Contents

Preface	2			xvii	
Table o	of Cas	es		xix	
Table o	of Stat	utes		xxix	
1	The Idea of a Constitution				
	1.1	Meanings of 'Constitution'			
	1.2	Constitution as Paramount Law			
	1.3		ution as the System of Government Flexible Constitutions	3 5	
	1.4	Constit	ution in the Philosophical Sense	7	
	1.5	Objecti	ons to the Rule of Law	8	
		1.5.1	Objection 1: The Rule of Law is Inefficient as Compared with the Rule of Persons	8	
		1.5.2	Objection 2: The Rule of Law is Oppressive	9	
		1.5.3	Objection 3: The Rule of Law is not Possible	11	
	1.6	Advant	ages of the Rule of Law and Constitutionalism	12	
2	Aus	tralian (Constitutionalism: An Overview	14	
	2.1	Introduction		14	
	2.2	The Common Law Doctrine of Legality		15	
	2.3	Rule of Law		17	
	2.4	Judicia	I Review	20	
		2.4.1	Judicial Review of Executive Action	20	
		2.4.2	Judicial Review of Legislation	22	
		2.4.3	Judicial Review of Primary Legislation in Australia	27	
		2.4.4	Standing and Judicial Review	29	
	2.5	Separation of Powers		32	
	2.6	Representative and Responsible Government		33	
	2.7	Federal Division of Powers		34	
	2.8	A Word	of Caution	35	

3	AP	A Parliamentary System of Government: The Idea of a				
	Res	sponsible Executive	36			
	3.1	Representative Democracy	36			
	3.2	Presidential and Parliamentary Forms of Democracy	37			
	3.3	Emergence of Responsible Government in England	39			
	3.4	Introduction of Parliamentary Democracy to Australia	41			
	3.5	Responsible Government in the Commonwealth Constitution 3.5.1 The Sources and Extent of the Executive Power of the Commonwealth	43			
		3.5.2 Parliamentary Control of Executive Power	48			
		3.5.3 The Crown does not Exercise Executive Power Directly3.5.4 Prerogatives and Statutory Executive Powers are	50			
		Exercised on Advice of Responsible Ministers	50			
		3.5.5 Government by Prime Minister and Cabinet	51 53			
		3.5.6 Collective Responsibility of the Cabinet3.5.7 Individual Ministerial Responsibility	54			
	3.6		55			
		3.6.1 Appointment of Prime Minister	55			
		3.6.2 Dismissal of Prime Minister	56			
		3.6.3 Dissolution of Parliament	58			
		3.6.4 Prorogation and Summoning of Parliament	60			
	3.7	When the Governor-General Must Follow Advice	61			
	3.8	State of Responsible Government Today	63			
4	Role	Role of the Upper House in Parliamentary Democracy				
	4.1	Bicameralism and Responsible Government 67				
	4.2	Government's Responsibility to the Upper House 68				
	4.3	Express Limitations on Upper House Powers				
	4.4	Are there Unwritten Limitations on Upper House Powers?				
	4.5	Upper House Power to Deny the Government Money to Conduct Routine Administration	71			
	4.6	Upper Houses and Legislation Appropriating Money Other than for Routine Administration	73			
	4.7	Resolution of Disagreements Between the House of				
		Representatives and the Senate	74			
		4.7.1 Section 57 is Mandatory and its Observance is Justiciable				
		4.7.2 Does s 57 Threaten Bicameralism?4.7.3 Strategic Use of the s 57 Procedure	77 78			
		4.7.4 The Cooling-Off Period	79			
		4.7.5 Effect of Non-Compliance with s 57	80			
	4.8	Resolution of Disagreements Between State Houses	81			

