets, nation-states and technologies to a degree never witnessed before...' (Friedman 2000, 9), but it is not just about the liberalisation and deregulation of markets in the service of global capital but a process of deterritorialization of clusters of political, economic and social transactions involving public and private national and international actors. Globalisation involves the creation of new markets and new tools as

well as changing the rules of the game by empowering new actors such as the World Trade Organisation (WTO), multinational corporations (MNCs), and networks of non-governmental organisations (NGOs).

Globalisation has been normalized as a dominant ideology and, in the contemporary era, has joined with neoliberalism and promoted individualism, efficiency, competition, and minimal state intervention in the economy (Mittelman 2004, 5; O'Connell 2010, 201). It can produce mixed results with commodification and markets providing employment and mobility while also often serving to foster economic exploitation (Meena 2017, 59). States retain much control over activities that occur within their territory and have choices as to the forms of political, economic and social development adopted (Held and McGrew 2002, 14) and as a creature of domestic politics but being one of many influences, economic globalisation cannot remove local difference and particularity (Holton 1998, 16–17). The impact of economic globalisation is about 'reorganising, rather than bypassing, states', so any 'constitutionalisation of neoliberalism' must be understood as having taken place through the agency of the state (Panitch 2004, 12, 36).

Economic globalisation and the promotion of neoliberalism, even if in a mixed form, has, understandably, had a pervasive influence over state policy-making in recent decades as it has sought to enhance the role of market forces. With an expansion in the role of market forces has come limits on a state's power with implications for the capacity of the state to act as a protector and promoter of rights. While many neoliberals have come to see the promotion of markets and of human rights as complementary endeavours (Hall and Lamont 2013, 11), this begs the question as to the vision of human rights that is held by these adherents of market dominance and whether that focus is likely to be more on civil and political rights than ESR. The CESCR has declared that developments associated with globalisation have not been 'necessarily incompatible with the principles of the ICESCR or with the ongoing obligations of governments' but its view of globalisation is not, however, without concern. It has stated that without additional policies by member States, globalisation risks downgrading the central place of human rights as given in UN instruments and has called for the maintenance of social protection and for the expansion of the scope of implemented human rights (CESCR 1998a, 49, 50).

Neoliberalism emerged as the dominant economic ideology influencing the political program in Anglo-American countries from the early 1970s

and by the 1990s through what became known as the 'Washington Consensus'. It has become a hegemonic form of thought and 'has become incorporated into the common-sense way many of us interpret, live in and understand the world' (Harvey 2005, 3) with the additional problem of a widespread belief in its inevitability. These ideas were promoted by powerful forces globally including the US and UK governments as well as the International Monetary Fund (IMF), the World Bank and the WTO (O'Connell 2010, 202–203; Stiglitz 2002, 12).

This ideology seeks to give as free as possible rein to private markets to provide optimal outcomes while minimising the role of government. However, market systems must depend on the rule of law and cannot regulate themselves (Kaufmann 2007, 19) and, in many ways, neoliberalism calls for an active state in the service of the market. With regard to the economic and social policy areas addressed in this book, neoliberalism calls for less involvement of the state in areas of social provision (Panitch 2004, 9) though there is a contradiction here with the neoliberal state taking a back seat to simply set the stage for market functions while also being activist so as to create a good business climate (Harvey 2005, 79). With neoliberalism being a 'sort of indomitable quasi-natural process' (Isa 2005, 11) and its adoption as a political 'rationality' for government action focusing on the individual and individual freedom, it should be seen as an 'artifact of particular strategies and modes of regulation rather than the absence of government intervention' (Beeson and Firth 1998, 218; Carney 2005, 158).

Neoliberalism is arguably no longer practised as a coherent approach with its adherents just as likely to use state resources and to regulate to support their particular interests with a tension remaining between the ideas as espoused and the actual practice of those in power (Dennis 2018; Harvey 2005, 19). Ideologically, 'neoliberalism contains within itself a number of different "threads" between the "pure" version premised on the individual and the free market and a more traditional conservative ideology based in family and nation' (Larner 2000, 10; Hall 1988, 52) and we can see these 'threads' at play in Australian economic and social policy-making.

