Index

Aboriginal persons see Indigenous persons
Abuse of powers
  child sexual, moral panic over, 256
  powers, of, by police, 207
  remedies, 208-12
Accountability, new forms of, 283-4
Acquisition
  just terms, of property on, 166-7
Administrative law
  environmental legislation, shift from constitutional law to, 101-2
Aesthetics, criminological, 22-4
Affect, concept of, 22
Amendment
  Constitutional see Amendment of Australian Constitution
  United States Constitution, and Article V, 4
Amendment of Australian Constitution
  accrual of Commonwealth power, proposed amendments involving, 19
  amendment provision, 22
    balance of rigidity and flexibility in drafting, 3
    comparative federal models, 4
    convention model, proposed, 9, 10, 19
    framers of Constitution and, 3-17
    Melbourne Convention, 17
    Winterton, view of reach of s 128, 20
  challenge facing advocates of, 1
  environment, amendment to provide legislative power in respect of, 103
  framers of Constitution, and amendment provision, 3-17
  history of amendment process, 1
  interests of larger States, protection, as fundamental issue concerning, 9-10, 18
  role of people, as fundamental issue concerning, 9
    Adelaide Convention 1897, 12
Arbitration
  conciliation and see Conciliation and arbitration; Industrial relations
Arendt, Hannah, 253
  domination, view of seductions of, 261
Asylum-seekers see Refugees
Baker, Richard Chaffey, 5
Barton, Edmund, 14
CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT

Batchelor, Lee, 16
Beazley, Mr KE, MHR, 129
Bill of Rights, xxv, 155
Braddon, Edward, 13, 18
Cabinet government
  local interests, effect on representation of, 26
Calwell, Arthur, 130
Canadian approach to constitutional amendment, 7, 18
Chameleon doctrine
  separation of power, approach under, 226
Clark, Andrew Inglis
  drafting text of Constitution, role in, 5
  United States Constitution, view of template provided by, 7
Cockburn, John
  amendment provision
    1891 Convention, contribution to debate at, 10-11
    1897 Convention, contribution to debate at, 13, 19
Common law and native title, 137, 139, 143
Commonwealth
  accrual of power, proposed Constitutional amendments involving, 19
  administrative discretions, , judicial review of discriminatory exercise of, 45
  continued existence, presumption in favour of, 51
  immunity, intergovernmental see Immunity doctrines
  power, High Court's expansive interpretation of, 222
  States, and see Federalism; Immunity doctrines
Communist Party Care, xxxviii-xliv
Conciliation and arbitration
  industrial relations, conferring of power with respect to, 105
Conciliation and Arbitration Act 1904
  enactment, 106
  repeal, 115-16
Constitution
  amendment see Amendment of Australian Constitution
  environment and
    contemporary environmental concerns, adequacy to accommodate, 81-2
    expansion of Commonwealth power sin respect of, 85-8
    historic background, constitutional, 82-3
    limitations on constitutional power, 94-5
  implications, legitimate and illegitimate constitutional, 177, 178
Preamble, liii
  sovereignty for, 19
Constitutional law
  doctrines, principles and interpretations of provisions, as large part of, 251
  theory in, 245-7

Control orders
  Ch III of Commonwealth constitution and, 74
  constitutional validity of legislation providing for, 74-7
  derogating and non-derogating, power in United Kingdom to make, 76
  fundamental human rights, adverse impact on, 61
  Republican, Preamble proposed by George Winterton, 145
  terrorism, as legal weapon to combat, 60

Convention model
  amendment of Australian Constitution, choice between referendums and,
    11, 19

Cooper, William, 129

Cooperative schemes
  environment, use of bilateral arrangements for protection of, 99-100

Corporations power
  industrial relations
    1993 Act, and, 119-20
    1996 Act and, 119-20
  significance to expansion of Commonwealth powers, 118
  Tasmanian Dam case and, 91

Courts
  State, and intergovernmental immunity, 37

Criminal law
  Commonwealth, power to authorise officers to breach State, 42-3
  general legislative power regarding, 55
  servants and agents, criminal liability of Commonwealth, 43
  State, application to commonwealth and instrumentalities, 43

Crown immunity, 24

Deakin, Alfred, 18
  amendment provision
    1891 Convention, contribution to debate at, 8, 10, 11
    1897 Convention, contribution to debate at, 13, 14, 19