5	The	Repres	sentative Principle in Australian Constitutionalism	83			
	5.1	The Re	epresentative Principle in the Commonwealth Constitution	84			
	5.2	The Crown as Part of the Legislature					
	5.3	The Composition of the Senate					
		5.3.1	The Senate as a States' House: Equal Representation				
			of the Original States	87			
		5.3.2	The Continuity of the Senate: Rotational Elections	87			
		5.3.3	The Nexus Rule: A 2:1 Ratio with the House of	00			
		E 2 1	Representatives Method of Flooting Senators	88			
		5.3.4	Method of Electing Senators				
	5.4		omposition of the House of Representatives	89			
		5.4.1	Interplay of the Nexus Rule, the Proportionality Rule and the Minimum Representation Rule	90			
	5 5	LIONA D		91			
	5.5		Representative are Australia's Legislatures? Suffrage	92			
			Compulsory Voting	97			
		5.5.3	Equal Choosing Power	98			
		5.5.4	The Form of the Ballot Paper	102			
		5.5.5	The Right to be Chosen: Who Can be Elected to Parliament?	103			
	5.6	Repres	sentation of Territories	105			
6	Sep	aration	of Powers: Australia's Asymmetric Model	109			
	6.1	Introdu	ıction	109			
	6.2	The Th	ree Powers	110			
		6.2.1	Aspects of Power	110			
			Legislative Power	111			
			Executive Power	113			
			Judicial Power	121			
	6.3		s of Separation of Powers	121			
			The Presidential Model of Separation The Parliamentary Model of Separation	122 123			
	6 1			123			
	6.4		osion of the Separation of Powers in the Modern State The Dilution of the Executive-Legislative Division:	123			
		0.7.1	The Problem of Executive Law Making	124			
		6.4.2	The Rise of the Quasi-Judicial Tribunal: The Problem				
			of the Legislating Judge	130			
	6.5	Separa	ation of Powers in the Australian States	132			
		6.5.1	Parliament May Delegate Legislative Power				
			but not Abdicate It	133			
			Ad hominem Laws: The Problem of Legislative Judgments	133			
			The Doctrine of Institutional Integrity of State Courts	135			
		6.5.4	Constitution of State Courts	137			

	8.10	Parliam	nent Must Not Direct the Way Courts Exercise				
		Judicial	l Power	200			
			Indirectly Altering the Course of Judicial Proceedings Judicial Power and the Law of Evidence: Limits of	201			
			Legislative Direction	202			
	8.11	The Ba	n on Bills of Attainder and Ex Post Facto Punishment	204			
9	Rule	s of Se	paration: The Exceptions	206			
	9.1	The Per	rsona Designata Rule	206			
	9.2	Judicial	I Power with Respect to Military Offences by				
		Service	Personnel May be Vested in Courts Martial	212			
		9.2.1	The Basis of the Rule	212			
		9.2.2	The Limits of the Judicial Power that can be				
			Conferred on Courts Martial	217			
		9.2.3	How the Limitation is Implemented	219			
		9.2.4	The Simultaneous Jurisdiction of Courts Martial				
			and Civil Courts in Respect of the Same Act	220			
		9.2.5	Are Peculiarly Military Offences Beyond the				
			Purview of Chapter III Courts?	223			
	9.3		Powers May be Exercised by Statutory Authorities	225			
	9.4	Parliament May Exercise Judicial Power in Relation to its Own					
		Powers, Privileges and Immunities					
	9.5		or Courts May Make Rules of Procedure	228			
		9.5.1	The Inherent Power of Superior Courts to Make Rules of	000			
		0 5 0	Procedure Devliere anti- Devember Malco Levy With Deepert to Dropedure	229			
		9.5.2	Parliament's Power to Make Law With Respect to Procedure	230			
		9.5.3	Does Delegated Rule-Making Power Supersede or	232			
		0.5.4	Suspend Inherent Power to Make Rules? Do Superior Courte Have Power to Pogulato the	202			
		9.5.4	Do Superior Courts Have Power to Regulate the Procedure of Inferior Courts?	235			
				200			
10	Interpreting Commonwealth Legislative Powers: Textualism,						
		Originalism or Underlying Principles?					
	10.1		es of Interpretation	239			
		10.1.1	Interpretation in the High Court	240			
	10.2		eting Commonwealth Powers	242			
			The High Court's Early Approach	243			
		10.2.2	Interpreting the Engineers Case	244			
	10.3	Balanci	ng Commonwealth and State Powers	246			
		10.3.1	The Expansion of the Commonwealth	248			
		10.3.2	The Evolving Constitutional Context	250			
		10.3.3	The Growth of External Affairs	251			