Despite its lack of coherence, neoliberalism retains a dominant influence over the economic debate and continues to be a political project to re-establish the conditions for capital accumulation and to restore the power of economic elites. In Australia, the rhetorical promise of an eventual 'trickle down' continues to be regularly raised by conservative

political parties, usually in relation to business tax cuts and as the rationale for adopting ideas around market-led policy-making. This approach has been incredibly effective in shifting the national debate away from what government policies are ‘right, fair or necessary and towards a permanent conversation about which policies are affordable, efficient and provide people with the right incentives’ (Dennis 2018, 7, 77).

Neoliberalism is a theory of political and economic practices and the state is given the role in seeking to create and preserve neoliberalism’s influence through the promotion of deregulation, privatisation and the withdrawal of the state from many areas of social provision (Harvey 2005, 3). As it affects ESR, neoliberal globalisation privileges private interests over public ones. At its most extreme, it seeks the privatisation of basic social services making them available to consumers as distinct from being an individual’s entitlement (O’Connell 2010, 209) while emphasising the significance of contractual relations in the marketplace. Privatisation has been an important aspect of the application of neoliberal ideas to Australian public policy and we can see its direct influence in health, housing and social security policies, three of the four ESR studied in this book. It is a hallmark of the withdrawal of the state from certain activities traditionally conducted by state agencies and this may involve the transfer of ownership or simply the removal of public authorities from the operation of an institution or service even if the state retains ownership. With liberalisation and deregulation, privatisation has meant that such activities are being increasingly regulated by the market. The role of the state becomes one of facilitating the involvement of private actors in delivering what were once conceived as solely public goods.

Privatisation has followed from processes of liberalisation and deregulation and has led to the removal of tools for democratic influence across policy areas (Wahl 2011, 78) if not actually taking decision-making either partly or wholly out of the democratic realm. As a recent inquiry by Australian civil society groups and trade unions found, discussion about privatisation has become ‘technocratic, inaccessible and opaque’ and there is a lack of meaningful consultation with stakeholders with vital information unavailable due to ‘commercial in confidence’ provisions (PSI et al. 2018, 11–12). In covering a wide range of public policy areas including hospitals, aged care, disability and child care, the inquiry concluded that privatisation as an approach to neoliberalism ‘purposefully obfuscates the role of government’ (PSI et al. 2018, 92). At the same time, it was seen as

negatively impacting the delivery of services for some of the most vulnerable people including women, Indigenous people, people with long-term health problems, the elderly and the disabled.

International law is neutral on privatisation as it is about the nature of the governing system,¹⁹ though international treaties make it clear that the state still holds the ultimate responsibility to guarantee human rights, as emphasised by The Maastricht Guidelines (1998, 692 para 2). States are obliged under international law to have a certain level of infrastructure if they are to fulfil their rights obligations and as to their economic, social and cultural rights obligations, are expected to create the conditions to empower people to lift themselves out of poverty (Nowak 2017, 2). ESR such as health care and social security are positive rights that call for a redistribution of resources by the state and, referencing the state's duty to protect under Article 2 of the ICESCR,²⁰ must rely on the state. To fulfil this duty where service delivery has been even partially privatised, the state is expected to be effectively reconfigured to retain an important role in ensuring democratic oversight. Equally, Article 2(1) does not allow retrogressive measures that would undermine ESR as a result of the privatisation of certain state functions. This begs the question of what instruments need to be developed by the state to oversee what happens when service delivery is privatised (De Feyter and Isa 2005, 3) given the fact that its obligation to protect thereby becomes even more important (Chirwa 2016, 407, 410).