Defence power
  characteristics, 56
  High Court’s jurisprudence on, 56-9, 75
  national security, sources of legislative powers to protect, 55
  proportionality test and, 56-7, 77-8
  purpose, and notion of, 56
  use of, 56-9

Detention
  indefinite, of aliens without trial, 70
    Australian system of government, under, 70-3
Detention (cont)
  preventative see Preventative detention
  punitive/non-punitive dichotomy, 71
  unlimited executive, 73

Disability
  out-of-State residents, right to be free of, 158

Discrimination
  governments, validity of legislation discriminating against, 28-9
  legislation, discriminatory
    against governments, validity of, 28-9
    protection of States from Commonwealth laws, as ground for, 34-6
  legislative power, as limitation on, 32
  out-of-State residents, right to be free of, 158
  protection of States from Commonwealth laws, as ground for, 34-6

Dixon, Sir Owen
  implied State immunity, resuscitated doctrine of, 31-4
  judicial implication of intergovernmental immunity, rationalisations for, 26-7

Donaldson, John, 18
  amendment provision, contribution to debate at 1891 Convention on, 11-2

Elkin, Professor AP, 129

Emergency powers
  entrenched, lack of, 55
  Winterton, concern about, 174

Enabling Acts
  passage in participating colonies, 12

Environment
  administrative law, shift of environmental legislation to, 101-2
  concept of, 79-81
  Constitution, Commonwealth, and
    contemporary environmental concerns, adequacy to accommodate, 81-2
      expansion of Commonwealth power in respect of, 85-8
      historic background, constitutional, 82-3
      limitations on constitutional power, 94-5
  cooperative schemes, use of bilateral arrangements for protection of, 99-100
  Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), 96-7
  external affairs power, Commonwealth legislation drawing on, 97-8
  federal balance between Commonwealth and State powers, 102-3, 294-5
  financial powers, Commonwealth legislation drawing on, 98-9
  global problems, adequacy of Constitution to address, 79
  legal regulation of aspects of, 81, 83
  legislation, environmental, and administrative schemes, 95-100
  Murray-Darling catchment area, as Commonwealth matter, 84

304
INDEX

natural and built, distinction between, 80
overseas and interstate trade and commerce power, Commonwealth legislation drawing on, 98
post 1975 commonwealth environmental measures, endorsement of, 89-94
protection and conservation
  Commonwealth power to engage in, 87, 88-94
  concept of, 79
specific legislative power, amendment of Constitution to provide, 103

Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), 96-7

Equal voting power principle, xxv

Evans, Gareth, 157

Executive, 189-221
  Commonwealth executive power, scope of, 190-8
  Crown's prerogative powers, and, 196
  maintenance component of s 61, 191-4
  ouster, legislative, of prerogative powers, 203-9
  reform, 209-10
  section 61, executive power and, 210-11
immunity
  Commonwealth, executive immunity of, 45
  State, and immunity of high level State employees, 37
indefinite preventative detention, power of, 73
legislative and executive, power, separation of, 198-203
supra-constitutional executive power, admission of exercise of, 175

Express rights provisions, 155-72
  application of express rights, 167-70
  Bill of Rights, no distinct, in Constitution, 155
  evaluation of body of case law attaching to, 156
  interstate trade, freedom of, 163-5
  jury trial, right to, 160-1
  just terms, acquisition of property on, 166-7
  out-of-State residents, rights of, 158-9
  political and civil rights, narrow interpretation by High Court, 157
  religion, freedom of, 162-3
  vote, right to, 159-60

External affairs power
  environment, Commonwealth legislation drawing on, 97-8
  national security, sources of legislative powers to protect, 55
  Tasmanian Dam case and, 91-3

Federal principle
  intergovernmental immunity doctrine, advancing through, 23-52

