Index

Aboriginal law – see also Native title	definition, 347
citizenship, 312-313	visa cancellation
disadvantage in law, report, 250	ministerial discretion, 348
discrimination	Asylum seekers – see also Detention
racial grounds, 317 reconciliation, 93-94	excise of offshore islands by government regulation, 9-12
rights, jurisprudence	preventing access, 9-12
background, 87-89	protection visa, application for
Administrative law	procedural fairness, 195
Administrative Decisions (Judicial Review) Act (ADJR), restrictions, 202-219	reviewable error, 195 refugee
"administrative" decision,	international definition, 250-251
requirements, 204-209	right to personal liberty, 17-18
commercial decisions, government,	Tampa, MV, 9
208	Bill of Rights
common law development, restrictions	Bill of Rights 1688
on, 202-204, 214	meaning of terms,
decisions under enactment, 207-209	Erglis v Buckley, 250
general principles, 202-204, 216-219	book review – see Book reviews
government power, 209 Governor-General, exclusion, 206	New Zealand – see New Zealand
grounds of review, 203, 214	Book reviews
jurisdictional provisions, 202	Appeal of Internal Review: Law,
Migration Act, decisions, 206-207, 214-216	Administrative Justice and the (Non-) Emergence of Disputes, 242-244
repeal, grounds for, 213-214	Litigating Rights: Perspectives from
Administrative review	Domestic and International Law,
Administrative Appeals Tribunal Act	237-242
proposed reforms, 259	Unity of Public Law, 245-249
Administrative Review Council	Canada
curriculum guideline, 253	native title, 89, 93
Commonwealth Administrative Review	civil rights, 99
Committee (Kerr Committee), 220	Crown liability, 94
notification requirement, 352	reconciliation, 93
principles	self-determination, 99
effect of Refugee and Torture	Supreme Court, 141-142
Convention on	
officers' duties under Migration Act, 74	Children detention – see Detention
RRT error in law, 74	Citizenship
structure, 259	alien, definition, 305-308, 347
Aliens	children's rights, 310-310
Commonwealth power to make laws	Constitution, interpretation in High Court – <i>see</i> Constitution
Shaw v Minister for Immigration, 72	

Citizenship – cont	s 57 and resolution of deadlocks, 71
Gaudron, Justice Mary, interpretation -	free trade
see Gaudron, Justice Mary	s 92, 257
Civil liberties	grants, 257
Cold War, comparison with, 177-178 Communist Party case, 177-178	Gaudron, Justice Mary, interpretation - see Gaudron, Justice Mary
Constitution, protection by, 179-180	interpretation, role of international law
legislation, scrutiny of, 180	High Court debate, 345
Commonwealth powers	judicial review, implications for - see
immunity – see Immunity	Judicial review
limits on uses for Federal purposes, 269- 280	limits on legislative and executive powers ss 52(i), 61 – see Commonwealth
commercial activities, 270	powers
Kangaroo Point case, 274	New Zealand – see New Zealand
land usage, doctrine, 273-274	paper money, definition, 252
Commonwealth Places (Application of	power to go to war, 5
Laws) Act 1970 (Cth), 270 airports, 269-270, 274-275, 278-279	regulation by contract and constitutional principle, 57-62
Constitution, limited by, 270	s 51(xix) and scope of Commonwealth
leases, invalidation, 273-274	power, 72
misuse of land, 273, 276	s 109, inconsistency, 252
relief, 273	State constitutions
scope of incidental power, 273- 274, 277	Attorney-General (WA) v Marquet 182-186
land forming part of site, 277	consequences, 186
ss 52(i), 61, 271-272, 274-275	manner and form limitations, 182- 186
detention, High Court cases, 346-347	Parliament
legislative and executive powers, limit on, 271-273	Constitution, powers or procedure of, 182-184
public places, laws governing, 276	s 106, Ranasinghe principle, 185
public purposes, acquisition for, 270	State laws, 253
compulsory acquisition, 271	statutory guarantees, 256
scope	treaties – see Treaty making
Constitution – <i>see</i> Constitution	Contract
non-citizen, definition, 252	government contracting
relationship between Australia and United Kingdom, 72	corporatisation and free markets, 59-
Constitution	cost-effectiveness, 52-53, 61
citizenship, ss 51(xix), 51(xxvii), 306	mechanisms for scrutiny, 53
civil liberties, protection of, 177-182	regulation by
commercial activities, limitations, 270	applications, 56
comparison of American and Australian	constitutional principle, 57-62
jurisprudence, 34-35	implications for rule of law, 51-70
constitutional change, discussion paper	improving process, 62-67
infringement of individual liberty, 17	r 0 r,