With all Australian governing parties believing that globalisation is both occurring and inevitable, the Australian state over recent decades has become both the promoter and respondent to globalisation and embraced neoliberalism. Early on in this period the national policy apparatus was effectively captured by neoliberal ideology so that public policy was reduced to 'a narrowly conceived ideology of maximum feasible market and business penetration into as many areas of the nation's life as possible' (Pusey 2010, 135). Economists took centre stage in the public sector and economists, either imbued with the neoliberal philosophy or seemingly presenting no resistance to it, soon began to dominate debates across all program areas, including the social policy areas so critical to Australia's position on the realisation of ESR.²¹

The Hawke and Keating Labor governments followed by the Howard Coalition government adopted this approach which meant that Australia had governments for 25 years relatively firmly ensconced in the neoliberal camps, despite some policy departures such as Labor's Medicare and

labour market regulation. Even the Rudd and Gillard Labor governments, when faced with the Global Financial Crisis (GFC) of 2008 and having resorted to some Keynesian ‘pump-priming’, were still firmly identified within the neoliberal camp in terms of their general economic policy approach (Johnson 2011, 566–567). The GFC, where Australia joined other governments in guaranteeing the viability of major financial institutions, was thought by some to have ushered in a period of greater state regulation. While the GFC was momentarily considered to be a problem *of* neoliberalism, it soon became one *for* neoliberalism and it was not long before neoliberalism reasserted itself as the dominant political and economic discourse in Australia as elsewhere in the developed world (Crouch 2011). The economic and social policy focus of the Coalition governments of 1996–2007 and from 2013 have been more avowedly on individualism, free enterprise and against state intervention and the welfare state. Coalition governments, and particularly the dominant Liberal party, have always been more comfortable with neoliberal policies than Labor and, having spent lengthy periods in office, has set much of the policy context.

It may not be entirely accurate to describe Australia as one of the ‘heartlands of neoliberalism’, as Jessop describes it, with an austerity strategy effectively subordinating the polity to the ‘imperatives’ of globalisation as construed in neoliberal discourse’ (Jessop 2016, 416). Yet, neoliberalism has remained the dominant policy discourse for three decades with the institutionalisation of rules by the state to favour market competition and privatisation and away from being an interventionist welfare state, effectively placing various forms of state regulation and/or governance on the defensive. Most economic and social policy areas involve a shared jurisdiction between federal and state governments. While state governments have variously been influenced by neoliberal ideas and fiscally attracted by privatisation and private/public partnerships, their relative closeness to their communities and their constitutional responsibilities have made them more politically sensitive to moving too far away from state intervention. As well, there is no question that ‘where state governments are not dependant on the federal finances their capacity for innovation and experimentation in fields that matter, remains alive’ (Bongiorno 2018, 3).

As addressed in this book, the realisation of particular ESR has been challenged by neoliberal ideas having percolated through the Australia’s institutional structure. As to the right to health, this has been undermined

by the rise of co-payments and out-of-pocket expenses for patients seeking primary health care, the privatisation of health through rebates supporting private health insurance and the growth of private hospitals. Support for trade liberalisation agreements have encouraged patent holders to block the development and availability of cheaper generic drugs as well as technology transfer. As to the right to housing, the state's failure to properly regulate the rental market, the reduction in social housing and the failure to engage seriously with the homelessness problem are all examples of a diminution of the state's responsibility with economic imperatives applied over social ones.

As to labour rights, be they the right to work or rights at work, we see globalisation being used as something of an ideological cover for breaches of international labour standards that Australia ratified while, in the past three decades, the labour laws of both major parties have, to varying extents, included the infringement of the freedom of association and restrictions on both the ability to bargain for improvements in wages and conditions and the right to strike. The right to social security has seen an emphasis on individual responsibility and behaviour for a person's well-being, tying benefits to workforce participation and with the social safety net reduced to a bare minimum in favour of a system emphasizing personal responsibility. Together with the contracting out of service delivery, there has been increasing reliance on private-public partnerships allowing private corporations to strongly influence, if not determine, public policies.

