

Index

Aboriginal and Torres Strait Islander Commission (ATSIC), 210, 228, 229, 242-51 abolition, background and reasons for, 246-9 ATSIC Senate Inquiry, 247 focal point of Indigenous advocacy and leadership, as, 243 nature of, 243 position after abolition, 228 rights-based and self-determination focus, 245-6 role and functions, 243-4 Aboriginal Australians. See Aboriginal people Aboriginal evidence, 122-3 Christianisation enabling swearing as witnesses, 637 devaluing of, 646 refusal of, 326, 537, 636 statutory reform admitting, 123, 635, 636-7 Evidence Further Amendment Act (1876), 123 Aboriginal Land Commissioners, 198, 233, 368, 381, 747 Aboriginal land rights, 354-76, 377, 550-1 Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth), 379 Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth), 379 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), 198, 233, 342, 346, 350, 354, 358-367, 379, 380-1, 747-8 Anangu Pitjantjatjara Yankunytjatjara Land Rights Act (1981), 350

background to Aboriginal peoples' land rights in Australia, 358-362 complex history of, 357 costs and benefits of land claims, 372 definition of traditional owner, 360 evidentiary requirements, 359, 363, 372-3 land justice. See land justice persistent claims for return of ancestral lands or reparation for dispossession, 746 recognition and denial of by colonists, 744-5 Yanyuwa land claims. See Yanyuwa land claims Aboriginal law. See First/Indigenous law Aboriginal Legal Service, 747 Aboriginal Medical Service, 534 Aboriginal offenders Aboriginal deaths in custody, 128, 758, 759-60 Royal Commission into Aboriginal Deaths in Custody (1993), 451, 722, 740, 758, 760 Aboriginal Offenders Act Amendment (1893), 129 criminal law and Aboriginal people, 487-8, See Aboriginal offenders Aboriginal people as objects of criminal law, 68 Indigenous custom as reason to mitigate punishment, 30 inter se cases, 25-7, 30, 107, 189, 309, 323, 633-5, 645-6, 647-8 legal deficit accounts used to justify higher levels of state intervention and control, 71-2 rates of incarceration, 629, 650, 741, 759-60



Index

Aboriginal offenders (cont.) criminalisation of Aboriginal people, 7 customary law, and. See First/ Indigenous law settler criminal law, and. See under settler law, First/Indigenous Peoples and Aboriginal people Aboriginality. See Aboriginality alcohol. See alcohol art production. See under copyright painting as form of protest, 716 ceremonies. See ceremonies children. See Indigenous children citizenship. See citizenship civil rights. See civil rights and Indigenous people criminal law, and. See Aboriginal offenders employment. See labour and labour law evidence. See Aboriginal evidence exclusion from constitutional settlement, 155-9 families. See Indigenous families First Nations Regional Dialogues, 158 first petition to a reigning monarch from, 116 governors, and changing relationship with, 110-11, 121 land justice. See land justice land rights. See Aboriginal land rights land use. See land use laws and traditions. See First/ Indigenous law legal status as British subjects, 7, 117, 305, 484, 537-8 legislation, control by, 191-2 mining, and. See mining Mparntwe/Alice Springs, in. See Mparntwe/Alice Springs National Constitutional Convention, and, 158 pastoralism, and. See pastoralism pensions. See economic and social welfare political rights asserting, 746 denial of, 114 protection regimes, and. See protection regimes representation on governance bodies. See Indigenous representation on governance bodies

reserves. See reserves sacred sites. See sacred sites self-government. See First/Indigenous Peoples, self-government, selfdetermination and settler law. See settler law, First/Indigenous Peoples and settler violence, and. See settler-Indigenous violence sovereignty. See Indigenous sovereignty Uluru Statement from the Heart. See Uluru Statement from the Heart wards, as. See Aboriginal wards welfare. See economic and social welfare women. See Indigenous women Aboriginal Protection Boards. See protection regimes Aboriginal Sacred Sites Protection Authority, 198 Aboriginal Tent Embassy, 378, 534-5, 747 Aboriginal wards Aboriginals Ordinance 1918-53 (Cth), 192 acceptable occupations, 710, 711, 715 legal and cultural status of wardship, 709-10 meaning of 'ward', 192 Northern Territory, 546 Police and Police Offenders Amendment Act 1956 (NT), 711 Police and Police Offenders Amendment Act 1957 (NT), 712, 713, 714, 715–16 powers to move wards around Northern Territory, 440 restrictions on freedom of contract, 709, 711-12 restrictions on selling art, 712 taxation, 710 trustee's powers, 712 wards employed under licence entitled to minimum wage, 716 Wards Employment Ordinance 1953 (Cth), 716 Welfare Act 1953 (Cth), 712, 713, 714, 715–16 Welfare Ordinance 1953-60 (Cth), 715-16 Welfare Ordinance 1957 (Cth), 712, 714 Aboriginality community acceptance, 19 descent, 19 protection legislation, definitions of Aboriginality in, 440-1 self-identification, 19, 574 Aboriginals Benefit Account, 381



Index

Aborigines Advancement League, 533 British Empire, and. See British Empire Cold War, and, 292 Aborigines Progressive Association, 7, 378, 515, 528 colonies. See colonies Constitution. See Commonwealth Aborigines Protection Society, 117, 118 Constitution abortion, 550, 612 constitutionalism. See Australian Adams, John, 48-9 Adkins v Adkins, 465-6 constitutionalism adoption, 445-7, 452, 454 courts. See Australian courts Dominion status, 173 Akiba v Commonwealth, 392 Empire, as. See Australia as Empire addiction, 448, 709 Federation. See Federation driving offences, 611 international affairs, and, 288-301 legal regulation of Aboriginal people's international law, and. See international law consumption of alcohol, 192, land law. See land law 546, 759 licences for sale of, 587 new international legal order, and, 291 prohibition of the sale to Aboriginal rapid expansion in population, 119 people, 125 sovereignty. See Australian sovereignty Alice Springs. See Mparntwe/Alice Springs war, in. See World War I; World Amalgamated Society of Engineers v Adelaide War II White Australia policy. See White Australia Steamship Co Ltd, 150-2 Anning v Anning, 661 policy Antarctic Treaty System, 294 Australia Acts (1986), 169, 171, 173, 174, 175, 176, Arrernte, 200 297, 652, 669 jurisdiction over settler development, 9 Australia as Empire, 258-80 Mparntwe/Alice Springs, in. See Australia appointed administering Mparntwe/Alice Springs authority over Nauru and New assimilation, 31, 196, 205, 245, 248, 274, 377, Guinea, 269 Australia as product and agent of Empire, 393, 514 aim of policy, 546 258-9 assimilation and 'exemption', 442 Australian administered islands, 280 Australian Monroeism, 262, 271 assimilationist 'protectionism', 7 attempted assimilation of Aboriginal legal tools of, 259 people of mixed descent into white nineteenth century, 259-65 post-war trusteeship to political Australian society, 496 children removal as assimilation, 437 independence, 272-9 families, and, 443-8 territorial administration, development of, increased Indigenous urbanisation, 269-70, 273 World War I, and, 265-7 and, 747 pathway to equal rights, seen as, 546 Australian Aboriginal Progressive policy of, 443 Association, 378, 524, 761 ending, 535 Australian Aborigines League, 524 promoting assimilation through labour, Australian Antarctic Territory, 280, 300 Australian Capital Territory, 429, 549 710, 715-17 shift from protection to welfare, 515 human rights, 172, 179 asylum seekers, 280, 300 human rights, and, 552 self-governance, 549 attainder, 98, 105 Attorney-General for the Commonwealth v 'Kevin self-governing, 280 statutory leases, 339 and Jennifer', 475-7, 479 Attorney-General of NSW v Brown, 333 Australian constitutionalism, 161-85, See also Austin, John, 165 Federation Australia, 1 American federalism, and, 5, 165-6 British arrival in, 284 authority, 175-8



Index

Australian constitutionalism (cont.) removal of Indigenous children, 443-4 State courts. See under New South Wales; popular sovereignty, and, 175-6 background Van Diemen's Land; South composition of population, 169-70 Australia: Western Australia impact of Australian colonial status on, traditional law and custom, judicial intervention in, 241-2 168-9 Indigenous people, treatment and traditional ownership, 231 position of, 167-8 Australian Law Reform Commission (ALRC) bicameralism, 180-1 'Recognition of Aboriginal Customary Commonwealth Constitution. See Laws', 39, 70 Commonwealth Constitution Aboriginal representation on juries, 616 'claim of right', 70 compliance, 183-4 concepts of constitutionalism, 161-3 definition of native title, recommending Constitution. See Commonwealth changes to, 397 Constitution 'Recognition of Aboriginal Customary constitutions, 170-5 Laws', 31-3 electoral democracy, 170, 178 Australian legal education, 722 influences on, 164-70 arguments for greater engagement with monolegalism, 168 First/Indigenous law, 731 organisation of public power, 178-82 arguments for reform of, 736-9 personal representative of the Crown, Canadian approaches to, 731-6 reserve powers of, 180 history of Indigenous people in legal separation of power, 181-2 education, 727-31 racism, and, 730 removal of British power to legislate for Australian legal traditions, 606-7 Commonwealth matters, 173 rights, protection of, 182 Australian School of Pacific Administration State constitutions, 170-2 (ASOPA), 273 Australian courts Australian sovereignty, 265 Aboriginal evidence. See Aboriginal fragility of, 1 singular sovereignty, 34, 35 evidence Administrative Appeals Tribunal, 547 Australian Union of Women, 529 Australian Aboriginal Fellowship (AAF), Australian Courts Act (1828), 28, 102, 104, 332, 334, 599 compliance with decisions as an aspect of autology, 363 rule of law, 184 female litigants, 100 Bagehot, Walter, 164 first Australian courts, 653-4 Balfour Declaration (1926), 268, 289 High Court of Australia, 660-6 Barunga Statement (1988), 234-5, 253, final court of appeal, as, 183 297 interpreting Constitution, 183-4 Bentham, Jeremy, 42, 101, 165 interpreting state legislation, 183 Black Power movement, 517, 524, 534-5 independence and impartiality, 183 development of Black Power movement in Indigenous sovereignty claims, and. See Australia, 533-4 United States, and, 8 Indigenous sovereignty judicial review. See judicial review Blackstone, Sir William, 45 jurisdiction over Aboriginal people, Commentaries on the Laws of England, 40 courts and tribunals, description of, 41 322 Land and Environment Court, 416, Habeas Corpus Act (1679), 60 husbands and wives, 460 421 land rights, 231-6 juries, 48 native title, development of case law and, magistrates' courts, 42 391-4 marriage, 480 Privy Council, and. See Privy Council Parliamentary sovereignty, 51