Contract – cont	criteria, 31
allowances for policy	Discrimination
flexibility, 66-67	Canadian Supreme Court, 316
enhanced parliamentary scrutiny, 62-65, 70	Gaudron, Justice Mary, interpretation - see Gaudron, Justice Mary
placing in public domain, 65-66	gender, 318
publication of tendering and procurement	racial grounds, 316-317
rules, 66	Electoral systems
rationale, 55-56	New Zealand – see New Zealand
Courts – see also Tribunals	Norfolk Island – see Norfolk Island
responsibilities, 283-288	Equality – see Discrimination
Cross-border powers	Extradition
investigative powers for law enforcement	Extradition Act 1988 (Cth)
report, 73 multi-jurisdictional law enforcement	jurisdiction, Supreme Court of Victoria, 255
model bills released, 73	Family Court
Criminal law	jurisdiction – see Jurisdiction
fair trial principle	Federal distribution of powers
Gaudron, Justice Mary, contribution to	- see Commonwealth powers
 see Gaudron, Justice Mary 	- see Cross-border powers
witnesses, self-incrimination, 351	Fishing laws
Defence	illegal fishing
Defence Act, proposed amendments to, 7, 190	Australian fisheries laws, enforcement of, 13-16
parliamentary approval of territorial	legal framework, 13-16
limits, 7	illegal, unreported and unregulated
defence force, 7-8 Detention	(IUU), 12
children	international legal framework, 13
0.000	right of hot pursuit, 12-16
Family court, jurisdiction, 255	requirement of continuity, 15
High Court cases, 347 Chu Kheng Lim v Minster for	where must valid pursuit commence?
Immigration, 22-26	Volga and Viarsa 1, 12-16
mandatory detention, 21	Free trade – see Treaty making
detention centres	Freedom of information
negligence action, conditions, 253	Annual Report 2002-2003 tabled, 74-75
executive powers to detain, 19, 346-347, 349	Gaudron, Justice Mary, interpretation - see Gaudron, Justice Mary
Al Masri, 26-29	Freedom of political communication – see
non-citizens and separation of powers, 17-35	Gaudron, Justice Mary
Australian law, 20-29	Gaudron, Justice Mary – see also Constitution
constitutional differences, 34	Australian law, contribution to, 281-282
United States law, 29-34	citizenship, 294-296, 305-313
punitive in effect, 31-35	Gaudron, Justice Mary – cont

alien, definition, 305-306, 347	difference and equality, 339-342
children's rights, 310	inspiration and leadership, 343-344
concept, 311	patronage and merit, 342-343
indigenous rights, 312-313	National Equality of Opportunity
migration, 305-308	Briefing Policy, 343
republicanism, 309-310	work practices, 339
collection of papers, 281-282	Government powers
Constitution	Australia in Iraq, 5-9
constitutional rights, 297-304	exclusive power of executive, 7-8
interpretation, 289-296	proposals for legislative reform, 7
background, 289	Prime Minster's powers, 5
freedom	control of delegated legislation
implied, 301-303, 336	deficiencies in parliamentary scrutiny
movement, of 299	9-12
political communication, of 298-	recommendations, 12
302, 335-336	restriction on retrospective operation,
government, limits on, 301	power to make contracts, 54
reasoning, approach to, 291-296	power to make regulations, 10-11
substance over form, 297-298	gazettal, 10
Territories, 299-303	Governor-General, 10
criminal law, 328-333	regulation by contract, 51-70
fair trial principle, 328-329	High Court of Australia
procedural fairness judgments,	_
329- 333	citizenship, interpretation – see Citizenship
right to silence, 331	Constitution, interpretation – see
democracy, 334-338	Constitution
equality and discrimination, 314-319, 320-327	criminal law
	fair trial principle, 328-333
gender, 318-319	detention, cases, 346-347
race, on grounds of, 317, 320-323 Street v Queensland Bar Association,	discrimination – see Discrimination
315	international law, interpretation, 345
freedom of information, 336-337	judgments
judicial process, consideration of, 284-285	Gaudron, Justice Mary - see
equal justice, 286-287	Gaudron, Justice Mary
impartiality, 286	Human rights
postmodernism, 285	book review – see Book reviews
procedural fairness, 287	Human Rights Act 2004 (ACT), 169-182
judicial responsibility, 283-288	256
justice, 320-327	Human Rights Commission establishment, 175
native title, 322-327	
Mabo case, 323	International Covenant on Civil and Political Rights 1966 (ICCPR).
separation of powers, 335	169
women in the law, 281, 339-344	interpretation, under Territory law,
women in the law, 201, 337-377	172-174