1.4 AUSTRALIA'S INSTITUTIONAL FRAMEWORK FOR PROTECTING RIGHTS

1.4.1 *Australia's Liberal Democracy and Economic and Social Rights*

While the CESCR says the ICESCR is neutral as to the political and economic systems within States Parties and focuses on the outcomes as to rights rather than the governing process, it does presume that the form of government is democratic. This does not take us very far and we should not be too confident in our predictions and should recognise the sobering thought that for even each democratic state, it is as much about the stressful relationship between human rights and sovereign power as it is about whether a democracy is implementing human rights (Gearty

2008, 304). The CESCR has admitted that being a democracy is not a sufficient condition for the realisation of these rights²² though it can be said that a democratic form of governance may be a necessary condition in that in a democracy people are, for example, more likely to gain information about the effects of economic policies (Beetham 1995, 49). In a democracy, the people are more likely to be given the capabilities to engage and participate in matters that affect them so it could be argued that ESR and democracy (in a holistic sense) work in a symbiotic way to bring about effective participation to enable people to realise their ESR.²³

There is something of a mutual dependency between ESR and democracy as a 'long-term denial of such rights undermines the basic tenets of political equality in a democracy and the viability of effective democratic institutions' (Beetham 1999, 114). Liberal democracies, as they have developed, are generally understood to require both institutions of private property and free exchange. Indeed, from a capability-based perspective, social rights could in fact perform a primary function in a liberal market economy of providing the conditions for substantive market access for individuals thereby 'promoting individual freedom but also enhancing the benefits to society of the mobilization, through the market, of economic resources' (Deakin 2006, 60). A broader conception of a democracy, however, would require it to be judged not just by adherence to civil and political rights but also by economic and social ones and compliance with these rights requires yet another level of state regulation (Beetham 1999, 102).

Australia is a developed liberal democracy where basic freedoms and the rule of law are respected and usually observed but for many of the country's political leaders, this is both the beginning and end of their engagement with human rights. As a liberal rather than a social democracy, the country's emphasis has been upon the creation of formal institutions to promote democracy and one where due process and procedure is seen by political decision-makers as about all that is necessary. While more conducive of human rights than a mere 'electoral democracy' (Donnelly 1999, p. 621), the liberal democracy's focus on civil and political rights reveals a minimalist form of democracy that arguably acts to reinforce unequal power relations and ensures economic and social concerns will not be central (Burchill 2007, 362). Australia can be classified as a 'low intensity democracy' that is focused on having 'juridical equality and the constitutional protection of civil and political rights, representative government and a market economy based on private

property rights' (Marks 2000, 63). It accords with a model of a liberal democracy that does not seek to promote a rights-based culture or aid social and economic empowerment or transformation but, at best, offers limited changes to civil and political rights and even less for economic and social reform (Evans 2001, 630).

There is no denying the importance of civil and political rights to the continued existence of a democracy and the privileging of civil and political rights by a liberal democracy can, in fact, serve to support ESR. CESCR has considered that the realisation of economic, social and cultural rights can follow from the achievement of civil and political rights (CESCR 1992, 82–83) and, in Australia, court cases have been brought using the two subnational bills of rights which, while based on civil and political rights, have helped to advance ESR. However, to be able to exercise CPR, individuals within a democracy need to be alive and capable of exercising these rights and this requires 'both physical security and access to the necessities of life: to the means of subsistence, shelter, clean water, sanitation and basic health care' (Shue 1980).

International institutions have developed core minimum standards for ESR as they have for other rights as well as indicators as to what action constitutes implementation. However, these human rights standards do remain decontextualized normative instruments given that the process by which they are made at international law is conducive to their being 'abstract and open-textured, leaving room for widely different interpretations' (Galligan and Sandler 2004, 39). While Australia has, almost ritualistically, declared its support for the universality and indivisibility of these different sets of rights, the history of its recognition and enforcement of these rights reveals a different story. Australia's human rights protective regime has been described as a patchwork of measures (Galligan 1994, 57) and its variable adherence to standards was revealed in two recent UN human rights peer reviews (HRC 2009, 2016).²⁴ It continues to appear as a country which assumes that 'endorsing ESR is a matter for foreign, rather than domestic, consumption' (Alston 1997, 189). In its response to the most recent UN review of Australia's compliance with human rights standards, the current federal Coalition government left the Committee in no doubt that its focus was on civil and political rights and made only brief reference to certain areas of ESR (HRC 2015, 2, parts D and E). The government's responses to the fifth report on the ICESCR,²⁵ tended to gloss over some particularly contentious areas of Australian policy, such as workers' and asylum seeker

rights, and was criticised for failing to engage constructively or provide a substantive report on measures taken to implement Covenant rights (NACLC and KLC 2017, 8).