Index

public wrongs, courts dealing with, 41–2	responsible government, demands for,
settled colonies, 164	II3, II5
terra nullius, 332	universities offering courses on Indigenous
Blomley v Ryan, 662	law. See under Australian legal
Booth v Bosworth, 424	education
Boston v Laycock, 93	Cape Barren Island Reserve Act (1912), 440
Bourhill v Young, 665	ceremonial grounds, 198–200
Bourke v Butterfield & Lewis Ltd, 665	ceremonies, 78, 80, 81, 229, 256
Bretton Woods, 291	ceremonies of Indigenous people, 80, 363,
British Empire, 1, 258	505, 716
Dominions, 173	Arrernte, 188
demands for greater autonomy, 266	jurisdiction enacted as, 193–4
empire as federation, 287–8, 289	ceremonial grounds, dam construction
external affairs, importance of powers	on, 200
over, 263	ceremonial ownership and
protection offices, 485	responsibility, 366
quasi-federal arrangements in, 5	ceremonies and native title, 392
British North America Act (1867), 139	'detribalisation', 190
British race nationalism, 3	Kurduju, 83
British race patriotism, 653	reservations in pastoral leases for
Australian judicial commitment to, 668	ceremonial activities, 336
demise in Australia, 653	Yanyuwa, 366, 368
legal traditions of, 667	Chartist movement, 540–1
one common law, 652	Cherokee Nation v Georgia, 26, 235
British sovereignty, 21, 23, 106-7, 167	children
claims to rights to land flowing from, 34	adoption. See adoption
non-justiciable, 34	child custody, 471, 472–5
Brodie v Singleton Shire Council, 657	Family Law Amendment (Shared
Bryce, James, 165–6	Parental Responsibility) Act
Budj Bim Cultural Landscape. See	(2005), 474
Gunditjmara	Lord Talfourd's Act (1839), 473
built environment	shared parenting, 474-5
national parks, and, 408–9	'welfare of the child', paramountcy
planning and development law, 416	of, 474
public health, 407–8	child labour, 509, 677, 678
town planning, 411	'destitute' children, 752
Bullock v Dodds, 98	economic and social welfare. See under
bushfires management, 429	economic and social welfare
bushrangers, 99, 102, 585, 600, 609	fostering, 509
	illegitimate children, 41, 464
Cable v Sinclair, 40, 92, 93, 98	Indigenous children. See Indigenous
Canada, 113, 698	children
Constitution, 173	mixed race children. See Indigenous
English law in, 44	children
federalism, 139	orphaned or neglected children, 508
federation, 166	settlers' children, removal of, 509
First Nations, stories of, 12	Christmas Island, 280
French law recognised in Québec,	asylum seekers, detention of, 280
	cities and towns. See built environment
44 Indigenous peoples, 228, 295, 354	citizenship
	*
legal plurality, 38	Aboriginal people, and, 5, 192
pursuing regional interests, 266	Australian Citizenship Act 1948 (Cth),
Québec Act (1774), 58–9	563–4, 566, 572



Index

citizenship (cont.) nineteenth century, during, 655-60 equality of citizenship, 256 defamation, 658-9 establishment of, 176 immunity, 656-8 immigration, and, 5, 556-77 repugnancy, 659-60 Aboriginal non-citizens and deportation, plurality, 651-3 plurality of law of civil wrongs replaced 5, 10, 19-20, 573-5 British subject status, 563-5 by Australian law, 667-70 British subjecthood, and, 566-8 plurality outside common law, 666-7 twentieth century and creation of High colonial period (1901-1920), 558-61 'common code' (1920–1949), 561–2 Court of Australia, 660-6 Constitutional framework, 557-8 fire, liability for damage caused by, disallegient conduct, 570-2 662-4 dual citizenship, 568-70 nervous shock/negligently-inflicted statutory Australian citizenship (1949mental harm, 664-5 Coe v the Commonwealth, 235 1987), 563-6 temporary long-term residents, pathway Cold War, 292 to citizenship and, 575-7 Colonial Conferences, 263 Nationality Act (1920), 561-2 Colonial Office, 310, 314, 487, 699 Nationality and Citizenship Act 1948 (Cth), Aboriginal people, and, 483, 489, 636-7 176, 273, 563, 760 British commercial interests, 148 divorce reform, 469 non-citizen, non-alien category, 19-20 Pacific Islanders excluded from, 264 draft Constitution, views on, 144 Papuans, and, 273 immoral laws, concerns about, 746 White Australia policy. See White Australia legal plurality in colonies, 22 policy Māori, 488 civil rights and Indigenous people, 523-35 policing, 590 1967 Referendum, 524, 528, 550 Protectors of Aborigines, 484 campaign, 529, 532 repugnancy of colonial legislation, disputes proposed changes to Constitution, 532 about, 102-3 significance of, 532-3, 761 unlawful acts, rejecting, 596 Aborigines Claim Citizen Rights!, 525-7 colonial self-government, 5, 108-31 children Australian Colonies Government Act human rights advocacy (1960s-1980s), (1850), 117-18 changes in settler population leading to challenges to Crown power, 109-10 overt discrimination of protectionism, 454 colonial constitutions, 118-19 policies of non-discrimination, 449 demands for political representation, removal of Indigenous children. See 108-9, 113-14 under Indigenous children Repeal of Waste Lands (Australia) Act, 118 civil rights, meaning of, 523 representation on Legislative Council 'Day of Mourning' protest, 525-7, 761 granted, 114-15 responsibility for Aboriginal governance discrimination by denial of civil rights, transferred to settler Federal Council for Aboriginal government, 118 Advancement, 529-30 self-governing colonies, 119-29 formal end of discrimination against Aboriginal evidence. See Aboriginal Indigenous people, 7 evidence Freedom Rides, 530-2 Aboriginal manhood suffrage, 122 ILO Convention 107, use of, 546-7 consequences for Aboriginal people, 121, impact of discriminatory law, 7-8 123-9 rights originating from Indigenous settler opposition to protectorates, 112-13 sovereignty, 523 turn towards self-government, 117-18 civil wrongs, 651-70 colonies



Index

British Peoples' Charter (1838), 541-2 British sovereignty, and, 107 colonial constitutions, 118-19 Colonial Laws Validity Act (1865), 119, 136, 137, 169, 660 common law applying, 329, 378 constitutions, 170 control of land, conflict over, 114-15 convict colonies, 89, 168 convicts. See convicts diplomatic engagement, 261 divorce legislation, 120-1 Federation. See Federation free settlement, 169 goldrushes bringing influx of population, 169 gubernatorial powers, 284 Homestead Acts, 305 imposition of direct Crown rule, 88 land law. See land law legal plurality in, 22 legislating for disposal of land, 318 Legislative Councils, 107, 109 North America, 26, 87, 88 convicts sent to North American colonies, 87 penal colonies, 100, 103 political rights, recognition of, 541-2 Privy Council, and. See Privy Council protection legislation. See protection regimes protectorates, 112, 117 reassertion of Crown authority, 109 reception of English law, 103-6, 107, 164 relationship with British Empire, 286-7 relationships between governors and Indigenous people, 110-11 repugnancy. See repugnancy of colonial legislation self-government. See colonial selfgovernment separation of powers in Crown colonies, 88 settled colonies, 103, 164, 168, 332 English law applying in, 1, 103 suspension of habeas corpus in rebellious colonies, 60 taxation of, 51 Comcare v Michaela Banerji, 553 common law, 3, 26-7 'accumulated wisdom of ages', 45 binding power by 'long and immemorial usage', 43 body of unwritten law, as, 43

English liberty and, 43-50 historical liberties of the community, and. 46 jury trials. See jury trials law of the territory, as, 34 legal custom, 44-5 estates and tenures, 47 social and economic relations, 46-7 political freedom, and, 45-6 procedures constitutive of English liberty, 47 settler law, as. See settler law superintendency of, 44 whether Indigenous people triable at, 23 Commonwealth Constitution, 132, 172-5 amending, 173, 254 Australia's relations with the Pacific islands, and, 263 citizenship, 557-8 Commonwealth of Australia Constitution Act (1900), 557 debates about recognising Indigenous people in, 205 framework for Australian federalism, as, 178 franchise, 177 judicial review, 183, 184 navigable rivers, 410 New Zealand, and, 263 popular sovereignty, and, 175-6 rights, and, 174, 176, 182, 536 separation of powers, 181 United States' Constitution, influence of 181 Commonwealth Heads of Government Meeting, 294, 297 Commonwealth of Australia. See Australia compulsory arbitration, 667, 682-9 compulsory voting. See voting conjugality. See marriage conservation. See environment Constitution, Australian. See Commonwealth Constitution Constitutional Referendum 1967. See under civil rights and Indigenous people constitutionalism, 161-3 Australian. See Australian constitutionalism contract of employment. See under labour and labour law convicts attainder, 98, 105 backgrounds of, 169



Index

convicts (cont.) criminal law civil and political rights as freeborn Aboriginal customary law, and, 189, 195, Britons, 5 demands of civil and political rights, 538-9 Aboriginal offenders. See Aboriginal deterrent effect of transportation, 100, 118 offenders emancipation. See emancipation of application of English law to Australian convicts cases, 90-1 Irish convicts, property rights and, 539 early New South Wales and Van Diemen's labour, and. See under labour and Land, in. See criminal law and labour law administration of justice in early New South Wales and Van North American colonies, sent to, 87 transportation, 40, 100, 118 Diemen's Land Western Australia, in, 117 England. See English law; English legal culture in late eighteenth century Cooper v Stuart, 333 copyright, 4, 693-718 history, 3 Aboriginal art production, 706-15 Indigenous people, settler criminal law copyright implications, 712 and. See under settler law, First/ legal and cultural status of wardship, Indigenous Peoples and persistent plurality in, 6 709-10 restrictions on the freedom of contract, prisons, use of. See prisons 711–12 sentencing, Aboriginal custom taken into Albert Namatjira, 5, 694, 706-15 account in, 190-1, 202-3 Australian Copyright Act 1905 (Cth), 698 states' power over, 178 Berne Convention (1886), 694, 698 twentieth century. See criminal law and justice in the 20th century Copyright Act (1869), 697 criminal law and administration of justice in Copyright Act 1905 (Cth), 694 Copyright Act 1912 (Cth), 694, 698, 703, 704 early New South Wales and Van Copyright Act 1968 (Cth), 694 Diemen's Land, 581-604 Copyright of Designs Act (1842), 698 Court of Criminal Jurisdiction, 582-6 historical overview of copyright laws, applying English law in summary 695-8 way, 582 changes to criminal law, 598-601 Australian legislation, 698 British laws in nineteenth century, criticisms of, 94-5 criticisms of court and justice system, colonial laws in nineteenth century, 590-3 697-8 jury trials, 601-3 international copyright laws, 698-700 magistrates, 586-90 May Gibbs, 4, 694, 698, 700-6 reforms to administration of justice, 593 Coultas v Victorian Railway Commissioners, assessment of, 593-8 655, 664 consequences of, 593-8 Country, 504 sentencing and punishments, 582-4 access to Country, 327 transportation, 584-6 centrality of to First People, 11, 19-20, criminal law and justice in the twentieth 79-80, 81, 366 century, 605-28 Country as a constant, 76-7 Australian legal traditions, development of, foundation of philosophy, law and 606-7 centrality of institution-building, 607 sociality, 4, 74-5 halting settler development on, 9 criminal law and justice enmeshed in state pastoral leases leaving open formal and policy, 607-8 decisions, effect of changing composition informal access to Country, 326 courts. See Australian courts; English courts of juries on, 617 COVID-19 pandemic, 154, 554-5, 576 defining the criminal, 608-10 Cox v Payne, 460-4 policing crime, 610-14



