The Constitution of South Australia

1998 – 2003 Supplement

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CORRECTIONS AND UPDATES TO 30 April 2003

page	correction/update
iii	Footnote 2: Add, "See Taggart (ed) *The Province of Administrative Law* (1997) at 133; Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 *PLR* 196".
1	Footnote 2: Add, "See generally, "Selway, "The Role of Policy in the Development of Native Title" (2000) 28 *FLR* 403; Selway, "Mabo: Where have we Been and Where Have we Yet to Go?" APLA Year Book 2002 at 95 ff."
2	Footnote 10: Add, "For example, ecclesiastical law was not received because it was inappropriate to the condition of the colony: see McPherson, "The Church as Consensual Compact" (2000) 74 *ALJ* 159; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
3	Footnote 17: Insert after "crimes between Aborigines.": "See Kercher, "Publication of Forgotten Case Law of the NSW Supreme Court" (1998) 72 *ALJ* 876 at 881-883". Insert after the words, "subject to the ordinary law", ": see Lane,

"Nationhood and Sovereignty in Australia" (1999) 73 *ALJ* 120."

Footnote 19: Add "Bhuta, "Mabo, Wik and the Art of Paradigm Management" (1998) 22 *MULR* 24 at 25-32"

4 Footnote 22: Add, "*Fejo v NT* (1998) 195 CLR 96 at 129-130, 148-150".

Footnote 24: Add, "In *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193, the Canadian Supreme Court clearly distinguished between "native title" (requiring continual occupation) and "native rights" (that are integral to the distinctive culture). See Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 *MULR* 65. However, in Australia the position would seem to be that Aboriginal rights, other than native title rights, are not recognised by the common law: see *DPP Reference No 1 of 1999* (1999) 128 NTR 1 at 13-15. Even if this approach would not be followed in Australia, it is still possible that customary law may be the source of enforceable rights: see eg *Bulun Bulun v R & T Textiles* (1998) 157 ALR 193 at 197, 204-212."

Footnote 26: Insert after reference to *Sutton v Dershaw*, "*Dillon v Davies* (1998) 156 ALR 142; Jeffrey, "Escaping the Nets: Native Title as a Defence to Breaches of Fishing Laws" (1997) 20 *UNSWLJ* 352; Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 Melbourne University Law Review 65". Add at end, "In part, this may be the consequence of the *Native Title Act* 1993 (Cth). See *Commonwealth v Yarmirr* (1999) 168 ALR 426 at [42]-[70]"

5 Footnote 29: Add, "La Nauze, *The Making of the Australian Constitution* (1972) at 258."

Footnote 31: Add after the reference to *South Australia v Victoria*, "*Fejo v NT* (1998) 195 CLR 96 at 128-129, 143-146;"

8 Footnote 45: Add, "Boothby's heresies appear to have been reborn in the UK: see *R v Secretary of State for the Foreign & Commonwealth Office; ex p Bancoult* [2001] QB 1067 : see Tomkins, "Magna Carta, Crown and Colonies" [2001] *PL* 571."

9 Footnote 54: Add, Bannon "South Australia" in Irving (ed) *The Centenary Companion to Australian Federation* (1999) at 129-186

Footnote 56: Add, Howell, "The Strongest Delegation: The South Australians at the Constitutional Convention of 1897-98" (1998) 1 *New Federalist* 44.

Footnote 58: Add, "*Fyffe v Victoria* [2000] HCA 31 at [19]; *Yougarla v WA* [2001] HCA 47; Graham, "State Constitutions" (2001) 75 *ALJ* 600; Pritchard, "State Constitutional Law: Some Recent Developments" (Proceedings of the 2001 Annual Public Law Weekend) 115.

11 Footnote 64: Insert after reference to *Swift (Aust) Pty Ltd v Boyd Parkinson*, "*Airservices Australia v Air Monarch* (1999) 167 ALR 392."

12 Footnote 77: Add "See *Kartinyeri v Cth* (1998) 195 CLR 337; Williams, Gageler & Lindell, "October Symposium – The Races Power" (1999) 9 *PLR* 265; Reilly, "Reading the Race Power: a Hermeneutic Analysis" (1999) 23 *MULR* 476"

13 Footnote 82: Add "See *AG (Qld) v Riordan* (1997) 192 CLR 1"

Footnote 83: Add, Lane, "State Reference of Corporate Matters to the Commonwealth" (2001) *ALJ* 289; For a further example, see the *Terrorism (Commonwealth Powers) Act 2002*."

Footnote 83: Add, "See *Smith v St James* (1998) 135 FLR 296"

15 Footnote 89: As to the relationship between the Executive power and the prerogative, see *Ruddock v Vadarlis* (2001) 183 ALR 1.

Footnote 91: Add, "Williams, "Human Rights under the Australian Constitution" (1998) at 103-110."

Footnote 92: Add, "but jury can be less than 12, but probably has to be a minimum of 10: see *Brownlee v R* (2001) 180 ALR 301".

Footnote 93: Add, "Williams, "Human Rights under the Australian Constitution" (1998) at 130-137. Section 92 also protects an individual right to cross the border: see *AMS v AIF* (1999) 163 ALR 501 at [40]-[43], [96]-[105], [161]-[165], [221], [276-279]."

16 Footnote 94: Add "*Kruger v Cth* (1997) 190 CLR 1 at 85-87, 121-124, 160; Puls, "The Wall of Separation" (1998) 26 *FL Rev* 139"; "Williams, "Human Rights under the Australian Constitution" (1998) at 110-119".

Footnote 96, "Add, "Williams, "Human Rights under the Australian Constitution" (1998) at 119-127."

Footnote 97: Add "*Lange v ABC* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; Kennett, "The Freedom Ride: Where to Now?" (1998) 9 *PLR* 111; "Williams, "Human Rights under the Australian Constitution" (1998) at 165-193; Lane, "Constitutional Implications and a Bill of Rights" (2001) 75 *ALJ* 469. On the question whether an inference of freedom of political expression necessarily requires judicial review, see *Matadeen v Pointu* [1998] 3 WLR 18."

Paragraph 1.5.2.4: Delete the words in brackets "(including the common law of defamation)". Insert at the end of that paragraph the words "These rights and freedoms operate as restrictions upon legislative power. They do not give rise to private rights of action." Insert a new footnote "98A" after the word "action". Footnote to provide, "*Lange v ABC* (1997) 189 CLR 520 at 566; *Kruger v Cth* (1997) 190 CLR 1 at 46, 124-125."

18 Footnote 105: Insert after the reference to the *Port MacDonnell Fishermen's Case*, "*Sue v Hill* (1999) 163 ALR 648 at 665."

Footnote 107: Add, "*Joosse v ASIC* (1999) 159 ALR 260 at 263-266; *Sue v Hill* (1999) 163 ALR 648."

19 Footnote 108: Add, "*Cth v Yarmirr* (1999) 168 ALR 426 at [110]-[175]; *Risk v NT* (2001) 180 ALR 705 at 717 [35]; (on appeal) 188 ALR 376"

Footnote 110: Add, "As to the changes in the Territorial Limits of each of the colonies and States, see McLelland, "Colonial and State Boundaries in Australia" (1971) 45 *ALJ* 671; Lloyd, "The Maritime Limits of the States and Territories" (unpublished paper presented to the Constitutional Law Section of the NSW Bar Assoc in June, 1999)."

20 Footnote 117: Add, "As to the effect of the Act in extending the jurisdiction of the State and its courts, see *Jones v Queensland* [1998] 2 Qd R 385."

Footnote 121: Delete reference to *Fisheries Act* 1952 (Cth) and insert in lieu thereof, "*Fisheries Management Act* 1991 (Cth) Pt V."

21 Footnote 4: Add, "See generally, "The Constitutional Role of the Queen of Australia" (2003) *Common Law World Review* 248."

22

22 Footnote 5: Insert after the reference to *Attorney General (UK) v Wellington Newspapers*, "*Sue v Hill* (1999) 163 ALR 648 at [47]-[65], [158]-[176]; *Re Patterson; ex p Taylor* (2001) 182 ALR 657."

Footnote 6: Insert after the word "compare", "*Joosse v ASIC* (1999) 159 ALR 260 at 263-266; Stone & Williams (eds) *The High Court at the Crossroads – Essays in Constitutional Law* (2000) at 77."

Footnote 9: Insert immediately at the start of the footnote: "*O'Meara v McTackett* (2000) 172 ALR 342 at [7]-[8]."

Add, "Although the Crown and the Government is personalised in the Queen, as a practical matter the Crown can be viewed as a corporation aggregate constituted in accordance with the law: see *Western Australia v Watson* [1990] WAR 248 at 266; Taggart (ed) *The Province of Administrative Law* (1997) at 77-78."

23 Footnote 12: Add, "But see Stokes, "Are there Separate State Crowns" (1998) 20 *Syd LR* 127"

Footnote 14: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 105; Seddon, "The Crown" (2000) *FL Rev* 245 at 248-253."

25 Footnote 23: Add, "R Brazier, "Skipping a Generation in the Line of Succession" [2000] *PL* 568."

Footnote 25: Add, See also Munro, "More daylight, Less magic: The Australian Referendum on the Monarchy" [2000] *PL* 3 at 5."

26 Footnote 30: Add, "Similarly, the provisions of English law relating to the appointment of a regent during the incapacity or infancy of the monarch have no application within Australia: see Queensland Constitutional Review Commission, "Issues Paper" (1999) at 1203-1204.

30 Paragraph 2.5: Insert footnote 55A after the words "provides in part" such footnote to provide, "See *O'Meara v McTackett* [2000] HCA 32 at [8]."

32 Paragraph 3.1: Insert after "the oath", "of allegiance and of".

Insert footnote 3A after the words, "of office" such footnote to provide, "As to the requirement and legal effect of an oath, see Campbell, "Oaths and Affirmations of Public Office" (1999) 25 *Mon ULR* 132."

33 Paragraph 3.2: Delete the words "following the commencement of the *Australia Act* 1986 (Cth)".

Insert a new footnote 7A after the words "the current Letters Patent" such footnote to provide, "The current Letters Patent were made under the UK Great Seal and on the advice of the UK Government. They were made before the commencement of the *Australia Act* 1986 although they were expressed not to come into operation until that commencement. As to the validity of the Letters Patent, see *Dooney v Henry* (2000) 174 ALR 41 at [20]-[21]; and Lee & Winterton (eds) *Australian Constitutional Perspectives* (1992) at 283-289."

Footnote 13: There was never an established church in South Australia: see *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 at [61]-[64].

Paragraph 3.2.2: Delete and insert in lieu, "The Letters Patent provided that the Queen was responsible for the appointment of the Lieutenant Governor. This was varied by Order in Council made on 25 October 2001 (GG at 4687) which conferred that power upon the Governor."

36 Footnote 33: Insert after the reference to *Williams v McCarthy*, "*R v IRC; ex p Rossminster Ltd* [1980] AC 952; *Gibbs v Rea* [1998] AC 786; *Selby v Pennings* (1999) 19 WAR 520 at 528-532; *Cassell v R* (2000) 169 ALR 439 at [17], contrast at [63]-[69]."

38 Footnote 43: Add, "See also Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *PLR* 114 at 118.

Footnote 44: Insert after the reference to the Forward by Forsey, "Markwell, "Griffith, Barton and the early Governor generals: Aspects of Australia's Constitutional Development" (1999) 10 *PLR* 280."

45 Footnote 87: Add, "Contrast Thomas, "A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework" (1999) 28 *UWALR* 225 at 235-236."

47 Footnote 12: Add, "As to justiciability of matters arising under s 28a, see Bhattarai Raghavan, "Judicial Scrutiny of the Dissolution of Legislatures" [1996-1997] *Lawasia* 21"

49 Footnote 27: Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 23."

Footnote 30: Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 57-94."

50 Footnote 35: Add, For example, in respect of an appointment as a Parliamentary Secretary to the Premier or a Minister: *Constitution Act* 1934, ss 45(1a) and 67A."

Footnote 38: Add, "As to the previous position see Carney, *Members of Parliament: Law and Ethics* (2000) at 95-140."

51 Footnote 46: Add, "See generally Carney, *Members of Parliament: Law and Ethics* (2000)."
Footnote 47: Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 28."
Footnote 51: Add, "*R v Greenway* noted (1998) 24 CLB 1317."

54 Footnote 73: Add, "See Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 59-63."

56 Footnote 81: Add "Carney, *Members of Parliament: Law and Ethics* (2000) at 159ff."

Footnote 82: Add, "As to the power of a court to inquire into the extent of any privilege: see *Halden v Marks* (1998) 17 WAR 447 and see Chapter 4.9.5"

Footnote 83: Add, "See generally, Leopold, "Report of the Joint Committee on Parliamentary Privilege" [1999] *PL* 604; Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 207 ff."

Footnote 84: Insert after the reference to *Sankey v Whitlam*, "*Egan v Willis* (1998) 195 CLR 424 at 490-493. In particular, Art 9 does not prevent the courts from inquiring into whether the Parliament has complied with any applicable manner and form requirement: *Westco Lagan Ltd v AG* [2001] 1 NZLR 40 at 52-54"

57 Footnote 88: Add, *"Re Thompson; ex p Nulyarimaand* (1999) 136 ACTR 9 at 33-34".

Footnote 91: Insert after the reference to *Laurance v Katter*, "*Hamilton v Al Fayed* [2000] 2 WLR 609 at 615-616, 619-620; *Rann v Olsen* (2000) 76 SASR 450; 172 ALR 395; *CJC v Parliamentary Criminal Justice Commissioner* (2002) 124 A Crim R 1; Campbell, "Rules of Evidence and the Constitution" (2000) 26 *Mon ULR* 312 at 321-327."

Footnote 92: Add, "*O'Chee v Rowley* (1997) 150 ALR 199 at 206-215; *Hamilton v Al Fayed* [2000] 2 WLR 609"

Footnote 93: Add, "See also 14.4.6. The privilege is only applicable after the publication is authorised: *Rowan v Cornwall* (1997) 68 SASR 253 at 254-255."

Footnote 94: Delete LSJS reference to *Chakravarti v Advertiser Newspapers Ltd* and insert in lieu thereof, "(1996) 65 SASR 527 at 543-545, 550-551; (on appeal) (1998) 193 CLR 519 at 540-541, 583-589; *Moriaty & Wortly v Advertiser Newspapers* (1998) 198 LSJS 31 at 40-49; *Nationwide News v Redford* (2001) 214 LSJS 294 at 302-303"

58 Footnote 97: Add, "*Hamilton v Al Fayed* [1999] 1 WLR 1569 at 1583-1591 (on appeal) [2000] 2 WLR 609; *Crane v Gething* (2000) 169 ALR 727 at 746-747; *Re Reid; ex p Beinstein* (2001) 182 ALR 473."

Footnote 98: Add, "(on appeal) (1998) 158 ALR 527. However, the court can inquire into whether the power exists: *R v Richards; ex p Fitzpatrick & Browne* (1955) 92 CLR 157, 162; *Egan v Willis* (1998) 195 CLR 424 at 466-467, 486-494."

Footnote 101: Add, "*R v Greenway* noted at (1998) 24 CLB 1317."

60 Footnote 112: Add after "61 ff" the following, "Woodhouse, "Ministerial Responsibility" [1997] *PL* 262; *Egan v Willis* (1998) 195 CLR 424 at 451-452, 498-504; *Re Patterson; ex p Taylor* (2001) 182 ALR 657 at [216]-[225]; Stone & Williams (eds) *The High Court at the Crossroads – Essays in Constitutional Law* (2000) at 35."

Footnote 113: Add, "Oliver & Drewry, "Public Service Reforms: Issues of Accountability and Public Law" (1996) at 6"

61 Paragraph 4.11.1: Add after the words "her Portfolio" a new footnote 113A. Footnote to provide: "See generally Brazier, *Ministers of the Crown* (1997) at 245-283."

Footnote 117: Insert after the reference to *Egan v Willis & Cahill*, "In *Egan v Chadwick* (1999) 46 NSWLR 563, it was held that the Legislative Council had the power to call for documents protected by legal professional privilege, but not Cabinet documents. The question whether it would call for the documents was a political question."

Add, "See generally, Woodhouse, "Ministerial Responsibility" [1997] *PL* 262; Forsyth & Hare, *The Golden Metwand and the Crooked Cord* (1998) at 297ff; MacPherson, "Public Governance through Private Contract: A State Audit Perspective" (1999) 3 *FJLR* 9."

Footnote 118: Insert after the numbers "224-230, "; Mullen, "Parliamentary Sub Judice Convention and the Media" (1996) 19 *UNSWLJ* 303."

63 Footnote 2: Add, "*Workcover Corp v Hojski* (1993) 61 SASR 290 at 293; *Strachan v Graves* (1997) 141 FLR 283."

Footnote 3: Add after the reference to *McCawley v R* the following, "*Arena v Nader* (1997) 71 ALJR 1604; Campbell, "Investigating the Truth of Statements Made in Parliament: The Australian Experience" [1998] *PL* 125;"

64 Footnote 5: Insert after the reference to *Kable v DPP (NSW)* the following, *"Kruger v Cth* (1997) 190 CLR 1 at 72-73; *Durham v NSW* (1999) 47 NSWLR 340 at 361-365; (on appeal) (2001) 205 CLR 399 at [9]-[14]; [52]-[65]; *Westco Lagan Ltd v AG* [2001] 1 NZLR 40; Goldsworthy *The Sovereignty of Parliament* (1999)."

Insert after the reference to "*BHP v Dagi*" the following, "*Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 at 657; *Matadeen v Pointu* [1999] 1 AC 98 at 108;" Add, "Bamforth, "Parliamentary Sovereignty and the Human Rights Act, 1998" [1998] *PL* 572; "Williams, *Human Rights under the Australian Constitution* (1998) at 15-18; Elliott, "The Demise of Parliamentary Sovereignty? The Implications for Judicial Review" (1999) 115 *LQR* 119. On the other hand, international practice and treaties (including in relation to human rights) in operation at the date of the Constitution, or the date of any amendment, can be referred to for the purposes of interpretation: see *Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v Cth* (1998) 195 CLR 337 at 362-363, 383-385, 418-419; *Matadeen v Pointu* [1999] 1 AC 98 at 114-116; *Fisher v Minister of Public Safety and immigration (No 2)* [1999] 2 WLR 349 at 355."

Paragraph 5.1: Add after footnote "5" in the text, the following, "State legislative powers are not purposive and (aside from guarantees and limitations under the Commonwealth Constitution) the concept of proportionality has no application to the exercise of those powers". Insert a new footnote "5A" after the word "powers". Footnote to provide, "*Carbone v SA* (1997) 68 SASR 200 at 210; *Wynbyne v Marshall* (1997) 117 NTR 11 at 13-15, 19-21."

Footnote 6: Add "*Lange v ABC* (1997) 189 CLR 520 at 562; *Re Residential Tenancies Tribunal; ex p Defence Housing* (1997) 190 CLR 410 at 452-453."

Footnote 7: Add *"Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 at 645-647; *Northern Sandblasting v Harris* (1997) 188 CLR 313 at 385-386."

Footnote 8: Add "cf. Allen, "Parliamentary Sovereignty: Law, Politics and Revolution" (1997) 113 *LQR* 443."

Paragraph 5.2: Add after footnote "10" in the text, the following, "If the limitations are exceeded the legislation is void ab initio, subject to the issue of severance. The limitations".

Delete the word "These".

Insert a new footnote "10A" after the words "ab initio". Footnote 10A to provide, "*Ngo Ngo Ha v NSW* (1997) 189 CLR 465 at 503-505, but contrast Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 *PLR* 196 at 201."

Insert a new footnote "10B" after the word "severance". Footnote 10B to provide, "See Chapter 18.9.2."

65 Footnote 15: Insert after reference to *State Authorities Superannuation Board Case*, "*Lipohar v R* (1999) 168 ALR 8 at [97] ; *Mobil Oil Australia Pty Ltd v Vic* (2002) 189 ALR 161."

Footnote 18: Add, "As to whether a law alters the powers of the Parliament, see *Arena v Nader* (1997) 42 NSWLR 427 at 435; Campbell, "Investigating the Truth of Statements Made in Parliament: The Australian Experience" [1998] *PL* 125"

66 Footnote 19: Insert after the reference to *West Lakes*, "*Marquet v Clerk of Parliaments (WA) v AG (WA)* (2002) 26 WAR 201;

Footnote 20: Add, "Section 64A of the *Constitution Act* 1934 (SA) does impose manner and form restrictions in relation to local government, although that section would not appear to be doubly entrenched."

Footnote 23: Add, "Williams, "Human Rights under the Australian Constitution" (1998) at 8-10."

Footnote 24: Add, "*Levy v Victoria* (1997) 189 CLR 579."

67 Footnote 27: Add, "*Chief Commissioner of Stamp Duties v Palifex* (1999) 166 ALR 466; *R v Porter* (2001) 53 NSWLR 354 (applied laws are applied as Commonwealth, not State laws). However, State laws (such as the *Real Property Act* or the *Crown Lands Act*) which define the Commonwealth place, must necessarily have application: see eg *Commonwealth v WA* (1999) 160 ALR 638."

Paragraph 5.2.3.1: Add after footnote "28" in the text, the following, "The exclusive power in respect of "transferred departments" is strictly construed, and is unlikely to have much effect in practice." Insert a new footnote "28A" after the word "practice". Footnote to provide, "*Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 434-438, 487-492."

67-69 Paragraph 5.2.3.2: Delete and insert in lieu thereof:

"**5.2.3.2** *Customs and excise*

Section 90 of the Commonwealth Constitution provides that the Commonwealth has exclusive power to impose customs, excises and bounties. The purpose of section 90 is to give to the Commonwealth a real control over the taxation of commodities. The limitation relating to excise duties has proven to be the most significant.

It should now be accepted that an excise is a tax which is, in substance, in respect of goods at any point in their production or distribution to the point of consumption. The question whether the tax is "in respect of goods" involves judgments of fact and degree. A tax determined on the basis of value or quantity produced, distributed or sold is likely to be held to be an excise. A relatively small fee imposed in relation to previous turnover may not be an excise; a large fee may be. Similarly a flat fee for carrying on business would not usually be characterised as "in respect of goods", but it may be if it is very large and discriminatory."

Insert a new footnote "29" after the word "commodities". Footnote 29 to provide, "*Ngo Ngo Ha v NSW* (1997) 189 CLR 465. As to what is a commodity, see *Telstra v Hurstville CC* (2000) 181 ALR 406 where it was held that electromagnetic signals are not "goods"."

Insert a new footnote "30" after the word "consumption". Footnote 30 to provide, "*Capital Duplicators v ACT (No 2)* (1993) 178 CLR 561 at 582, 583."

Insert a new footnote "31" after the words "may be". Footnote 31 to provide, "Compare *Dennis Hotels v Victoria* (1960) 104 CLR 529 and *Ngo Ngo Ha v NSW* (1997) 189 CLR 465. As a result of the decision in *Ngo Ngo Ha v NSW* the State Government accepted that the ad valorem fees imposed by the *Liquor Licensing Act* 1985, by the *Petroleum Products Regulation Act* 1995 and by the *Tobacco*

Products Regulation Act 1997 could be invalid. The State requested that the Commonwealth increase the excises on those products which the Commonwealth has done. The amount of the increase is refunded to the States: See Williams, "Come in Spinner: Section 90 of the Constitution and the Future of State Government Finances" (1999) 21 *Syd LR* 627."

Insert a new footnote "32" after the word "discriminatory". Footnote 32 to provide, "*Hematite Petroleum v Victoria* (1982) 151 CLR 599."

70 Footnote 50: Add "In the US the foreign affairs power is treated as exclusive: Denning & McCall "The Constitutionality of State and Local Sanctions Against Foreign Countries" (1999) 26 *Hastings Constitutional Law Quarterly* 307."

Footnote 51: Add "And see Chapter 5.2.6 respecting the implication of exclusive Commonwealth power that can be derived from s 61."