Federalism
  coordinate, concept of, 27-8, 50
  environment, federal balance between Commonwealth and State powers, 102-3
Federalism (cont)
  equal status between levels of government, 46
  Winterton, George, analysis by, 24
Fraser, Simon, 14
Garran, Robert, 20
Gillies, Duncan, 8-9
Gleeson, Chief Justice Murray
  constitution, and, 269-82
    meaning of constitution, 271-74
  legalism, and strict and complete, 269-71
Government
  representative
    capacity of system to adapt, 222
    constitutional provision of system of, 179-81
  responsible, constitutional provision of system of, 179-81
Governor-General
  reserve powers of, 189, 213
    identification, issue of, 213-16
    reforms, proposed, 216-21
    specific powers conferred on by draft Constitution, 211-13
Griffith, Sir Samuel
  amendment provision, contribution to debate at 1891 Convention on, 8, 9, 11
Heydon, Hon J.F
  amendment provision, view of object of, 15-16
Higgins, HB, 18-19, 20
High Court
  autonomy for units in federal system, development of formula concerning, 24, 51
  Commonwealth power, expansive interpretation of, 222
  defence power, jurisprudence on, 56-9, 75
  interpretation, incremental change to Constitution by, 1
  national security, balancing of protection and fundamental liberties, 56
Holder, Frederick, 15, 17
Holt, Prime Minister Harold, 130
Howe, James, 14
Immunity doctrines
  absolute implied intergovernmental immunity, rejection of, 50
  Commonwealth immunity, scope of, 40-50
    binding effect of State laws, and, 41
    criminal law, power to authorise officers to breach State, 42-3
    implied immunities, 41
    tax, State, immunity from, 45
courts, in respect of State, 37
development of current, 29-50
discriminatory legislation
against governments, validity of, 28-9
protection of States from Commonwealth laws, as ground for, 34-6
duties, and imposition of, 46-50
early, and its rejection, 29-31
enforcement of laws against States, 38
executive
Commonwealth, executive immunity of, 45
State, and immunity of high level State employees, 37
express immunities, Constitutional provision of, 24
federal legislation binding on States, examples of, 33
financial assistance, and protection of States against conditions on, 39
implied State immunity, resuscitated doctrine of, 31-4
intergovernmental immunity doctrine, advancing federal principle through, 23-52
processes of State governments, protection by, 37
summary of modern Australian, 34
judicial implication of, rationalisations for, 26-9
legislatures, State
Commonwealth, immunity from laws of, 38
each other, implied immunities from legislation passed by, 39-40
members of parliament, State, immunity of, 52
officials, and conferral of powers on, 46-50
parliamentary immunity, Commonwealth, 45
Imperial Parliament
abuse of powers, as political remedy for, 25
amendment of Australian Constitution, power in respect of, 8
sovereignty for Australian Constitution and, 19
Implied rights, 173-88
constitutional implications, legitimate and illegitimate, 177, 178
extra-constitutional notions, use to justify, 175
implied powers, and, 174
political communication, implied guarantee of freedom of, 178, 182-4
means and ends, balancing, 184-8
Indigenous Australians
Bark Petition, presentation to Commonwealth Parliament, 129
country, responsibility for and ownership of, 143
custodial title to land, constitutional history in respect of, 126-54
pre-history, 126-8
native title see Native title
race power, 128-30
amendment by referendum, 130
protection of Aboriginal interests, and, 128
referendum of 1967 concerning, 19
sovereignties, co-existing indigenous and non-indigenous, 143
Indigenous Australians (cont)
Tasmanian Dam case and, special laws for people of Aboriginal race, 93 treaties with, 142-5

Industrial relations
Commonwealth power over, 105-125
expanding, in 1920s and 1930s, 111-14
High Court, continued expansion in 1980s, 116-17
new sources of power, 117-18
referendum, evolution without, 120-5
reservations on using, in 1900s, 106-9
World War II, in 1940s and 1950s, 114-15

Conciliation and Arbitration Act 1904
enactment, 106
repeal, 115-16
conciliation and arbitration, conferring of power with respect to, 105
corporations power
1993 Act, and, 119-20
1996 Act and, 119-20
significance to expansion of Commonwealth powers, 118

Court of Conciliation and Arbitration, 107
awards, 106

external affairs power
1993 Act, and, 118
significance to expansion of Commonwealth powers, 118

federal system, coverage of employees by, 106
1980s, 115-16

industrial disputes, construction of phrase, 105
industrial matters
requirement for dispute to be about, 106
what constituted, in 2000s, 117

Industrial Relations Act 1988, enactment, 115
referenda, failed, in respect of, 109-11
State systems, coverage of employees by, 106
1980s, 115-16

