International Law and Australian Federalism edited by **Brian Operskin and Donald R Rothwell** [Melbourne, Melbourne University Press, 1997, xviii + 379 pages, ISBN 0522 846 858]

This is a collection of essays by prominent Australian international lawyers. It explains the relationship between international law and domestic law. This of course is more complicated in our federation than in a unitary state, such as New Zealand.

It has become an increasingly common strategy to challenge controversial government proposals on the grounds that they would breach international law. This is understandable. In an increasingly secular and humanist society, there is still a need to refer to some higher authority. The public could thus assume that international law is morally or legally superior to Australian law. But international law is not necessarily of greater moral value than the laws of the Australian parliament. It was after all international law which justified European colonialism, the doctrine of *terra nullius* and slavery. It was British legislation which outlawed slavery long before international law caught up. And international law is not "superior" to Australian law - Australian legislation can overrule it.

The way Australia enters into treaties is often criticised. It is said there is a "democratic deficit" in the process. In Australia, the federal government exercising the royal prerogative, makes treaties without any reference to parliament. In the United States Senate approval by a two-thirds majority is necessary. Under Prime Minister Menzies, parliament was at least treated courteously. Treaties were tabled in parliament before ratification. Since then Parliament has been treated poorly. In more recent years, treaties were even tabled in bulk every six months. The Howard federal government has now adopted a more transparent treaty making process with parliamentary and also state government scrutiny before ratification.

The international legal system is separate from the Australian legal system. But international law can be a source of Australian law. The classical view is that treaties have no impact on Australian law until adopted by local legislation. There are now over 920 treaties under which Australia has assumed international legal obligations and made us subject to international scrutiny. These can have an impact inside Australia, even in the absence of legislation. Three examples will suffice.

First, as the doyen of Australia's international lawyers, Professor Ivan Shearer observes, judges, many of whom "escaped a compulsory immersion in international law as part of their legal education" have shown a remarkable ability to adjust to the importance of international law. They have indicated a willingness to invoke international law in the development of the common law. Perhaps most spectacularly in *Mabo v Queensland (No 2)*[1] and in the implied rights cases. (They have since retreated in finding rights implied in the constitution).

The second example was in *Minister of State for Immigration and Ethnic Affairs v Teoh.*[2] There the High Court held that administrators making a decision must take into account any relevant ratified treaty - even where these have not been enacted into Australian law! If parliament wishes, it can still reverse this. In fact, the Keating federal government introduced legislation to achieve this result, but the legislation lapsed with the election.

Perhaps the most far reaching development has been in constitutional law. Using the external relations power, and within the terms of ratified treaties, the High Court has ruled that the Commonwealth can legislate within areas previously considered the preserve of the states. This is potentially the most significant change to the constitution in the history of federation. Professor Ben Rimmer argues that the power is more latent than exercised. The Commonwealth can "cherrypick" among its treaties to find a way to bring a recalcitrant state to heal. As it did in *Toonen v Australia*[3] in relation to Tasmania's sodomy law. The method used there, not necessarily the result, appalls those who believe that Australians chose a federal structure and that any change to this should be approved in a referendum. I am not as sanguine as the authors are about the constraints on the Commonwealth in using this power. Treaty provisions are often extremely broad, as was the one relied on in the *Toonen case*, and the Commonwealth's discretion to legislate or not to legislate can also be very wide.

Since 1920, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd,*[4] the High Court has effectively changed the power balance in favour of the federal government. Attempts by various governments to make

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1 (1992) 175 Commonwealth Law Reports.
2 (1995) 128 Australian Law Reports 353.
3 Communication No 488/1992, UN Doc CCPR/C/50/D/188/1992, 4 April 1994.
4 (1920) 28 Commonwealth Law Reports 129.

judicial appointments to counter this have more often than not failed. They made the mistake of thinking that a conservative barrister would make a conservative, and therefore federalist, judge. Not so. What is needed now are some judges who are committed intellectually to federalism. There is not much point looking at what a lawyer may have argued in court or for whom a lawyer may have acted. Lawyers are paid to do precisely that. With new vacancies coming up the government should inject a new intellectual federalism into the court. And it should not be assumed that federalism equals conservatism. Competitive federalism can demonstrate by trial that some policies are better that others. The Dunstan government (South Australia) on liberal social attitudes, the Bjelke-Peterson government (Queensland) on death duties, and the Kennett government (Victoria) on sound financial administration are examples.

It has to be admitted that our methods of judicial selection is unregulated, secret and far from perfect. It is also vastly superior to the methods used in continental Europe or the United States. The result is seen in the general impartiality, incorruptibility and intellectual quality of the bench, however irritated we may be by individual decisions. So why then do we allow quasi judicial power to a body such as the UN Human Rights Committee? It is authorised to give opinions on complaints brought by individuals. No doubt it has several worthy members, but some members are the chosen nominees of states whose own human rights records are not up to ours.

In summary, this book will greatly assist lawyers and members of the public in, for example, understanding the way in which international law impacts on domestic issues, as had occurred in *Wik Peoples v State of Queensland and Others; Thayorre People v State of Queensland and Others.*[5] They will first need to understand why some legislative remedy to the High Court's decision was necessary, and what the government, opposition and cross benches are proposing. Buying and wearing ribbons are no substitutes for knowledge.

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[5] (1996) 141 Australian Law Reports 129.