Index

changing social attitudes to, 611 white settler states, 294 criminal identification systems, defamation. See under civil wrongs advances in, 613-14 'detribalisation', 194-5 domestic violence, 611 believed to be inevitable, 191 property crime, 610-11 extinguishing Aboriginal customary rates of reported crime, 612-13 law, 190 technology, and, 613 mixed-race children, 192 traffic offences, 611 typical course of, 190 Dicey, A. V., 165, 168, 537 prosecuting offenders, 614-19 changing composition of juries, 616 discrimination. See civil rights and Indigenous crime reporting, 619 people decline of jury trials, 618 dispossession in the nineteenth century, growing complexity of trials, 619 305-27 dispossession by closer settlement, 317-21 legal aid, 615 sworn testimony, and, 615-16 dispossession by land grants, 310-17 unrepresented defendants, 614-16 dispossession by settlement without treaty, punishing offenders, 620-3 306-10 capital punishment, 620 dispossession by violence, 322-6 pastoral leases, 313-17 corporal punishment, 620 imprisonment, 621 reparation for dispossession, claims for, 746 individualising sentences, 621-2 squatters, 312-15 medical control, rejection of, 623 Doe dem Jenkins v Pearce and wife, 98 pre-sentence reports, 622 Dreamings ancestral Wave dreaming, 365 rehabilitation, 622-3 suspended sentences, 621 binding past to present, 282-3 victims, 623-7 creation narratives, 723 evidence, and, 626 Indigenous legal systems grounded in, 742 false reports, 625-6 international law, and, 282-3 focus on psychological trauma and firstongoing creation of Country, 77 Two-Women Dreaming, 200 person advocacy, 627 reporting crime, importance of, 623-5 Yanyuwa, 364 dualism, 723 systematic reasons not to report crime, 625 Australian federation, 133 Crown Lands Encroachment Act (1833), 312 dualistic structure of property law, 352 Crown reserves. See reserves cultural heritage. See natural and cultural East Timor, 298-9 economic and social welfare, 444, 490, 502-22 heritage customary law, 30-3, See First/Indigenous law blankets, 110, 126, 436, 489, 508, 640 children, 508-11 Davies, Sir John, 45 child endowment, 513-14 de Vattel, Emer, 308 deep time economies, survival of, 503-6 funding welfare, 498, 507-8 Declaration on the Rights of Indigenous Peoples (2007), 450 government rations, 489 increased and universal benefits, 516-17 decolonisation, 265, 272, 292, 295 Australia forestalling decolonisation of maternity allowance, 512 external territories, 273 national debate on Aboriginal welfare, 496 calls for, 290 neoliberalism, 517-22 European empires, 546 pensions, 192, 512, 513, 514 global, 272, 276, 294 poor laws, 498 Pacific region, 293, 294, 297 settler welfare as tool of Indigenous Papua New Guinea, 278 dispossession, 502 self-determination and social justice, social security benefits, 513 and, 762 state welfare legislation, increase in, 511-16



Index

economic and social welfare (cont.) laws in nineteenth century, 695-7 veterans, support for, 513 Statute of Anne (1710), 693 welfare and assimilation, 503 courts. See English courts welfare as a weapon, 522 criminal law, 55-7, 103 welfare officers, introduction of, 437 Crown Proceedings Act (1947), 656 emancipation of convicts, 100 divorce, 468 claims to civil and political rights as East India Company (Regulating) Act (1773), 58-9 freeborn Britons, 5, 538-9 convicts as lawyers, 96, 97 embodied in written documents, 8 emancipist rights, disputes over, 94, 97, 539 female suffrage, 165 tensions between emancipated convicts feudal law, 47, 331 and officer-traders, 94 Glorious Revolution, 46 emancipists. See emancipation of convicts habeas corpus, 60 Habeas Corpus Act (1679), 46 Empire. See Australia as Empire; British Human Rights Act (1998), 172, 552 Empire English courts jury trials. See jury trials labour law, 676-7, 679 assize, 41 central royal courts, 41 legal plurality. See under legal plurality common law courts, 44-5 legislation, 50-60 courts and tribunals in nineteenth Magna Carta, 46, 47, 49, 60, 164, 543, 544, 545 century, 41 marriage, 463, 467 courts dealing with public wrongs, 41-2 New South Wales, in. See under New South courts of special jurisdiction, 41 Wales ecclesiastical courts, 41, 43, 44 no written constitution, 162 House of Lords, 41 Parliament. See Parliament, British political conflicts over Stuart absolutism, magistrates' courts, 42 maritime courts, 41, 44 and, 46 mercantile courts, 44 Québec Act (1774), 58-9 military courts, 41, 43 slavery, abolition of, 111 Privy Council. See Privy Council stare decisis, 165 Statute of Frauds (1677), 334 quarter sessions, executive powers for, 58 English law. See also English legal culture in tenure and estates, doctrine of. See under late eighteenth century land law Trade Union Act (1871), 677 Act of Settlement (1701), 164 Acts of Union (1707), 44 Transportation Act (1718), 57 Bill of Rights (1688), 46, 164 English legal culture in late eighteenth British Constitution, 165 century, 3, 40-60 British Nationality and Status of Aliens Act usages and practices of courts of common law, 44-5 (1914), 561 British race nationalism. See British race administrative discretion, 58 nationalism capital statutes, 55-6 British race patriotism. See British race common law. See common law patriotism courts and tribunals, nature of, 41 Case of Proclamations, 164 crime, addressing, 55-7 Case of Prohibitions, 164 custom and political liberty, 45-6 colonies. See under colonies discretion in processes of criminal common law. See common law justice, 56-7 copyright, 693 economic transformation and social Copyright Act 1911 (UK), 694 conflict, 56 Copyright Amendment Act (1842), 696-7 English liberty, common law and, 43-50 Dramatic Literary Property Act entrenchment of exclusive property (1833), 696 rights, 55 Foreign Reprints Act (1847), 696 estates and tenures, 47



More Information

Index

greater executive government and increasing statutes, 51-2 habeas corpus, 60 jury trials. See jury trials justices of the peace, 57-8 legal custom, 45 legal institutions as customary inheritance, 48-9 legislation and state capacity, 50-60 legislative particularism, development of, 54-5 magistrates' courts, 42 metropolitan authority and imperial domination, preservation of, 58-9 Parliamentary authority, 51-2 political conflicts over Stuart absolutism, 46 private Acts of Parliament, 53 public wrongs, courts dealing with, 41-2 social and economic relations, 46-7 transportation, 57 Entick v Carrington, 164 environment, 402-30 attempts in eighteenth century to protect natural resources, 404-5 built environment. See built environment bushfires management, 429 criticisms of environmental policy, 402-3, 428-30 developmentalism, 413, 423, 430 ecologically sustainable development, 418-21 Environment Protection (Impact of Proposals) Act (1974), 415-16 Environment Protection and Biodiversity Conservation Act 1999 (Cth), 423-6, 428 environmental studies and assessments, 415-16 exploitation 1788-1901, 403-9 Federation Drought (1895-1903), 409, 410 Intergovernmental Agreement on the Environment, 421-2 judicial review of environmental governance decisions, 416 mining. See mining modern environmentalism (1960s-2020), 413-28 national development, 409-13 National Forest Policy Statement, 422-3 national parks, 408-9 natural and cultural heritage, 414, See natural and cultural heritage

natural resources, state governments exploiting, 411-12 pastoral occupation causing environmental degradation, 409 pollution, 414 precautionary principle, 420-1 ringbarking, 406-7 rivers and dams, 410-11, 417, 424-5 sanitary conditions of colonial cities, 407-8 soil conservation, 412-13 South Australia land policy, 405-6 State of the Environment Report, 402 water management. See water management Eora, 284, 307, 503, 504 Eureka Rebellion, 286, 541 evidence. See Aboriginal evidence fauna, 404, 413, 414, 420, 430 Federal Council for Aboriginal Advancement, 529-30 Federal Council for the Advancement of Aboriginal and Torres Strait Islanders, 546 Federal Council of Aboriginal and Torres Strait Islanders, 530 federalism American. See under United States Australian. See Federation nature of, 178 Federation, 5, 119, 129, 140-8, 165, 263, See also Australian constitutionalism: Commonwealth Constitution Australasian Federal League, 142 centralisation, 148 concept of, 133-4 Constitution (1901), 132 draft Constitution (1891), 140 dualist nature, 133 Engineer's case, expansion of Commonwealth's power and, 150-2 evolution since 1901, 148-55 exclusion of First/Indigenous Peoples from constitutional settlement, 155-9 Federal Council, 138, 139 financial dominance of Commonwealth, 152-3 first Convention (1891), 140-2 full independence, 169 Imperial government receptive to, 263 legal constraints, 153-4 Melbourne Conference, 140



More Information

Index

Federation (cont.) Melbourne Conference (1898), 139 multiple dimensions of, 155 National Australasian Convention, proposal for, 139 New South Wales, attitude towards, 142-3 repugnancy of colonial legislation, 136-8 reservation of powers in relation to domestic affairs, 148-9 second Convention (1897), 143-8 shared sense of nationhood, emergence six settler colonies coming together, 5 two-fold sovereignty, 132 Voice to the Parliament, 158-9 Fiji, 138, 262, 263, 298 fire, damage caused by. See under civil wrongs First law. See First/Indigenous law First Nations Australia. See Aboriginal people; First/ Indigenous Peoples; Torres Strait Islanders Canada. See under Canada First/Indigenous law, 8-9, 27-8, 61-84 Aboriginal custom at margins of colonial rule, 189 Aboriginal customary law and criminal law, 195 Aboriginal customary law at edges of colonial rule, 189 Aboriginal customary law being extinguished through 'detribalisation', 189-90 Aboriginal offenders, 30 ALRC Report. See Australian Law Reform Commission (ALRC) assertion of British sovereignty, and, 35-6 attempts to incorporate into colonising state law, 70 Australian Law Reform Commission Report 'Recognition of Aboriginal Customary Laws', 31-3 basic precepts of Country, relationality and autonomy, 74–5 'claim of right', 70 colonisation, effect of, 10-11, 22, 29 continuing existence of Indigenous customary law, 188 Country, and. See Country creation of lawful meetings grounds, need criminal law, and. See criminal law

damage done by state lawyers and hearings, 82 damaging misrepresentation of, 70-1 decolonisation, and, 73 'detribalisation', and, 190 difficulty of recognising, 64 diverse kinship laws, 77 dynamic and adaptive nature of, 8 focus on interdependency and environment, 12 giving evidence of, 82 governmental object, as, 31 guilt, 69 Indigenous Australian jurisprudence, foundations for, 723-6 Indigenous offenders, 30 institutions and traditions amounting to system of law, 32 interconnecting nature of, 76, 80-1 lawful behaviour as constitutive of identity and belonging, 11 law-making capacity, denial of, 36 laws of relationship, as, 24 legal plurality, and. See under legal plurality local law and knowledge, 75-6 multi-national order of Indigenous People, 9 native title, and. See native title no Indigenous criminal law, 63 not embodied in written form, 8 plurality of laws and legal systems, 9 prerogative to take life in response to transgression, 189 Raw Law, 725 recentring First law, 72-3, 83 recognition of in Australian law, 188, 201, 202, 204 recognition space, 188, 201, 202, 204 relationality, 77-9 renewed engagement with, 31-3 sentencing, and, 190-1 settler law, and, See settler law, First/ Indigenous Peoples and social sciences and creative arts, left to, 82 sovereignty. See Indigenous sovereignty statutory land rights regimes, and. See Aboriginal land rights struggles with recognition of, 29-30, 67-8, 72, 106–7 suppression of, 8 First/Indigenous peoples Aboriginal land rights. See Aboriginal land