Footnote 57: Add, "*R v Brownlee* (1997) 41 NSWLR 139."

71 Footnote 60: Add "See generally on implications within the Commonwealth Constitution limiting the power of the States: *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at [11], [14], [70]-[77]. On the other hand, there is no implication of "equality" within the Commonwealth Constitution: see *Kruger v Cth* (1997) 190 CLR 1 at 61-68, 80-85, 94-97, 107-114, 152-155; and see *Matadeen v Pointu* [1999] 1 AC 98 at 110-111."

Footnote 61: Insert after the reference to *Laurance v Katter*, "*Bruce v Cole* (1998) 45 NSWLR 163." Insert after the words, "public confidence in the court.", "See generally, "Wheeler, "The Doctrine of Separation of Powers and Constitutionally Protected Due Process in Australia" (1997) 23 *Mon ULR* 248; Campbell, "Constitutional Protection of State Courts and Judges" (1997) 23 *Mon ULR* 397; Johnston & Hardcastle, "State Courts: The Limits of Kable" (1998) 20 Syd LR 216; Stone & Williams (eds) *The High Court at the Crossroads – Essays in Constitutional Law"* (2000) at 119, 148; Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Outcome" (1999) 25 *Mon ULR* 209". Add "See Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *PLR* 153; "Williams, "Human Rights under the Australian Constitution" (1998) at 198-226. A law fixing a mandatory penalty is not inconsistent with the principle: *Wynbyne v Marshall* (1997) 117 NTR 11 at 21-26. A law imposing a mandatory sentence is not incompatible: *R v Moffatt* [1998] 2 VR 229; *Lloyd v Snooks* (2000) 153 FLR 339. A law limiting the *Ridgeway* discretion is not incompatible: *Nicholas v R* (1998) 193 CLR 173. A law changing the planning regime in the midst of a planning case is not inconsistent with the principle: *Bachrach v Qld* (1998) 195 CLR 547. A law conferring a supervisory role in relation to the Law Society is not inconsistent with the principle: *Felman v Law Institute of Victoria* [1998] 4 VR 324 at 352-358. Nor is a law giving to the Court the power to issue administrative orders in relation to a licensing scheme: *Evans v Strachan* (2000) 153 FLR 293. Nor is a law establishing a witness protection programme: *R v Nixon* (2000) 181 ALR 747. Nor is a law limiting publication of proceedings: *John Fairfax Publications v AG (NSW)* (2001) 181 ALR 694"

Footnote 62: Add, "As to the meaning of a "court", see Campbell, "What are Courts of Law" (1998) 17 *U Tas LR* 19. A similar requirement applies in relation to the Parliament: *Arena v Nader* (1997) 42 NSWLR 427 at 434."

Footnote 63: Add "Stone, "Freedom of Political Communication, The Constitution and the Common Law" (1998) 26 *FL Rev* 219; *Lange v ABC* (1997) 189 CLR 520; *Kruger v Cth* (1997) 190 CLR 1, 68-70, 88-93, 114-121, 142, 156-158; *Levy v Victoria* (1997) 189 CLR 579, 595; *R v Brisbane TV Ltd; ex p CJC* [1998] 2 Qd R 483; *Apache Northwest Pty Ltd v Western Power Corp* (1998) 19 WAR 350; *Coleman v Sellars* (2001) 181 ALR 120; *John Fairfax Publications v AG (NSW)* (2001) 181 ALR 694; *Power v Coleman* [2002] 2 Qd R 620; *ABC v Lenah Game Meats* (2002) 208 CLR 199 at 280-284, 330-339; *Roberts v Bass* (2002) 194 ALR 161; Stone & Williams (eds) *The High Court at the Crossroads – Essays in Constitutional Law* (2000) at 1; Lane, "Freedom to Communicate and Criticise" (2001) 75 ALJ 291; Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *MULR* 374; Gleeson, "The Shape of Representative Democracy" (2001) 27 *Mon LR* 1. In the UK freedom of expression has been held to be a fundamental common law right: see *R v Home Secretary; ex p Simms* [1999] 3 WLR 328 at 336-337,340*;* Chesterman, "Defamation and Critique" (2001) 25 *MULR* 522".

Paragraph 5.2.6: Delete the words "prerogative, property or revenues" and insert in lieu thereof the words "capacities or functions". Insert after the word "Crown" the following, "This is because s 61 (the "executive power"), combined with s 51(xxxix) (the "incidental power") of the Commonwealth Constitution gives to the Commonwealth Parliament the exclusive power to legislate in respect of the capacities and functions of the Commonwealth Executive." Insert after the word "invalid" the following, "On the other hand, State legislation can deal with transactions entered into by the Commonwealth Executive. The full effect of the distinction remains unclear, but it would seem that State legislation dealing generally with a particular subject matter (eg sale of goods, or road traffic laws) will be applicable to the Commonwealth and its officers unless excluded by Commonwealth legislation."

Footnote 66: Delete and insert in lieu thereof, "*Re Residential Tenancies Tribunal; ex p Defence Housing* (1997) 190 CLR 410 at 424-427, 438-447, 451-460, 463-474, 499-509; *Commonwealth v WA* (1999) 160 ALR 638 at 699-702; *Bass v Permanent Trustee* (1999) 198 CLR 334; *Commonwealth v Cigamatic* (1962) 108 CLR 372; Seddon *Government Contracts* (2nd ed) at 143-150; Penhallurick, "Commonwealth Immunity as a Constitutional Implication" (2001) 29 *FL Rev* 151 . The significance of this principle has been considerably reduced in light of the statutory subjection of the Commonwealth to substantive liability: see Chapter 11."

72 Footnote 67: Insert after the first reference to *"Engineers case"* the following, "*Kruger v Cth* (1997) 190 CLR 1 at 42; *Mobil Oil Australia Pty Ltd v Vic* (2002) 189 ALR 161; "Williams, "Human Rights under the Australian Constitution" (1998) at 51-56." Insert after the reference to *State Authorities Superannuation Board Case*, "*Sue v Hill* (1999) 163 ALR 648 at 667-675." Insert after the

reference to *Kable v DPP (NSW)* the following, "*Lange v ABC* (1997) 189 CLR 520 at 563-564; *Lipohar v R* (1999) 168 ALR 8 at [43]-[59] but contrast at [231]-[262]; *Pfeiffer v Rogerson* (2000) 172 ALR 625 at [2], [124]. (The single common law and the unified legal system have the necessary effect that, in the absence of a successful referendum under s 128, a secession must be unlawful: see *Fyffe v Victoria* [2000] HCA 31 at [20].)" Insert after the words "relevant implication.", "See Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *FL Rev* 1; Wright, "Sovereignty of the People – the New Constitutional Grundnorm" (1998) 26 *FL Rev* 165; Williams, "Human Rights under the Australian Constitution" (1998) at 91-95."

Paragraph 5.2.7.1: Insert after the words "another State," the words, "compulsory acquisition of property situated in another State,"

Footnote 68: Insert after the reference to *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* the following, "*R v Humby; ex p* Rooney (1973) 129 CLR 231 at 239, 240, 245-246; *Re Pearson* (1999) 162 ALR 248, 264; *Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 451; *Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 at 543-544, 585-586; *Mobil Oil Australia Pty Ltd v Vic* (2002) 189 ALR 161 and see Selway, "The Nature of the Commonwealth: A Comment" (1998) 20 *Adel LR* 95 at 96-97;"

Footnote 69: Add, "*Mobil Oil Australia Pty Ltd v Vic* (2002) 189 ALR 161; Leeming, "Resolving Conflicts Between State Criminal Laws" (1994) 12 Australian Bar Review 107; Nicholson, "The Concept of 'One Australia' in Constitutional Law and the Place of Territories" (1997) 25 *FL Rev* 281; Selway, "Commentary on Commonwealth Immunity" (1998) 17 *Aust Bar Rev* 42; Selway, "The Nature of the Commonwealth: A Comment" (1998) 20 *Adel LR* 95; Kirk, "Conflicts and Choice of Law within the Australian Constitutional Context" (Proceedings of the 2001 Annual Public Law Weekend) 53."

73 Footnote 70: Add, *Konrad v Victoria Police* (1999) 165 ALR 23 at 29-31, 52-55; *Austin v Cth* [2003] HCA 3 [17]-[28], [111]-[174], [207]-[229], [268]-[275], [283]-[294], .

Paragraph 5.2.7.3: Delete last sentence beginning, "Although less likely to arise in practice." Insert in lieu thereof the following, "Although the High Court has held that this limitation does not apply to State power, it may be that the implication does have application, at least in relation to the power of a State legislature in respect of other States." Insert a new footnote "70A" after the word "power". Footnote 70A to provide, "*Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 424-426, 440-441, 451-455, 508."

Footnote 74: Add, "The process of legislating by adoption does not involve any abrogation: see *Byrnes v R* (1999) 199 CLR 1, 38; *Pauls Ltd v Elkington* (2001) 189 ALR 551."

Footnote 75: Insert after the second reference to *McGinty* the following, "(although maybe not too much democracy: see *Initiative and Referendum*

Reference [1919] AC 935 at 945). Similarly, it may be necessary for the body to have some of the privileges associated with a Parliament: see *Arena v Nader* (1997) 71 ALJR 1604 at 1605."

75 Paragraph 6.1: Delete, "of the South Australia Company"

Footnote 3: Add, "The former limit in relation to 13 Ministers, in which case no more than 10 are members of Executive Council was repealed by the *Constitution (Ministerial Office) Amendment Act, 2002*

77 Paragraph 6.2: Insert immediately after the words "Cabinet is the meeting of" the following, "certain"

Footnote 20: Add, "*Arcadia Holdings P/L v Brown* (1998) 18 WAR 350 at 358-363"

78 Paragraph 6.2.1: Delete and insert in lieu thereof, "Where there are only 13 Ministers or less, all Ministers are members of Cabinet. Where there are more than 13 Ministers, only those that are Executive Councillors are invited to Cabinet as a matter of course, but the other Ministers may be invited to a particular meeting or to a particular discussion by the Premier. On occasions, persons other than ministers are present during Cabinet." Insert new footnote 20A after the words "During Cabinet". The new footnote to provide, "See Brazier, *Ministers of the Crown* (1997) at 15ff."

79 Footnote 25: Add, "See Brazier, *Ministers of the Crown* (1997) at 27ff. More than one Minister may be appointed to administer a single Department: *Re Patterson; ex p Taylor* (2001) 182 ALR 657."

Paragraph 6.4.2: Delete and insert in lieu thereof, "There can be up to 15 Ministers." Insert footnote 26 after the words "meetings of Cabinet". Footnote 26 to provide, "*Constitution Act* 1934, ss 65. See Chapters 6.1 and 6.2."

Paragraph 6.4.3: Delete the words "of an election" and insert in lieu thereof the following, "of the dissolution of Parliament".

Paragraph 6.4.4: Delete.

80 Footnote 32: Replace the numbers "302" with the numbers "8.23"

Footnote 33: Add, "See, for example, the Government Gazette of 20 October 1997 at page 1057."

Paragraph 6.4.8: Add, "A Minister may be specified by proclamation as the delegate of another specified Ministry, being one of the Ministries held by one of the 10 "portfolio" Ministers. For legal purposes third parties may treat the delegate Ministers as if they exercised all of the powers of the portfolio Ministers in respect of the particular delegated Ministry. However, there are internal arrangements put in place by the Premier to regulate the arrangements between the two Ministers, but these do not have legal effects upon third parties." Insert a new footnote

"35A" after the words "one of the 10 "portfolio" Ministers". Footnote 35A to provide, "*Administrative Arrangements Act* 1994, s 9A."

Footnote 35: Add, "See *A-G v Foster* (1999) 161 ALR 232."

Footnote 36: Insert after the reference to *State Chamber of Commerce and Industry v Commonwealth*, "*McKellar v Container Terminal Management Services* (1999) 165 ALR 409 at 448."

Insert after the reference to *Meates v AG*, "compare Brazier, *Ministers of the Crown* (1997) at 203ff."

81 Footnote 40: Delete reference for *R v RWD* and insert in lieu thereof, "(1994) Man R (2d) LEXIS 1052."

Paragraph 6.5.2: Insert new footnote 42a after the words "to government". New footnote to provide, "See Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 *PLR* 196; Selway, "The Duties of Lawyers Acting for Government" (1999) 10 PLR 114; contrast King, "The Attorney General, Politics and the Judiciary" (2000) 29 *UWALR* 155."

Footnote 43: Insert after reference to Edwards' book, "; *Hamilton v Al Fayed* [1999] 1 WLR 1569 at 1573; (on appeal) [2000] 2 WLR 609."

82 Footnote 47: Add, "But see *DPP v B* (1998) 194 CLR 566 at 578-580. The Attorney General can give undertakings not to prosecute when it is his view that it is in the public interest to do so: *Bolkiah v Brunei Darussalam (State) and BIA (No 2)* [2001] 2 Law Reports of Commonwealth 134 at 162"

Footnote 48: Add, "The position in South Australia was stated by Attorney General Sumner in the Legislative Council on 25 August 1988: see *Hansard* for that day at pp 512-513."

83 Paragraph 6.5.6: In paragraph (a) insert after the words "The Attorney General is a proper" the words, "and necessary".

In paragraph (b) insert after the words "suffered some special damage" the words, "or (where only equitable relief is sought) has sufficient interest that the controversy is justiciable".

Footnote 51: Add, "The principle is not limited to "charitable trusts". It also includes statutory trusts: see *WA v Ward* [2002] HCA 28 at [241]."

Insert footnote 52A after the word "justiciable", such footnote to provide, "*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 263". Insert after the words "or special damage" the words, "or sufficient interest".

Footnote 51: Insert after the reference to the *Trustee Act*, "and see *Bathurst CC v PWC Properties P/L* (1998) 195 CLR 566 at 583-584; *Scott v National Trust* [1998] 2 All ER 705 at 713-714. Although the Attorney General has the power to take action to enforce a charitable trust, the Attorney General does not owe any

private law duty to beneficiaries to do so: *Mendelssohn v AG* [1999] 2 NZLR 268 at 276-277."

Footnote 52: Insert at the start of the footnote, "As to the special constitutional role of the Attorney General as the guardian of the public interest, see *AG v Blake* [1998] Ch 439 at 459; (on appeal) [2000] 3 WLR 625. So, for example, the Attorney general may be a proper party to protect the public interest even where the State also has a commercial interest: see *Johnson Tiles Pty Ltd v State Electricity Commission of Victoria* [2000] FCA 1510 (although there must be some doubt about some of the reasoning in that case). On the question of locus standi to enforce public rights,". Insert after the reference to the article by Fisher & Kirk, "*Bridgetown Friends v Conservation* (1997) 18 WAR 126 at 133-135, 151, 159-161." Insert after the words "and "private" rights" the following, "and the question of special damage or interest are". Add after the reference to *Boots Co (Aust) Pty Ltd v Smithkline Beecham Healthcare Pty Ltd* the following, "*Aboriginal Community Benefits Fund v Bateman's Bay Local Aboriginal Land Council* (1997) 41 NSWLR 494; (on appeal) (1998)194 CLR 247; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616 at [37]-[41], [101]-[103], [160]-[161], [211]." Insert after the words "Public rights of way", "(as to which, see *DPP v Jones (Margaret)* [1999] 2 AC 240 at 253-258, 261-264, 268-275, 279-281, 285-293)." Insert after the words "Excesses of statutory power", "(as to which see *Corporation of the City of Enfield v DAC* (2000) 169 ALR 400 at [16]-[23]). Add to the end of the footnote, "There may be a common law public right that a person should not profit from his or her criminal activity: see *AG v Blake* [1998] Ch 439 at 462, but contrast on appeal [2000] 3 WLR 625. It may be that an injunction is available at the request of a statutory body to support the performance of statutory duties by that body: *Broadmoor HA v R*obinson [2000] 2 All ER 727 at 734, 738-739, 740. As to the obligation of the Crown to give an undertaking for damages when seeking an interlocutory injunction in respect of a public right, see *Optus v City of Boroondara* [1997] 2 VR 318 at 321, 330-336, 340-341."

84 Footnote 57: Add, "Contrast *Re McBain; ex p Australian Catholic Bishops Conference* (2002) 209 CLR 372."

Footnote 60: Add, "See also Chapter 11.3.2.7."

85 Footnote 62: Add, "The Attorney General has a right to remove a constitutional case into the High Court: *Judiciary Act* 1903 (Cth) s 40. See *Local Govt Assoc Qld v Qld; ex p AG (Qld)* (2002) 185 ALR 457."

Footnote 63: Add "*SCI Operations v Cth* (1996) 69 FCR 346 (reversed on other grounds (1998) 192 CLR 285); *Scott v Handley* [1999] FCA 404 at [43]-[47]. The expectations are not limited to the Crown as litigant, eg as a party to a contract: Seddon *Government Contracts* (2nd ed) at 11-15"

Footnote 66: Add, "*Australian Industry Group v AFMEPKIU* (2002) 188 ALR 653 at 655-656 [8]. The power is not limited to contempt: it includes power to seek orders in inherent jurisdiction to control vexatious litigants: see *AG v Ebert* [2002] 2 All ER 789."

Footnote 67: Add, "However, in federal jurisdiction there must be a matter in which the Attorney General has an interest, at least in circumstances where any error is within jurisdiction: *Re McBain; ex p Australian Catholic Bishops Conference* (2000) 209 CLR 372; 188 ALR 1."

86 Footnote 69: Add, "Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *PLR* 114 at 119; King, "The Attorney General, Politics and the Judiciary" (2000) 29 *UWALR* 155 at 159-164."

Footnote 70: Add, "As to the privilege of "policy" advice, see Willcock, "Legal Professional Privilege and the In-house Lawyer – Principles and Practice" (1999) 27 *ABLR* 364. As to waiver of legal professional privilege, see *Mann v Carnell* [1999] HCA 66 at [16], [33]-[35], [149]-[154] (contrast 78-93) where legal professional privilege was held to continue to apply to Executive documents provided to a member of Parliament."

Footnote 72: Insert after the reference to McKechnie, "Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *PLR* 114 at 118." Add, "*HIC v Freeman* (1998) 158 ALR 267 at 281-287; contrast *Goodridge v Chief Constable of Hampshire Constabulary* [1999] 1 All ER 896 at 901-903. As to the duties of prosecutors, see *Velevski v R* (2002) 187 ALR 233; *R v Reci* (1997) 70 SASR 78 at 100-101."

87 Footnote 1: Insert after the reference to Harris' article, "Seddon, "The Crown" (2000) 28 *FL Rev* 245 at 254;"

Footnote 2: Insert after the reference to *Ex p Fire Brigades Union*, "*R v DPP; ex p Kebilene* [1999] 3 WLR 175 at 186-187, 197; *Ruddock v Vadarlis* (2001) 110 FCR 491; *Oates v AG (Cth)* (2003) 197 ALR 105". Insert after the reference to the article by Thomas, "Forsyth & Hare, *The Golden Metwand and the Crooked Cord* (1998) at 65ff; Billings & Pontin, "Prerogative Powers and the Human Rights Act: Elevating the Status of Orders in Council [2001] *PL* 21 at 22.".

88 Footnote 6: Add, "As to the relationship between the Executive power and the prerogative, see *Ruddock v Vadarlis* (2001) 183 ALR 1."

89 Footnote 89: Insert after the reference to *Davis v Commonwealth*, "*R v Hughes* (2000) 171 ALR 155 at 165-167."

91 Footnote 32: Add Pannick, "Why the Silk's Purse Won't Survive" [2001] *PL* 439."

92 Footnote 45: Add, "see *Von Einem v Griffin* (1998) 72 SASR 110."

Paragraph 7.2.4: Delete the words "by a convicted person and addressed" and insert in lieu thereof the following, "by a person convicted on information, forwarded".

93 Footnote 54: Add, "contrast Mathieson, "Does the Crown Have Human Powers" (1992) 15 *NZULR* 117 at 119-124."

Footnote 55: Insert after reference to *Hawker Pacific v Freeland*, "*US v Tingey* 30 US 114 at 127-128 (1831);". Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 58-61".

Footnote 60: Add, "but see Seddon & Bottomley, "Commonwealth Companies and the Constitution" (1998) 26 *FL Rev* 271."

Footnote 61: Add, "That case would seem to apply the ordinary rule as to the effect of a statute upon prerogative powers, to the personal powers ie if a statute touches the same subject matter then the prerogative is wholly inapplicable, unless the statute is facultative. However some take a different view ie. that the statute will only exclude the personal power is it does so expressly or by necessary implication, see *Vass v Cth* (2000) 169 ALR 486 at [18]-[19]; Seddon, *Government Contracts* (2nd ed, 1999) at 42-43."

95 Footnote 70: Add, " Of course, the law may be referred to for the purpose of understanding the meaning of statutory terms: see, for example, the analysis at *South Australian River Fishery Association & Warrick v South Australia* [2003] SASC 38 at [93] ff ."

Paragraph 7.2.6: Insert new footnote 70A after the words "legislation dealing with Crown lands". Footnote 70A to provide, "*Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Wik Peoples v Qld* (1996) 187 CLR 1 at 108-111, 139-143, 171-174, 227-228, 243. It has been suggested that this has the effect that the Crown cannot deal with the land at all eg by giving contractual rights to a particular party: *Munday v ACT* (1998) 146 FLR 17 at 25-26."

Footnote 71: Add, "However, the principle probably has no application to ordinary commercial transactions: *Lonrho Exports Ltd v ECGD* [1999] Ch 158 at 183."

Footnote 72: Add, "As to the breadth of the jurisdiction, see *In re A (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480 at 512-513 where the Court of Appeal authorised treatment which would inevitably result in the earlier death of one Siamese twin, but would give the other some opportunity for long term survival, contrary to the wishes of the parents".

96 Footnote 80: Add, "The common law power did not include a power to restrain a prisoner with irons for the purposes of punishment: *Binse v Williams* [1998] 1 VR 381 at 389-391."

Footnote 83: Add, "but not where the Crown was the proper party: *Esquimalt & Nanaimo Railway Co v Wilson* [1920] AC 358 at 367."

Footnote 84: Insert after the reference to *Feather v R* the following, "*Commonwealth v Mewett* (1997) 191 CLR 471 at 496-497, 541." Add, "*Bazley v Curry* (1999) 174 DLR (4th) 45; *Jacobs v Griffiths* (1999) 174 DLR (4th) 71; Kneebone, "Tort Liability of Public Authorities" (1988) at 319-323. Contrast *Mewett v Cth* (1997) 191 CLR 471 holding that the Crown could commit a tort, but was immune from liability: see Selway, "The Source and Nature of the Liability in Tort of Australian Governments" (2002) 10 *Tort L Rev* 14."

97 Footnote 88: Insert after the reference to *Franklin v Queen (No 2)*, "*PSAC, Local 660 v CBC* (1976) 66 DLR (3d) 760;". Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 97."

Footnote 89: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 161-163." Insert after the reference to *Factortame*, "*Enfield CC v DAC* (1997) 69 SASR 99 at 115"

Footnote 90: Add, "Forsyth & Hare, *The Golden Metwand and the Crooked Cord* (1998)at 253ff".

Footnote 91: Add, "*Keable v Canada (AG)* (1979) 90 DLR (3d) 161."

98 Footnote 98: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 165-166."

100 Footnote 125: Add, "*Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd* (1998) 45 NSWLR 556 at 563-566

101 Paragraph 7.2.18: Insert footnote 136A after the words, "Limits of the jurisdiction" such footnote to provide: Which, in South Australia and the Northern Territory include "bays and gulfs": see *Risk v NT* (2001) 180 ALR 705 at 717 [35] (on appeal) [2002] HCA 23 at [24], [122]."

102 Footnote 140: Insert after the reference to *Minister for Primary Industry and Energy v Davey*, "*Cth v Yarmirr* (1999) 168 ALR 426 at [205]-[219]." Add, "The public right in relation to rivers is limited to tidal waters, although the Crown has acquiesced in the use of non tidal waters eg in the River Murray: see *South Australian River Fishery Association & Warrick v South Australia* [2003] SASC 38 at [53]-[61]. In *Munday v ACT* (1998) 146 FLR 17 at 23-24, it is suggested that there were also general public rights to use unalienated Crown land. This would appear to be in error."