	10.4 Constitutional Implications	253
	10.4.1 Federalism and Implied Rights	255
	10.5 A Dworkinian High Court?	256
11	Federal-State Relations	259
	11.1 Introduction	259
	11.2 Constitutional Guarantee of the Existence of the States	260
	11.3 The Australian Scheme of Distributing Legislative Powers 11.3.1 Subjects Exclusively Within the Legislative Power of the	260
	Commonwealth 11.3.2 Subjects that are Concurrently Within the Legislative	261
	Power of Commonwealth and State Parliaments 11.3.3 The Province Over Which State Parliaments have	262
	Exclusive Legislative Power	263
	11.3.4 Legislative Power that is Denied to Both States and the Commonwealth	263
	11.4 Resolution of Conflicts Between Federal and State Law:	
	The Operation of s 109	263
	11.4.1 Conflicts Can Occur Only Between Valid Laws	264
	11.4.2 Meaning of 'Law' in s 109	265 267
	11.4.3 Types of Inconsistency11.4.4 The Effect of Inconsistency on State Law	273
	11.5 Scope and Limits of Commonwealth Legislative Powers:	210
	The Shifting Standards	276
	11.5.1 The Early High Court: Implied Immunities and	210
	Reserved Powers	276
	11.5.2 The Doctrine of the Engineers Case	278
	11.5.3 Expansionary Consequences of the <i>Engineers</i> Doctrine11.5.4 The Roll-Back of the <i>Engineers</i> Doctrine and the Rise of	280
	the Model of Limited Powers	284
	11.5.5 Implied Limitations Arising from the Federal Structure	005
	(the <i>Melbourne Corporation</i> Rule)	285
	11.6 Implied Limits on State Power	289
	11.7 Further Limitations on Commonwealth Legislative Powers	291
	11.7.1 Limitations Derived from the Rule of Law Ideal	291
	11.7.2 Limitations Imposed by the Separation of Judicial	000
	and Non-Judicial Powers 11.7.3 Representative Democracy and Freedom	292
	of Communication	294
	11.8 Connectivity and Proportionality	294
	11.8.1 The Case of the Defence Power	296
	11.8.2 The Test of Appropriateness and Adaptation	297
	11.9 Conclusions	298

12	Trade, C	Com	merce and Industrial Relations	300
	12.1 Ecc	onon	nic Underpinning of Federations	301
	12.	1.1	Vertical Fiscal Balance	301
	12.	1.2	Horizontal Fiscal Balance	301
	12.	1.3	Economic Conditions for a Successful Federation	302
	12.2 Fre	edor	m of Interstate Trade, Commerce and Intercourse	303
	12.	2.1	A Brief History of 'Absolute Freedom'	305
	12.	2.2	Cole v Whitfield: The New Beginning	308
			Further Implications Not Noted in Cole v Whitfield	309
	12.	2.4	National Markets and the Re-Emergence of the Individual	313
			m of Interstate Intercourse	315
	12.	3.1	Freedom of Interstate Intercourse is an Individual	
	4.0	~ ~	Entitlement	315
			Freedom of Intercourse is Not Absolute The Test Where the Same Activity Amounts to Trade	316
	12.	J.J	The Test Where the Same Activity Amounts to Trade as Well as Intercourse	316
	40 4 00	100 100 1		
			onwealth's Trade and Commerce Power: s 51(i)	316
			Scope of the Power The Impact of the Engineers Doctrine on the Trade and	017
	1 4-1	7.2	Commerce Power	318
	12.5 Co	rnora	ations Power	319
			Trading Corporations	320
			Financial Corporations	322
	12.	5.3	Foreign Corporations	322
	12.	5.4	What Kinds of Law can be Made With Respect to	
			Constitutional Corporations?	323
			Corporations and Industrial Relations	324
	12.	5.6	Limits of the Corporations Power	329
			al Relations Power	329
			Conciliation and Arbitration as the Sole Means	330
			Existence of a Dispute	330
			Meaning of Industrial Dispute Extension Powand the Limite of Apy One State	331
			Extension Beyond the Limits of Any One State	
13			opropriation and Spending	334
	13.1 Tax	ation	n and Constitutionalism	335
	13.2 Sou	urces	s of Taxation Power	336
	13.3 Wh			337
			Compulsory Exaction of Money	338
			Public Authority	341
			Public Purpose Decursion Depolities are not Toyon	342
	13.	5.4	Pecuniary Penalties are not Taxes	343