Index

Aboriginal people. See Aboriginal people First/Indigenous Peoples, self-government, access to pastoral lands. See pastoralism self-determination and, 5, autonomy, 80 206-7, 228 adverse effects of self-government, 121 ceremonies. See ceremonies civil rights. See civil rights and Indigenous case studies on Indigenous selfpeople government. See Gunditjmara and constitutional recognition of, 5 Ngarrindjeri Country, and. See Country negative impacts of colonial selfcriminal law, lawlessness of, 71-2 government on, 5 desert lawmen, 61-3, 64-5 policy of self-determination, introduction dispossession. See dispossession in the of, 196-8 self-determination, 31, 205 nineteenth century employment. See labour and labour law traditional ownership, and. See traditional exclusion from constitutional settlement, ownership flora and fauna, 404, 413, 414, 430 First Nations Regional Dialogues, 158 free trade agreements, 301 identity, 79 Freedom Rides, 530-2, 533 Indigenous governance. See Indigenous governance Garran, Robert, 132, 133, 136, 151, 159 Indigenous people having no sovereignty, General Agreement on Tariffs and Trade, 291, 308-9 294, 301 international law, and. See inter-Geneva Conventions on the Law of the Sea national law (1958), 293 jurisdiction over Indigenous people, 23 Gibbs, May. See under copyright land justice. See land justice gig economy, 690-1 living in a 'state of nature', perception gold. See under mining of, 744 goldrushes, 540 marginalisation of, 167 advancing democratic rights in Australia, mining, and. See mining 541-4 National Constitutional Convention, 158 immigration, and, 124, 169, 317 native title. See native title undermining deterrent powers of negotiating for legislative and policy transportation, 118 reform, 72 governance. See Indigenous governance part of global movement, 81 Grotius, Hugo, 744 perpetuating myths about, 71 Gunditjmara, 207-13 commitment to self-determination, protection legislation. See protection regimes 207-8 recognised as British subjects, 484 community-wide decision-making forum, rejected as polities, 230 209-I3 relationships, 255 constitutional arrangements, 726 sacred sites. See sacred sites Full Group, creation and demise of, 210-13 settler law, and, See settler law, First/ Kerrup-Emmara EAC, 209 Indigenous Peoples and native title application, 210-13 settler violence, and. See settler-Indigenous pre-colonisation, 208 violence regaining control of Gunditjmara Country, sovereignty. See Indigenous sovereignty 208-9 Uluru Statement from the Heart. See Uluru UNESCO World Heritage status for Budj Statement from the Heart Bim Cultural Landscape, 213 Voice to the Parliament. See Voice to the Gunditjmara and Ngarrindjeri, 10, 204-24 Parliament challenges in developing governance welfare. See economic and social welfare systems, 222-3 wellbeing, 79-80 dispute resolution mechanisms, need

for, 223

women. See Indigenous women



Index

Gunditjmara and Ngarrindjeri (cont.) Ngarrindjeri, treaty negotiations with South Australia and. See Ngarrindieri UNESCO World Heritage status for Budj Bim Cultural Landscape. See Gunditimara use of community meetings to garner broad-based support, 222 Gunggari, 19, 573 Hale, Matthew, 43, 52 Harvester judgment, 512, 544, 684 Hazelwood v Webber, 663 Hedley Byrne & Co Ltd v Heller & Partners Ltd, 669 human and civil rights, 5-6, 174, 252, 292, 297 abortion, 550 asylum seekers, 300 bill of rights, consideration of, 544, 547-8, 552-3 British rights to human rights, from, 544-7 COVID-19 pandemic restrictions, 554-5 democratic rights, 541-4 freedom of information, 547 Human Rights Commission, 549 human rights treaties, 179 Indigenous people, civil rights and. See civil rights and Indigenous people international human rights instruments, 295, 545, 548 land rights. See Aboriginal land rights LGBTI people, rights of, 549-50 LGBTI rights, 612 marriage equality. See under marriage protection against discrimination in Commonwealth Constitution, 176 racial discrimination. See racial discrimination racism. See racial discrimination religious discrimination, 554 segregation and racism, increased exposure of. 530-2 social rights, 543-4 special group rights, demands for, 8 states' power over, 178 statutory rights protection, 172 Universal Declaration of Human Rights (1948), 292, 545, 553, 555 White Australia policy. See White Australia policy women's movement, 548-9 Human Rights Commission, 9, 121, 495, 539, 549, 566

immigration. See citizenship; White Australia policy immunity. See under civil wrongs Indigenous children. See also Indigenous families Aboriginal and Torres Strait Islander child placement principle, 450-1 adoption of, 445-7, 452, 454 assimilation, and, 437, 443-8 attachment theory, impact of, 445 Chief Protector as 'guardian' of Aboriginal children, 191 child care/children's agencies, formation of, 448-51 discrimination, and. See under civil rights and Indigenous people missions, and, 435-6 mixed-race children, Northern Territory treatment of, 192 National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their Families, 434, 482, 511 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 434, 482, 511 Northern Territory National Emergency Response Act 2007 (Cth), 251-2 parents resisting removal of, 447 permanency reforms, 454 placed in district boarding schools, poverty and child welfare, 448-9 protection Acts, impact of, 320, 436-42 removal, 509, 510 discrimination, as, 753-5 early child removal (1788-1860s), 434-6 exploitation of children, 435 extent of harm caused by, 447-8 forcible separation as child welfare intervention, 7 mixed descent children, 437-8, 751-2 reasons for, 435-6, 443, 444 rescue narrative justifying, 435-6 Secretariat of National Aboriginal and Islander Child Care, 450, 452 state guardianship. See protection regimes teaching, 73 well-being, 455 Indigenous families 'exemption' from protection legislation, 442



Index

colonial self-government negatively adoption of children, 445-7 attachment theory, impact of, 445 impacting on, 5 child welfare interventions. See under competing visions of Australian body Indigenous children politic, 229-31 children. See Indigenous children consequences of recognising, 763-4 colonial law controlling, 433-55 Constitution, and, 158 assimilation and families (1950s-1960s), contested sovereignty, 205 443-8 courts deflecting sovereignty claims, early child removal (1788-1860s), 434-6 228 human rights advocacy (late 1960s-early derived from ontological relationship to 1980s), 448-51 land and territory, 523 protection and families (1860s-1960s), failure to take enduring approach to, 309 436-42 judicial disavowal of, 228 turn from rights to individual Love-Thoms case, and. See Love responsibility in 1990s, 454 v Commonwealth of Australia (Lovediscriminatory social welfare policies, Thoms) Mabo v Queensland (No. 2). See Mabo 445, 452 'exemption' from protection legislation, v Queensland (No. 2) 721-2 non-citizen, non-alien status, and, 20 Family Is Culture review, 453 rejection of, 19-20 marriage. See Indigenous marriage spiritual notion, as, 253 national inquiries into separation of Indigenous women. See also women children from families, 454 child endowment, 514, 515 National Inquiry into the Separation of children, and. See Indigenous children Aboriginal and Torres Strait directed into domestic work in white Islander Children from their households, 497 Families, 452 exclusion from Yanyuwa land claims, poverty, and, 444-5 369, 371 exclusion of women as landowners and state guardianship. See protection regimes welfare. See economic and social welfare claimants, 369 families, and. See Indigenous families women's sexuality, protection legislation controlling, 441-2 marriage, and. See Indigenous marriage Indigenous governance recipients of charity, 507 Mparntwe/Alice Springs. See Mparntwe/ sexuality and choice of partners, protection Alice Springs legislation controlling, 441-2 Indigenous Land and Sea Corporation, 389 subordination, 71 Two-Women Dreaming, 200 Indigenous Land and Sea Future Fund, 389 Indigenous law. See First/Indigenous law violence, and, 71-2 Indigenous legal traditions, 8, 9, 721-39 industrial tribunals, 682-9 Indigenous marriage inter se cases. See under Aboriginal state control over, 7, 441-2, 755 offenders Indigenous polities, 61-84 international administration, 267 ATSIC, 242-51 International Convention on the Regulation of Whaling, 291 competing visions of Australian body politic, 229-31 International Convention on the Rights of the inhumanitarian intervention in Northern Child, 450 Territory, 251-2 International Court of Justice, 291 land rights in politics and court, 231-6 Australia, East Timor and, 299 Australia, France and, 296 native title law, traditional law and custom in, 237-42 Australia, Japan and, 293 Voice to the Parliament, 252-6 Australia, Nauru and, 299 International Covenant on Civil and Political Indigenous sovereignty, 10, 501, 537 Coe v the Commonwealth, 235 Rights, 552