104 Footnote 155: Add, "The Crown in England also had the prerogative right to certain animals eg swans: *Yanner v Eaton* (1999) 166 ALR 258 at [99]."

Footnote 156: Insert after the reference to Renfree, "Horrigan (ed), *Government Law and Policy* (1998) at 144-170."

Footnote 158: Add, "The Crown may also use copyright material in certain circumstances: ss Taylor-Sands & Graham, "Crown Use of Copyright Material and Computer Programs" (2001) 75 *ALJ* 566; Campbell & Monetti, "Immunities

of Agents of Government from Liability for Infringement of Copyright" (2002) 30 *FL Rev* 459..."

Footnote 160: Add, "See generally Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 57-63."

105 Footnote 162: Add, "Billings & Pontin, "Prerogative Powers and the Human Rights Act: Elevating the Status of Orders in Council" [2001] *PL* 21 at 23-27."

Footnote 165: Add, "*Selby v Pennings* (1998) 19 WAR 520; contrast as to search warrants: *Ousley v R* (1997) 192 CLR 69 at 82-84, 87-91, 105-109, 128-131, 149-157; *R v IRC; ex p Rossminster* [1980] AC 952 at 1000, 1004, 1009."

Footnote 167: Add, Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 125-131."

Footnote 169: Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 58, 120-122."

Footnote 172: Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd Ed, 1999) at 122-125, 291."

Footnote 174: Add, "Section 39 is qualified in that the power to amend is subject to any qualification to the contrary, including by reason of subject matter. In *South Australian River Fishery Association & Warrick v South Australia* [2003] SASC 38 at [155] ff it was held that there was a necessary qualification where the relevant right was a property right such that the delegated legislation establishing that right could only be varied upon reasonable notice or upon payment of reasonable compensation.

Footnote 177: Add, "As to the presumption of constitutionality, see *de Freitas v Ministry of Agriculture, Fisheries, Land & Housing* [1999] AC 69 at 75."

107 Footnote 179: Add, "*Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541-547; *Minister for Immigration v Kurtovic* (1990) 92 ALR 93 at 112; *Leung v Minister* (1997) 150 ALR 76 at 83-85. Contrast *Pfeiffer v Stevens* (2001) 185 ALR 183 re Ministerial power to extend the operation of a regulation – could be exercised more than once. See Orr & Briese, "Don't Think Twice? Can Administrative Decision Makers" (2003) 35 *AIAL Forum* 11. "

Footnote 180: Add, "*Jovanovic v R* (1999) 165 ALR 6 at 10-16."

Footnote 181: Delete reference to *Muscat v Magistrates* Court and insert in lieu thereof, "(1996) 66 SASR 367; *Tran v Police* (unreported, SASC, Perry J, 2 October 1998);" Add, "; Allars, "Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts to Re-Open and Reconsider Their Decisions" (2001) 21 *Aust Bar Rev* 50. As to relationship between functus officio and invalidity, see *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11 and see Chapter 18.9.1".

109 Footnote 11: Add, "Campbell, "Inferior and Superior Courts and Courts of Record" (1997) 6 *JJA* 249. As to the control that a court of record has over its

records, see Chandler, "Media Access to Court Documents" (1998) 17 *U Tas LR* 186."

Footnote 16: Add, "As to the collegiate nature of a court, see *Re Jarman; ex p Cook* (1997) 188 CLR 595 at 610. As to the role of the Chief Judge at common law, see *Rajski v Wood* (1989) 18 NSWLR 512 at 525-526."

112 Footnote 46: Add, For a general description of the jurisdiction and practice of the High Court, see Jackson, "Practice in the High Court of Australia" (1997) 15 *Aust Bar Rev* 187.

113 Footnote 51: Insert after the number "19.", "It does not have jurisdiction to determine the entitlement of a Parliamentarian to vote in Parliament: *Ellis v Atkinson* [1998] 3 VR 175." Insert after the reference to *Couzens v Negri*, "*Elder v Queensland* (1997) 141 FLR 467".

Footnote 52: Add, "Indictable offences includes a summary offence when tried with an indictable offence upon the same information: *R v Adams* (1995) 66 SASR 284."

Paragraph 8.3.2: Insert footnote 52A after the words "court of appeal in the State", such footnote to provide, "As to the various types of appeal, see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622; *Coal and Allied Operations Pty Ltd v AIRC* (2000) 174 ALR 585 at 590 [12]-[14], 605-607 [68]-[75], 618-621 [113]-[121]."

Footnote 54: Insert at the start, "*Pfeiffer v Rogerson* (2000) 172 ALR 625 at [25], [115]-[117]."

Footnote 57: Insert after the reference to *R v Winfield*, "*R v Manning* [1998] 4 All ER 876."

Add, "Goode, "The Tortured Tale of Criminal Jurisdiction" (1997) 21 *MULR* 411."

Paragraph 8.3.2: Insert after the words, "removed by State legislation", "The Supreme Court comprises the Court of Disputed Returns for Parliamentary elections." Insert footnote 57A after the word "elections" such footnote to provide, "*Featherston v Tully* (2002) 83 SASR 302.

114 Footnote 67: Add, "contrast *City of Victor Harbor v Roeger* (2002) 82 SASR 140."

Footnote 71: Insert after the reference to *Grassby v R*, "*Taylor v Taylor (*1979) 143 CLR 1 at 6, 7, 16: *Merribee v ANZ* (1998) 193 CLR 502 at 510-511; *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290 at 293-294; *Christmas Island Resort P/L v Geraldton Building Co Pty Ltd (No 5)* (1997) 18 WAR 334 at 343-345; *DPP v Shirvanian* (1998) 44 NSWLR 129 at 132-138, 148-156;" Add after the reference to the article by Dockray, "Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23; Gordon, "Judicial Review and Crown Office Practice" (1999) at 3-4."

115 Footnote 72: Insert after the reference to *R v Forbes; ex parte Bevan*, "*Papzoglou v Republic of the Philippines* (1997) 74 FCR 108; *Bynder v Gokel* (1998) 125 NTR 1 at 4-6; *DPP v Shirvanian* (1998) 44 NSWLR 129; *Cabal v United Mexican States (No 2)* (2001) 181 ALR 169 at 173; (on appeal) (2001) 183 ALR 719."

Footnote 74: Add, "See *Byrnes v R* (1999) 164 ALR 520 at [32]."

Footnote 75: Add, "*Re Colina; ex p Torney* (1999) 166 ALR 545 at 578-579. The power is not limited to contempt. It includes power to make orders in the inherent jurisdiction of the court to control vexatious litigants: *AG v Ebert* [2002] 2 All ER 789."

Footnote 77: Add, "*Patrick Stevedores Operations v MUA* (1998) 195 CLR 1 at 32-33; *Pelechowski v The Registrar* (1999) 162 ALR 336 at 346-348; *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294; *DPP v Scarlett* [2000] 1 WLR 515 at 522. In contrast, the Magistrates Court has no such jurisdiction: *Roberts (Trading as Contract Refrigeration Services) v Kowshu Enterprises Pty Ltd* (1999) 202 LSJS 191."

Paragraph 8.3.5.3: Add new paragraph, "The Supreme Court, as a superior court of record, has jurisdiction to determine the limits of its jurisdiction."
Add a new footnote 77A after the word "jurisdiction" such footnote to provide, "*Canada Trust v Stolzenburg* [1997] 4 All ER 983 at 988-989; *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13."

Footnote 78: Add, "*Phong v AG (Cth)* (2001) 185 ALR 753 at 764-765".

Footnote 79: Insert after the reference to *R v O'Loughlin; ex p Ralphs*, "contrast *DPP v Shirvanian* (1998) 44 NSWLR 129. The implied power to control procedure and to punish contempts carries with it a power to remand into custody, at least for a short period: *O'Brien v NT* (2002) 139 NTR 1. As to the implied power of the High Court to grant bail in relation to appeals to it, see *United Mexican States v Cabal* (2001) 183 ALR 645 at 655-656 [37]-[38]."

116 Footnote 80: This may include an inherent jurisdiction to order that a vexatious litigant cannot commence proceedings except with the leave of the court: contrast *Ebert v Venvil* [1999] 3 WLR 670 with *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311.

Footnote 81: Add, "*Taylor v Taylor* (1979) 143 CLR 1 at 6, 7, 16; *Hoskins v Van Den-Brook* (1998) 43 NSWLR 290 at 293-294."

Footnote 82: Add, "The power to control proceedings includes power to give access to court documents: *Hammond v Schienberg* (2000) 52 NSWLR 49."

117 Footnote 94: Insert after the reference to *"Jellyn v State Bank*", "*Commonwealth v Silverton Ltd* (1998) 130 ACTR 1 at 8-13; *Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39 at [14]-[15], [48]."

118 Footnote 116: Delete and insert in lieu thereof, "The cross vesting of State jurisdiction on Federal Courts was held invalid in *Re Wakim; ex p McNally* (1999)

163 ALR 270. See Stone & Williams (eds) *The High Court at the Crossroads – Essays in Constitutional Law* (2000) at 186."

Paragraph 8.3.7.1: Insert a full stop after the words, "Northern Territory". Delete the words, "of the Family Court ... determine the proceeding".

120 Footnote 133: Add, "As to the relevant principles respecting the processes of appointment to and tenure of judicial office, see note at (1997) 71 *ALJ* 401."

121 Paragraph 8.5.4: Add after the words, "applying the law.", "This includes the exercise of independence from the other members of the court when exercising judicial functions." Insert footnote 141A after the words "judicial functions" such footnote to provide, "*Rajski v Wood* (1989) 18 NSWLR 512 at 525-526; *Barton v Walker* [1979] 2 NSWLR 740 at 749-750, 755-760; *Mann v NT News* (1988) 53 NTR 15 at 17; *Bainton v Rajski* (1992) 29 NSWLR 539 at 541, 544; *Re Colina; ex p Torney* (1999) 166 ALR 545 at [29]-[31], [142].

Footnote 149: Add, "As to the common law right of access to the courts, see *R v Lord Chancellor; ex p Witham* [1998] QB 575; *R v Lord Chancellor; ex p Lightfoot* [2000] 2 WLR 318 at 326-330; Willheim, "Are Our Courts Truly Open?" (2002) 13 *PLR* 191".

122 Footnote 152: Add, "*R v City of London Magistrates* [1997] 3 All ER 551 at 557."

Footnote 153: Add, "As to the relationship between tenure and independence, see Zeitz, "Security of Tenure and Judicial Independence" (1998) 7 *JJA* 159. See also *Valente v R* (1985) 24 DLR (4th) 161 at 174-190; *Reference Re Public Sector Pay Reduction Act (Prince Edward Island)* (1997) 150 DLR (4th) 577."

Footnote 155: Add, "see note at (1998) 72 *ALJ* 577."

Footnote 157: Add, after the reference to Todd's book, "Campbell, "Judicial Review of Proceedings for Removal of Judges From Office" (1999) *UNSWLJ* 325."

125 Footnote 8: Insert after the reference to *Air Caledonie v Cth* the following, "*WorkCover v Olifent* (1997) 68 SASR 310 at 317-320, 325; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133; *Australian Communication Authority v Viper Communications* (2001) 183 ALR 735 at 762-767." Add, "A tax is also to be distinguished from a penalty: see *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467. Where a penalty is created by statute it belongs to the Crown unless the statute provides to the contrary: *Yanner v Eaton* (1999) 166 ALR 258 at [100]. However,".

126 Footnote 11: Add, "*Airservices Australia v Monarch Airlines* (1999) 167 ALR 392 at [90]-[97], [135]-[145], [295]-[327], [416]-[470]."

Footnote 16: Insert after the reference to *Precision Pools Pty Ltd v FCT*, "*McKay v National Australia Bank* [1998] 4 VR 677 at 686-689, 689-690, 691." Insert after the reference to *Commissioner of State Revenue (Vic) v Royal Insurance*, "*SCI Operations v Cth* (1998) 192 CLR 285; *Roxborough v Rothmans of Pall*

Mall Australia Ltd (2002) 208 CLR 516; articles noted in *ABLOS v Jones* (1998) 150 ALR 488 at 542; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 208 CLR 516". Insert after the reference to the article by McInnes the following, "McInnes, "Passing On in the Law of Restitution: A Reconsideration" (1997) 19 *Syd LR* 179; Bamforth, "Restitution and the Scope of Judicial Review" [1997] *PL* 603; Voon, "Restitution from Government in Australia: Woolwich and its Necessary Boundaries" (1998) 9 *PLR* 15; Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 *UWALR* 13; Finnis, "The Fairy Tale's Moral" (1999) 115 *LQR* 170; Vrisakis & Carter, "Restitution of Payments Made Under Contracts Prohibited by Statute" (2000) 15 *JCL* 228. In the UK the problems raised by *Woolwich* were resolved by retrospective legislation: see Oliver, "A Negative Aspect to Legitimate Expectations" [1998] *PL* 558, but this may not be possible where the tax is in breach of the Commonwealth Constitution. Where the payee knows that the tax may be invalid but makes the payment to avoid the cost of litigation, the payment is voluntary: see *Riessen v SA* (2001) 213 LSJS 51."

127 Footnote 23: Add, "It should be noted that appropriation law is predicated upon cash accounting, rather than accrual accounting. See White & Hollingsworth, "Resource Accounting and Budgeting: Constitutional Implications" [1997] *PL* 437."

128 Footnote 27: Add, "Daintith, "The Legal Effects of the Appropriation Act" [1998] *PL* 552"

Footnote 30: Add, "*Archives & Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607 at 629-632."

133 Chapter 9.7. Insert after the words, "maintained at the Treasury." , "The receipts and payments (like appropriations) refer to cash entries."

Insert footnote 67A after the words, "cash entries" such footnote to provide, "As to whether the public accounts should be on an accrual basis, see White & Hollingsworth, "Public Finance Reform: The Government Resources and Accounts Act, 2000" [2001] *PL* 50; Aiken & Capitanio, "Accrual Accounting Valuations and Accountability in Government" (1995) 54 *AJPA* 564."

135 Footnote 77: Add, "Friedmann, "Payment Under Mistake – Tracing and Subrogation" (1999) 115 *LQR* 195.

Footnote 78: Add, "For examples in early Australian history of such unlawful payments, see Waugh, "Evading Parliamentary Control of Government Spending: Some Early Case Studies" (1998) 9 *PLR* 28.

136 Footnote 88: Add after the reference to *New South Wales v Bardolph*, "*Vass v Cth* (2000) 169 ALR 486 at [22]-[25]." Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed), at 98-100."

137 Footnote 91: Insert after the numbers "46.", "Although in some countries this is a statutory requirement, see Harley, "Multiyear Contracts: Pitfalls and Quandaries" (1998) 27 *Public Contract Law Journal* 555; nevertheless, within Australia,". Delete "With respect". Insert immediately after "too narrow", "see *Vass v Cth* (2000) 169 ALR 486 at [20]." Add, "In the UK there has been a practice that expenditure extending beyond a single financial year should be authorised by legislation: Daintith, "The Legal Effects of the Appropriation Act" [1998] *PL* 552."

Footnote 94: Insert after reference to Campbell article, "MacPherson, "Public Governance through Private Contract: A State Audit Perspective" (1999) 3 *FJLR* 9 at 14-18"

140 Footnote 11: Add, "Seddon, "The Crown" (2000) 28 *FL Rev* 245 at 259-262."

Footnote 12: Delete the sentence beginning "It should be noted ..." and insert in lieu thereof, "However, prospective overruling has now been rejected by the High Court, see Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 *PLR* 196 at 200-201. It has also been rejected in the UK: *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349; *R v Governor of Brockhill Prison; ex p Evans (No 2)* [1999] QB 1043."

141 Footnote 14: Delete "The *Trade Practices Act*" and insert in lieu thereof the following, "Part IV of the *Trade Practices Act*". Insert immediately before the words "*Competition Policy Reform (South Australia) Act* 1996" the word, "also". Insert immediately after those words the following, "which applies to unincorporated associations." Add, "See Horrigan (ed), *Government Law and Policy* (1998) at 419-439."

Footnote 15: Add, "*Bridgetown Friends v Conservation* (1997) 18 WAR 126 at 142-143, 182-183."

142 Footnote 20: Add, "*Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 427-428".

Footnote 21: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 110-111". Insert after the reference to *Woodlands v Permanent Trustee* the following, "*Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 457-458."

Footnote 22: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 111-125; Seddon, "Crown Immunity and Private Bodies" (1999) 10 *PLR* 263." Insert after the reference to the book by Seddon the following, "cf *Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 445-446." Add, "As to the position of local government, see Horrigan (ed), *Government Law and Policy* (1998) at 211-214."

Footnote 23: Insert after the reference to *Jellyn v State Bank of SA* the following, "*Ventana v FAC* (1997) 147 ALR 200 at 209-218; *NT Power Generation Pty Ltd v Power & Water Authority* (2001) 184 ALR 481 at 536-544".

143 Footnote 25: Insert after the reference to *Bropho v Western Australia*, "*Telstra Corporation Ltd v Worthing* (1999) 73 ALJR 565 at [22];".

144 Paragraph 10.4.2: Insert immediately before the words" The Crown in right". "Where the statute concerns the rights of the Crown itself (eg its right to property)".

Footnote 38: Insert after the reference to *Bradken Consolidated v Commissioner of Railways* the following, "*Ventana v FAC* (1997) 147 ALR 200 at 203-209; Katz, "The Test for Determining the Applicability to the States of Federal Statutes which do not Expressly Bind Them" (1994) 11 *Aust Bar Rev* 222 at 225-227; Taylor, Devolution and the Applicability of Statutes to the Crown in the Inter-Governmental Context" [2000] *PL* 7. However, it may be more correct to treat the implication as one derived from the federal structure in the Constitution, and to be related to the State or the Commonwealth, rather then to the Crown: see *Commonwealth v WA* (1999) 160 ALR 638 at 648, 663-665; *Sue v Hill* (1999) 163 ALR 648 at [67]-[94]; Seddon *Government Contracts* (2nd ed) at 151-160; Taylor, "Cth v WA and the Operation in Federal Systems of the Presumption that Statutes do Not Apply to the Crown" (2000) 24 *MULR* 77."

Paragraph 10.4.3: Insert a new paragraph 10.4.3 immediately after paragraph 10.4.2 to provide,

> "10.4.3 Where the statute concerns the regulation of the conduct of persons or individuals, it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents of the executive government of the polity concerned, rather than whether they bind the Crown in one or other of its capacities."

Insert footnote 38A after the word "capacities; 76 SASR 450" in paragraph 10.4.3.

Footnote 38A: *Bass v Permanent Trustee* (1999) 161 ALR 399 at 407.

146 Footnote 1: Add after "26-32", "Kneebone *Tort Liability of Public Authorities* (1988) at 296-316."

Footnote 2: Add, "Such liability includes vicarious liability: see *Canadian Saltfish Corp v Rasmussen* (1987) 30 DLR (4th) 399."

Footnote 4: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 126-160; Seddon, "The Crown" (2000) 28 *FL Rev* 245 at 256-259." Insert after the reference to Seddon, "Horrigan (ed), *Government Law and Policy* (1998) at 303-315."

Footnote 6: Add, "; *Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39 at [56]-[64], [105]-[113]. However, the State law must give rights between subject and subject, not between the State and the subject: see *Commonwealth v WA* (1999) 160 ALR 638 at 702-703."

Paragraph 11.2: Insert new footnote 6A after the words "applies to legal proceedings". Footnote 6A to provide, "*RE Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 460-461, 474-475, 510-512; *Commonwealth v WA* (1999) 160 ALR 638 at 650-651, 670-671. Section 64 of the

Judiciary Act only applies to proceedings in federal jurisdiction: *Bass v Permanent Trustee* (1999) 161 ALR 399 at 409."

147 Footnote 11: Delete the word "It" at the start of the footnote and insert, "It was necessary to specifically include Ministers and other Executive officers (who are declared by regulation to be an instrumentality or agency) because the Crown was not vicariously liable for the torts of such officers: see *McKellar v Container Terminal Management Services* (1999) 165 ALR 409 at 448-451. On the other hand, in respect of employees it".

148 Footnote 12: Delete the words "compare ... is not bound by statute." and insert in lieu thereof, "*Corporation of the City of Unley v South Australia* (1997) 68 SASR 511 at 512-513, 519-525."

Footnote 14: Add, "But contrast *Mann v Carnell* [1999] HCA 66 at [16], [33]-[35], [149]-[154] (contrast at [78]-[93]) where legal professional privilege was held to attach to Executive documents provided to a member of Parliament."

Footnote 15: Add, "*Commonwealth v WA* (1999) 160 ALR 638 at 650-651, 670-671, 702-703; *Bass v Permanent Trustee* (1999) 161 ALR 399."

Footnote 18: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 174." Insert after the reference to Seddon, "Horrigan (ed), *Government Law and Policy* (1998) at 230-237; MacPherson, "Public Governance through Private Contract: A State Audit Perspective" (1999) 3 *FJLR* 9 at 27".

149 Footnote 20. Insert after "s 7.", "See *Enfield CC v DAC* (1997) 69 SASR 99 at 115." Add, *"Australian Ferries Pty Ltd v South Australia* (1999) 201 LSJS 402 at 421."

Footnote 25: Insert after the reference to *O'Keefe Nominees v BP* the following, "*Levy v Victoria* (1997) 189 CLR 579 at 650; *Cheesman v Waters* (1997) 148 ALR 21 at 25-27; *Bulun Bulun v R&T Textiles* (1998) 157 ALR 193 at 202-203; *AG (Cth) v Breckler* (1999)163 ALR 576 at [102]-[109]; *Cmmr Taxation v Scully* [2000] HCA 6 [76]-[82]; Campbell, "Intervention in Constitutional Cases" (1999) 9 *PLR* 255; Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 298-300; G Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis (2000) 28 *FL Rev* 365". Add at the end of the footnote the following, "It is unlikely that discretionary leave to intervene would be granted on a special leave application: *R v Elliott* (1996) 185 CLR 250 at 253-254. As to costs of intervention, see *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 97-101."

150 Footnote 27: Add, "See also Chapter 13.1. If the proceedings are instituted in the wrong name, an amendment may be possible: see *Konrad v Victoria Police* (1998) 152 ALR 132 at 146-147 ."

151 Footnote 30: Insert after the reference to *Breavington v Godleman* the following, "*Cth v Mewett* (1997) 191 CLR 471 at 523".

Footnote 31: Add, "*Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39 at [57]."

Footnote 35: Add, "See also *Bass v Permanent Trustee* (1999) 161 ALR 399. However, limitation statutes are applicable to the Commonwealth pursuant to section 79 of the *Judiciary Act*: see *Commonwealth v Mewett* (1997) 191 CLR 471 at 523."

Paragraph 11.4.3: Add new paragraph, "A further possibility is that the substantive liability of the States in federal jurisdiction is derived from the terms of ss 75 and 76 of the Commonwealth Constitution. Although the relevant analysis seems more compelling in respect of Commonwealth liability, it necessarily must apply to the States if it applies to the Commonwealth." Insert a new footnote "35A" after the words "to the Commonwealth". Footnote 35A to provide, "*Commonwealth v Mewett* (1997) 191 CLR 471; and see generally Kneebone *Tort Liability of Public Authorities* (1988) at 334-337; Leeming, "The Liability of the Government under the Constitution" (1998) 17 *Aust Bar Rev* 214; Selway, "The Source and Nature of the Liability in Tort of Australian Governments" (2002) 10 *Tort L Rev* 14."

152 Footnote 2: Add, "Brazier, *Ministers of the Crown* (1997) at 3 ff".

Footnote 4: Insert after the reference to *Edwards v Clinch*, "*PSA v SA* (1997) 68 SASR 461. There can only be one officer in any office: See (2001) 75 *ALJ* 472."