Human rights – cont	administrative action
incompatibility, 174	issue estoppel, 351
limitations, 170-172	common law, book review - see Book
omissions, 175	reviews
scope, 169	Constitutional principles, 187-201
Human Rights and Equal Opportunity	administrative justice, 201
Commission litigation, consent of Attorney-	limitation on power by Parliament, 187-189, 195
General, 180	Migration Act, 191
New Zealand – see New Zealand	privative clause, cases, 188
Immunity	procedural fairness, 192-193, 195-198
Commonwealth legislation	separation of powers, 190, 201
State immunity, 252	statutory construction, limits, 193-195
Individual rights	unreasonableness, 198-201
constitutional guarantees, 73, 256, 350-	High Court Annual Report
351 defamation	increase in constitutional writs and self-represented litigants, 73
extended defence of qualified privilege	natural justice, 259
in, 73	United Kingdom, 209-210
magistrate, 256	Judiciary – see also Courts
political expression, 349	forfeiture provisions, 254
criminality, 74	judicial power, 254-255, 348-349
political parties, registration, 350	judicial process, 284-285
Popovic's case, 256	impartiality, 286
International law – see also United Nations	Magistrates
Australia's obligations under UN Charter,	appointment
6	invalidity, 253
customary international law	conduct
background, 36-37	qualified privilege defence, application
domestic law, relationship with, 43-46	to, 73
in common law, 40-43	Jurisdiction
Pinochet case, 43	extradition – see Extradition
human rights, 37	Family Court
overview, 38-40	welfare or release of children in
effect on New Zealand jurisprudence – see	detention, 255
New Zealand	military tribunals – see Tribunals
Statute of the International Court of	public places, offences in, 255
Justice (ICJ Statute), 38 definition, 38	Legal systems
	foundations, 71, 250-251
treaty making process, Australian – see Treaty making	Legislation
Iraq	scrutiny bodies, 251
power to go to war in Iraq - see War	Local government
Judicial review – see also Administrative	amalgamations, NSW report, 75
law	Marriage
	same-sex relationships

Marriage Amendment Act 2004 (Cth),	civil cases, 108
Migration and La Citizanskin	common law rights, 106
Migration – see also Citizenship	Court of Appeal, considerations, 105
Australia's migration zones	criminal law cases, 107-108
government by regulation, 9-12	enactment, 107
migrant detention – see also Detention	historical background, 103-105
Migration Act	Human Rights Act, 115
ADJR review, 206-207	inconsistencies, 115
limitation of power – see Judicial review	Parliament, relationship with, 117-119
non-citizen, definition, 252	inconsistency, 117
processing of unauthorised arrivals, 9	statutes, interaction with, 108-113
prohibited immigrants, 20-21	Moonen case, 113-114
procedural fairness, 195-198	statutory interpretation, 109, 112-
visa cancellation	113
Ministerial discretion, 378	White Paper proposal, 103-105
Native title	Constitution, 81-85
Canada – see Canada	unwritten, 81
connection with land	electoral system, 121-136
	criteria for effectiveness, 121
De Rose v South Australia, 71	first-past-the-post (FPP), 121-122
Federal Court determination, 345	government, formation of, 123
High Court cases, 321-326	"agree to disagree" provisions, 129
customary laws, recognition of, 323	caretaker conventions, 125
Mabo case, 323-327	coalition agreements, 127-129
New Zealand – see New Zealand	executive, size of, 128
Parliamentary Joint Committee on Native Title and the Aboriginal and	Governor-General, 125-127
Torres Strait Islander Land Fund	negotiations, duration of, 124
extension of operation, 250	representation of community, 133-
power to acquire land, 250	136
reconciliation, 98	scrutiny of, 132-133
Ward native title claim	support agreements, 129-130
final determination, 71	types of, 123-124
Natural justice – see Procedural fairness	legislation, enactment, 130-132
New South Wales	standing orders, 131, 133
Tribunals - see Tribunals, New South	mixed-member proportional (MMP) system, 122-124
Wales Administrative Appeals	Electoral Act 1993, 122
Tribunal (ADT)	reforms to improve effectiveness,
New Zealand	135
Aboriginal rights, 95-102	review of, 136
appeal to Privy Council, abolition, 84	parties, role of, 134
Bill of Rights, 84	party-hopping, 134-135
Bill of Rights Act (BORA), 100, 103	native title, 85
Canadian Charter cases, comparisons with, 107	•