More Information

Index

International Covenant on Economic, Social and Cultural Rights, 552 International Criminal Court, 300 international law, 13, 282-4 British arrival in Australia, rights of First Nations and, 284 Dreamings as source of, 282-3 Makarrata Commission, 158, 253, 302 non-state international legal relations, new forms of, 285-6 scientific evidence as source of, 283 scope, 282 written records as source of, 283-4 International Monetary Fund, 291 Ireland English law in, 44 Irish convicts engaged in rebellion, 539 Parliament's authority to create valid laws, 51 Jefferson, Thomas, 48, 49 English tenures, 49-50 judicial review, 162, 175 entrenchment in codified Constitution, 183 environmental governance, of, 416, 426 government action, of, 183 Indigenous law-making, of, 229 native title legislation, 237 validity of legislation, of, 169, 183 iurisdiction definition of, 27 jurisdictional politics, 24, 25, 37 jurisdictional thinking, 23-5 legal plurality, and. See legal plurality movement back to, 21 persistent technology of law, as, 21 personal jurisdiction, 28-9 territorial jurisdiction, 28 territorial jurisdiction, pre-eminence of, 39 jury trial New South Wales, in, 601-3 jury trials, 43, 48, 101 Aboriginal representation on juries, 616 changing composition of juries, 178, 540, 616 common law juries, importance of, 475-80 constitutional protection of, 178 decisions, effect of changing composition of juries on, 617 decline of, 618 Indigenous massacres, and, 112 jurors emblematic of participatory governance, 48

jury nullification, 643 military juries, 107 multiple forms of, 48 New South Wales, in, 601-3 public setting for airing grievances, 48 rights of Indigenous people, and, 629-30 suitability for penal colonies, 100 Van Diemen's Land, in, 601-3 Western Australia, in, 89 women on juries, 178, 548, 616 Kamilaroi, 19, 573 kangaroos and wallabies, 406 kincentric ecology, 363, 367 komboism, 497 Koroitamana v Commonwealth, 572 Kulin, 309, 490, 505 labour and labour law, 671-92 convict and bonded labour, 671-6 convict labour regimes, 4 employer paternalism, 492 employment contracts, 4, 756 gig economy, 690-1 hotel and bar work, 679-80 hours and wages, legislation on, 676-82 immigration, and, 689-90 Indigenous workers exploitation of, 514 Protectors policing, 755-6

hotel and bar work, 679–80
hours and wages, legislation on, 676–82
immigration, and, 689–90
Indigenous workers
exploitation of, 514
Protectors policing, 755–6
regulation of, 437, 497–8, 681
Indigenous workers in pastoralism, 316–17,
489, 492, 675, 681
Indigenous workers included within
pastoral award, 192, 498, 499, 684,
716
suing on behalf of Aboriginal wards, 500
industrial tribunals and compulsory
arbitration, 682–9
master and servant, law of, 671–6
minimum wage, 512, 513, 678, 679
Aboriginal wards entitled to, 716
minimum Indigenous wage, 498
promoting assimilation through labour,
715–17

right of male breadwinner to living wage, 543–4 Harvester judgment. *See* Harvester

Harvester judgment. See Harvester judgment seafarers. 600

stolen wages, protection and, 362–367 compensation for stolen wages, 498, 499, 756–7



Index

unions, growth of, 676-82 Aboriginal land use, 744 women. See under women Indigenous Land Use Agreements, 391, women of mixed descent, restrictions 396, 400 on, 497 pastoralism. See pastoralism women, and, 516 zoning, 411 land claims. See Aboriginal land rights; land larrikinism, 609 justice; native title law of the sea treaties, 293, 299 League of Nations, 267, 269, 270, 288, 289 Land Councils, 234, 251 land grants, 232, 326, 332 mandate system, 268-9 dispossession by, 310-17 Leatch v National Parks and Wildlife Service and Shoalhaven City Council, 420 informal, 95 reservations of gold and silver, legal aid, 615 containing, 343 legal plurality, 19-39 land justice ALRC Report Aboriginal Land Act 1991 (Qld), 384-7 'Recognition of Aboriginal Customary Aboriginal Land Rights (Northern Laws', 31-3 Australia, in, 20, 22-3, 357 Territory) Act 1976 (Cth), 380-1 Aboriginal Land Rights Act 1983 (NSW), challenges to court's jurisdiction and common law, 33 381-3 achieving land justice, 379, 398-401 common law historical context of land rights legislation, law of the territory, as, 34 obscuring Indigenous jurisdiction, 29 native title. See native title plurality outside common law, 666-7 land law, 328-53 containment of, 31 colonies, and, 329 early cases, 25-9 Crown land, statutory titles and reserves, England, 22, 26-7, 44 Scots law, 44 334-6 land title by registration, 346-50 First/Indigenous law Mabo v Queensland (No. 2). See Mabo Aboriginal offenders and, 30-1 v Queensland (No. 2) accommodation of, 29-30 pastoral leases, 337-40 renewed engagement with, 31-3 reserves for the benefit of First Nations. jurisdiction, 21-2, 27 jurisdictional plurality, 38, 334 reserves for the benefit of First Nations jurisdictional politics, 24-5, 37 people jurisdictional thinking, 23-5 'reserve', 'reserved' and 'reservation', legal plurality in the Australian legal meaning of, 341 system, denial of, 35-7 Sale of Waste Lands Act (1842), 114, 335, 341 Mabo v Queensland (No. 2), 23-4 Sale of Waste Lands Act Amendment Act New South Wales, 22, 27, 106-7 (1846), 335, 337 plurality in nineteenth century, 22-3 sub-surface rights, mining leases and sovereignty, jurisdiction and, 33-7 licences, 343-6 Yorta Yorta, legality plurality after, 36-7 tenure and estates, 193, 331-2 legal traditions. See Australian legal traditions; Wik v Queensland. See Wik v Queensland Indigenous legal traditions land management by Indigenous people, 737, Legislative Councils, 107, 109, 117, 284, 539, See also Gunditimara and 602, See also under New South Wales; South Australia; Van Ngarrindjeri land rights, 231-6 Diemen's Land Aboriginal land rights. See Aboriginal land Locke, John, 308, 538, 744 Love v Commonwealth of Australia (Love-Thoms), land rights legislation reflecting political 10, 19-20, 38, 39, 168, 229-30, 235, will not common law rights, 748 568, 573-5 land use, 410 Luritja, 193



More Information

Index

Mabo v Queensland (No. 1), 388, 551 Marriage Act (1834), 464 Mabo v Queensland (No. 2), 10, 19, 20, 33, 34-6, Marriage Act (1855), 464 38, 106, 107, 167, 233, 238, 301, 333, 387, Marriage Act (1961), 464 393, 394, 551, 574, 722, 745-6, 749-50 marriage equality, 456, 475-80, 554 key findings, 388 arguments against, 479 membership law, 235-6 arguments in favour, 479 native title determinations, 240 movement for same-sex marriage, recognition of pre-colonisation land 478-9 nature of, 456-9, 470, 476-7 interests, 329 terra nullius overturned, 23, 200, 327, 749 rape in marriage, outlawing of, 466, MacDonald v Levy, 164-6 Macintosh v Dun, 666 same-sex couples, discrimination Makarrata Commission, 158, 253, 302 against, 477-8 Manus Island, 275, 280 transgender spouses, and, 475-7 Marbury v Madison, 183 married women allowed to sue, 100, 467 marriage, 4 Married Women's Property Act (1879), breach of promise, 460-1, 464 467 cohabitation, 462, 476-7 married women's property rights, coverture, doctrine of, 459-60, 466, 467, 467-8, 511 status of wives, 459-60, 472 472 divorce terms of marriage externally imposed by history of, 468-70 the state, 466 impossibility of divorce until mid-Members of the Yorta Yorta Aboriginal nineteenth century, 462 Community v Victoria, 237, 393, legislation granting right to divorce by 395, 396 1873, 467 Milirrpum v Nabalco Pty Ltd, 32, 232-3, 333, 361, no-fault divorce, 466, 470-1 378, 551, 747 property, and, 465-72 Mill, John Stuart, 42 Miller v McKeon, 657 rates of divorce, 470 self-divorce, 462 mineral rights. See mining dominant legal form, as, 4 mining, 119, 425, 430 encouraged through government policy, access to private land 462-3 Mining on Private Property Act 1884 female convicts, and, 462 (Vic), 345 access to private land for, 345 Indigenous marriage. See Indigenous marriage Mining on Private Land Act 1909 individually negotiated contract or set of (Qld), 345 norms, as, 466 alluvial mining, water supplies for, 407 juridical approach to formal requirements bauxite, 231-2 of, 463-4 coal legal history of non-Indigenous marriage, Coal Acquisition Act 1981 (NSW), 456-81 child custody. See under children coal mine, approval for, 425-6 cohabitation to legally sanctioned reserved in land grants, 343 marriage, from, 460-4 consultation with Indigenous people de facto relationships and marriage before mineral exploration, 359 destruction of sacred caves in Juukan equality, 475-80 marriage after Federation, 465-75 Gorge, 398 First Nations' use of land, and, 320, marriage during the colonial period, 458-64 345-6, 359 property and divorce, 465-72 gold and silver (royal minerals) marital family as the foundation of civil held by the Crown, 343 society, 460, 461 reserved in land grants, 343



Index

nation-building, 1, 3 Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA), 345 membership, 5 legislation vesting minerals in Crown, negative impacts on First Peoples, 6 written constitutions of bills of rights, 5 344, 412 mineral extraction, settler law Native Labourers' Protection Act (1884), 125 native title, 9, 188, 200-1, 377, 387-98, 550-1, prioritising, 404 miner's right to vote, 541 750-1, See also land law Mining Act 1865 (Vic), 344 assertion of British sovereignty, and, 35-6 Mining Act 1904 (WA), 344, 345 ceremonies, 392 Mining Act 1971 (SA), 344 changes to definition of, 397 Mining Act 1978 (WA), 345 determinations recorded in National mining leases and licences, 336, 343-6, 388 Native Title Register, 350 Mining Statute 1865 (Vic), 407 development of case law, 391-4 ownership of land including minerals, 343 compensation, 394 Papua New Guinea, in, 259, 278 proof, 393 power imbalance between miners and title, 392-3 Aboriginal groups, 398 evidentiary requirements, 238, 750 regulation by statute, 344-5 extinguishment of rights, 390-1 reservations of minerals, 343-4 'inconsistency of incidents' extinguishment royalties, Indigenous people and, 374 rule, 238 land justice. See land justice royalties, Indigenous people, and, 381 safety legislation, 678 legal foundations of, 388-91 sand mining, 415 Love-Thoms case, 19 Mabo v Queensland (No. 2), 23, 36, 329 Yanyuwa Borroloola land claim, 370 Yirrkala Bark Petitions, 231-2 Native Title Act 1993 (Cth). See Native Title mixed descent/race, 192, 193, See also Act 1993 (Cth) Aboriginality Native Title Registered Bodies assimilation, and, 496 Corporate, 751 children. See Indigenous children native title rights surviving annexation, denial of Aboriginality for mixed race 23, 33 descendants, 124 nature of, 201 'detribalisation', 194–5 pastoral leases, effect of, 330 Mparntwe/Alice Springs, 186-204 posture adopted by governments, 394-8 Arrernte in Alice Springs, 188–91, 194 legislators, 397-8 Arrernte jurisdiction enacted as policy-setters, 395-7 ceremonies, 193-4 respondents, 394-5 recognition of inherent right, as, 748 contested sites, 198-200 criminal law, curtailment of recognition rights to resources recognised in native title cases, 346 and, 202-3 legislation, control by, 191-2 rules for recognition and mixed race children in 'the Bungalow', 192 extinguishment, 34 native title, 200-1 settlement of disputes, 241-2 population, 192-3 traditional law and custom in native title self-determination, application of policy of, law, 237-42 196-8 traditional laws and customs in native title Mparntwe/Alice Springs' law, 36 Aboriginal population in, 192-4 water rights, 726 Yamatji Nation Native Title Settlement, 72 Namatjira, Albert. See under copyright Yorta Yorta, 36-7 national parks Native Title Act 1993 (Cth), 36-7, 174, 201, 237, environmental benefit, 408-9 343, 350, 354, 362, 377, 389, 428