Footnote 5: Insert immediately before "Finn", "*R v McCann* [1998] 2 Qd R 56; *Henderson v McAfferty* [2002] 1 Qd R 170".

153 Footnote 6: Add, "Campbell, "Suspension of Judges from Office" (1999) 18 *Aust Bar Rev* 63."

Footnote 9: Add, "Similarly in the United States: Luci, "Contracting with Government Employees: A Comparison and a Compromise" (1997) 27 *Pub Cont LJ* 37 at 64."

Paragraph 12.1.2: Delete the final sentence beginning "The officer ..." and insert in lieu thereof, "At common law an officer impliedly resigns on accepting another public office[9], but the full rigour of this rule has now been ameliorated by statute." Insert a new footnote 9A after the word "statute" such footnote to provide, "*Public Sector Management Act* 1995, s 70A."

Footnote 15: See generally Robertson, "Liability of Public Officers" (2003) 34 *AIAL Forum* 25.

154 Footnote 19: Add, "See Horrigan (ed), *Government Law and Policy* (1998) at 372-383."

Footnote 20: Insert after the reference to *South Australia v Clark* the following, "*Hughes Aircraft v Airservices Australia* (1997) 146 ALR 1 at 79-81." Insert after the reference to *Reading v AG* the following, "*Cade v Thomson Simmons* (1997)

191 LSJS 99 at 153-154". Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 247 ff ."

Footnote 23: Add, "Brazier, *Ministers of the Crown* (1997) at 103 ff; Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 247ff."

155 Footnote 25: Add, "See the discussion of "public trust" in *Kinloch v Secretary of State for India* (1882) 7 App Cas 619; *Bathurst CC v PWC Properties P/L* (1998) 195 CLR 566 at 585-587, 589-592; Selway, "The Duties of Government Lawyers" (1999) 10 *PLR* 114. In Australia it would seem that the distinction between private and public trust obligations are likely to be maintained. For example, the private fiduciary obligation of the Crown to indigenous persons which has been recognised in Canada has not been adopted in Australia: see *Nulyarimma v Thompson* (1999) 165 ALR 621 at 676-677."

Footnote 26: Add, "Add, *Carney, Members of Parliament: Law and Ethics* (2000) at 265."

Footnote 27: Add, "Sampford & Preston (eds), *Public Sector Ethics* (1998) at 15-16; Selway, "The Duties of Government Lawyers" (1999) 10 *PLR* 114; *de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing* [1999] AC 69 at 75-76; Add, "Carney, *Members of Parliament: Law and Ethics* (2000) at 247 ff."

Footnote 28: Delete the words, "However, there is now much dicta suggesting it may be:" and insert in lieu, "However, in Canada it has been held to be contractual: see *Her Majesty the Queen in Right of Newfoundland v Wells* (1999) 177 DLR (4th) 73, and there is much dicta from elsewhere to the same effect:"

156 Chapter 2.2: Insert after the words "ministers of the Crown and judges," the following, "Subject to the *Crown Proceedings Act* 1992 the Crown is not vicariously liable for these officers." Insert footnote 30A after the words "these officers" such footnote to provide, "*McKellar v Container Terminal Management Services* (1999) 165 ALR 409 at 448 and see Chapter 11.3.1."

Footnote 33: Add, "*Stevedoring Industry Finance Committee v Crimmins* [1999] 1 VR 782 at 809, 823; *Cubillo v Cth* (2000) 174 ALR 97 at 437-449; (on appeal) (2001) 183 ALR 249".

Footnote 34: Insert after the reference to *Oriental Foods v Commonwealth*, *"Cubillo v Cth* (1999) 163 ALR 395 at 443-444; (on appeal) (2001) 183 ALR 249 at 323-325."

Footnote 35: Add after the reference to *R v Commissioner of Police; ex p Ross* the following, "*Re Australian Federal Police Assoc* (1997) 73 IR 155; *Frost v Chief Constable of South Yorkshire Police* [1998] QB 254 at 290; *Konrad v Victoria Police* (1999) 165 ALR 23 at 27-28, 45-52; *Orchard v Victoria Police* (1998) 79 IR 476; Carabetta, "Employment Status of Police in Australia" (2003) 27 *MULR* 1."

157 Paragraph 12.2: Insert new footnote 38A after the word "parliamentarians" such footnote to provide, "As to whether parliamentarians hold a public office, see Bradley, "Parliamentary Privilege and the Common Law Of Corruption" [1999]

PL 256 and see *R v Boston* (1923) 33 CLR 386; *R v Greenway* (noted (1998) 24 CLB 1317) ."

Insert new footnote 38B after the words "abilities of these officers" such footnote to provide, "See eg *Konrad v Victoria Police* (1999) 165 ALR 23 at 45-52."

Paragraph 12.3.1: Insert new footnote 39A after the words "restricted to employees" such footnote to provide, "*PSA v SA* (1997) 68 SASR 461 at 479-480."

158 Footnote 44: Insert at start of footnote, "*R v Jones* [1999] WASCA 194;".

159 Footnote 46: Add, "and see *Knight v Indian Head School Division No 19* (19990) 69 DLR (4th) 489."

Footnote 49: Add, "*Jarratt v Commissioner of Police for NSW and NSW* (2003) 56 NSWLR 72.

Footnote 48: Insert after the reference to *McManus v Scott-Charlton*, "and *Barratt v Howard* (1999) 165 ALR 605 at 608-609; (on appeal) 170 ALR 529, 537-541, 548; Richardson, "Triumphant Ministers and Doomsday for Natural Justice in Barratt v Howard" (2000) 11 *PLR* 168."

160 Footnote 54: Add, See *Barratt v Howard* (2000) 170 ALR 529 at 548-551.

Footnote 60: Add, "*McManus v Scott-Charlton* (1996) 140 ALR 625; *Anderson v Sullivan* (1998) 78 FCR 380 at 390-395; *de Freitas v Ministry of Agriculture* [1998] 3 WLR 675 at 679-683."

163 Chapter 12.5.6: Insert footnote 92A after the words, "his or her salary" such footnote to provide, "This can be inferred from the Act: see *Clark v Chief of Defence Force* (2000) 59 ALD 506 at 516-518."

Footnote 102: Add, "The requirements of natural justice must still be complied with: see *Jarratt v Commissioner of Police for NSW and NSW* (2003) 56 NSWLR 72.

Chapter 12.5.9: Insert footnote 95A after the words "in the following ways", such footnote to provide, "Failure to comply with the statutory requirements for termination will render the termination null and void: see *Re Railway Appeal Board; ex p WA Government Railways Assoc* (2000) 21 WAR 1."

Footnote 96: Add, "See *Morante v State Superannuation Board* (1999) 84 IR 205 as to whether an officer had resigned or been "retrenched".

164 Paragraph 12.5.9: Delete the words "it is unclear ... dismissal." and insert in lieu thereof, "the Commission probably does not have jurisdiction to hear claims for unfair dismissal."

Footnote 105: Add, "Contrast *Kelly v Commissioner of Dept of Corrective Services* (2001) 52 NSWLR 533."

Footnote 106: Insert after "s 105.", See *Abdullah v Commissioner for Public Employment* (unreported, SA Indus Comn, Commissioner Fairweather, 22 October, 1998); *Stone v Cmmr Public Employment* (2001) 107 IR 442."

165 Footnote 114: Add, "See *Anderson v Sullivan* (1998) 78 FCR 380 at 395-398; *Stone v Cmmr Public Employment* (2001) 107 IR 442."

166 Footnote 2: Add, "Contrast *WorkCover NSW v Police Service of NSW* (2000) 50 NSWLR 333 at 337-352 where the Crown and the Government seem to be confused."

Footnote 3: Delete "of 14 December 1993 at page 2977" and insert in lieu thereof "of 20 October 1997 at page 1057".

168 Footnote 15: Add, "*Ex p Defence Housing Authority* (1997) 146 ALR 495 at 533-534; Finn, "The State Corporation" (1999) 3 *FJLR* 1; Wettenhall, "SOCOG as a Hallmark Event Manager: A Public Administration Perspective" (2000) 11 *PLR* 27; Froomkiin, "Reinventing the Government Corporation" (1995) *U Illinois LR* 543."

171 Footnote 27: Insert after reference to *Deuchov v Gas Light & Coke Co*, "*New Zealand Kiwifruit Marketing Board v Beaumont* [1997] 3 NZLR 516 at 520; *Federal Crop Insurance Corp v Merrill* 332 US 380 at 383-384 (1947)". Add, "The requirement that the power can only be exercised in furtherance of the objects of the body has the necessary consequence that the body cannot alienate its assets if doing so would prevent the body achieving its functions: *R v Gough; ex p AMIEU* (1965) 114 CLR 394 at 409, 415-416. The validity of acts of a corporate body can be challenged in collateral proceedings: *Credit Suisse v Allerdale BC* [1997] QB 306 at 335-344, 350-357."

Footnote 28: Delete Seddon and insert in lieu, "Seddon *Government Contracts* (2nd ed) at 61-65, 96-98." Insert after reference to Seddon's book, "Seddon & Bottomley, "Commonwealth Companies and the Constitution" (1998) 26 *FL Rev* 271; Mantziaris, "Event Corporations in the System of Responsible Government – Why SOCOG is Constitutionally Unhealthy" (2000) 11 *PLR* 39."

Footnote 31: Add "; *Puntoriero v Water Administration Corporation* (1999) 165 ALR 337 at 343 [16]."

172 Footnote 36: Add, "This is to be contrasted with the approach of the Australian courts to local government powers, see Horrigan (ed), *Government, Law and Policy* (1998) at 214-221."

173 Footnote 40: Insert after the reference to the *Westdeutsche Case*, "*Guiness Mahon v Kensington BC* [1998] 3 WLR 829; *Kleinwort Benson Ltd v Lincoln CC* [1998] 3 WLR 1095." Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 65-71."

Paragraph 13.2.3: Insert a new footnote 41A after the words "constituting statute" such footnote to provide, "See generally Mantziaris, "Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?" (1998) 26 *FL Rev* 309."

Footnote 43: Add, "*Archives & Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607 at 616."

Footnote 43: Add, "As to the power of the Minister to direct the authority to provide "confidential" information to the Minister, see *Hughes Aircraft v Airservices* (1997) 146 ALR 1 at 74-75, 88-89. However, in giving such a direction, the Minister may have a duty to afford a right to be heard to a person who might be affected: see *Sanders v Snell* (1998) 157 ALR 491 at 505; (2003) 198 ALR 560."

174 Footnote 46: Add, "See generally, Dept Premier & Cabinet, "Government Boards and Committees: Guidelines for Agencies and Board Directors" (1998)."

175 Paragraph 13.2.4: Add a new paragraph as follows, "Evidence may be called to establish the "purpose" of a corporate board where such purpose is a relevant issue."

Insert a new footnote "51A" immediately after the words "relevant issue". Footnote 51A to provide, "See *IW v Perth* (1997) 146 ALR 696 at 730, 741."

Footnote 52: Add, "*Commonwealth v Silverton* (1998) 130 ACTR 1 at 13-18; Seddon *Government Contracts* (2nd ed) at 102-104"

178 Footnote 71: Add, "But see Horrigan (ed), *Government Law and Policy* (1998) at 291-294."

179 Footnote 1: Insert at start of footnote, "see Selway, "The Source and Nature of the Liability in Tort of Australian Governments" (2002) 10 *TLR* 14.

Paragraph 14.2: Delete the words, "a sufficient proximity between the parties" and insert in lieu, "if it is foreseeable that the act or omission of one party would cause damage to another and if it is appropriate to impose a duty of care upon that party (previously described by the High Court as "proximity)"). Insert footnote 1A after the words "that party" such footnote to provide, "*Hatton v Sutherland* [2002] 2 All ER 1 at 11."

Insert footnote 1B after the words "positive acts which cause injury" such footnote to provide, "*Agar v Wolsely* [2000] HCA 41 at [68]."

Footnote 4: Insert after the reference to *Bryan v Maloney* the following, "*Hillman v Black* (1996) 67 SASR 490; *Hill v Van Earp* (1997) 142 ALR 687; *Pyrenees Shire Council v Day* (1998) 151 ALR 147; *Perre v Apand Pty Ltd* (1999) 164 ALR 606; Lunney, "Don't Play with Matches" (1998) 114 *LQR* 377; Horrigan (ed) *Government Law and Policy* (1998) at 367-370; Doyle & Redwood, "The Common Law Liability of Public Authorities: The Interface Between Public & Private Law" (1999) 7 *Tort L Rev* 30; Phegan, "The Tort of Negligence into the

New Milennium" (1999) 73 *ALJ* 885". Add, "Where the omission arises in the course of positive conduct, it may be treated as a positive act for the purposes of determining proximity: see *Avenhouse v Hornsby SC* (1998) 44 NSWLR 1 at 22."

Paragraph 14.2: Insert a new paragraph immediately after the words "positive act". New paragraph to provide, "Under the *Crown Proceedings Act* the Crown is liable both directly and vicariously. However, it is sometimes important to distinguish the two. For example, where the Crown has a direct duty of care involving both knowledge and an act, it may be sufficient that the knowledge and the act involve quite different employees working in different parts of the organisation that can be described as "the Crown". If the liability is only vicarious then it is necessary to identify that a particular employee or employees each committed the relevant tort."

Insert new footnote 4a after the words "described as the "Crown" "such footnote to provide, "See *Johnson v South Australia* (1980) 26 SASR 1 at 19-22, but contrast where the act is that of a statutory authority with separate legal existence and the knowledge is within a separate Government Department: see *Babcock International Ltd v Babcock Australia Ltd* (2003) 56 NSWLR 51."

180 Paragraph 14.2.2 Add, "fn 14A" on sentence "The duty can not be delegated."

Footnote 6: Add, "As to nondelegable duties, see *Sandblasting v Harris* (1997) 146 ALR 572 at 580, 595, 604, 608 – 610, 630-633; *Hatton v Sutherland* [2002] 2 All ER 1 at 13; Fridman, "Non Vicarious Liability for the Acts of Others" (1997) 5 *Tort L Rev* 102."

Footnote 7: Add, "; Young, "Liability of Schools for Teachers' Misconduct" (2001) 75 *ALJ* 473-474. See *New South Wales v Lepore* [2003] HCA 4; *Lister v Hesley Hall* [2002] 1 AC 215. Professionals such as educational psychologists may also owe duties to school students. If the professionals are employed by the education authority it may be vicariously liable for the failure to discharge those duties: *Phelps v Hillington* [2000] 3 WLR 776."

Insert Footnote 7A: "Though the duty can not be delegated this does not mean that the school authority is liable in the absence of negligence for any injury, whether accidental or intentional, inflicted on a student. In cases involving criminal misconduct there are further questions as to whether or not the misconduct is in the course of employment giving rise to vicarious liability: *New South Wales v Lepore* [2003] HCA 4."

Footnote 13: Insert after the reference to *Kirkham's Case* "*Reeves v Commissioner of Police of the Metropolis* [1999] 1 AC 360; *Orange v Chief Constable of West Yorkshire Police* [2002] QB 347 (duty of care to safeguard against the suicide of a prisoner). However, that duty of care may not extend to the prisoner in relation to

the escape of that prisoner: *Vellino v Chief Constable of Greater Manchester* [2002] 3 All ER 78 "

181 Footnote 16: Add, "As to the nature of imprisonment and the rights lost by reason of such a sentence, see *R v Home Secretary; ex p Simms* [1998] 3 WLR 1169 at 1179."

Footnote 17: Add, "A custodian will not generally be liable for discretionary decisions that a parent would normally make, but this is not an absolute rule and the matter will depend upon the statutory powers and the extent of the unreasonableness: *Barrett v Enfield London BC* [1999] 3 All ER 193 at 208-209: *Cubillo v Cth* (2000) 174 ALR 97 at 468-491; (on appeal) (2001) 183 ALR 249, 330-341; *S v Gloucester CC* [2000] 3 All ER 346; see Craig & Fairgrieve, "Barrett, Negligence and Discretionary Powers" [1999] *PL* 626; Mullender, "Negligence, Public Authorities and Policy-Level Decisions" (2000) 116 *LQR* 40. Discretionary decisions relating to whether or not to take custody of the child will also often not give rise to any liability: see *X v Bedfordshire CC* [1995] 2 AC 633; *Hillman v Black* (1996) 67 SASR 490; *B v AG* [1999] 2 NZLR 296; *Barrett v Enfield London BC* [1999] 3 All ER 193; *Sullivan v Moody* (2001) 183 ALR 404. The custodian may also owe a fiduciary duty of care: *Cubillo v Cth* (1999) 163 ALR 395 at 432-440 (on appeal) (2001) 183 ALR 249 at 366-370."

Footnote 18: Add, "This may include a duty to foster parents and foster siblings to warn of any dangers they may face as a result of the child's previous behaviour: see *W v Essex CC* [2000] 2 WLR 601.

Footnote 19: Insert after the reference to *Australian Safeway Stores Pty Ltd v Zaluzna* the following, "*Sandblasting v Harris* (1997) 146 ALR 572;"
Footnote 20: Insert immediately before "compare", "; (on appeal) *Romeo v Conservation Commission (NT)* (1998) 151 ALR 263; *Secretary to the Department of Natural Resources and Energy v Harper* [2000] 1 VR 133 (tree falling in national park)". Insert immediately before "*Nagle*", " *McDonnell v Darwin CC* (1997) 118 NTR 9 at 21-23;". Add, "In *Munday v ACT* (1999) 146 FLR 17 at 23-24, it is suggested that the public may have legal rights to the use of unalienated Crown land. This would provide a ready justification for the different duties of the Crown in relation to unalienated Crown land, but is nevertheless probably in error."

Footnote 21: Add, "*Cubillo v Cth* (1999) 163 ALR 395 at 421-428; *Crimmins v Stevedoring Industry Finance Committee (*1999) 167 ALR 1 at [157]-[158]; *Cubillo v Cth* (2000) 174 ALR 97 at 465-466; *Graham Barclay Oyster v Ryan* (2002) 194 ALR 337; Kneebone, *Tort Liability of Public Authorities* (1988) at 144-167."

182 Footnote 23: Insert after the reference to *Hague's Case*, "*O'Rourke v Camden LBC* [1998] AC 188;". Insert after the reference to *Olotu v Home Office*, "*Clunis v Camden & Islington HA* [1998] 2 WLR 902 at 912-914; *Abbott v Women's & Children's Hospital Inc* [2003] SASC 145 at [25]-[26]". Insert after the reference to Finn's book, "Where there is no private duty of care, "derivative torts, such as

conspiracy by unlawful means, will also not be available: see *Michaels v Taylor Woodrow Developments Ltd* [2000] 4 All ER 645."

Footnote 24: Insert after the reference to *Woollahra v Sved*, "*Crimmins v Stevedoring Industry Finance Committee (*1999) 167 ALR 1 at [25]-[27], [42]-[44], [51], [73], [79]-[80], [93]-[102], [163]-[167], [221]-[237], [270]-[274]; *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 194 ALR 337 . Insert after the numbers "59-62", "Horrigan (ed), *Government, Law and Policy* (1998)at 390-415; Kneebone, *Tort Liability of Public Authorities* (1988) at 69-143. However, there still seem to be some cases where proximity is found in the absence of any reliance: see *Avenhouse v Hornsby SC* (1998) 44 NSWLR 1 at 20-26. It is not obvious that these cases are consistent with *Sutherland Shire Council*, although they claim to be. There is no requirement that the relevant act or commission be ultra vires: see *Barrett v Enfield London BC* [1999] 3 All ER 193 at 210, 225. As to an example where the action of a planning authority created a new danger, see *Kane v New Forst DC* [2001] 3 All ER 914 at 921 [28], [33]". Insert after the numbers "230-237", "; (on appeal) *Pyrenees Shire Council v Day* (1998) 151 ALR 147; *AG v Prince & Gardiner* [1998] 1 NZLR 262; Davies, "Common Law Liability of Statutory Authorities" (1997) 27 *UWALR* 21; Vernon, "Liability of Public Authorities for the Failure to Exercise Discretionary Statutory Powers" (1998) 4 *Loc Gov LJ* 187; Doyle & Redwood, "The Common Law Liability of Public Authorities: The Interface Between Public & Private Law" (1999) 7 *Tort L Rev* 30." Insert after the reference to the article by Wallace the following, "Wallace, "The Murphy Saga in Australia" (1997) 113 *LQR* 355,"

Footnote 25: Delete current reference to *SAAMCO Case* and insert in lieu, "[1997] AC 191". Add, "Contrast *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 163 ALR 611. See McLauchlan & Rickett, "SAAMCO in the High Court of Australia" (2000) 16 *LQR* 1."

Footnote 26: Add, "*Romeo v Conservation Commission (NT)* (1998) 151 ALR 263 at 279-281, 299-302, 306-311; *Clunis v Camden & Islington HA* [1998] 2 WLR 902 at 907-911; *Harris v Evans* [1998] 1 WLR 1285."

183 Footnote 27: Add, "; (on appeal) [1998] QB 254 at 282-283, 290-291, but contrast in the House of Lords [1998] 3 WLR 1509 at 1520, 1557. Third parties who cause the danger may also be liable: *Club Italia (Geelong) Inc v Ritchie* [2001] 3 VR 447".

Footnote 28: Insert after the reference to *R v Cambridge Health Authority*, "*W v Essex CC* [1998] 3 All ER 111."

Footnote 29: Insert after the reference to *South Australia v Wilmot*, "*Romeo v Conservation Commission (NT)* (1998) 151 ALR 263 at 304, 310; *Barrett v Enfield London BC* [1999] 3 All ER 193 at 211; *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1 at [27], [84]-[87]; *Hussein v Lancaster CC* [2000] QB 1". Insert after the numbers "62-67", "Davies, "Common Law Liability of Statutory Authorities" (1997) 27 *UWALR* 21, 36-42; Doyle & Redwood, "The Common Law Liability of Public Authorities: The Interface Between Public & Private Law" (1999) 7 *Tort L Rev* 30; see Craig & Fairgrieve, "Barrett,

Negligence and Discretionary Powers" [1999] *PL* 626; Mullender, "Negligence, Public Authorities and Policy-Level Decisions" (2000) 116 *LQR* 40; Deegan, "The Public/Private Law Dichotomy and its Relationship with the Policy/Operational Factors Distinction in Tort Law" (2001) 1(2) *QUTLJ* 241."

184 Footnote 33: Insert after reference to *Benning v Wong*, "*Lester-Travers v Frankston* [1970] VR 2 at 14-16;" Add, "Kneebone, *Tort Liability of Public Authorities* (1988) at 198-241."

Footnote 34: Insert after reference to *Northern Territory v Mengel*, "*Crimmins v Stevedoring Industry Finance Committee (*1999) 167 ALR 1 at [81]-[90], [218]". Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 106; Panetta, "Damages for Wrongful Administrative Decisions" (1999) 6 *AJAL* 163."

Footnote 36: Delete the reference to *Three Rivers DC v Bank of England (No 3)* and insert in lieu thereof, "[2001] 2 All ER 513." Delete the reference to *Sanders v Snell* and insert in lieu thereof, "(1998) 157 ALR 491 (may include deliberate or reckless breach of the requirements of procedural fairness but see on further hearing and appeal (2003) 198 ALR 560; *Fitzwood P/L v Whittlesea* CC (1998) 98 LGERA 28; *Garrett v AG* [1997] 2 NZLR 332; *Rawlinson v Rice* [1997] 2 NZLR 651; *Homestead Award Winning Homes v South Australia* (1997) 72 SASR 299 at 311-318; *Martin v Tasmanian Development & Resources* (1999) 163 ALR 79 at 99; *Sita v Queensland* (1999) 164 ALR 18 at 34-37, 40-43; *McKellar v Container Terminal Management Services* (1999) 165 ALR 409 at 455; *Henderson v McAfferty* [2002] 1 Qd R 170."