Interpretation
adoption of theory of, 284-5, 284
commom law freedoms, to preserve fundamental, 275

connotation and denotation, distinction, 250, 253, 265
utility of meaning/application distinction, 255-7
core meaning of term, identifying, 260
flexible, of constitutions, 251-2
founders' intentions, relevance to constitutional, 247-68
Gleeson, Chief Justice, and constitutional, 269-82
meaning of constitution, 271-74
High Court, by, 262-8, 285-6
judicial, and constitutional change, 284
INDEX

originalism, as approach to, 236-7
   moderate originalism, 247-53, 286-92
   objections, recent, to originalist theory, 253-62
progressive, 222-44
social consequences, relevance of, 277-81

Interstate trade
   freedom of, 163-5
   proportionality, application to free trade guarantee, 169

Isaacs, Isaac
   amendment provision, contribution to debate at 1897 Convention on, 13
   franchise of women, 14
   diminishment of number of representatives, view of, 15

Judicial appointment, xxiv

Judicial power
   exercise of federal, and right to trial by jury, 161
   Interstate Commission, whether vested in, 254
   separation of powers see Separation of power

Judicial review, 175-6
   interpretation, judicial, and constitutional change, 284
   legitimacy of, 2
   official theory, of judicial interpretation, 23

Jury
   right to trial by, 160-1

Just terms
   acquisition of property on, 166-7

Kerr, Sir John, xxxviii

Kingston, Charles Cameron
   constitutional model produced by, 6-7
   drafting text of Constitution, role in, 5

Law
   State, application by virtue of force of Commonwealth law, 43-4

Legalism
   strict and complete
      Gleeson, Chief Justice Murray and, 269-71
      Mason, view of Sir Anthony, 269

Lewis, Neil
   amendment provision, contribution to debate at 1897 Convention on, 14

Mabo litigation, 134-40

Mason, Sir Anthony
   constitutional advancement, reflections on, 283-99
   legalism, view of strict and complete, 269

McMillan, William, 14
CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT

Menzies, Prime Minister, 130
Munro, James, 9, 10
Murray-Darling catchment area
  Commonwealth matter, as, 84
  rivers, right to reasonable use of water of, 170-2

National Native Title Tribunal
  establishment of, 146
  management of determination applications, development of systems to
    improve, 153

Nationhood power
  implied, *Tasmanian Dam case* and, 94

Native title, 299
  common law rules underpinning recognition of, 137, 139, 143
  definition, statutory, 149
  indigenous customary title to land, constitutional history in respect of, 126-54
    pre-history, 126-8
  land title agreements, acceptance of indigenous, 154
  *Mabo* litigation, 134-40
National Native Title Tribunal
  establishment of, 146
  management of determination applications, development of systems to
    improve, 153
*Native Title Act 1993 (Cth)*, 145-53
  amendments, 153
  connection requirement in, 150-1
  consent determinations, 151-52
  determination, requirements for, 149-50
  litigation concerning, 146-8
  persisting beneficial purpose, 148-9
*Racial Discrimination Act 1975*, and, 133, 136
  recognition, extinguishment and, 140-2
  statutory land rights, move to, 130-3
*Native Title Act 1993 (Cth)*, 145-53
  amendments, 153
  connection requirement in, 150-1
  consent determinations, 151-52
  determination, requirements for, 149-50
  litigation concerning, 146-8
  persisting beneficial purpose, 148-9

Necessity, principle of, 174

Originalism
  interpretation, as approach to, 236-7
  moderate originalism, 247-53, 286-92
  objections, recent, to originalist theory, 253-62
INDEX

Out-of-State residents
   rights of, 158-9

Overseas and interstate trade and commerce power
   environment, Commonwealth legislation drawing on, 98

Playford, Sir Thomas
   amendment provision, contribution to debate at 1891 Convention on, 8, 10

Political communication
   implied guarantee of freedom of, 178, 182-4
   legitimacy of, 292-3
   means and ends, balancing, 184-8

Preamble, liii

Preventative detention
   fundamental human rights, adverse impact on, 61
   terrorism, as legal weapon to combat, 60
   war on terror, and, 66-70
   wartime, judiciary and, 62-6

Proportionality
   approach to analysis of, 168
   defence power, proportionality test and, 56-7, 77-8
   free trade guarantee, application to, 169

Race power, 128-30
   amendment by referendum, 130
   protection of Aboriginal interests, and, 128