Native Title Amendment Act 1998 (Cth),

Tasmania, revocation of status in, 415

traditional owners, and, 386



Index

Native Title Report (Social Justice Second, 96-9, 100 Commissioner), 395 Third, 591, 593 natural and cultural heritage, 210, 217, 228, 414, Chief Justice's veto over legislation, 101-2 417, See also environment child custody, 473 Australian Heritage Commission Act closer settlement, 318 cohabitation, 462 (1975), 415 National Parks and Wildlife Conservation colonial constitution, 118 Act (1975), 415 colonial separation, and, 119 common law, whether Indigenous people sacred sites. See sacred sites Nauru, 265 triable at, 23 asylum seekers, detention of, 279 consequences of colonial self-government Australia appointed as Administering for Aboriginal people, 123, 125-6 Authority, 269 constitutional arrangements, 172 Australian mining interests, 259 convict majority, 3 developmentalist policies, 274 courts independence, 276-7, 294 civil cases, 92-3 Indigenous people, treatment of, 269-70 convicts providing legal representation, 'native' government structures, 96, 97 Court of Civil Jurisdiction, 40, 90, 96 introduction of, 275 UN trusteeship system, under, 272 Court of Criminal Judicature, 90 nervous shock. See under civil wrongs governors controlling, 87, 88 New Guinea, 265, See Papua New Guinea Judge Advocate, roles of, 90 New South Wales, 3, 22, 134, 168 justice and courts (1788-1814), 90-6 Aboriginal Advisory Council, 382 minor courts, 97 new Supreme Court, 96-7, 591, 593 Aboriginal evidence, 122-3, 637 Aboriginal Land Rights Act 1983 (NSW), reception of English law, 103-6, 107 criminal law. See criminal law and adminis-381-3, 399 Aboriginal protection legislation, 320 tration of justice in early New South Wales and Van Diemen's Aboriginality, meaning of, 441 Aborigines (Amendment) Act 1973 Land Crown Colony, as, 88 (NSW), 378 Crown Lands Act 1884 (NSW), 339, 407 Aborigines Act 1969 (NSW), 381 Aborigines Protection Act 1909 (NSW), 381, debt recovery, 93, 95 debtors, protection of, 93-4 495, 529 Aborigines Protection Board, 126, 493, diplomatic relationships, 258 505, 524 direct Crown rule, 88 Aborigines Welfare Board. dispossession by tenure, 311-12 disestablishment of, 533 divorce legislation, 120, 469 abortion, 550 early case law, 25-9 adaptation of English law to local economy, 119 conditions, 3 Environmental Planning and Assessment amateurism and pluralism, 90-6 Act 1979 (NSW), 416 Animals Protection Act 1879 (NSW), 406 Federation, attitude towards, 142-3 assimilationist welfare model, adoption Forest Act 1909 (NSW), 411 of, 443 Forestry Act 1916 (NSW), 411 attainder, application of, 98 formalisation of law, 96-9 autocracy, slow decline of, 100-1 founded as convict colony, 88 autocratic legal structure, 87 Free Selection Act 1861 (NSW), 405 freedom of the press, 102 British law failing to protect Aboriginal people, 325-6 from settlement to colony, 87-107 Bushranger legislation, 102 goldrush, 118 Charter of Justice, 93, 582, 584 Indigenous law, 106-7 Keane Report, 382 First, 90, 586



Index

lack of separation of powers, 88 land law claims, 95 Lands Acts Amendment Act (1874). Lands Acts Further Amendment Act (1880), 407 Law Reform (Miscellaneous Provisions) Act 1944 (NSW), 665 legal plurality, 22, See under legal plurality legislation, repugnancy and, 101-3 Legislative Council, 88, 101-3, 539, 540 Local Aboriginal Land Councils, 382 mammals, legislation on, 406 manhood suffrage, 120 martial law, 323-4 national park, 408 New South Wales Act 1823 (NSW), 101, 593, New South Wales Constitution Act, 113 Noise Control Act 1975 (NSW), 414 Pastures and Stock Protection Act 1880 (NSW), 406 penal colony subject to military law, 87 penal purpose, problems for administration of justice and, 3 Privy Council, and. See Privy Council promissory notes, 95-6 protection legislation, 438-9, 442, 493 protectorate, establishing, 112 reservations of minerals, 344 reserves, 341, 533 creation of, 319-20 resumption of transportation, opposition to, 112 ringbarking, 406-7 Ringbarking on Crown Lands Regulation Act (1881), 407 Robertson Acts, 318 Rum Rebellion, 94-5 self-government. See colonial selfgovernment settler-Indigenous violence, 322 Soil Conservation Act 1938 (NSW), 412 soldiers subject to ordinary law, 93 Supreme Court, 539 tensions between officers and emancipists, 94 Water Pollution Prevention Act 1875 (NSW), 408 Water Rights Act 1896 (NSW), 412 Western Lands Act 1901 (NSW), 340, 409 New Zealand, 28, 263, 264

Indigenous peoples, 295, 488 land rights, and, 228, 354 Māori Representation Act (1867), 121 no written constitution, 162 pursuing regional interests, 266 Ngarrindjeri constitutional arrangements, 726 KNYA strategy, 217-19 Ngarrindjeri Regional Authority, 213-14, 216-19 re-establishment of Ngarrindjeri Tendi, 215-16 regional authority to treaty negotiations with South Australia, 213-20 settlers, relations with, 214-15 well-being, 217, 219 Nolan v Minister for Immigration and Ethnic Affairs, 567 Noonuccal, 34 Norfolk Island, 261, 272, 280, 404, 587 offenders sentenced to transportation, 585, 594, 595, 600 Northern Territory Aboriginal customary law, 189 Aboriginal Sacred Sites Protection Authority, 198 Aboriginal wards. See Aboriginal wards Aboriginals Act (1910), 495 Aboriginals Ordinance 1911 (Cth), 191 codification of criminal law, 202 Criminal Code Act 1983 (NT), 202 interracial marriage, and, 441 mixed-race children, treatment of, 192 Mparntwe/Alice Springs. See Mparntwe/ Alice Springs Northern Territory Aboriginals Act 1910 (SA), 191 Northern Territory National Emergency Response Act 2007 (Cth), 202, 251, 452, 521, 724 protection legislation, 440, 442 reserves, 342 Royal Commission into Aboriginal land rights, 358-359 sacred sites, treatment of, 198-200 seasonal migration of Indigenous people, 317 self-governance, 549 self-governing, 280 Sentencing Act 1995 (NT), 202 statutory land claims. See Aboriginal land rights wards. See Aboriginal wards



Index

Ombudsman, Commonwealth, 547 Onus v Alcoa, 208, 209 Pacific Island Labourers Act (1901), 264 Pacific, colonisation of. See Australia as Empire Paine, Tom, 539 Papua. See under Papua New Guinea Papua New Guinea, 259, 264 attempted annexation by Queensland, 262 Australia appointed as Administering Authority, 269 Australian mining interests, 259, 278 decolonisation, 278 developmentalist policies, 274 independence, 273, 277-9, 294 Indigenous people, treatment of, 269-70 Indigenous resistance, 275 'native' government structures, introduction of, 275 New Guinea Laws Repeal and Adopting Ordinance (1921), 264 Papua, 259, 273 Australian Commonwealth, under authority of, 264-5 Indigenous people, treatment of, 264-5 'native' government structures, introduction of, 275 New Guinea, merged with, 270 Papua Act (1905), 264 Papuans as British subjects, 270 Papua and New Guinea Act (1949), 273 protectorate of British New Guinea, establishment of, 263 UN trusteeship system, under, 272 under authority of Australian Commonwealth, 264 Paris Peace Conference, 268-9, 288-9 Australia's C mandates permitting Australia to exclude foreigners, 556 permitting rejection of racial equality and of open door trade, 269, 271, 289 origin of Australia's international legal personality, as, 288 Parker v R, 652, 661, 668 Parliament, British, 50-60 capital statutes, 55-6 colonies, constitutions of, 170 concern about volume of statutes, 52-3 controversies over nature and limits of Parliamentary authority, 51

criminal law, 55-7 East India Company Regulating Act (1773), 58-9 enactment of the Commonwealth Constitution, 173 executive government, and, 51-2 Habeas Corpus Act (1679), 60 habeas corpus, Suspension Acts (1777-83) and. 60 High Court of Parliament as pinnacle of political authority, 51 humanitarian concern for Aboriginal people, 111-12 legislation increasing administrative discretion, 58 legislative particularism, development of, 54-5 ministerial responsibility to, 164 Parliamentary sovereignty, 51, 165 private Acts, 53 property protection, 55 Québec Act (1774), 58–9 Select Committee on the Aboriginal Tribes, 111-12 Slavery Abolition Act (1833), 111 Transportation Act (1718), 57 Parliament, federal power to regulate Pacific islands, 263 Parliamentary sovereignty Australia, 171 British. See under Parliament, British pastoralism effect of closer settlement on Aboriginal tenure, 319 environmental effects, 319, 409 hunting, fishing and cultural activities, importance of access for, 342 Indigenous workers in. See under labour law pastoral leases, 313-17, 319, 337-40 consistency with native title rights, 389-90 effect on native title, 326, 330, 336 Patterson, Re; ex parte Taylor, 567 Pearl-Shell and Beche-de-Mer Fishery Act (1886), 125 Permanent Court of International Justice, 289 Piro v W Foster & Co Ltd, 665 Pitjantjatjara, 193, 200, 282 Pitjantjatjara Land Rights Act (1981), 342, 350 plural legal orders. See legal plurality Pochi v McPhee, 566 policing, 6, 610-14