185 Footnote 36: Insert after numbers "83-86", "Horrigan (ed), *Government Law and Policy* (1998) at 342-364; Kneebone, *Tort Liability of Public Authorities* (1988) at 167-192; Stanton, "Defining Misfeasance in Public Office" (2001) 9 *Tort L Rev* 20. There may also be a separate tort of bribery: contrast Handley, "Civil Liability for Bribery" (2001) 117 *LQR* 536."

Footnote 37: Insert after the reference to *Martin v Watson* the following, "*Grimwade v Victoria* (1997) Aust Torts R ¶81-422; *Grivas v Brooks* (1997) 69 SASR 532; *Van Heeren v Cooper* [1999] 1 NZLR 731; *Gregory v Portsmouth CC* [2000] 1 AC 419; *Mahon v Rahn (No 2)* [2000] 4 All ER 41 at 93-94, 96". Add, "There is also a related tort of maliciously procuring the issue of a search warrant without reasonable cause. For this purpose malice includes improper motive: *Gibbs v Rea* [1998] AC 786."

Footnote 38: Insert after the reference to *Northern Territory v Mengel*, "; see Sales & Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 *LQR* 411."

Paragraph 14.4.6: Insert in the text after footnote 39 the following, "Absolute privilege also attaches to discussions between officers of State and to statements made by Judges and members of tribunals when performing their official functions."

Insert a new footnote "39A" after the word "functions". Footnote 39A to provide, "*Mann v O'Neill* (1997) 145 ALR 682 at 685-686, 693."
Add, "It is unlikely that there is a general tort involving a right to privacy."

Insert footnote 42A after the word "privacy" such footnote to provide, "See *Australian Broadcasting Corporation v Lenah Game Meats* (2000) 185 ALR 1."

Footnote 40: Insert after the reference to *Toyne v Everingham*, "*Reynolds v Times Newspapers* [2001] 2 AC 127; *Lange v Atkinson* [1998] 3 NZLR 424; Mitchell, "Malice in Qualified Privilege" [1999] *PL* 328." Add, "This includes political matters: see *Lange v ABC* (1997) 189 CLR 520; *Mann v O'Neill* (1997) 145 ALR 682; *Australian Broadcasting Corporation v Lenah Game Meats* (2000) 185 ALR 1."

Footnote 41: Add, "*NSW Aboriginal Land Council v Jones* (1998) 43 NSWLR 300; *R v Home Secretary; ex p Simms* [1999] 3 WLR 328; Loveland, "The Constitutionalisation of Political Libels in English Common Law" [1998] *PL* 633; Trindade, "Defaming Politicians – The English Approach." (1999) 115 *LQR* 175."

Footnote 42: Insert after reference to *Theophanous Case*, "and was finally resolved in *Lange v ABC* (1997) 189 CLR 520. In that case the High Court accepted that the common law in Australia now recognised a defence of qualified privilege in relation to the publication of federal political and governmental matters, providing that the action of the publisher is reasonable. See *Brander v Ryan* (2000) 76 SASR 212 at 219-224; *Nationwide News v Redford* (2001) 214 LSJS 294 at 303-304, 316-317 as to what constitutes reasonableness. (The requirement of "reasonableness" may not be required in other jurisdictions: see *Lange v Atkinson* [1998] 3 NZLR 424; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127)."

186 Footnote 43: Insert after the reference to *M v Home Office* the following, "*Cth v Mewett* (1997) 146 ALR 299 at 342; *National Harbours Board v Langelier* (1969) 2 DLR (3d) 81;".

Footnote 44: Add: "The superior officer may still owe duties similar to those owed by an employer: see *Waters v Cmmr Police of the Metropolis* [2000] 1 WLR 1607. A superior officer may be an "employer" in relation to a statutory scheme: *Commissioner of Police v Estate of Russell* (2002) 194 ALR 319."

Footnote 47: Add, "Kneebone, *Tort Liability of Public Authorities* (1988) at 319-323."

187 Footnote 54: Insert after the reference to *Webster v Lampard* the following, "*Chief Cmmr for Business Franchises v Century Impact Pty Ltd* (1996) 40 NSWLR 511 at 522-523; *Puntoriero v Water Administration Ministerial Corporation* (1999) 165 ALR 337 at [18], [34], [56]-[66], [109];". Add, "Kneebone, *Tort Liability of Public Authorities* (1988) at 244-259."

Footnote 55: Add, "*Alcoa v State Energy Commission* (1997) 17 WAR 112. See Bailey, "Personal Liability in Local Government Law" [1999] *PL* 461."

188 Footnote 62: Add, "*Gracey v Thomson Newspapers Corp* (1991) 82 DLR (4th) 244; *Re Residential Tenancies Tribunal; ex p Defence Housing Authority* (1997) 190 CLR 410 at 470-471; *Telstra Corporation Ltd v Worthing* (1999) 161 ALR 489 at [12]-[20]."

189 Paragraph 14.7.1: Insert new footnote 66A after the words "person acting judicially" second appearing. Footnote 66A to provide, "In addition there is a general immunity for those involved in civil or criminal litigation including before tribunals, including investigations preparatory to such litigation: *H v Black* (1996) 67 SASR 490 at 503-505, 511-512; *Taylor v Serious Fraud Office* [1997] 4 All ER 887 at 900-901; *Stanton v Callaghan* [1998] 4 All ER 961 at 971-984, 985-991; *Mahon v Rahan (No 2)* [2000] 4 All ER 41 at 68; *Darker v Chief Constable of the West Midlands Police* [2000] 4 All ER 193 at 196-197, 199-201, 206-207, 212-217. So, for example, the institution of proceedings cannot found a cause of action or be the basis for a criminal prosecution, save for malicious prosecution, contempt etc: see *Jamieson v R* (1993) 177 CLR 574."

Footnote 67: Insert after reference to *Gall v Dawson (No 2)*, "*Canada Trust v Stolzenberg* [1997] 4 All ER 983 at 988-989; *Mann v O'Neill* (1997) 191 CLR 204; *Re East* (1999) 159 ALR 108 at 115; *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 at 671, 678-681, 683-685; *Wentworth v Wentworth* (2001) 52 NSWLR 602; Olowofoyeku, "State Liability for the Exercise of Judicial Power" [1998] *PL* 444; Kneebone, *Tort Liability of Public Authorities* (1988) at 259-283; Knoll, "Protecting Participants in the Mediation Process" (1998) 34 *Tort & Insurance Law Journal* (US) 115 at 122-128."

190 Chapter 14.7.3: Delete and insert in lieu, "Historically, highway authorities were treated differently from other users of land. This was by reason of a special common law immunity. That immunity has now been rejected. Whilst the common law immunity may not now apply, the question still arises whether there is any duty of care and in what circumstances. The most important feature that distinguishes highway authorities from other occupiers of land is the duty upon the highway authority to permit members of the public to use the highway. This feature has the consequence that the duty of care owed by a highway authority will be different from, and probably less than, the duty owed by some other occupiers."

Insert footnote 73 after the words, "common law immunity" such footnote to provide, "*MC Sydney v Bourke* [1895] AC 433 at 442; *Sheppard v Glossop Corp* [1921] 3 KB 132; *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v Transport Commission* (1950) 80 CLR 357; *Singleton SC v Brodie* [1999] NSWCA 37; (on appeal) (2001) 180 ALR 145; *Threadgate v Tamworth CC* [1999] NSWCA 32; *Wade v Australian Railway Historical Society (SA Div)* (2000) 77 SASR 221; *Frankston CC v Eyles* [2000] 1 VR 587; *City of Ballarat v Perovic* (2001) 4 VR 1; S Kneebone, "The Liability of Local Government as an Occupier of Public Land" (2000) 6 *Local Govt LJ* 17 at 22-24; M Davies, "Common Law Liability of Statutory Authorities" (1997) 27 *UWALR* 21 at 40-42. Functions such as the erection of "traffic control devices" and the control of

roadside vegetation did not fall within the rule: see *Turner v Ku-ring-gai MC* (1990) 72 LGRA 60; *Calvaresi v Beare* (2000) 76 SASR 300 at 331-332; *Frankston CC v Eyles* [2000] 1 VR 654".

Insert footnote 74 after the word, "rejected" such footnote to provide, "*Brodie v Singleton SC* (2001) 180 ALR 145".

Insert footnote 75 after the words, "to use the highway" such footnote to provide, *"DPP v Jones* [1999] 2 AC 240 at 256-257, 261-264, 268-269, 279-281, 285-287; *City of Melbourne v Barnett* [1999] 2 VR 726 at 727-730; *Goodes v East Sussex CC* [2000] 1 WLR 1356 at 1361; *Brodie v Singleton SC* (2001) 180 ALR 145 at [120]-[121], [146], [303]-[304]".

Insert new footnote 75A after the words, "other occupiers" such footnote to provide, "As to the relevant duty of care, see *Brodie v Singleton SC* (2001) 180 ALR 145 at [150]-[162]; *Wade v Australian Railway Historical Society (SA Div)* (2000) 77 SASR 221 at 245-248 (special leave to appeal refused); *Beare v Adelaide Hills Council & South Australia* (2001) 214 LSJS 440."

Paragraph 14.7.4: Insert new footnote 75B after the word "arrest". Footnote 75B to provide, " As to police powers of arrest, see Lunn, *Criminal Law, South Australia*, Vol 2 pp 52, 975-52, 978. As to power of arrest to prevent a breach of the peace, see *Foulkes v Chief Constable of Merseyside Police* [1998] 3 All ER 705. As to the exercise of powers of detention for reasons of "necessity", see *R v Bournewood MHT; ex p L* [1998] 3 WLR 107 at 120, 125-126; but contrast *St George's Healthcare NHS Trust v S* [1998] 3 WLR 936."

Footnote 77: Insert after the reference to *Ancell v McDermott*, "*Wilson v New South Wales* (2001) 53 NSWLR 407;"

Add, "However, some persons may have a closer relationship than merely as "members of the public" and duties of care may be owed eg other police officers: *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550; contrast an independent volunteer who is present during a police interview at the request of the police who may be owed some duties of care, but not others: *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421 at 1433-1439, 1441-1443."

Footnote 78: Delete "[1996] 4 All ER 336 at 344" and insert in lieu thereof "[1997] 2 All ER 865". Add, "The same principle applies to the fire brigade, but maybe not to the ambulance service: see *OLL Ltd v Secretary State for Transport* [1997] 3 All ER 897; contrast *Kent v Griffiths* [2000] 2 WLR 1158; Bagshaw, "Proximity's Siren Song: Negligence Liability of Fire Brigades in England" (1998) 6 *Tort L Rev* 109."

191 Footnote 79: Add, "See also *Russell v Ridley* (1997) 191 LSJS 490."

192 Footnote 6: Delete "(Authorities) No 304.3" and insert in lieu thereof, "Nos 8.13, 8.14."

193 Footnote 7: Replace "308" with "8.18".

Paragraph 15.1.1: Delete words "registers of contracts be maintained[8] with special". Insert after footnote number "9" in the text, "be maintained. It also specified guidelines for the evaluation of projects." Insert a new footnote 9A after the word "projects". Footnote 9A to provide, "Ibid Nos 17.8, 17.9."

Footnote 8: Delete.

Footnote 9: Replace "1002" with "20.2".

Footnote 10: Replace "302" with "8.15". Replace "$250,000" with $1,000,000".

Footnote 13: Add, "and Prudential Management Framework" (1998)".

Footnote 15: Add, "*Sita Qld Pty Ltd v Qld* (1999) 164 ALR 18 at 21-23; Seddon *Government Contracts* (2nd ed) at 175-191."

Footnote 16: Add, "Compare Thomson, "Estoppel by Representation in Administrative Law" (1998) 26 *FL Rev* 83."

194 Footnote 17: Add, "See also Corcoran & McPherson, "Disclosure and the Public Interest: Confidentiality Claims in the Public Interest" (2000) 74 *ALJ* 259."

Footnote 18: Delete reference to Seddon and insert, "*Brown v R* (1986) 160 CLR 171 at 208."

Footnote 21: Delete reference to Seddon and insert, "But see *Mann v Carnell* [1999] HCA 66 at [16]; and see Seddon *Government Contracts* (2nd ed) at 89-96".

Footnote 26: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 92-94".

Footnote 27: Insert after the reference to *Minister of Immigration v Kurtovic*, "*Moran Hospitals v King* (1998) 49 ALD 444; *Riessen v SA* (2001) 213 LSJS 51".

195 Footnote 29: Add, "and see *Coogee Surf Motel v Cth* (1976) 50 ALR 363 at 376-378 (re land acquisition); Horrigan (ed), *Government Law and Policy* (1998) at 133-134. As to the distinction between mandatory and directory requirements, see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355."

Footnote 31: Insert after the reference to *Australian Woollen Mills v Commonwealth*, "; V*ass v Cth* (2000) 169 ALR 486 at [14]; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105-107".

Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 73-83".

Footnote 34: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 90".

197 Footnote 41: Insert after Dorter article, "Koutsis "Is it too Tough for Tendering? Enhancing Accountability in Tendering Decisions for New South Wales Infrastructure Projects" (2000) 8 *AJAL* 5".

Footnote 42: Add, "Flick, "Integrity in Government Tendering Processes: Means of Review" (1998) 14 *BCL* 13; Lithgow, "Judicial Review of Government Contracting in NSW" (1998) 14 *BCL* 176; Horrigan (ed), *Government Law and*

Policy (1998) at 69-103; Harvey, "The Hughes Aircraft Case and the Private Law of Public Tenders" (1998) 5 *AJAL* 207; Phang, "Tenders, Implied Terms and Fairness in the Law of Contract" (1998) 13 *JCL* 126; MacPherson, "Public Governance through Private Contract: A State Audit Perspective" (1999) 3 *FJLR* 9 at 24-32. However, it should be noted that the decision in *Hughes Aircraft Systems International v AirServices Australia* (1997) 146 ALR 1 was not based upon considerations of judicial review: see *May v DCT* (1999) 163 ALR 357 at 368."

Footnote 43: Add, "Horrigan (ed), *Government Law and Policy* (1998) at 89-93; Seddon *Government Contracts* (2nd ed) at 300-317."

198 Footnote 48: Add, "See *Hughes Aircraft v Airservices Australia* (1997) 146 ALR 1 at 25-30; Horrigan (ed), *Government Law and Policy* (1998) at 76-82; O'Donovan, "Statutory Authorities, General Newspapers and Decisions Made Under an Enactment" (1998) 5 *AJAL* 69; Taggart (ed) *The Province of Administrative Law* (1997) at 144-146."

Footnote 49: Delete reference to Seddon and insert, "Seddon *Government Contracts* (2nd ed) at 222-262."

198-199 Paragraph 15.2.2: Delete the words "However, the law in Australia ... In any event," and insert in lieu thereof the following, "In Australia it can be expected that".

199 Footnote 50: Add, "Horrigan (ed), *Government Law and Policy* (1998) at 86; Seddon *Government Contracts* (2nd ed) at 262-266."

Footnote 52: Delete and insert in lieu thereof the following, "The pro-competition provisions of the *Trade Practices Act* 1974 (Cth) (ie Part IV) also now expressly apply to incorporated State Government agencies in so far as they are "carrying on a business". (Part IV of the *Trade Practices Act* now also applies to relevant unincorporated Government agencies: see *Competition Policy Reform (South Australia) Act* 1996.) This is an aspect of the Competition Reforms discussed in Report of the Auditor General for the year ended 30 June 1996 Part A, Audit Overview, page 59 and following. See Horrigan (ed), *Government Law and Policy* (1998) at 82-85, 419-439. See generally Seddon *Government Contracts* (2nd ed) at 192-217, 267-272."

Paragraph 15.2.4: Insert new footnote 52A after the words "his or her loss". Footnote 52A to provide, "As to the general effect of these provisions, see Skapinker and Carter, "Breach of Contract and Misleading or Deceptive Conduct in Australia" (1997) 113 *LQR* 294. See also *Hughes Aircraft v Airservices Australia* (1997) 146 ALR 1 at 43-46."

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Chapters 16.1 and 16.2 Delete and insert in lieu thereof:

"16.1 RADICAL TITLE

The legal propositions established by the High Court in respect of native title as recognised by the common law in Australia would seem to be:[1]

16.1.1 By virtue of its sovereignty and prerogative, on settlement the Crown held the radical title to all land within the colonies.

16.1.2 Where there were subsisting native title interests,[2] that radical title was subject to the native title rights, which are recognised by the common law and can be enforced at common law.[3]

16.1.3 Native title rights cannot be alienated except to the Crown or to another indigenous group in conformity with customary law.[4]

16.1.4 Unless extinguished, the native title rights will continue to exist providing that holders of native title continue to exercise such rights and maintain their connection to the land in accordance with their laws and customs, even if those laws and customs undergo change. On the other hand, if the holders cease to acknowledge those laws and customs or lose their connection with the land, native title will be extinguished. Once extinguished, native title cannot be revived.[5]

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1 These propositions are based largely upon the judgment of Brennan J in *Mabo (No 2)*. Following the decisions of the High Court in *WA v Cth* (1995) 183 CLR 373 at 422, 452, 492, 493-494 and in *Wik Peoples v Qld* (1996) 187 CLR 1, it would seem that most of the reasoning of Brennan J in *Mabo (No 2)* enjoys the support of the majority of the High Court and should now be accepted as the fundamental statement of the recognition of native title by the Australian common law: see *Cth v Yarmirr* (1999) 168 ALR 426 at [12]-[41]. See generally French, "A Hitchhiker's Guide to the Native Title Act" (1999) 25 *Mon ULR* 375; Selway, "Mabo: Where Have we Been and Where Have we Yet to Travel?" [2002] *AMPLA Year Book* at 95ff; Hiley, "Native Title by Decision" [2002] *AMPLA Year Book* at 131ff."

2 See *Ngalakan People v Northern Territory* [2001] FCA 654.

3 It has been suggested in at least one case that the public generally also had rights to Crown land subject to radical title: see *Munday v ACT* (1998) 146 FLR 17 at 23-24. This is contrary to principle. The only groups which had rights to unalienated Crown land which were enforceable against the Crown are Aboriginal groups. It is unclear just what aspects of Aboriginal life can give rise to property rights and what aspects do not. For example, the Canadian Supreme Court has held that the common law will protect those aboriginal customary rights which are the result of an activity which is "integral to the distinctive culture of the aboriginal group": see *R v Van Der Peet* (1996) 137 DLR (4th) 289 at 310. (For a similar approach in Australia, see also *Sutton v Derschaw* (1995) 82 A Crim R 318 at 323-324; contrast *Bulun Bulun v R & T Textiles* (1998) 157 ALR 193 at 196-205.) The Supreme Court has also held that "native title" is a distinct species of such customary rights, although it is not necessary to show that it is distinctive because of the requirement that there be continuous occupation of the land: *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 230, 231, 243, 244, 246, 247, 252-260, 272-273. Although the Canadian approach would not seem to be applicable in Australia (see *Fejo v NT* (1998) 195 CLR 96; contrast *Dillon v Davies* (1998) 156 ALR 142 at 147-149; *Ward v WA* (1999) 159 ALR 483 at 498-504; Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 *MULR* 65, at least it does identify some of the issues needing to be addressed. See Chapter 1.1.

Following the decision in *Wik Peoples v Queensland* (1996) 187 CLR 1, there must now be doubt whether native title can be explained in terms of "radical title" and the theory of tenures. See Bhuta, "Mabo, Wik and the Art of Paradigm Management" (1998) 22 *MULR* 24 at 32-37 and see *Wik* at 177-184, 205-207, contrast 89-91. However, the High Court has not yet identified any other explanation of its decision in *Mabo (No 2)*. Doubt about the applicability of the doctrine would seem to have been laid to rest by the joint judgment in *Fejo v NT* (198) 195 CLR 96 at 126-129 which clearly applies the doctrine.

4 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 59-60, 88.

5 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 70; *Mason v Tritton* (1994) 34 NSWLR 572; *Larrakia People v Northern Territory* (1998) 152 ALR 477 at 484-487; *Fejo v NT* (1998) 195 CLR 96; *Yorta Yorta Community v Victoria* (2001) 180 ALR 655 at 701-702 (on appeal) 194 ALR 538. For example, fisheries and mining legislation may have extinguished Aboriginal rights to fish and to

Having regard to the nature of the native title right, and the means by which it has been held that such a right may be extinguished, it is likely that the relevant continuing connection must involve the continued physical use or occupation of the land. Otherwise it is not obvious why a grant of a fee simple interest necessarily extinguished native title.

16.1.5 Subject to statute, the native title rights could be extinguished by land grant made pursuant to the prerogative,[6] although the prerogative in respect of waste lands has been entirely replaced by statute.[7]

16.1.6 The relevant statutory regimes (eg the initial Colonisation Act and, later, the Crown Lands Acts) empowered the relevant officers to make grants which could extinguish native title. Given the special nature of native title, general Acts empowering the grant of land would not be read as having themselves extinguished native title. Indeed the Legislature, assuming that native title did not exist, would not have seen any need to expressly extinguish native title.[8] On the other hand, given the history of native title in Australia, such Acts would not be read down so as not to apply to land subject to native title. Those Acts empowered the Crown to make grants which extinguished native title.[9] This is subject to the qualification that, from 1975, the power to make grants pursuant to State

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mine: *Commonwealth v Yarmirr* (1999) 168 ALR 426 at [77]-[89], [209]-[212], [238]-[240], [255]; *Yarmirr v NT* (1998) 156 ALR 370 at 431-438. This is to be contrasted with the approach in *Ward v WA* (1999) 159 ALR 483 at 508-509, 557, 580 that unless all native title rights are extinguished, none are. They are merely suppressed during the term of any interest granted, and , for this reason, traditional mining rights can continue to exist even if they are suppressed.

6 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 50-51, 69, 75-76, 89-94, 100, 110. It should be noted that the relevant prerogative never applied in South Australia: *Fejo v NT* (1998) 195 CLR 96 at 144-145.

7 *Cudgen Rutile (No 2) P/L v Chalk* [1975] AC 520 at 533; *Wik Peoples v Qld* (1996) 187 CLR 1 at 108-111, 139-143, 171-174, 227-228, 243.

8 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 64-65, 111, 196; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 431-433; *Fejo v NT* (1998) 195 CLR 96.

9 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 63-64, 110-111; *Pareroultja v Tickner* (1993) 117 ALR 206 at 218-219. This is to be contrasted with the usual rule that a statutory power would not be construed as authorising an interference with property rights, unless expressly or by necessary implication: see Reynolds & Dalziel, "Aborigines and Pastoral Leases" (1996) 19 *UNSWLJ* 315 at 320; and see *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 521-525, 595, 661-669. This "usual" rule is nevertheless applied in Australia so as to limit the potential effect of a statutory grant ie. unless it is a clear and necessary consequence of the legislation that native title interests will be extinguished, then "coexistence" will be presumed: *Wik Peoples v Qld* (1996) 187 CLR 1.

legislation would be subject to the *Racial Discrimination Act* 1975,[10] and that the power of the Commonwealth Parliament to extinguish native title is subject to the payment of compensation on just terms.[11]

16.1.7 Where there was a valid grant of an estate in land, native title was extinguished if the grant was intended to extinguish native title. Such an intention is to be determined from the legal effect of the grant and not from the subjective intention of the person making the grant;[12] nor is it relevant whether or not the extent of occupation pursuant to the grant is inconsistent with native title. The legal effect of the grant is to be ascertained from the terms of the grant itself and of the statutes pursuant to which the grant was made.[13]

16.1.8 A grant of an exclusive right to occupy is necessarily inconsistent with the continuation of native title. This is because such a right gives a power to exclude and such a power is inconsistent with the continuation of possessory rights. The grant of a fee simple is a grant of a right of exclusive occupation; on the other hand, the grant of a statutory right does not necessarily confer a right of exclusive possession or extinguish native title rights even if that right is described in the legislation as a "lease".[14]

16.1.8 Where the Crown occupies Crown land without making a grant, native title will be extinguished to the extent that the occupation is, in fact, inconsistent with native title.[15]

16.2 NATIVE TITLE ACT 1993

The *Native Title Act* 1993 (Cth)[16] (referred to herein incorporating the substantial amendments made in 1998 as the "NTA") basically does seven things:[17]

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10 *Mabo v Qld (No 1)* (1988) 166 CLR 186; *Mabo v Qld (No 2)* (1992) 175 CLR 1, at 67, 74, 111-112, 172-173, 214-216.