Racial Discrimination Act 1975, 133, 136

Recognition, 142-5
   common law rules of, limits on, 142

Reference power
   national security, sources of legislative powers to protect, 55

Referendums
   conservatism, innate, and likely result of future, 6
   convention model, choice between referendums and, 11, 19
   failed, 2
   industrial relation, failed, in respect of, 109-11
   legitimacy attached to process, 19
   progress, as bulwark against constitutional, 6
   race power, amendment by, 130
   Swiss Constitution, use of, 5

Religion, freedom of, 162-3

Republic
   advent of, 216-21
   debate about, xxix-xxxvii
   referendum, 1999, xxxiv
   Winterton, George, and quest for Australian, xxiv, 20, 283
Reserved powers of States, doctrine of, 24, 25

Responsible government
  abuse of powers, as political remedy for, 25-6

Rights
  express see Express rights provisions
  implied, 173-88

Rivers, right to reasonable use of water of, 170-2

Rule of law
  Winterton, view of constitutionalism and, 173-4

Russell, Captain William, 8

Security
  freedom, and, 53-6, 78
  tension between, historical perspective of, 59-60, 297-9
  national, sources of legislative powers to protect, 55
  salus populi suprema lex esto, reliance by government on maxim, 53
  statutory powers, and spectrum of special, 60-1
  threats to, response of democracy to, 53

Senate elections
  abuse of powers, States’ house as political remedy for, 25
  elections, amendment of s 13 of Constitution by referendum, 19

Separation of power, 295-7
  chameleon doctrine, approach under, 226
  first limb of doctrine
    changing circumstances, application in, 229-30
    establishment of, 223-4
  flexible application of principle, 222
    case for maintaining, 234-9
    future of, 239-44
    impact of, 227-30
  historical development of separation of federal judicial power, 223-7
  progressive interpretation, separation doctrine’s capacity for, 223
  rights protection and, 239-44
  second limb of doctrine, interpretative history, 224-4
  Thomas v Mowbray, 239-44, 297
    correctly decided, whether, 232-2
    decision in, 230-2

Sovereignty, 142-5
  common law, recognisor of indigenous, 144
  indigenous and non-indigenous, co-existing, 143

State debts
  referendum, amendment of s 105 of Constitution by, 19

States
  Commonwealth, and see Federalism; Immunity doctrines
  continued existence, presumption in favour of, 51
Index

immunity, intergovernmental. See Immunity doctrines
law, application by virtue of force of Commonwealth law, 43-4

Surplus revenue
referendum dealing with, defeat of, 19

Swiss Constitution
model, use by framers of Australian Constitution as, 10
referendum, use of, 5, 10

Tax
State, Commonwealth immunity from, 45

Terrorism
control orders, as legal weapon to combat, 60
definition, proper, 55
preventative detention
legal weapon to combat, as, 60
war on terror, and, 66-70
specific legislative power regarding, 55
statutory powers against terrorist acts, spectrum of special, 60-1
Thomas v Mowbray, 239-44
correctly decided, whether, 232-2
decision in, 230-2

Theory
constitutional law, in, 245-7
originalist, recent objections to, 253-62
interpretation, adoption of theory of, 284-5, 284
Thomas v Mowbray, 239-44
correctly decided, whether, 232-2
decision in, 230-2

Thynne, Andrew, 8

Trade practices, restrictive, 108

Treaties
Australia’s indigenous people, with, 142-5
meaning, 142

Trial by jury, 160-1

Turner, George, 14

United Kingdom
war on terror, and preventative detention in, 66-70

United States Constitution
amendment provision, consideration of Article V, 4
trade and commerce power, xxiii

Vote, right to, 159-60

Water rights, 170-2

Whitlam, Mr EG, 130
government, dismissal of, xxxviii, xliii-xlvi, 189
Winterton, George
Australian constitutional order, view of, 173
comparative constitutional law, xxiii
draft republican Constitution, 216-21
extra-constitutional notions, view of
judicial creativity, as critic of too much, 155
legacy of, 20, 54
necessity, view of principle of, 54
republic, and quest for Australian, 20
Republican Constitution, Preamble proposed by, 145
rule of law, view of constitutionalism and, 173-4

Women
vote secured by, in South Australian, 12, 14

Wood, Richard, 16
Woodward Royal Commission, 131
Work Choices, 119-20