Index

criminal identification and documentation, Chief Protector's powers over Aboriginal 607, 613-14 people, 191-2 fingerprinting, 610, 613 children, impact of protection legislation jurisdiction, 634 on, 436-42 overpolicing of Aboriginal people, 741, 759 definition of Aboriginality in protection police involvement in mass killings in 19th legislation, 440-1 century, 607 early protection policies in Australian police violence against Aboriginal people, colonies, 483-91 effect of protection legislation, 320-1 324-5 profiling offenders, 622 ending of, 500-1 protection laws, and, 437 evolution of protection statutes, 491-6 assimilation and segregation rates of reported crime, 612-13 technology and information sharing, policies, 496 Oueensland, 495 613 traffic offences, 611 South Australia, 493 victims reporting crimes and initiating Victoria, 491-2 investigation, 623-5 Western Australia, 493-5 pollution, 414 'exemption' from protection precautionary principle, 420-1 legislation, 442 prisons human and cultural costs of protection Aboriginal deaths in custody, 128 laws, 482 major instrument of state power, as, 3 Indigenous women's sexuality, and, Privy Council 441-2 'one common law' for the Empire, 651 legal discrimination, as, 752-5 Police and Police Offenders Amendment appeals committee, 87, 92, 284 colonial legislatures, powers of, 137 Act 1956 (NT), 711 consistent interpretation of law across the Police and Police Offenders Amendment British Empire, 106 Act 1957 (NT), 712, 713, 714, 715-16 protection grounded in principles of state contested continuation of appeals to, 173 surveillance and guardianship end of Australian federal appeals to, 296, 669 across the country, 495-6 High Court of Australia bound by, 661 protection, stolen wages and, 362-367 judicial review of validity of legislation, Protectors of Aborigines, 483-91 Aboriginal people as Crown subjects, 169, 183 New South Wales, appeals from, 92, 97 487-8 duties of, 484-5 recognition of Indigenous property rights, 379 limited success of, 487 protection regimes, 320-1, 482-501 state encroachment into Indigenous lives, Aboriginal Protection Boards, 124, 319, 443 as, 483 Aboriginals Ordinance 1918-53 (Cth), 192 state guardianship, 7 Aboriginals Protection and Restriction of challenges to, 500 state guardianship to self-determination, the Sale of Opium Act 1897 (Qld), 125, 320, 439, 495 Aborigines Act 1969 (NSW), 381 wards. See Aboriginal wards Aborigines Protection Act (1909-1936), 526 Wards Employment Ordinance 1953 Aborigines Protection Act 1869 (Vic), (Cth), 716 Welfare Act 1953 (Cth), 712, 713, 714, 491, 492 Aborigines Protection Act 1886 (Vic), 492 715–16 Welfare Ordinance 1953-60 (Cth), 715-16 Aborigines Protection Act 1886 (WA), Welfare Ordinance 1957 (Cth), 712, 714 493, 494 Aborigines Protection Act 1909 (NSW), 381 protectionism, 31, 377, 393 Aborigines Protection Boards, 126, 128, 129, assimilationist protectionism, 7 208, 269, 515 discrimination of, 454



Index

racial discrimination, 245, 371, 531 protectorates colonies, establishing in, 112 attempted abolition of native title, and, 749 failure of, 117 child welfare departments, in, 443 New South Wales, 112 common law, and, 737 immigration, 560, 682 violent opposition to, 112-13 legal education, in. See under Australian Queensland, 119, 168 legal education Aboriginal evidence, 123 naturalisation, 560 Aboriginal Land Act 1991 (Qld), 384-7 part of the social fabric of Australia, as, Aboriginal protection legislation, 320, 439, 167, 535 public understanding of, 531 442, 495 Aboriginals Protection and Restriction of Racial Discrimination Act 1975 (Cth), 174, the Sale of Opium Act 1897 (Qld), 231, 251, 295, 388, 551, 553 segregation, 530-2 320, 439, 495 attempted annexation of New Guinea, 262 systemic discrimination continuing into Cape York Peninsula Heritage Act 2007 20th century, 167 (Old), 386 UN Convention for the Elimination of All closer settlement, 318 Forms of Racial consequences of colonial self-government Discrimination, 295 for Aboriginal people, 123, 125 Redfern Aboriginal Legal Service, 534 constitutional arrangements, 172 repugnancy of colonial legislation, 101-3, deeds of grant in trust, 384-5 136-8, 169, 659-60 economy, 119 reserves, 336, 340-3, 378, 510, 515 frontier violence, 128 Aboriginal sympathizers agitating for, 745 governor, 172 coercion onto, 320 dispossession and control of First Nations, human rights, 172 Human Rights Act (2019), 552 as tool for, 319, 342 Indigenous suffrage, 530 efforts to move people off reserves, 747 interdependency on Pacific peoples and enabling resistance, 514 resources, 259-61 land rights claims, and, 342 manhood suffrage, 120, 122 New South Wales, withdrawal of minimum Indigenous wage, 498 administration from reserves in, 533 Native Plants Protection Act 1930 (Qld), 413 purposes, 340, 341 permission required for interracial Queensland, 320 marriage, 441 South Australia, 320 police violence against Aboriginal Victoria, 319 people, 324 Western Australia, 320 Rio Declaration, 418 reservations of minerals, 344 reserves, 320, 342 Risk v Northern Territory, 393 settler-Indigenous violence, 128 rivers and dams, 410-11, 417, 424-5, 429, See Torres Strait islands, incorporation of, 261 also water management navigable rivers, 410 R v Ballard, 25, 27-8, 33, 106-7, 323 sacred sites and ceremonial grounds, jurisdiction, 25-6 and, 200 R v Boatman, 25, 26, 27-8, 33 Roach v Electoral Commissioner, 178, 553 R v Bonjon, 107, 309 Ross v Chambers, 500 R v Farrell, Dingle and Woodward, 105 Routledge v Low, 697 R v Madden, 103 Rowe v Electoral Commissioner, 178 R v Minor, 202 rule of law, 93, 165, 581, 723 R v Murrell, 25, 28–9, 33, 34, 38, 39, 106–7, 308–9, Aboriginal people, and, 484 633, 635, 645 colonisation, and, 68 R v Powell and others, 91 compliance with Australian constitution, 183 R v Wedge, 33



Index

compliance with judicial decisions, 163, 184 compulsory jurisdiction in inter-state disputes, 291 courts, in, 168 procedurally constructed in New South Wales, 101 requiring relationships of trust, 453 settlers, and, 653, 654 Rylands v Fletcher, 663 sacred sites, 198-200, 417 Aboriginal Sacred Sites Act 1978 (NT), 198 Aboriginal Sacred Sites Protection Authority, 198 dam construction, and, 200 destruction of, 198-9, 398 Northern Territory, 198-200 protection of, 202, 231, 346, 359, 746 self-determination. See First/Indigenous Peoples, self-government, selfdetermination and self-government, 5 colonial. See colonial self-government First/Indigenous Peoples. See First/ Indigenous Peoples, selfgovernment, self-determination and negative impacts on Indigenous sovereignty and self-determination separation of powers, 181-2 Commonwealth Constitution, 181 the states, and, 182 settled colonies. See under colonies settlement. See dispossession in the nineteenth century settler government, 5 settler law, 1 common law, arrival of, 21, 22, 23 denial of Indigenous sovereignty, consequences of, 742-3, 763 iurisdiction over Indigenous people, 23 policing and protection. See policing reception of English law, 103-6, 107 self-government. See colonial selfgovernment settler law, First/Indigenous Peoples and, 1, 6-7, 204-6 ALRC Report. See Australian Law Reform Commission (ALRC) challenges to court's jurisdiction and common law, 33 common law as law of the territory, 34

common law obscuring Indigenous jurisdictions, 29 criminal law, Indigenous people and, 629-50, See also Aboriginal offenders discrimination against Indigenous people, 757-60 incarceration rates. See under Aboriginal offenders inter se cases. See under Aboriginal offenders interpreting, 637-9 jurisdiction, 632-5 penalties, 640-2 prosecution fairness and outcomes, 646-9 victims, 642-6 witnesses, 635-7 customary law, accommodation of, 29-30 displacement or obfuscation of Indigenous jurisdictions, 21 encouraging lawyers to critically engage about Aboriginal law, 71 Indigenous families, controlling. See Indigenous families legal plurality. See legal plurality ongoing contestation between, 21 recognition of First/Indigenous law, struggles with, 106-7 settler law refusing to engage with First/ Indigenous law, 8 statutory schemes applying to Indigenous people, 31 traditional ownership, indigenous law and. See traditional ownership violence of colonising state law, 69 settler nation-building. See nation-building settler-Indigenous violence, 3, 484 Aboriginal legal status, and, 322-3 Aboriginal resistance to, 322-5 British law, and, 91-2, 325-6 creation of reserves as a response to, 340 deaths of Indigenous people, 91, 112, 322, 325, 435, 600, 607, 642 dispossession, and, 322-6 impact on families, 436 martial law, imposition of, 323-4, 484 Native Mounted Police, 125 New South Wales, 111, 322 police violence against Aboriginal people, protectorates, violent opposition to, 112-13



Index

settler-Indigenous violence (cont.) Spence v Queensland, 153 Queensland, 128 squatters, 312-15, 319 safeguarding Indigenous people from criticism of, 317 settler violence, 437 using wealth and knowledge to retain most Western Australia, 128-9 fertile land, 405 Statute of Westminster (1931), 173, 265, 289 Shaw v Minister for Immigration and Multicultural Affairs, 567-8 statutory land rights. See Aboriginal land silver. See under mining rights Stolen Generations, 452, 722 slavery, 111 social welfare. See economic and social compensation schemes, 757 welfare national apology to, 453, 454, 482 South Australia, 89, 168 redress through the courts, 448, 754 Aboriginal evidence, 122, 637 refusal of Howard government to Aboriginal Lands Trust Act 1966 (SA), 378 apologise, 453 Aboriginal protection legislation, 320 stolen wages, and, 499 Aborigines Act 1911 (SA), 440, 495 sub-surface rights, 342, 343-6 abortion, 550 suffrage colonial constitution, 118 Aboriginal men, 122 female suffrage, 120, 136, 147, 170, 177, 466, colonial population, growth in, 117 consequences of colonial self-government 511, 542 for Aboriginal people, 123, 126-8 female suffrage (UK), 165 Indigenous people, 122, 177, 530, 542-3 courts, 89 economy, 119 male/manhood suffrage, 120, 122, 136, 177, environmental land policy, 405-6 507, 541, 542 female suffrage, 120, 177 white male suffrage, 288 Legislative Council, 89 suffragette movement, 702 manhood suffrage, 120 mining. See mining Tanganekald, 724 National Parks and Wildlife Act 1972 Tasmania, 168, See also Van Diemen's Land (SA), 414 Aboriginal protection legislation, 320 police violence against Aboriginal Cape Barren Island Reserve Act (1912), 496 people, 324 consequences of colonial self-government protection legislation, 112, 440, 442, 486, for Aboriginal people, 123-4 492, 493 economy, 119 reserves, 320, 342 manhood suffrage, 120 Scrub Lands Act (1866), 405 protection legislation, 440, 495 Truganini as last Aboriginal of full South Australian Act (1834), 676 Supreme Court, 89 descent, 124 Town Planning and Development Act 1920 Telstra Corporation v Hornsby Shire Council, (SA), 411 421 women standing for Parliament, 542 tenure and estates, doctrine of. See under sovereignty. See Australian sovereignty; land law British sovereignty; Indigenous terra nullius, 106-7, 305, 332, 378, 651, 725, 730, See also land law sovereignty Australian. See Australian sovereignty Aboriginal people, and, 8 colonies, 24 adoption of fiction of, 4 Federation. See Federation Australia classified as, 8 nature of, 34 consequences of, 745-6 Parliamentary. See Parliamentary criticisms of terra nullius petering out, sovereignty 745 rights to land flowing from assertion of, 34 development of doctrine, 326 singular sovereignty, modern model of, legacy of, 743–51 New South Wales treated as, 330, 744