11 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 111.

12 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 68; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422; *Mason v Tritton* (1994) 34 NSWLR 572 at 591; *Re Wadi Wadi People's Application* (1995) 129 ALR 167 at 178; *Wik Peoples v Qld* (1996) 187 CLR 1 at 71, 85-86, 133, 233-238. In *Ward v WA* (1999) 159 ALR 483, Lee J held that it was necessary that there be an intention to extinguish all native title. Otherwise all that occurred was the suppression of the particular incidents of the title for the period of the tenure. At the conclusion of the tenure the full title is resurrected: see at 509-510, 557. There is no discussion as to whether this results in the tenant being impeachable for waste by the native title holders.

13 *Wik Peoples v Qld* (1996) 187 CLR 1 at 91, 112, 150-155, 197-198, 243-244.

14 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 68-69, 89, 110, 196; *Wik Peoples v Qld* (1996) 187 CLR 1 at 71, 155, 176, 236-237, 250; *Fejo v NT* (1998) 195 CLR 96; *Bodney v Westralia Airports* (2001) 180 ALR 1.

15 *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 68; *Fourmile v Selpam* (1998) 152 ALR 294; *Wik Peoples v Qld* (1996) 187 CLR 1 at 225-226; 233-234.

16 See generally as to the effect of the NTA before the 1998 amendments: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 453-459.

17 The NTA is a very long, complex and detailed statute. The following discussion is only intended to outline the issues dealt with by the Act in the broadest terms. The discussion is not comprehensive. It is not intended as a detailed analysis of the operation of the NTA. See generally French, "A Hitchhiker's Guide to the Native Title Act" (1999) 25 *Mon ULR* 375; See generally, "Selway, "The Role of Policy in the Development of Native Title" (2000) 28 *FL Rev* 403.

16.2.1 Prevents Extinguishment

It prevents the extinguishment of common law native title[18] except in accordance with the provisions of the Act.[19]

16.2.2 Creation of "Native Title"

The NTA expressly provides that the previous extinguishment of native title at common law is to be disregarded in certain limited circumstances.[20]

In addition the NTA expressly provides for statutory access rights to cross over and hunt on pastoral lands once a claim respecting those lands has been registered.[21] It also provides that Aborigines can continue to perform certain activities (such as hunting and fishing) in exercise of their native title rights if the activities would otherwise be subject to a licence or an approval.[22]

In *Yarmirr v Cth*,[23] the Federal Court has also held that the definition of native title in s 223 of the NTA has the effect that native title for the purposes of that Act is a significantly wider concept than common law native title. This is discussed below.

16.2.3 Confirmation of Common Law

The NTA confirms that certain grants made before 23 December, 1996 extinguished native title and authorises the States to make similar provision.[24]

The NTA also confirms the existing rights of the States to minerals and waterways and the rights of those holding existing fishing rights.[25]

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18 See NTA s 223. That definition requires a "connection". The rights include hunting, gathering and fishing. They also include statutory rights granted in replacement of native title rights.

19 NTA ss 10, 11, 211.

20 Where the property is a pastoral lease held by a native title claimant or a trustee or company holding on behalf of a claimant (NTA s 47); where legislation or grant pursuant to which the land is held expressly makes provision for the land to be held for the benefit of Aboriginal peoples (NTA s 47A) or where the land is vacant Crown land which is actually "occupied" by claimants at the time that the claim is made (NTA s 47B). See *Hayes v NT* [1999] FCA 1248 at [118]. The various provisions seem to be limited in their application to "purposes under" the NTA. It is unclear to the writer what effect these provisions might have if common law proceedings were instituted (eg for trespass) where the NTA would not seem to apply).

21 NTA ss 44A, 44B.

22 NTA s 211. See *Yanner v Eaton* (1999) 166 ALR 258.

23 (1998) 156 ALR 370; (on appeal) [1999] FCA 1668.

24 Where the grant was of an "exclusive possession act" (some of which are prescribed) then native title is absolutely extinguished: NTA s 23B. If the grant was of a "non exclusive act" (eg a pastoral lease) then the rights granted prevail over any native title rights (NTA ss 23G, 23I, 44H) and those rights are extinguished to the extent of any inconsistency (NTA s 23F but see the notification requirements in s 23HA). Compensation is payable where native title has been extinguished by reason of these provisions (NTA s 23J).

25 NTA s 212.

16.2.4 Validation of Past Acts

The NTA provides a procedure to validate certain titles granted before 1 January 1994[26] ("past acts").

16.2.5 Validation of Intermediate Acts

The NTA also provides for the validation of "intermediate acts" which occurred between 1 January 1994 and 23 December 1996.[27]

16.2.6 Determinations of Native Title

The NTA provides a procedure for the determination of the existence of native title.[28]

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26 NTA ss 14-20. There is a difference in dates between legislative and administrative acts. The States and Territories are permitted to enact legislation that validates all "past acts" which otherwise would have been invalid due to the existence of native title providing that such legislation complies with the NTA scheme. Under that scheme past acts are divided into 4 categories. Category A, comprising freehold grants, grants of commercial, pastoral, agricultural or residential leases and the construction of permanent city, town or private residences or other works as a result of a mining lease (NTA, ss15(1)(a) and 229). These extinguish native title. (Category A does not include grants to the Crown or grants to Aboriginal people: NTA, s229). Category B, comprising leases other than leases to the Crown, mining leases and those in category A: NTA, ss15(1)(c) and 230. Category B includes, for example, some miscellaneous leases, although the reasons why these are treated differently from agricultural leases etc remains but one of the mysteries of this Act. These extinguish native title to the extent of any inconsistency. And Category C (NTA, ss15(1)(d) and 231) and Category D (NTA, ss15(1)(d) and 232) comprising mining leases and all other interests, including grants to the Crown. In respect of these the "non extinguishment" principle applies ie. native title is merely suspended and will revive when the relevant act ceases to apply (in whole or in part) so as to prevent native title from operating (NTA s 238).

27 NTA ss 21, 232A. In some circumstances there are obligations to notify etc., see NTA s 22H. These are acts which would otherwise be invalid and which are done pursuant to or under a valid grant of a freehold or of a lease (other than a mining lease) or which comprise a public work over certain areas including areas where a pastoral lease had previously been granted. Again there are four categories.

Where the relevant past act or intermediate act is validated, compensation is payable by the Commonwealth or State (as the case may be: NTA ss17, 20, 22D and 22G. It should be noted that compensation under the NTA is "capped" at the amount payable for the compulsory acquisition of freehold, although that amount can be exceeded if it would not result in "just terms" for the purposes of the Commonwealth Constitution: see NTA ss 51A and 53.).

28 NTA ss 13(1) and 61. Persons asserting a native title interest can apply to the Federal Court for a determination that native title exists: see *Daniel v WA* (2002) 194 ALR 278. The Federal Court has broad powers to deal with the claim, including by referring the claim to the National Native Title Tribunal for mediation (NTA s 86B). Ultimately, the Federal Court has power to determine whether native title exists and, if it does, its nature and extent (NTA ss 79A, 81, 94A, 225). It is likely that the determination of the Federal Court would be an "in rem" decision which would bind third parties (See *Wik Peoples v Qld* (1994) 49 FCR 1. That decision may not have been correct at the time it was given, but in light of the broader jurisdiction now given to the Federal Court, the reasoning would now seem correct.). Nevertheless, the jurisdiction is not exclusive and common law proceedings could still be instituted in State Courts eg for trespass or for injunctions to restrain threatened interferences with native title (may also fall within accrued jurisdiction: See *Lardil Peoples v Queensland* (2001) 185 ALR 513).

16.2.7 Authorisation of Future Acts

Future acts[29] which "affect" native title[30] are invalid unless:[31]

1. The act is consented to in an Indigenous Land Use Agreement;[32]
2. A non claimant application has been made and the provisions of the NTA complied with;[33]
3. In some circumstances where the act is authorised or approved by the State in relation to a lease which permits "primary production activity";[34]
4. The act relates to water and/or airspace;[35]
5. The act is pursuant to an act existing before 23 December 1996 or is a renewal or extension of specified leases;[36]
6. The use of land which was dedicated or reserved by the State before 23 December 1996 for a particular purpose for that purpose (or for another purpose having no greater effect upon native title);[37]
7. An act by a State permitting, requiring or involving the construction, use or maintenance of public facilities;[38]

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29 It should be noted that the NTA is basically concerned with the actions of governments. Private acts which unlawfully interfere with existing native title are unlawful. They are subject to the usual remedies for the interference with property rights eg actions for trespass or nuisance

30 NTA ss 24AA, 28. Contrast approach of High Court in *North Ganalanja Corp v Qld* (1996) 185 CLR 595 where it was held that the "right to negotiate" applied even if there was no native title that could be affected. The 1998 Amendments make it clear that there is no limitation upon future acts if native title does not exist: *Lardil Peoples v Queensland* (2002) 185 ALR 513.

31 NTA ss 10, 11, 24AA, 24OA.

32 NTA s 24EA, 24EB, 24EC. There are 4 types of agreements: body corporate agreements (NTA s 24BA: all registered bodies corporate must be parties to agreement); area agreements: NTA s 24CA (all reasonable efforts must be made to identify all potential claimants who each must agree); alternative procedure agreements (NTA s 24DA: not necessary that all registered bodies be parties or that all claimants agree, but Registrar must be satisfied that agreement is fair. The agreement cannot extinguish native title); and agreements which comply with any requirements specified by regulation (NTA s 24DM)

33 NTA ss 24FA, 66(10). If, 3 months after the making of that application, no native title claim has been registered then all acts done thereafter are valid, even if they result in the extinguishment of native title, until a native title determination (if any) is eventually made. Compensation is payable.

34 NTA ss 24GB, 24GC, 24GE. There are 3 circumstances: (1) A State can validly act so as to authorise the lessee of a non exclusive lease to carry out other primary production activities on the land, but not if the effect of doing so is to convert the lease to one conferring exclusive possession. The non extinguishment principle applies and compensation is payable if native title is affected. (2) Primary production activities which were permitted under the lease before 31 March 1998 are permitted and prevail over, but do not extinguish native title. Compensation is not payable at least for carrying out the act. (3) A State can authorise minor activities, such as cutting timber or removing gravel, providing that certain procedural requirements are met.

35 NTA s 24HA. In relation to waters and airspace a State can make and amend legislation and make grants and confer entitlements. The non extinguishment principle applies and compensation is payable.

36 NTA s 24IA. There are certain procedural obligations imposed. If the lease grants a right of exclusive possession then the grant of the renewal or extension extinguishes native title, but otherwise the non extinguishment principle applies. Compensation is payable.

37 NTA s 24JB. There are procedural requirements that must be complied with. If the use involves a public work then native title is extinguished. Otherwise the non extinguishment principle applies. Compensation is payable.

38 NTA s 24KA. Public facilities are eg roads, jetties, utilities etc. Native title holders must have the same procedural rights as other land holders, have reasonable access to the land and heritage sites must be protected by legislation. The non extinguishment principle applies and compensation is payable. Note the exemption for "compulsory acquisition" in 24KA(1A). This term is not defined but presumably this does not render the rest of the section meaningless.

8. An act which is a "low impact future act"[39] where there has been no determination of the existence of native title;
9. An act relates to an "off-shore";[40]
10. An act consisting of legislation which treats the native title holders the same or better than if they held freehold; or an act which is other than legislation and which applies to an "on shore place" and which treats the native title holders the same or better than if they held freehold and where there is in place heritage protection legislation; or an act which consists of opal or gem mining in certain circumstances[41] AND, in each case, if the "right to negotiate" procedure and other procedural requirements are complied with;[42] and
11. In the absence of satisfactory alternative State provisions,[43] an act consisting of a right to mine[44] or of a compulsory acquisition for the benefit of third parties (other than public infrastructure) or of any other act specified by the Minister where the "right to negotiate" procedure has been complied with.[45]

The "right to negotiate" procedure consists of the notification of various parties,[46] negotiation in good faith with those parties[47] with the assistance of an "arbitral body"[48] or, if the negotiations fail to reach a resolution within six months of the commencement of the procedure, a compulsory arbitration by the "arbitral body".[49]

210 Footnote 67: Add, "As to dedicated lands: see *Mogo Local Aboriginal Land Council v Eurobodalla SC* (2002) 54 NSWLR 1 at 15. As to whether the definition includes land covered by sea: see *Risk v NT* (2002) 188 ALR 376."

Footnote 68: Add, "*Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 at 634-635."

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39 NTA s 24LA. These acts are defined broadly, but exclude grants of exclusive possession, grants of leases, excavation or clearing (other than for reasons of public health, public safety or the protection of the environment), mining (other than fossicking), the construction of fixtures and the disposal of poisonous, toxic or hazardous waste. The non extinguishment principle applies.

40 NTA s 24NA. If the act consists of a compulsory acquisition then native title is extinguished; otherwise the non extinguishment principle applies. Compensation is payable.

41 NTA s 24MB(2), 24MD. There must be in place heritage protection legislation. The act is valid but only if the "right to negotiate" and other procedural requirements are complied with.

42 NTA ss 24MA, 24MB(1), 24MD. The effect of the act depends upon the what the act is eg. a compulsory acquisition will usually extinguish native title.

43 NTA s 43A: see *Qld v Central Qld Land Council* (2002) 195 ALR 106.

44 There are some qualifications, see eg NTA ss 24MD(6B)(b), 26.

45 NTA s 26. The procedure does not apply where the relevant act is a compulsory acquisition wholly within a town or city or where the act is valid under some other provision of the NTA (NTA s 26(2). The Minister may exempt certain acts from the "right to negotiate procedure" eg. exploration acts, gold or tin mining, opal or gem mining and renewals of earlier rights (NTA ss 26A, 26B, 26C, 26D. In each case the Minister must be satisfied as to various matters). If there are satisfactory alternative State provisions then those provisions apply to the exclusion of the "right to negotiate".

46 NTA s 29. Claimants are only entitled to take part in the right to negotiate procedure if they are "registered". As to tests for registration see NTA s 190A(6), 190B and 190C. However, even if claimants are not registered, representative bodies must be notified.

47 NTA s 31.

48 Either the National Native Title Tribunal or, if a State has established a satisfactory body, a State body: NTA s 27.

49 NTA s 35.

216 Footnote 145: Add, "As to the effect of the dedication, and the obligation in relation to the public trust thereby created, see *Ward v WA* (1999) 159 ALR 483, 562-567 at 574-576."

218 Footnote 160: Insert after the reference to *Wik Peoples v Queensland*, "*Ward v WA* (1999) 159 ALR 483 at 553-562."

220 Footnote 184: Insert at start of footnote, "See *Lansen v Olney* (1999) 169 ALR 49 at [42]-[58], [105]-[116]."

221 Paragraph 16.6.2: Replace "10,000 square miles" with "26,000 square kilometres".

Footnote 192: Add, "As to the nature of a royalty, see *Bromley v Forestry Commission* (2001) 51 NSWLR 378 at 392 [46]."

222 Footnote 198: Add, "Seddon *Government Contracts* (2nd ed) at 83-88."

223 Footnote 4: Delete "14 April, 1984, p 50" and insert in lieu, "19 April, 1984 page 950"

224 Footnote 5: Insert after the reference to *Wilson's Case*, "*Bollag v AG (Cth)* (1998) 47 ALD 568;"

Footnote 6: Add, "*McGuiness v AG (Vic)* (1940) 63 CLR 73 at 98-99."

Footnote 7: Insert after reference to *See v Milner*, "*R v Davidson* (1991) 54 SASR 580 at 586; *Bartlett v Weir* (1994) 72 A Crim R 511 at 519; *Tye v Cmmr Police* (1995) 72 A Crim R 511 at 519; *Cowan v Condon* [2000] 1 WLR 254 at 261-265; *R (Rottman) v Cmmr Police* [2002] 2 All ER 865 at 869-877, 881-885, 894-900." Add, "*Challenge Plastics Pty Ltd v Collector Customs* (1991) 42 FCR 397 at 405-406, *R v Applebee* (1995) 79 A Crim R 554 at 558."

Footnote 8: Add, "See *Gibbs v Rea* [1998] AC 786 as to legal liability for maliciously and wrongfully procuring the issue of a search warrant."

225 Chapter 17.3: Insert immediately before the word, "Subject", "It may be doubted whether there is a general duty of confidentiality whether in tort or in equity. However,".

Insert footnote 18A after the word "equity" such footnote to provide, "See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1."

Footnote 20: Add, "See Jolly, "Freedom of Communication and Government Information" (2000) 28 FLR 41 at 47".

Footnote 21: Insert after the reference to *R v Clarkson (No 2)* the following, "*BCCI v Price Waterhouse* [1997] 4 All ER 781 at 797-799".

226 Footnote 23" Add, "Where the confidentiality attaches to identity and the information has been varied so that, for example, the identity of the relevant person is not revealed, the information may be released: *R v Hertfordshire CC; ex p Green Environmental Industries Ltd* [2000] 1 All ER 773. As to the ownership of medical records held by a hospital or health unit, see *Health Services for Men P/L v D'Douza* (2000) 48 NSWLR 448."

Footnote 26: Add, "Where the information is obtained for the purpose of legal proceedings or consists of legal advice then the material may be protected by legal professional privilege. As to the applicability of that privilege to Government lawyers, see *AG (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Cth* (1987) 163 CLR 54; *Grofam P/L v ANZ* (1993) 117 LR 669; *Freeman v Health Insurance Commission* (1998) 157 ALR 339."

Footnote 29: Insert at the start of the footnote, "See *In re L* [1999] 1 WLR 299 at 302-307."

Footnote 30: Insert after the reference to *Soden v Burn*, "*Taylor v Serious Fraud Office* [1999] 2 AC 177 at 205, 213-215, 219-222; *Katsuno v R* (1999) 199 CLR 40 at [21]-[25]". Add, "Voon, "Breach of Confidence by Government" (1998) *AIPJ* 66; Horrigan (ed), *Government, Law and Policy* (1998) at 196-203; Seddon *Government Contracts* (2nd ed) at 273; Carney, *Members of Parliament: Law and Ethics* (2000) at 317ff."

Footnote 31: Add, "*R v Chief Constable of NW Police; ex p AB* [1997] 3 All ER 57; (on appeal) *R v Chief Constable of the NW Police; ex p Thorpe* [1999] QB 396. The public interest may include the release of the information to appropriate regulatory or licensing authorities: *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604 at 615. See Gobert & Punch, "Whistleblowers, the Public Interest and the Public Interest Disclosure" (2000) 63 *Mod LR* 25; See also Corcoran & McPherson, "Disclosure and the Public Interest: Confidentiality Claims in the Public Interest" (2000) 74 *ALJ* 259."

227 Footnote 33: Add, "As to whether the duty continues to apply after the employment ceases, see *AG v Blake* [1998] Ch 439 at 453-455 (on appeal) [2000] 3 WLR 625."

Footnote 34: Add, "Horrigan (ed), *Government Law and Policy* (1998) at 186-196; *Minister for Mineral Resources v Newcastle Newspapers* (1998) 40 IPR 403."

Footnote 37: Add, "Horrigan (ed), *Government, Law and Policy* (1998) at 186-196; Goode, "Policy Considerations in the formulation of Whistleblowers Protection Legislation: The South Australian Whistleblowers Protection Act 1993" (2000) 22 *Adel LR* 27."

Footnote 38: Add, "See *Morgan v Mallard* (1997) 68 SASR 184 at 197-198."

Footnote 43: Add, "See *Sutton v SA* (1996) 68 SASR 13."

228 Footnote 47: Insert after the reference to *Balfour v Foreign & Commonwealth Office*, "so too in New Zealand: *Choudry v AG* [1999] 3 NZLR 399;". Add, "As to

the practice in the UK respecting class claims in criminal matters, see Supperstone & Coppel, "A New Approach to Public Interest Immunity?" [1997] *PL* 211."

Footnote 48: Add, "*Adelaide Brighton Cement Ltd v South Australia* (1999) 75 SASR 1; *Commonwealth v Construction, Forestry, Mining & Energy Union* (2000) 171 ALR 379 at 386-389, 390; *Medical Board of South Australia v Fisher* (2000)76 SASR 242 at 248-254."

229 Footnote 49: Insert after the reference to *Commonwealth v Northern Land Council*, "*Commonwealth v Construction, Forestry, Mining & Energy Union* (2000) 171 ALR 379 at 386-389, 390"; *NTEU v Cth* (2001) 188 ALR 614 at 625-630.

Footnote 50: Insert after the reference to *R v Keane*, "*Medical Board of South Australia v Fisher* (2000)76 SASR 242 at 252-254." Add, "The privilege is not limited to public bodies: see Seddon, "Crown Immunity and Private Bodies" (1999) 10 *PLR* 263. The privilege can be waived by the informer eg where the informer wishes to use the information in civil proceedings: *Savage v Chief Constable* [1997] 1 WLR 1061 at 1067-1968."

Footnote 53: Insert after the reference to *Taylor v Anderson* the following, "*Savage v Chief Constable* [1997] 1 WLR 1061 at 1066-1067; *Middleton v WA* (1998) 17 WAR 201; contrast *R v Polley* (1997) 68 SASR 227 at 245-248, 251."

Footnote 55: Add, "In some circumstances the Court may even permit cross examination of the deponent to the affidavit, but this will be rare: *Young v Quin* (1984) 59 ALR 225; *Woodroffe v NCA* (2000) 168 ALR 585 at 589-590."

Footnote 56: Add, "Horrigan (ed), *Government Law and Policy* (1998) at 104-123. There is some argument that there is a constitutional right to free access to government information: see Jolly, "Freedom of Communication and Government Information" (2000) 28 *FL Rev* 41. However, this may confuse a constitutional limitation upon legislative power with a right." Footnote 57: Add, "See *Channel 31 Community Education Ltd v Inglis* (2002) 25 WAR 147.

230 Footnote 66: Add, "cl 3."

Paragraph 17.5.6, (d), Add, "or the impartial adjudication of any case."; (e) Add, "of any contravention of the law or any possible contravention."; Add in final paragraph, "except in the case of the matters stated in (c), (d) or (i) where no public interest test needs to be satisfied"

Paragraph 17.5.7: Delete the existing paragraph and substitute in lieu thereof: "That if the documents were disclosed it could reasonably be expected to damage intergovernmental relations or it would divulge information from a confidential intergovernmental communication, and in each case, it would be contrary to the public interest to release the document.

Paragraph 17.5.9 Delete the existing paragraph and substitute in lieu thereof "That a document would reveal trade secrets or information that has commercial value to another person. Alternatively, where the disclosure would have adverse effects on the business, financial or professional affairs of any person or would prejudice the future supply of that information to the Government or to an agency, and in each case, it would be contrary to the public interest to release the document.

Paragraph 17.5.10, Add "and it would be contrary to the public interest to release the document.

231 Footnote 70: Insert after the reference to *Manly v Ministry of Premier* the following, "*Ipex Information v DIT* (1997) 192 LSJS 54 at 68-71."

Footnote 71: Add, "*Re Cosco Holdings Pty Ltd and Department of Treasury* (1999) 51 ALD 140."

Footnote 73: Add, "Finn, "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJAL* 113; Horrigan (ed), *Government Law and Policy* (1998) at 106-113; McClure, "The Treatment of Contract Prices under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract prices Really Trade Secrets" (2002) 31(2) *Public Contract Law Journal* 185."