claims resolution, 100	citizenship, 260
fisheries settlements, 101	Ombudsman
Maori Land Court, 101	Victoria – see Victoria
Treaty of Waitangi and indigenous law	Pacific
Bill of Rights, impact upon, 119-	Pacific Plan
120	Pacific Islands forum, 260
Canadian law, similarities with, 93	Parliament
common law doctrine, 93	foreign trade policy, role in formulation
historical background, 89	and scrutiny of, 72
historical claims, 90	legislative function, 251
reconciliation, 94	Prisoners
rights integration, 97-98	unrepresented, criminal appeal
reinstatement of legal aid, 71	oral submissions, 256-257
review of cases, 91-92	Privacy legislation
State Owned Enterprises Act 1986,	Commonwealth v State laws, 252
90	Procedural fairness
treaty principles, 89-95, 102	open justice, principle of, 287
Waitangi Tribunal, 90, 100	Property
public law, 81-161	acquisition
bibliography, 1998-2003, 146-161	forfeiture, 257
historical background, 81-86	Public law
system of government	book review – see Book reviews
historical background, 81-86	contracts between government and private
political parties, 83	sector, implications – see Contract
role of customary international law, 36-50	New Zealand – see New Zealand
approach by courts, 48	Refugee Review Tribunal – see
Supreme Court, 137-145	Administrative review –
appeal courts, 137-138	principles
appellate bar, development of, 144	Refugees – see Asylum seekers
Chief Justice, 144	Republic, Australian
commercial cases, 142-143	Senate report, 345
Court of Appeal, value to, 143-144	Sea
criminal cases, hearing of, 142	law of the sea – see Fishing laws
functions, 138-139	Separation of powers - see also Judicial
judicial appointments, 145	review
leave power, 142	forfeiture provisions, 254
parliamentary sovereignty, impact on, 141-142	Gaudron, Justice Mary, interpretation – see Gaudron, Justice Mary
Privy Council	main objectives, 18
abolition of appeals to, 137	State immunity see – Immunity
commercial cases, 142	State powers
criminal cases, hearing of, 142	Kable doctrine, 347-349
role of, 139-141	Parliament, 347

Norfolk Island

New Zealand - cont

Supreme Court, New Zealand – see New	justice system, relevance to, 225-232
Zealand	Leggatt Report, 236
Terrorism	military
bills relating to, 257	jurisdiction, 349-350
civil liberties, impact on, – see Civil liberties	New South Wales Administrative Appeals Tribunal (ADT), 226-227
classified information ALRC report, 257	Administrative Decisions Tribunal Act 1997 (NSW), 226-229
defence	model tribunal, 226-227
Anti-Terrorism Act 2004 (Cth), 351	processes and jurisdiction, 227-229
Trade practices	rights of review, 230-231
bilateral trade treaties – see Treaty making	set of rules, 226 relationship with other bodies, 229-232
Closer Economic Relations	executive, links with, 230
Australia-New Zealand relations, 258	training, 233-234
Treaty making	Victorian Civil and Administrative
Australian process, 265-280	Tribunal (VCAT), 227-229
bilateral trade treaties, 265	United Kingdom
Australia-United States Free Trade	Human Rights Act, 107, 110, 114
Agreement (AUSFTA), 267	cases prior to, 111
democracy, questions of, 265-267	judicial review - see Judicial review,
executives' accountability to parliament, 267-268	United Kingdom parliamentary sovereignty, 142
international law, relationship with,	Supreme Court, 141
268	United Nations
impact of reforms, 268	legal framework
Joint Standing Committee on Treaties (JSCOT), 265-269	prohibition of use of force, 6
National Interest Analysis (NIA), 265	statutory interpretation, 112
reforms, 265-268	United States
Tribunals	Australia-United States Free Trade
attitudes to	Agreement (AUSFTA) – see
executive, by, 224-225	Treaty making Constitution
legal profession, by, 221-224	
Commonwealth Administrative Appeals	due process clause, case law, 29-34 detention of non-citizens, 29-34
Tribunal, 226	federal Indian law
Commonwealth Administrative Review	
Committee (Kerr Committee),	civil rights, 98
220, 232	tribal courts, 99
complaint-handling processes, 226, 230- 232	Crown liability, 94
	tribal sovereignty, 88
Compliance, 230 Council on Australian Tribunals (COAT),	Victoria
220	extradition
decisions, reporting, 235	jurisdiction – see Extradition
independence, 233	Police Ombudsman, 260
*	

${\bf Victoria}-cont$

Tribunals – see Tribunals – Victorian Civil and Administrative Tribunal (VCAT)

War

power to go to war
Australia
government's power, 5-9
United States
President's powers, 5-6

Women in the law

 $\begin{array}{c} \textbf{Gaudron, Justice Mary, contributions} - \textit{see} \\ \textbf{Gaudron, Justice Mary} \end{array}$