More Information

Index

repudiation of, 4, 200, 749 terrorism, disallegiant conduct and, 570-2 Torrens Land Registration System, 336, 346-50 Torres Strait Islander people children. See Indigenous children exclusion from constitutional settlement, 155-9 families. See Indigenous families incorporation of Torres Strait Islands into Queensland, 261 land use. See land use laws and traditions. See First/ Indigenous law recognition of parentage, 72 settler law, and. See settler law, First/ Indigenous Peoples and sovereignty. See Indigenous sovereignty sovereignty as spiritual notion, 253 Uluru Statement from the Heart. See Uluru Statement from the Heart Trade Practices Act 1965 (Cth), 152 traditional ownership, 251, 374, 380 communities characterised as racial groups not polities, 227-8 criterion based on race, as, 231 definition of traditional Aboriginal owner, 360 freehold grants of traditional land to traditional owners, 233 land rights in politics and court, 231-6 matrilineal descent, 371 native title law. See native title traditional ownership and political groupings in Canada and United States, 228 Uluru Statement from the Heart, 158-9, 252, 253, 254, 255, 302, 764 Voice to the Parliament. See Voice to the Parliament UNCITRAL, 301 United League of Indigenous Nations Treaty (2007), 214

United Nations, 290-1, 546

Charter of the UN, 291

Australia's ambivalent relationship with

and military interventions, 295

UN system, 293 Australia's involvement in peacekeeping

self-government as goal of

trusteeship, 272

Convention on Biological Diversity (1992), 418 Convention on the Law of the Sea (1982), 299 Framework Convention on Climate Change (1992), 418 General Assembly, 292, 545 Declaration on the Granting of Independence to Colonial Peoples (1960), 276 Trusteeship Council, 272, 273, 276, 278 United States American Revolution, 306 Bill of Rights, 544 Black Power movement, 8 Cherokee Nation v Georgia, 26, 235 civil rights and anti-apartheid movements, 546 colonial opposition to British rule, 48-50 Constitution, 165-6, 181, 536 constitutional law, 13 criminal profiling, 622 Declaration of Independence, 50 Declaratory Act (1766), 50-1 English law in, 44 equal protection, concept of, 536 federalism, 5, 139, 170 free labour, doctrine of, 687 Indian Child Welfare Act (1978), 449 Indian Federal Law and reservations, 374 Indigenous peoples, 295 land rights of Indigenous people, 228, 354 loss of North American colonies, 87 major influence on Australian constitutionalism, as, 165-6 Monroe Doctrine, 262 Stamp Act (1765), 48-9 repeal, 50-1 Yellowstone, 408 urban living. See built environment

Conference on Environment and

Development (1992), 418

Van Diemen's Land, 88, 99–100, See also
Tasmania
Aboriginal people asserting rights as free
people, 115–16
Aboriginal resistance to and negotiation
with government, 110–11
attempts physically to remove Aboriginal
people, 327
Chief Justice's veto over legislation, 101–2
civil courts. 100



Index

Van Diemen's Land (cont.) colonial constitution, 118 continuation of transportation to, 112 creation as separate colony, 101 criminal courts, 99 criminal law. See criminal law and administration of justice in early New South Wales and Van Diemen's Land dispossession through tenure, 311 establishment as separate penal colony, 88 legislation, repugnancy and, 101-3 Legislative Council, 88, 101-3, 539, 540 Lieutenant Governor's Court, 97 reception of English law, 103-6 Tasmania, becoming, 118 Victoria, 134, 168 Aboriginal evidence, 122 Aboriginal Lands Act 1970 (Vic), 378 Aboriginal Protection Board, 124 Aboriginal protection legislation, 320 Aborigines Protection Act 1869 (Vic), 491, 492 Aborigines Protection Act 1886 (Vic), 492 abortion, 550 access to water on goldfields, 407 Act to Provide for the Protection and Management of the Aboriginal Natives of Victoria (1869), 124 Charter of Human Rights and Responsibilities (2006), 552 Clean Air Act 1957 (Vic), 414 closer settlement, 318 colonial constitution, 118 consequences of colonial self-government for Aboriginal people, 123 Crown Lands Alienation Act, 318 divorce legislation, 120 economy, 119 Environment Effects Act 1978 (Vic), female suffrage, 177 Free Selection Act 1860 (Vic), 405 Game Act 1867 (Vic), 406 goldrush, 118 human rights, 172 interventionist Aboriginal policy, 124-5 liberal divorce laws, 469 manhood suffrage, 120, 122 national park, 408 protection legislation, 438, 491-2 protectors, appointment of, 436-7 Public Health Act 1889 (Vic), 408

reserves, 126, 319, 342 Traditional Owner Settlement Act 2010 (Vic), 396, 399 Wages Boards, 120 Vietnamese 'boat people', 297 violence. See settler-Indigenous violence Voice to the Parliament, 158-9, 229, 231, 252-6, 302 backdrop to proposals, 254 Commonwealth Constitution, calling for recognition First Nations in, 253 endorsed by more than 250 Indigenous leaders, 252 government's refusal to accept, 252 incorporating local and regional voices, legislative body advising Executive, government proposing, 255 Makarrata Commission, calling for, 253 proposal inconsistent with fundamental principle of equal civic rights, 255-6 Voice, Treaty, Truth proposals, 253 Commonwealth Franchise Act (1902), 177, 760 Commonwealth Franchise Act (1962), 76_I compulsory voting, 170, 176 Indigenous people, 177, 761 inflexible administration of voting rules, 178 Māori in Australia, 264 plural voting, abolition of, 120 prisoner voting, 178, 553 secret ballot, 120, 542 state voting, discrimination and, 760-1 suffrage. See suffrage wages. See under labour and labour law

wages. See under labour and labour law
Walker v New South Wales, 34–5
Ward v Taylor, 656
Ward v Western Australia, 392, 395
Warlpiri, 78, 83, 193
greeting new person as 'countryman',
78
language concerning ongoing creation of
Country, 77
water management, 407, 411, 426–9, See also
rivers and dams
Aboriginal protection of water
landscapes, 726
ensuring Indigenous involvement in
managing water resources, 742



Index

legislative modification of access rights to mining. See mining permission required for marriage of water, 412 water access in Victoria goldfields, 407 Aboriginal woman to nonwater contamination, 408 Aboriginal man, 441 welfare. See economic and social welfare police violence against Aboriginal well-being. See also economic and social people, 325 welfare protection legislation, 439, 442, 486, 493-5 established protocols laying foundation of protectorate, establishing, 112 Indigenous well-being, 504 representative government delayed, 117 history of Indigenous well-being, 522 reserves, 320, 342 improving community well-being, 206 self-government. See colonial self-Indigenous children, 454 government Indigenous people using settler welfare to settler-Indigenous violence, 128 advance wellbeing, 502 Soil and Land Conservation Act 1945 Indigenous ways and ideas of wellbeing, (WA), 412 521, 522 transportation of convicts to, 117 international mandatory obligations with Western Australia v Brown, 345 respect to 'native' well-being, Western Australia v Ward, 36 whaling, 291, 299 269, 270 Ngarrindjeri Nation, 219 Australia supporting ban on, 296 responsibility of First/Indigenous Peoples White Australia policy, 5, 263-4, 277, 288, 298, for each other's wellbeing, 79 542, 559, 613 self-government assisting community aims of, 556 wellbeing, 206 ambitions to extend to Oceania, 289 Western Australia, 88-9, 168 demise of, 556 Aboriginal Affairs Planning Authority Act discrimination by means of immigration 1972 (WA), 378 regulations, 559 Aboriginal evidence, 122, 637 isolating Australia, 290 Aboriginal protection legislation, 320 objections to, 292 Aborigines Act 1905 (WA), 495 protected from international law Aborigines Act Amendment Act 1936 challenge, 291 Wik v Queensland, 329–30, 337, 339, 345, 349, (WA), 751 Aborigines Protection Act 1886 (WA), 389-90 Williams cases, 184 493, 494 Aborigines Protection Board, 128, 129, Wilson v Anderson, 340 women. See also Indigenous women Child Welfare Act 1947–1950 (WA), 752 Aboriginal women and women of mixed Clean Air Act 1964 (WA), 414 descent, restrictions on, 497 closer settlement, 318 binding women convicts to work in colonial self-government, 108 domestic service, 672 consequences of colonial self-government child endowment, 514, See under economic for Aboriginal people, 123, 128-9 and social welfare civil and political freedoms in twentieth courts, 89 century, 466 economy, 119 excluded from transition to selfcoercive control, dynamics of, 625 government, 119 community child care, 516 female suffrage, 120, 177 divorce, 120 domestic violence, 611, 625 governor, 172 jury trials, 89 employment Land (Titles and Traditional Usage) Act awards system, and, 684-6 1993 (WA), 389 dangerous trades and industries, in, 678 dangerous workplaces, barred from, 679 invalidity of, 389 manhood suffrage, 120, 122 discrimination outlawed, 549



Index

post-war administration of occupied women (cont.) factories, in, 677 territories, 268-9 hotel and bar work, 679-80 prosecutions for theft rising after, labour law discriminating against soldier settlement schemes dispossessing women, 686 Indigenous people, 305 limiting hours of work, 678 minimum wage, 516 support for internationalised prohibited from Commonwealth Public administration, 267 Service after marriage, 548 veteran defendants after, 617 World War II, 272, 290 wages and equal pay, 512, 544, 548, 549, 625, 679, 684-6 Aboriginal veterans, 515 fears of women's sexuality, 459 conflict in Pacific, 271 female convicts obtaining freedom upon decolonisation, precipitating, marriage, 462 female defendants less likely to be imperial fealty during, 661 convicted, 617 international legal order after, 291 juries, women on, 548, 616, 627 mass immigration after, 610 labour movement, in, 513 revived interest in protection of rights through Constitution, 544 Legislative Councils, no voice in, 284 marriage, and. See marriage maternity allowance, 512 Yanvuwa Papua New Guinea, 279 bush names, 365, 373 political rights, 541, 760 identity, 365-366 presumed innate differences between men land claims. See Yanyuwa land claims and women, 459 Yanyuwa land claims, 9, 355-6, 370-372 rape prosecutions, lack of, 612 1992 reclaim case, 371 refuges, 516 Aboriginal people of mixed descent, 371 Sex Discrimination Act 1984 (Cth), 549 adoption of 'urgent patience' approach, 373 sexual charges against men, 626 community meeting to discuss claims, standing for Parliament, 542 367-370 suffrage. See under suffrage evidentiary burden, 372-3 violence against women, 71-2, 612 exclusion of women, 369, 371 welfare, 514 first land claim (Borrolloa I), 370-371 widow's pensions, 513 mining interests, 370 Sea Bed and Banks Claim, 371-2 women's movement, 470, 548-9 Woodward Royal Commission, 346, tensions, emergence of, 373-4 Yanyuwa as saltwater people, 363 358-359, 379 Yanyuwa law, 362-367 World Bank, 291 World Commission on Environment and identity, 364-365 Yirrkala Bark Petitions, 130, 231-2, 253, 378, Development, 418 World War I 746-7 Australia's pursuit of ambitions for Pacific Yolngu, 228, 231, 234 supremacy, 265-7 claim for recognition of traditional domestic violence after, 611 rights, 378 Paris Peace Conference. See Paris Peace sovereignty, 229-31 Conference Yorta Yorta Community v Victoria, 35-7