232 Footnote 78: Add, "Horrigan (ed), *Government Law and Policy* (1998) at 113-117."

233 Paragraph 17.5.24: Delete the words, "Before making a decision to refuse access on the basis of the grounds in" and insert in lieu thereof, "Before making a decision to grant access to documents which could fall within".

Paragraph 17.5.24 Subparagraph (b) Add, "or agency (if a not a State government agency)" after the words "the responsible Minister.";

Final paragraph: Delete the words "It must be considered by the CEO of relevant agency or the delegate of the CEO" and insert in lieu thereof, " It must be dealt with by an accredited FOI officer of the agency"; Add, "or the Police Complaints Authority" after the word "Ombudsman"

Footnote 89: As to judicial review, see *Shergold v Tanner* (2003) 209 CLR 126

Footnote 92: Add, "For definition of "accredited FOI officer": s4.

234 Footnote 94: Add, "See *Ipex Information v DIT* (1997) 192 LSJS 54."

Paragraph 17.5: Insert footnote 95A after words, "pre trial discovery" such footnote to provide, "See *Johnson Tiles v Esso* (2000) 174 ALR 701." Add, "The public has a right of access to some documents even if the Freedom of Information Act does not apply. This includes, for example, some public court documents".

Insert a new footnote 95A after the words, "court documents", such footnote to provide, "See *Titelius v Public Service Appeal Board* (2000) 21 WAR 201."

Paragraph 17.6: Insert a new paragraph 17.6:

> "**17.6 State Records**
> Records created or maintained by Government agencies cannot be destroyed by the agency, except in accordance with guidelines prepared by State Records. If the documents cannot be destroyed, then the records must be delivered to State Records either when they are no longer required, or during the year when the record was first brought into existence (whichever first occurs). The agency delivering up the records may determine that access to the record should be restricted. If this is not done then the public may have access to the record, unless there is a statutory duty of secrecy in respect of the record."

Insert a new footnote 96 after the word "agencies" such footnote to provide, "Defined in s 3(1) of the *State Records Act* 1997".

Insert a new footnote 97 after the words, "first occurs)" such footnote to provide, "*State Records Act* 1997, ss 18, 19."

Insert a new footnote 98 after the words "of the record" such footnote to provide, "Ibid ss 20, 26."

235 Footnote 1: Add, "Thomas, "Administrative Jurisdiction: The Jewel in the Crown" (1998) 9 *PLR* 43; Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 15ff; Craig, "Public Law, Political Theory and Legal Theory" [2000] *PL* 211; Harlow, "Export, Import. The Ebb and Flow of English Public Law" [2000] *PL* 240; J Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] *PL* 671; Craig & Schonberg, "Substantive Legitimate Expectations After Coughlin" [2000] *PL* 684; Roberts, "Public Law Representations and Substantive Legitimate Expectations (2001) 64 *Mod LR* 112; but see *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 7 at [45]". See also fn 127."

236 Footnote 4: Add, "As to the position in the US, see Taggart (ed) *The Province of Administrative Law* (1997) at 103-104. As to the meaning of public body, see *Poplar HRCA v Donoghue* [2001] 4 All ER 604."

Footnote 6: Add after the reference to *Ex p Smith*, "*Von Einem v Griffin* (1998) 72 SASR 110; Seddon, "The Crown" (2000) 28 *FL Rev* 245 at 255."

Footnote 10: Add, "*AFL v Carlton Football Club* [1998] 2 VR 546 at 549-557, 577-580."

Footnote 11: Insert after the reference to *R v Chief Rabbi*, "*R v London Beth Din; ex p Bloom* Noted at [1998] *PL* 519;". Add, "Taggart (ed), *The Province of Administrative Law* (1997) at 196-216."

237 Footnote 12: Insert after the reference to *Andricciola v Italian Community* the following, "contrast *Baker v Liberal Party* (1997) 68 SASR 366 at 374-375; and

Clarke v Australian Labor Party (1999) 74 SASR 109 at 124-140; *Robinson v Australian Assoc of Social Workers* (2000) 206 LSJS 209 at 228-233; *Mitchell v Royal NSW Canine Council Ltd* (2001) 52 NSWLR 242 at 246-247; *Abbott v Women's & Children's Hospital Inc* [2003] SASC 145 ". Add, "Oliver, Common Values in Public and Private Law and the Public/Private Divide" [1997] *PL* 630; Bagot, "Administrative accountability in Prisons" (2002) 9 *Aust J Admin Law* 143."

Footnote 13: Insert after the reference to *Victoria v Master Builders Association*, "this also highlights the issue of whether the relevant right or expectation is a public or a private right. This issue is of particular importance with the growing use of contractors in the provision of Government services: see". Add, "Taggart (ed) *The Province of Administrative Law* (1997) at 28-33, 46-48; Seddon *Government Contracts* (2nd ed) at 298-300; Davies, "The Effect of Prison Privatisation on the Legal Position of Prisoners" (1998) 6 *AJAL* 34; MacPherson, "Public Governance through Private Contract: A State Audit Perspective" (1999) 3 *FJLR* 9 at 31; Freeman, "Private Parties, Public Functions and the New Administrative Law" (2000) 52 *Admin Law Review* 813 at 821 ff (re the US position); Guttman, "Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty" (2000) 52 *Admin Law Review* 859 at 910 (as to US attempts to distinguish public and private functions). As to private bodies performing statutory functions: see *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35."

Footnote 16: Insert after the reference to *Re McJannet* the following, "*Emanuele v Emanuel Investment P/L* (1997) 191 LSJS 412 at 416, 429-430; *Re Hammond; ex p Roddan* (1996) 17 WAR 50; *Ousley v R* (1997) 192 CLR 69 at 99; *Re Owen; ex p Sumampow* (2001) 183 ALR 372 at 378 [28]." Add, "Parliamentary bodies may also be excluded: see *R v Parliamentary Commissioner for Standards; ex p Al-Fayed* [1998] 1 All ER 93."

Paragraph 18.2.4: Insert after "eg", "Parliamentary bodies,".

238 Footnote 18: Add, "Where the relevant University statute does not provide for a Visitor the usual principles of administrative law apply. However, this does not mean that the Court could do all that the Visitor could do eg the Court could not make determinations on educational issues: *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988 at 1992."

Footnote 21: Add, "See Taggart (ed), *The Province of Administrative Law* (1997) at 217-242 where it is suggested that there are 5 key values: autonomy, dignity, respect, status and security."

Footnote 22: Add, "It does not matter that the relevant officer has misunderstood the source of the power, so long as the relevant power in fact exists: *Mercantile Mutual Life Insurance Co Ltd v ASC* (1993) 40 FCR 409 at 412; *Johns v ASC* (1993) 178 CLR 408 at 426; *R v Romeo* (1982) 30 SASR 243 at 276-278; *Canwest v Treasurer* (1997) 147 ALR 509 at 530-531; *Harris v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651 at 655. This is subject to the exercise of the power not thereby becoming actuated by mala fides: see *R v Chalkley* [1998] QB

848 at 871-873. Although usually not, there may be some limited instances (eg delegated legislation or warrants) where failure to include the source of power, or failure to correctly identify the source, may lead to invalidity: see Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 117-119; *Harris v Great Barrier Reef* (1999) 162 ALR 651 at 655-657."

239 Footnote 23: Delete reference to "Pearce" and insert in lieu, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 132-151. The power does not enable a new jurisdiction to be conferred on a superior court: *Retirement Benefits Fund Board v Hingston* (1997) 7 Tas R 134 at 144-145."

Footnote 24: Delete reference to "Pearce" and insert in lieu, "Pearce & Argument, *Delegated Legislation in Australia*" (2nd ed, 1999) at 152-164."

Footnote 25: Delete reference to "Pearce" and insert in lieu, Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 164-181."

Footnote 26: Add, "Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *MULR* 1. It is sometimes assumed that proportionality and reasonableness are requirements for the validity of regulations, whether or not the relevant power is purposive: see *South Australian River Fishery Assoc v SA* [2003] SASC 174."

Footnote 27: Insert after reference to *Australian Heritage Commission v Mt Isa Mines*, "*Corporation of the City of Kensington v DAC* (1998) 70 SASR 471 at 480-485; *AG (Q) v Riordan* (1997) 192 CLR 1 at 12-16, 29; *Bruce v Cole* (1998) 45 NSWLR 163 at 183-187, 202, 20; *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 62-75; *Upham v Grand Hotel (SA) Pty Ltd* (2000) 74 SASR 557 at [126]-[169]; *Re Minister for Immigration and Multicultural Affairs; ex p Durairajasingham* (2000) 168 ALR 407 at [68]-[70]; *Cubillo v Cth* (2000) 174 ALR 97 at 461-462." Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 115, 315-320."

Footnote 29: Delete reference to "Pearce" and insert in lieu, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 257-280."

Footnote 30: Delete reference to "Pearce" and insert in lieu, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 278-280."

240 Footnote 31: Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 229-241. However, there are some dicta that suggest that statutory powers must be exercised reasonably: see *Kruger v Cth* (1997) 190 CLR 1 at 36; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650; *Re Refugee Review Tribunal; ex p Aala* [2000] HCA 57 at [40]. Where the exercise of the power is inconsistent with a fundamental common law right (eg the right to freedom of expression) then the empowering provision will be strictly construed so as to be, as far as possible, consistent with the right: *R v Home Secretary; ex p Simms* [1999] 3 WLR 328."

Footnote 32: Add, Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 242-256."

Footnote 36: Insert after the reference to *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* the following, "*Canwest Global Communications Corp v ABA* (1997) 147 ALR 539 at 566-567; *Dooney v Henry* (2000) 174 ALR 41 at [10]-[17]."

241 Footnote 38: Add, "*Casino Pty Ltd v Police Complaints Authority* (1997) 68 SASR 169 at 180-182."

Footnote 39: Insert after the reference to *Re Reference under the Ombudsman Act section 11*, "*PSA v SA* (1997) 68 SASR 461 at 462-463; *R v Kolaroff* (1997) 192 LSJS 308 at 313-316; *AG v Foster* (1999) 161 ALR 232 at 242-244."

242 Footnote 43: Insert after the reference to *Winton v Jolliffe*, "*Cassell v R* (2000) 201 CLR 189 at [18], [70]-[74]; *Bond v R* (2000) 169 ALR 607 at [32]-[34]; *MacCarron v Coles Supermarkets* (2000) 23 WAR 355; *Re Patterson; ex p Taylor* (2001) 182 ALR 657 at [204]." Add, "Campbell, "De Facto Officers" (1994) 2 *AJAL* 5; Campbell, "Ostensible Authority in Public Law" (1999) 27 *FL Rev* 1."

Paragraph 18.4.2.3: Insert footnote 43A immediately after the words "Given a discretion" such footnote to provide, "As to the nature of a discretion, see *Coal & Allied Operations v AIRC* (2000) 174 ALR 585 at 591 [19]."

Footnote 44: Insert after the reference to *Re Findlay*, "*Quark Technologies Pty Ltd v WorkCover* (1998) 70 SASR 153; *Ex p Zhu* (2001) 178 ALR 213 at 216; *Westhaven Shellfish Ltd v Chief Executive of Ministry of* Fisheries [2002] 2 NZLR 158; *Neat Domestic Trading Ltd v AWB* [2003] HCA 35; O'Connor, "Knowing When to Say Yes Minister: Ministerial Control of Directions Vested in Officials" (1998) 5 *AJAL* 168; Schwartz, "Administrative Law Lessons Regarding the Role of Politically Appointed Officials in Default Terminations (2001) 30(2) *Public Contract Law Journal* 143; Hilson, "Judicial Review, Policies and the Fettering of Discretion" [2002] *PL* 111"

Footnote 45: Insert after the reference to *Edwards v Olsen*, "*Tyler v Attorney General* [2000] 1 NZLR 211 at 222."

Footnote 46: Insert after the reference to *Re Toohey*, "*Bridgetown Friends v Conservation* (1977) 18 WAR 126 at 138-140, 153-154, 175-176; *Noroton Holdings Pty Ltd v Friends of Katoomba Falls Creek Valley Inc* (1998) 98 LGERA 335; *May v DCT* (1999) 163 ALR 357 at 364-365; *Upham v Grand Hotel (SA) Pty Ltd.* (2000) 74 SASR 557 at [149]-[156]; *Titelius v Public Service Appeal Board* (2000) 21 WAR 201 at 204; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585 at 592 [21], 594 [31], 609-611 [81]-[85]; *Re Minister for Heritage; ex p City of Fremantle* (2000) 22 WAR 342; *Re Patterson; ex p Taylor* (2001) 182 ALR 657 [193]-[200]". Add, "*MIMA v Yusuf* [2001] HCA 30 at [39]-[41], [61], [80]-[82]; contrast *RSL v Liquor Licensing Commissioner* [1999] 2 VR 203 at 211-215 which suggests that the distinction between courts and tribunals may not be helpful and that the issue is one of statutory interpretation. It may be that error of law as to jurisdiction includes an invalid fetter on discretion (see above), at least for a Tribunal and that that is an example of jurisdictional error, rather than a separate category of error.

Where there is power to exercise a discretion, but the decision maker is mistaken as to the source of that power, the exercise of the power is still valid: see footnote 22. On the question whether an error is one of law or of fact, see *Minister for Immigration and Multicultural Affairs v Ye Hu* (1997) 149 ALR 318 at 331-332 and see Endicott, "Questions of Law" (1998) 114 *LQR* 292. An error will only invalidate the decision if (or, perhaps, the discretion to grant a remedy will be refused unless) the error could have or "might" have affected the outcome: *Commonwealth v HREOC* (1998) 152 ALR 182; *R v Inner South London Coroner; ex p Douglas-Williams* [1999] 1 All ER 344 at 347; *X v Cth* [1999] HCA 63 at [112]. Errors relating to credibility findings are usually non jurisdictional errors, unless the finding involves the existence or otherwise of a jurisdictional fact: *Marksman Training Systems P/L v IRC* (1998) 71 SASR 72 at 83-85, 87-89, 98."

Footnote 47: Add, "Contrast *R v East Sussex CC; ex p Tandy* [1998] 2 All ER 769."

243 Footnote 48: Add, "See Footnote 27".

Footnote 49: Insert after the reference to *Sydney Municipal Council v Campbell*, "*Vanmeld P/L v Fairfield CC* (1999) 46 NSWLR 78 at 101; *May v DCT* (1999) 163 ALR 357 at 368-370; *R v Secretary of State for the Environment, Transport & the Regions; ex p Spath Holme Ltd* [2000] 3 WLR 141; *Telstra v Hurstville CC* (2001) 181 ALR 406 at 457-459; *R v Environment Secretary; ex p Spath Holme Ltd* [2001] 2 AC 349 at 381-396, 404; *Gerlach v Clifton Bricks Pty* Ltd [2002] HCA 22 at [70]; *South Australian River Fishery Assoc v South Australia* [2003] SASC 38 ; Donaghue, "Coercive Questioning After Charge" (2000) 28 *FL Rev* 1 at 4." Add, "As to the purpose of a corporate body, see *IW v Perth* (1997) 191 CLR 1 at 47-48, 61; *Vanmeld P/L v Fairfield CC* (1999) 46 NSWLR 78 at 101; *Telstra v Hurstville CC* (2001) 181 ALR 406 at 457-459. The relevant ulterior purpose is a subjective purpose. It is to be distinguished from the objective purpose referred to in Chapter 18.4.1: see *SA v Tanner* (1989) 166 CLR 161 at 174-175; Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1996) 7 *PLR* 212; Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 219-228. The purpose must be an "ulterior" or "improper" purpose. Some collateral purposes are permissible if they are consistent with the statutory purpose: see *R v Chalkley* [1998] 3 WLR 146 at 168; *AG v Ireland* [2002] 2 NZLR 220."

Footnote 50: Add, "; *Reid v Sinderberry* (1944) 68 CLR 504 at 514; *Bienke v Minister* (1996) 135 ALR 128 at 136."

Footnote 52: Add, "*Selamis v WorkCover Corp* (unreported, SASC, Lander J, 19 November 1998); *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 62-75. See generally Aronson, "The Resurgence of Jurisdictional Facts" (2001) 12 *PLR* 17; Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *FL Rev* 217. However, unless it is an error on the face of the record, an error of a non-jurisdictional fact does not give a ground of review: see *MIMA v Yusuf* (2001) 180 ALR 1; S157 v Cth (2002) 195 ALR 24.. "

Footnote 53: Add, "*AG (Qld) v Riordan* (1997) 192 CLR 1 at 15-16, 37-39. However, this differs from any deference to the views of the Executive such as exist in the US. Contrast *Chevron USA Inc v Natural Resources Defence Council* 467 US 837 (1984); and *Corporation of Enfield v DAC and Collex* (2000) 169 ALR 400 at [39]-[52], [59]."

244 Footnote 54: Insert after the reference to *Ex p Shaw*, "*Pelechowski v The Registrar* (1999) 162 ALR 336 at 373-374." Add, "Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at 113ff. However, in federal jurisdiction there must be a "matter": *Re McBain; ex p Australian Catholic Bishops Conference* (2002) 209 CLR 372."

Footnote 56: Insert after the reference to *Hockey v Yelland* the following, "*Thompson v Byrne* (1997) 93 A Crim R 69;". Insert after the reference to *Sims v Planning Appeal Tribunal* the following, "*Rona v District Court* (1994) 63 SASR 223 at 229."

Footnote 58: Add, "It may be that the principle extends beyond the actual decision to the process by which the decision was made: see *Foster v Minister for Justice & Customs* (1999) 164 ALR 357 at 376. Although usually described as a principle, this may be misleading. In fact, it would seem that it is a narrow test either in respect of a statutory duty to be reasonable (see *Kruger v Cth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126]; *Re Refugee Review Tribunal; ex p Aala* [2000] HCA 57 at [40]or to be logical (*Hill v Green* (1999) 48 NSWLR 161 at 174-177)."

Footnote 59: Add, "*Minister for Immigration and Multicultural Affairs v Eshetu* (2000) 197 CLR 611 at [39]-[53], [100]-[103], [122]-[147], [183]-[194]; *Upham v Grand Hotel (SA) Pty Ltd* (2000) 74 SASR 557 at [157]-[169]; *Cubillo v Cth* (2000) 174 ALR 97 at 462-463; *Cubillo v Cth* (2001) 183 ALR 249 at 315."

245 Footnote 61: Add, "Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at pp 185 ff; Airo-Farulla, "Rationality and Judicial Review of Administrative Action" (2000) 24 *MULR* 543; *Minister for Immigration and Multicultural Affairs v Perera* (2001) 183 ALR 204".

Footnote 62: Insert after "76, 80.", "; *Bruce v Cole* (1998) 45 NSWLR 163 at 185-187. Nevertheless, there has been some broadening of the test in the UK, apparently in response to the proportionality test as applied in the European Community and in particular the European Convention on Human Rights: see *R v Chief Constable; ex p ITF Ltd* [1998] 2 AC 418 at 451-453; *R (Alconbury) v Sec State* [2001] 2 All ER 929 at 975-977, 1008; and *R v Sec State; ex p Daly* [2001] 3 All ER 433 at 445-447."

Footnote 63: Insert after the reference to the article by McMillan, "Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at 15ff". Add, "*Bruce v Cole* (1998) 45 NSWLR 163 at 185-187; *Ex p Fejzullah* [2000] HCA 23 at [6]; contrast the House of Lords in *R(Alconbury) v Sec of State* [2001] 2 All ER 929 at 956-957, 975-976, 980-981, 1008 which may now accept that proportionality is an appropriate test."

Footnote 65: Insert after reference to *Dover Fisheries case, "South Australian River Fishery Association & Warrick v South Australia* [2003] SASC 38 at [221]-[231]."

246 Footnote 69: Add, "*Wiseman v Borneman* [1971] AC 297 at 308 and any applicable statutory regime: *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224 at 241-248."

247 Footnote 73: Insert after reference to *Ex p Richmond LBC*, "*Dighton v SA* (2000) 78 SASR 1 at 19-20." Insert after the reference to *Minister for Immigration v Kurtovic*, "*R v Education Secretary; ex p Begbie* [2000] 1 WLR 1115". Add, "Where it is reasonably expected that a matter is finalised this may give rise to a legitimate expectation that affected parties will be heard before a decision is made to reopen the matter: *Boyce v Munro* [1998] 4 VR 773; contrast position where the decision is initially made to hold an inquiry: *May v DCT* (1999) 163 ALR 357 at 366-368. Statements made in the context of an election will not usually be treated as giving rise to a legitimate expectation: see *Roche v South Australia* (1983) 105 LSJS 140 at 147-148; *R v Education Secretary; ex p Begbie* [2000] 1 WLR 1115 at 1125-1126, 1134."

Footnote 75: Insert after reference to *Minister for Immigration and Ethnic Affairs v Teoh*, "*R v DPP; ex p Kebilene* [1999] 3 WLR 175 at 185, 199-200; Lacey, "In the Wake of Teoh: Finding an Appropriate Government Response" (2001) 29 *FL Rev* 219". Insert after the reference to "*ex p Smith*", "*Fisher v Minister of Public Safety & Immigration (No 2)* [1999] 2 WLR 349 at 356".

Footnote 79: Add, "*Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 175 ALR 706 at 714-718; *Maritime Union of Australia v Anderson* (2000) 100 FCR 58; *Dighton v SA* (2000) 78 SASR 1 at 17-19".

Paragraph 18.6.1: Insert immediately after footnote 81, "There is no legitimate expectation in relation to a notice or document which commences an administrative or legal process which itself affords the opportunity for a hearing eg the issue of a complaint or an abatement notice etc." Insert footnote 81A after the words "abatement notice" such footnote to provide, "*R v Falmouth; ex p South West Water* [2000] 3 All ER 306 at 318-319."

248 Footnote 82: Add, "This extends to a direction given by a person having power to direct: see *Sanders v Snell* (1998) 157 ALR 491 at 505."

Footnote 85: Insert after the reference to *Aerolineas Argentinas v FAC*, the following, "*FAC v Aerolineas Argentinas* (1997) 147 ALR 649 at 656-658; *Transport Action Group Against Motorways Inc v RTA* (1999) 46 NSWLR 598 at 622." Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 107-109."

Footnote 89: Insert after the reference to *Victoria v MBA*, "*Fisher v Minister of Public Safety & Immigration (No 2)* [1999] 2 WLR 349 at 356; *Thomas v Baptiste*

[2000] 2 AC 1 at 25; *Barratt v Howard* (2000) 170 ALR 529 at 545-546; Richardson, "Triumphant Ministers and Doomsday for Natural Justice in Barratt v Howard" (2000) 11 *PLR* 168; Forsyth, "Wednesbury Protection of Substantive Legitimate Expectations" [1997] *PL* 375; contrast *R v North and East Devon HA; ex p Coughlan* [2000] 2 WLR 622 at 644-647, 663, where the Court of Appeal held that there are some narrow circumstances where a legitimate expectation can be enforced; Roberts, "Public Law Representations and Substantive Legitimate Expectations" (2001) 64 *Mod LR* 112 contrast *Re MIMA; ex p Lam* (2003) 195 ALR 502."

Footnote 90: Insert after the reference to *NCSC v News Corp* the following, "*Boucher v ASC* (1997) 71 FCR 122 at 128; *Barratt v Howard* (2000) 170 ALR 529 at 543-544; Richardson, "Triumphant Ministers and Doomsday for Natural Justice in Barratt v Howard" (2000) 11 *PLR* 168."

249 Paragraph 18.6.2: Insert footnote 92A after the words "and an unbiased decision maker" such footnote to provide, "*May v DCT* (1999) 163 ALR 357 at 366-368."

Footnote 95: Add, "*Minister for Aboriginal and Torres Strait Islander Affairs v WA* (1997) 149 ALR 78 at 88-92."

Footnote 97: Add, "However, where the result is inevitable (eg dismissal on redundancy grounds) procedural fairness has a "diminished role": *KL Dowling & Co v Employee Relations Commission* [1998] 1 VR 251 at 272."

Chapter 18.6.3.2: Insert footnote 98A after the words, "written submissions is sufficient" such footnote to provide, "See Re *MIMA; ex p PT* (2001) 178 ALR 497 at 502-504."