1.4.2 *The Institutional Framework*

The Australian Constitution, unlike its US counterpart, was not meant to be a rights-protecting instrument. It addresses the rights of the federating states more than those of the Australian people²⁶ and contains only a few implicit and explicit rights²⁷ with the only ESR being the economic ones of property compensation and the freedom of interstate trade. The constitutional rights relating principally to CPR rather than ESR appear in the document for pragmatic reasons, having played little part in the development of the Australian federation (O'Neill et al. 2004, 51). A prominent jurist has held that those constitutional guarantees that are expressly given should be construed and applied, as far as is practicable, to promote the human rights to which they refer,²⁸ but this has not been a view widely shared amongst Australia's judiciary. Constitutional protection of rights has generally been described as piecemeal without a coherent framework (Castan 2013, 84) and without being developed as a constitutional issue, the protection of rights has instead become dependent on institutional arrangements (Saunders 2011, 257). Australia is not a member of any regional grouping with human rights instruments and so is not under any obligations as to rights at that supranational level while, at the subnational level, state constitutions also provide few human rights protections.

The High Court's interpretation of the Constitution both generally and with respect to rights has chiefly been one of 'strict legalism and judicial restraint' (O'Neill et al. 2004, 93) with deference to the national parliament as the forum for deciding rights issues. However, there are a few instances where the court's interpretation has resulted in the creation of rights and a rare example is the *Mabo* case²⁹ with its creation of indigenous land rights. The High Court has also given some credence to the view that there were implied rights in the Constitution with there being a freedom of political expression in relation to public and political affairs. However, the court did not consider a personal right to freedom of communication to have been implied from the nature of the Australian democracy.³⁰ The Constitution and its interpretations to date provide little comfort for anyone seeking to ascribe to it an important role in

any Australian protective rights regime and the constitutional contribution can be summed up as an 'ad hoc scheme in search of coherence' (Williams 2002, 48).

Australia accepts international law obligations by signing and ratifying international treaties but this has no substantial impact upon domestic law until a treaty is reflected in domestic law (Charlesworth 1995, 131–132)³¹ and this effectively means the validity of any domestic legislation in Australia is not dependent on its consistency with international law. (Piotrowicz and Kaye 2000, 200). Important aspects or sub-rights of the ESR discussed in this book have also acquired the status of customary international law imposing obligations upon the state. Their effect at international law results from their establishment through state practice and through courts treating their norms as legally binding.³² That said, this status does not enhance the enforceability of any such rights or sub-rights under Australian domestic law in the absence of applicable domestic legislation.

The Constitution does not grant power to the federal government to legislate in the human rights area. However, Section 51 (xxix) vests the federal government with the power to legislate with respect to 'external affairs' and the High Court has interpreted this to include the power to legislate to give effect to the international obligations, including rights obligations, assumed under treaties.³³ Again, these international treaties or instruments do not have direct legal effect and create binding obligations without domestic legislation. The High Court in *Teoh*³⁴ held that treaty ratification may give rise to a 'legitimate expectation' that decision-makers would act in accordance with an international treaty, but both major political parties rejected this at the time and, in the *Lam* case,³⁵ the court returned to its more traditional approach. So, this strict interpretation of Australia as a dualist state requiring domestic legislation to give effect to obligations arising from international rights instruments also means that any rights arising under an international treaty, to which Australia is a signatory, cannot be successfully asserted in an Australian court without such legislation.

While it is the federal government that is bound to implement Australia's international human rights obligations, much of the constitutional power to actually realise human rights, in the area of ESR as much as CPR, lies with the state and territory governments. The federal government has the constitutional power to ensure that the states and territories do fully implement the human rights obligations to which Australia is a