	13.4 Customs and Excise Duties	343
	13.4.1 Licence Fees as a Source of State Revenue	345
	13.4.2 Consumption Tax	347
	13.5 Substantive Limit on the Taxation Power:	
	The Rule Against Discrimination	348
	13.6 Procedural Limits on the Taxation Power	349
	13.6.1 Taxation Laws Cannot Originate in the Senate	349
	13.6.2 The Senate Cannot Amend Taxation Laws, but May	
	Reject Them	349
	13.6.3 Laws Imposing Taxation Must Deal Only with Taxation:	0.40
	The Rule Against Tacking 13.6.4 The One Subject Rule	349 350
	13.7 Appropriation	350
	13.7.1 Appropriations for the Ordinary Annual Services of Government	351
	13.7.2 Purposes of the Commonwealth	352
	13.7.3 Specificity of Purpose	354
	13.8 Commonwealth Grants Power	356
	13.9 Intergovernmental Agreement on the Reform of	
	Commonwealth-State Financial Relations	357
14	The International Powers of the Commonwealth:	
	Defence and External Affairs	359
	14.1 The Defence Power	360
	14.1.1 The Defence Power in Wartime	361
	14.1.2 The Defence Power in Peacetime	363
	14.2 The External Affairs Power	365
	14.2.1 The Geographical Power	366
	14.2.2 The Treaty Power	367
	14.2.3 The International Relations Power	372
	14.3 External Affairs and Federalism	374
15	Constitutional Rights and Freedoms	376
	15.1 Rights and Freedoms	376
	15.1.1 Hohfeld's Conceptions of Right and Freedom	377
	15.1.2 Positive and Negative Freedoms	380
	15.2 The Hierarchy of Rights and Freedoms	381
	15.2.1 Common Law Rights	381
	15.2.2 Statute Law Rights	384
	15.2.3 Constitutional Rights	385
	15.3 The Threshold Problem of Standing	386

	15.4	Section	151(xxxi): The Right to Compensation on Just	
		Terms f	or Property Acquired by the Commonwealth	387
		15.4.1	Property	388
		15.4.2	Acquisition	388
		15.4.3	Just Terms	396
		15.4.4	Purposes for Which Private Property May be Acquired	398
		15.4.5	Section 51(xxxi) Applies to Grants Under s 96	399
		15.4.6	The Case of Taxation	399
	15.5	The Rig	ght to a Fair Trial Before Deprivation of Life,	
		Liberty	or Property	400
		15.5.1	The Scope of the Right	400
		15.5.2	The Ban on Executive Deprivations of Liberty and Property	402
		15.5.3	The Ban on Bills of Attainder (Nullum Crimen, Nulla Poena	
			Sine Lege)	403
		15.5.4	The Right to Trial by Jury	407
	15.6	The Rig	ght to Equality Before the Law	409
		15.6.1	Non-Discrimination on Religious Grounds	410
		15.6.2	Non-Discrimination on Grounds of Residency	412
	15.7	Freedor	m of Political Communication	412
		15.7.1	The Basis of the Freedom	414
		15.7.2	The Scope of the Freedom	416
		15.7.3	Permissible Restrictions on the Freedom	418
		15.7.4	The Expanded Defence of Qualified Privilege	420
		15.7.5	A Personal Right or a Restriction on Power?	421
	15.8	Freedor	m of Association	422
16	Cons	stitutior	nal Change	424
	16.1	Some T	Theoretical Issues	424
		16.1.1	Rigidity and Flexibility	424
		16.1.2	Forms of Constitutional Change in the	
			Australian Federation	426
		16.1.3	Revolutions and Constitutional Change	427
		16.1.4	'Basic Norm' of the Constitution	428
		16.1.5	Can a Sovereign Body Limit Itself?	429
	16.2	Constitu	utional Alteration: The Commonwealth	430
		16.2.1	Evolution of Australian Independence	430
		16.2.2	Constitutional Alteration Under s 128:	
			The Referendum Route	433
		16.2.3	The Legal Status of the Constitution	
			of the Commonwealth of Australia Act	434
			The Australia Act 1986 as a Source of Constituent Power	436
		16.2.5	Implications of the Fox Hunting Case	438

	16.2.6	The Constituent Potential of s 51(xxxvii)	439
	16.2.7	The Constituent Potential of s 51(xxxviii)	440
	16.3 Constit	tutional Alteration: The States	441
	16.3.1	Constitutional Change Bypassing State Parliaments	441
	16.3.2	Constituent Power of State Parliaments	442
	16.3.3	Constitutional Change by Implication: McCawley's Case	443
	16.3.4	Manner and Form Limitations	444
	16.3.5	Can State Parliaments Bind Themselves?	451
	16.3.6	The Question of Remedies	455
Index			457