250 Footnote 100: Add, "Similarly, the decision maker is not required to carry out his or her own inquiry unless required to do so by the statute or unless the role of the board or the prosecutor has been such that it would be unfair to rely upon the absence of evidence: *R v Criminal Injuries Board; ex p A* [1999] 2 AC 330 at 343-346."

Footnote 104: Add, "However, it will not readily be assumed that further material will be superfluous: *Minister for Aboriginal and Torres Strait Islander Affairs v WA* (1997) 149 ALR 78 at 95."

Footnote 105: Insert after the reference to *O'Rourke v Miller*, "*Rose v Bridges* (1997) 149 ALR 710 at 715-720; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 175 ALR 706 at 722-723".

Footnote 107: Insert after reference to *NCSC v News Corp*, "*Re Real Estate and Business Agents Supervisory Board; ex p Cohen* (2000) 21 WAR 158 (re legal advice)".

Footnote 108: Insert after the reference to *Commissioner for Railways v Peters* the following,: "*Rick Cobby P/L v Podestra Transport P/L* (1997) 191 LSJS 469 at 472; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381-382; *R v Keyte* (2000) 211 LSJS 200, although not in instances where there is no right of

appeal eg orders to commit: *Tzeegankoff v Magistrates Court* (1998) 199 LSJS 296; but contrast the refusal of leave where reasons should be given: *Roy Morgan Research Centre v Cmmr State Revenue* [2001] HCA 49 at [26], [32]-[33];". Insert after the reference to *T v Medical Board*, "*Lacey v Police*(1999) 202 LSJS 267; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Edwards v Giudice* (2000) 169 ALR 89 at [10]-[11], [41]-[48]; *Fleming v Queen* (1998) 197 CLR 250 at 260; *MIMA v Yusuf* [2001] HCA 30 at [208]". Add, "It may be that the failure to give reasons does not necessarily result in invalidity: see *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2; *Cedeno v Logan* [2001] 1 WLR 86 at 90-92 and see Chapter 18.9.1."

Paragraph 18.6.3.3: Insert footnote 109A after the word "closely". Footnote to provide, "*Yung v Adams* (1998) 150 ALR 436 at 464; *Comcare Australia v Lees* (1998) 151 ALR 647 at 656-659, *Scott v National Trust* [1998] 2 All ER 705 at 718-719; compare *Dornan v Riordan* (1990) 95 ALR 451."

Add, "The decision maker is not required to disclose his or her method of reasoning for the purposes of inviting comment, but it may be that the possibility of an adverse conclusion of a type not anticipated should be raised for comment." Insert footnote 109B after the word "comment", such footnote to provide, "*Victims Compensation Fund Corp v Nguyen* (2001) 52 NSWLR 213 at 220."

251 Footnote 109: Insert after the reference to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* the following, "*Friends of Hinchinbrook Soc Inc v Minister* (1997) 147 ALR 608 at 611, 628-629; *May v DCT* (1999) 163 ALR 357 at 366-368." Add, "Zipser, "Revisiting Osmond" (1998) 9 *PLR* 3; Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at 161ff; Le Sueur, "Taking the Soft Option? The Duty to Give Reasons in the Draft Freedom of Information Bill" [1999] *PL* 419."

Footnote 111: Insert after the reference to *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* the following, "*Gaisford v Hunt* (1997) 71 FCR 187 at 197-199; *Emanuele v Emanuel Investments* (1997) 191 LSJS 412 at 420-424; *Von Einem v Ahern* (1988) 49 SASR 424 at 428-429, 430; *Brooks v The Upjohn Co* (1998) 156 ALR 622 at 631; *Brown & Dixon v Police* (1999) 204 LSJS 40 at 44-46; *Johnson v Johnson* [2000] HCA 48; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644". Add, "See also *R v Hereford Court; ex p Rowlands* [1998] QB 110, 130-132 contrast *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at 722-723, 726-727. There may be a different standard for administrative bodies because they are largely conducted in private. There the test is formulated by reference to a hypothetical fair minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias: *Re Refugee Review Tribunal; ex p H* [2001] HCA 28 at [28]; *Passenger Transport Board v Bell & Zarko* (2001) 215 LSJS 374 at 386-387. As to the obligation of the decision maker to inform the parties of any facts that may give rise to an appearance of bias, see *Dovade P/L v Westpac Banking Group* (1999) 46 NSWLR 168 at 190-191. For a general discussion of the principles and procedures applicable to judicial officers, see *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644. As to actual bias, see *MIMA v Jia*

(2001) 178 ALR 421 at 450-451. As to unconscious prejudice, see Mason, "Unconscious Judicial Prejudice" (2001) 75 *ALJ* 676."

Footnote 112: Add, "*Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644. As to whether the interests of advisers are sufficient, see *Hot Holdings v Creasy* (2002) 77 ALJR 70; "

Footnote 113: Add, "Family interests include the financial interests of family members which interests are known to the decision maker: *Dovade P/L v Westpac Banking Group* (1999) 46 NSWLR 168 at 190; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644. Personal interests also include membership in a charitable organisation which intervened in the proceedings: *R v Bow Street Magistrates; ex p Pinochet (No 2)* [1999] 2 WLR 272. See Malleson, "Judicial Bias and Disqualification after Pinochet (No 2)" (2000) 63 *Mod LR* 119."

Footnote 114: Add, "As to contact with others, see *Ruffles v Chilman* (1997) 17 WAR 1; *Man O'War Station Ltd v Auckland CC* [2001] 1 NZLR 552; *Taylor v Lawrence* [2002] 2 All ER 353".

Footnote 115: Insert after the reference to *Hinton v Mill* the following, "*Magistrates Court of Prahan v Murphy* [1997] 2 VR 186 at 206-213, *Re Colina; ex p Torney* (1999) 166 ALR 545 at 553-554, 588-589; *Johnson v Johnson* [2000] HCA 48; *Kola v District Court of South Australia* [2001] SASC 268. Previous decisions on matters of law do not constitute "prejudgement": *Helljay Investments P/L v Deputy Commissioner of Taxation* (1999) 166 ALR 302 at [11]-[13]; contrast findings of fact or on credit: *Southern Equities Corp Ltd (In Liq) v Bond* (2000) 78 SASR 339.

Footnote 116: Add, "*Plenty v Seventh Day Adventist Church* (1997) 191 LSJS 1 at 28; *Grivas v Brooks* (1997) 69 SASR 532 at 539-545; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644. However, there can be no waiver if the person affected is not aware of the relevant facts: *Carver v Law Society of NSW* (1997) 43 NSWLR 71 at 90, 102-103. On the question whether waiver is precluded by Chapter III of the Commonwealth Constitution, contrast *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644 and Campbell, "Waiver of Judicial Disqualification for Bias or Apprehended Bias – A Constitutional Issue" (1999) 2(3) *CLPR* 42. The House of Lords has held that there can be no waiver in cases of financial interest. This is not the law in Australia: see *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644 and Olowofoyeku, "The Nemo Judex Rule: The Case Against Automatic Disqualification" [2000] *PL* 456."

252 Footnote 117: Add, "*South Australia v Clark* (1997) 68 SASR 327 at 333-338, 357-361; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644."

Footnote 118: Add, "*Haggarty & Morrison v NSW* (1998) 98 LGERA 226."

Footnote 119: Insert after reference to *Reckley v Minister of Public Safety*, "*Von Einem v Griffin* (1998) 72 SASR 110." Add, "Contrast *Lewis v AG (Jamaica)* [2001] 2 AC 50 where the Privy Council overruled *Reckley* and held that there was a duty to afford natural justice in relation to the prerogative of mercy."

Footnote 121: Insert after the reference to *R v Barlow* the following, "*R v Chief Constable; ex p ITF Ltd* [1998] 3 WLR 1260 at 1268; *R v DPP; ex p Kebilene*

[1999] 3 WLR 972 at 983, 1005-1007 (which seems to be based upon applicable statutory limitations). In England it has been held that a prosecutor may be required to give reasons for not proceeding: see Blom-Cooper, "Reasons for not Prosecuting" [2000] *PL* 560." Delete the words "Cf *Ex p Percival ... R v Chief Constable of Sussex* [1996] QB 197". Add, "However, decisions to prosecute or commence proceedings after the normal time for commencement has expired may give rise to a right to be heard: see *Oates v AG* (1998) 156 ALR 1 at 6-12."

253 Footnote 123: Insert after the word "compare" the following, "*Canwest & Global Communications Corporation v Treasurer* (1997) 147 ALR 509 at 524-527 and".

Chapter 18.8: Insert footnote 123A after the words "to determine illegality" such footnote to provide, "For example, *R v Maidstone Crown Court; ex p Harrow LBC* [2000] 2 WLR 237 at 256-257."

Footnote 124: Insert after the words "reference to the relevant power", "or is Wednesbury unreasonable". Insert after the reference to *Darling Casino Case*, "*Londish v Knox Grammar School* (1998) 97 LGERA 1; *AFL v Carlton Football Club* [1998] 2 VR 546 at 557-559, 568-569; *Re City of Melville; ex p J Corp Pty Ltd* (1999) 20 WAR 72; *Vanmeld Pty Ltd v Fairfield CC* (1999) 46 NSWLR 78 at 91-101, 105-112, 113; Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 325-332; Taggart (ed), *The Province of Administrative Law* (1997) at 282-286." Insert immediately before the words "See also 18.13" the following, "*AG (Qld) v Riordan* (1997) 192 CLR 1 at 11-16, 27-30, 37-39; *S134/2002 v MIMA* (2003) 195 ALR 1; *S157/2002 v MIMA* (2003) 195 ALR 24."

Footnote 125: Add, "Contrast *Barratt v Howard* (1999) 165 ALR 605 at 615-619."

Footnote 126: Add, "*R v City of Munno Para; ex parte Weeks* (1987) 46 SASR 400 at 406-407; *Dutton v Republic of South Africa* (1999) 162 ALR 625 at 635-636; *Upham v Grand Hotel (SA) Pty Ltd.* (2000) 74 SASR 557 at [70]-[110]; *Harris v Great Barrier Reef Marine Park Authority* (2000) 173 ALR 159 at [29]; *Blinco v Speer* (2000) 76 SASR 341; *Hill v Green* (1999) 48 NSWLR 161 at 167-170. There must be a clear legislative intention to exclude the common law rule: the maxim expressio unius will rarely be sufficient: *Barratt v Howard* (1999) 165 ALR 605 at 615-619."

254 Footnote 127: Add, "Forsyth, "Collateral Challenge and the Foundations of Judicial Review: Orthodoxy Vindicated and Procedural Exclusivity Rejected" [1998] *PL* 364; Campbell, "Effect of Administrative Decisions Procured by Fraud or Misrepresentation" (1998) 5 *AJAL* 240; Selway, "Judicial Review – A Process in Search of a Principle" (1998) 19 *AIAL Forum* 18; Craig, "Competing Models of Judicial Review" [1999] *PL* 428; Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] *PL* 448."

Paragraph 18.9.1: Insert after the words "merely voidable" the following, "and the related question of what courts can determine whether the act is valid and in what circumstances ("collateral challenge"). Insert footnote 128 after the words "("collateral challenge")" such footnote to provide, "See generally Selway, "The

Rule of Law, Invalidity and the Executive" (1998) 9 PLR 196 at 201-203; Elliott, "The Demise of Parliamentary Sovereignty? The implication for Justifying Judicial Review" (1999) 115 *LQR* 119; Aronson, "Criteria for Restricting Collateral Challenge" (1998) 9 *PLR* 237; Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at 141ff; Campbell, "Collateral Challenge of the Validity of Governmental Action" (1998) 24 *Mon ULR* 272; Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 293, 302-303; Allars, "Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts to Re-Open and Reconsider Their Decisions" (2001) 21 *Aust Bar Rev* 50; Beech-Jones, "ReOpening Tribunal Decisions: Recent Developments" (2001) 21 *Aust Bar Rev* 75; Orr & Briese, "Don't Think Twice? Can Administrative Decision Makers" (2003) 35 *AIAL Forum* 11; O'Brien, "When May a Decision Maker Remake an Administrative Decision" (2003) 35 *AIAL Forum* 44." Delete the words. "Given the unsatisfactory state that the law ... are brought well out of time" and insert in lieu thereof:

> "In the absence of any consistent theory to explain the constitutional validity of administrative law, it is not surprising that there is considerable confusion about this question. Historically, the accepted position seems to have been that an administrative decision that was "illegal" was void ab initio and could be challenged in collateral proceedings, at least so long as the vitiating defect was patent. However, acts and decisions that were in breach of administrative law by reason of irrationality or procedural impropriety were not void ab initio, but were merely voidable. They continued to be effective until set aside by a superior court in judicial review proceedings. This approach no longer enjoys general acceptance. Although there have been some other attempts to develop completely new approaches to the issues, it would seem that the preferred current approach is that the question is one of statutory interpretation. Under this approach all acts and decisions involving a material jurisdictional error are invalid ab initio at least in the absence of a legislative direction to the contrary. This test still has some difficulties, particularly in practical application where the challenge relates to a particular fact situation of which both parties have limited knowledge."

Insert footnote 129 after the words "was patent" such footnote to provide, "*Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461 at 483; *Murphy v R* (1989) 167 CLR 94 at 106."

Insert footnote 130 after the words "judicial review proceedings" such footnote to provide, "See eg *Calvin v Carr* [1980] AC 574; *Ainsworth v CJC* (1992) 175 CLR 564 at 579-580, 594ff" .

Insert footnote 130A after the words "support that approach" such footnote to provide, "*Ousley v R* (1997) 192 CLR 69 at 79-80, 86-88."

Insert footnote 130B after the words "general acceptance", such footnote to provide, "It could not still apply in the UK because of the rejection in that country of the distinction between Jurisdictional and other errors: see *Boddington v British Transport Police* [1998] 2 WLR 639 at 645-646, 650. Of course, that distinction is still recognised in Australian law: see *Craig v South Australia* (1995) 184 CLR 163 at 178-179; *Pelechowski v The Registrar* (1999) 162 ALR 336 at 373-374."

Insert footnote 130C after the words "the issues" such footnote to provide, "See eg *Bugg v DPP* [1993] QB 473 at 491-500; *Leung v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 76 at 86-90."

Insert footnote 130D after the words "statutory interpretation" such footnote to provide, "*R v Wicks* [1998] AC 92 at 117; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 373-375; *Ousley v* R (1997) 148 ALR 510 at 552; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 629-634; *AG (Cth) v Breckler* (1999) 163 ALR 576 at [36], [46], [94]; *Vanmeld P/L v Fairfield CC* (1999) 46 NSWLR 78 at 89; *City of Port Adelaide & Enfield v Min Transport* (1999) 73 SASR 22 at 28-31; *Barwick v Law Society of New South Wales* [2000] HCA 2 at [48]-[63], [116]-[118]".

Insert footnote 130DA after the words, "material jurisdictional error" such footnote to provide, "*Samad v District Court (NSW)* (2002) 189 ALR 1."

Insert footnote 130E after the words "to the contrary" such footnote to provide, "*Minister for Immigration and Multicultural affairs v Bhardwaj* [2002] HCA 11; *Ousley v R* (1997) 192 CLR 69 at 100-104; *Boddington v British Transport Police* [1999] 2 AC 143 at 154-155, 158, 167-168; *Selby v Pennings* (1999) 19 WAR 520 at 533-537, 538-543, 550-551; *AG (Cth) v Breckler* 163 ALR 576 at [36], [46], [94]. As to the relevant legislative intention in relation to "procedural irregularities", see *R v Immigration Appeal Tribunal; ex p Jeyeanthan* [1999] 3 All ER 231 at 235-239. As to the relevant legislative intention in relation to statutory notices, see *DCT v Woodhams* [2000] HCA 10 at [15]; *Blinco v Speer* (2000) 76 SASR 341 at 354."

Insert footnote 130F after the words "grounds of judicial review" such footnote to provide," For example, it now seems clear that a failure to afford natural justice is a jurisdictional error, but it is unclear whether all such failures result in invalidity: *see Rumpf v Mornington Peninsula SC* [2000] 2 VR 69 at 94. As a matter of principle it is difficult to see why not."

255 Footnote 131: Add, "*de Freitas v Ministry of Agriculture* [1999] 1 AC 69 at 77-81; Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 333-341."

Footnote 133: Insert after reference to *O'Reilly v Mackman*, "*British Steel plc v Customs & Excise Commissioners* [1997] 2 All ER 366." Add: "The significance of the rule has been reduced over time: see eg *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at 1993, 1994-1998. As to the new Rules, see Fordham "Judicial Review: The New Rules" [2001] *PL* 4."

Footnote 135: Add, "*Minister for Immigration and Multicultural Affairs v Ozmanian* (1997) 71 FCR 1 at 30-32."

Footnote 136: Add, "*Manna Hill v South Australia* (2001) 82 SASR 18 at 26-29. Where the declaration is sought as an ancillary remedy to an order in the nature of a prerogative writ, Order 98 must be complied with, including as to service: see *Xenephon v South Australia* (2000) 78 SASR 251 at 256. However, compliance with Order 98 is not required where the declaration is not ancillary: "*Manna Hill v South Australia* (2001) 82 SASR 18 at 28."

Footnote 137: Add, "However, there must be a justiciable controversy: see *Egan v* Willis (1998) 195 CLR 424 at 438-439; *St George's Healthcare NHS Trust v S* [1998] 3 WLR 936 at 964-967; *Electricity Supply Assoc v ACCC* (2002) 189 ALR 109 at [122], [131]. Although the breadth of the jurisdiction to grant a declaration may mean that some of the technical restrictions on the prerogative writs can be avoided, this does not mean that the substantive limitations upon the exercise of judicial power can be avoided eg by undertaking a merit review: *Foster v Minister of Justice & Customs* (1999) 164 ALR 357 at 359-360."

256 Footnote 140: Add, "Pearce & Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 293-297; *Corporation of the City of Enfield v DAC* (20000 169 ALR 400 at [22], [58]."

Footnote 142: Insert after reference to *Castlemaine Tooheys v South Australia*, "*R v Ministry of Agriculture Fisheries and Food; ex p Monsanto plc* [1999] QB 1161 at 1172-1173. See generally as to the use of injunctions to enforce public law rights: Wright, "The Role of Equitable Remedies in the Merging of Private and Public Law" (2001) 12 *PLR* 40."

Footnote 145: Add, "Where the public duty involves an obligation to pay moneys, the failure to make the payment may give rise to private and public rights of action: *Trustees of the Dennis Rye Pension Fund v Sheffield CC* [1997] 4 All ER 747 at 752, 758 ; *Abbott v Women's & Children's Hospital Inc* [2003] SASC 145 at [25]-[26]"

257 Footnote 148: Add, "As to the standing of the Attorney General, see Chapter 6.5.14."

Footnote 149: Insert after reference to *Talbot v Lane*, "*Flynn v DPP* [1998] 1 VR 322 at 333-340; *Re Minister for Heritage; ex p City of Fremantle* (2000) 22 WAR 342; *Re McBain; ex p Australian Catholics Bishops Conference* (2002) 209 CLR 372."

Paragraph 18.13.2: Insert footnote 149A after the words "breach of such rules". Footnote 149A to provide, "*Magistrates Court at Prahan v Murphy* [1997] 2 VR 186 at 213; *Re Refugee Review Tribunal; ex p Aala* [2000] HCA 57 at [142], [159]."

Footnote 152: Insert after the reference to *Maksimovic v Walsh*, "*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263."

Footnote 153: Insert at the start of the footnote, "*Re Refugee Review Tribunal; ex p Aala* [2000] HCA 57 at [142], [159]." Add, "Mandamus cannot authorise the superior court to exercise the relevant power itself: *KL Dowling & Co v Employee Relations Commission* [1998] 1 VR 251 at 264-265."

Footnote 154: Add, "*Re Minister for Heritage; ex p City of Fremantle* (2000) 22 WAR 342."

258 Footnote 157 Add, "See footnote 46. Although discretionary, prohibition will usually go if there is a jurisdictional error and the prosecutor is aggrieved: see *Re Refugee Review Tribunal; ex p Aala* [2000] HCA 57 at [51]-[52], [149]."

Footnote 158: Insert after the reference to *Goldsmith v Newman* the following, "*Frugtniet v Vic* (1997) 148 ALR 320 at 326; *Oates v AG* (1998) 156 ALR 1 at 13-14;".

Footnote 159: Insert after reference to *Re Alley*, "*Ballog v AG (Cth)* (1997) 149 ALR 355 at 373;".

Footnote 160: Add, "*R v Chief Constable of the Merseyside Police; ex p Calveley* [1986] QB 424 at 433-434, 435-437, 440; *Bollag v AG (Cth)* (1997) 149 ALR 355 at 373; Wade, "Judicial Review and Alternative Remedies" [1997] *PL* 589; Forsyth & Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) at 203ff, 267ff. Failure to appeal, or the existence of a right of appeal in due course, may not be a ground for refusing prohibition for excess of jurisdiction: see *R v Federal Court of Australia; ex p WA National Football League* (1979) 143 CLR 190 at 201-202, 216, 240-241."

Footnote 164: Insert after reference to *Public Service Association v Federated Clerks' Union*, "*Re Thompson; ex p Nulyarimma* (1999) 136 ACTR 9 at 28; *Re Carmody; ex p Glennan* (2000) 173 ALR 145 at [2]-[7]; *Re Heerey; ex p Heinrich* [2001] HCA 74 at [14]." Add, "See *Dimitropoulos v District Court* (1998) 199 LSJS 7; *Von Einem v Griffin* (1998) 102 A Crim R 51 at 55." Add, "Leave should not be granted if there is an alternative remedy such as an appeal: see *R v Falmouth; ex p South West Water* [2000] 2 All ER 306 at 332; *Re Heerey; ex p Heinrich* [2001] HCA 74 at [17]."

259 Footnote 165: Insert after the words "prerogative proceedings", "see *R v Ministry of Agriculture, Fisheries and Food; ex p Monsanto* [1999] QB 1161 at 1173".

Footnote 169: Insert after reference to *Commissioner of Police v Hallenstein*, "*S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 99; *Commonwealth v HREOC* (1998) 152 ALR 182 at 195-196, 199, 206-207; *Boyce v Munro* [1998] 4 VR 773 at 782; *Edge v Pensions Ombudsman* [1999] 4 All ER 546 at 582; *TXU Electricity Ltd v Office of the Regulator General* [2001] 3 VR 93." Add, "Campbell, "Role of Respondents to Applications for Judicial Review" (1998) 6 *AJAL* 5. Where the Respondent is a Court or Tribunal it is inappropriate to name the members themselves as parties: *Re Ruddock; ex p Reyes* (2001) 177 ALR 484 at 489."

Paragraph 18.13.3: Add after the words ""fishing expedition"" the following, "In any event, if the Crown fails to inform the court as to what actually occurred, the court may infer that there has been a breach of the procedural requirements." Insert footnote 169A after the word "requirements". Footnote 169A to provide, "*Minister for Aboriginal and Torres Strait Islander Affairs v WA* (1997) 149 ALR 78 at 98-100; *Abernethy v Deitz* (1996) 39 NSWLR 701 at 706-707."

Footnote 170: See generally *Re Australian Electoral Commission; ex p Kelly* [2003] HCA 37.

260 Footnote 171: Insert after reference to Shrimpton paper, "Simon Brown, "Habeas Corpus – A New Chapter" [2000] *PL* 31; Clark & McCoy, *Habeas Corpus – Australia, New Zealand and The South Pacific* (2000)." Add, "*R v Bournewood Community and Mental Health NHS Trust; ex p L* [1999] 1 AC 458 (detention of mental patient justified by necessity)."

Footnote 172: Insert after reference to *R v Deputy Governor of Parkhurst Prison; ex p Hague*, "*Hassan v Australasian Correctional Services P/L* (2002) 219 LSJS 253;"

Footnote 173: Add, "See also *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616."