

THE PREAMBLE AND INDIGENOUS RECOGNITION

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I Introduction

The Expert Panel on the Recognition of Indigenous Australians recently considered the many ways in which Aboriginal and Torres Strait Islander peoples could be recognised in the *Constitution*. The Expert Panel's Discussion Paper¹ set out seven ideas, including a statement of recognition in the body of the *Constitution*, a statement of recognition and values in the body of the *Constitution*, the amendment or repeal of the race power in section 51(xxvi) of the *Constitution*, the repeal of section 25 of the *Constitution* and the insertion of an agreement-making power in the *Constitution*.²

This article, however, is confined in its scope to the proposal to recognise Indigenous Australians in a preamble. The Expert Panel separated this kind of recognition into two separate 'ideas'. The first was the inclusion of a new preamble in the *Commonwealth Constitution* 'that recognises Aboriginal and Torres Strait Islander peoples' distinct cultural identities, prior ownership and custodianship of their lands and waters'.³ The other idea was to include a 'Statement of Values' in a new preamble to the *Constitution*, which 'incorporates recognition of Aboriginal and Torres Strait Islander peoples alongside a description of the Australian people's fundamental values, such as a commitment to democratic beliefs, the rule of law, gender equality, and acknowledgement of freedoms, rights and responsibilities'.⁴

The Expert Panel ultimately rejected the idea of altering the existing preamble or inserting a new preamble in the *Constitution*, although it did include a preamble to the new section 51A that it proposed be inserted in the *Constitution*.⁵ This article is drawn from a larger paper that was presented

to the Expert Panel,⁶ and which contributed to the shaping of its views in relation to a preamble. It addresses the various legal issues that arise with respect to the use of a preamble for the recognition of Aboriginal and Torres Strait Islander peoples and provides useful background to explain why the Expert Panel took the course that it did.

Part II of this article considers the history of the Preamble to the *Commonwealth of Australia Constitution Act*, the history of proposals to recognise Indigenous Australians in the *Constitution* and the history of the recognition of Indigenous Australians in state constitutions. Part III examines the role of preambles in statutes and constitutions and the use made of them by the courts. Part IV deals with the legal, structural and technical issues concerning the amendment of the existing Preamble or the insertion of a new preamble in the *Constitution*, including the power to make these changes and the method of its exercise. Part V deals with the potential implications of an amendment to the existing Preamble or the insertion of a new one, including the much disputed issues about the extent to which a preamble might be used by the High Court in constitutional interpretation and whether it is appropriate or necessary to include a clause that prohibits the courts from making such use of it. Part VI outlines the Expert Panel's recommendations with respect to a preamble and provides a brief analysis of them.

II History and Background

A History of the Preamble to the *Commonwealth of Australia Constitution Act*

The *Commonwealth Constitution* does not itself contain a preamble. The Preamble is instead placed at the beginning of the British Act of Parliament, the *Commonwealth of*

Australia Constitution Act 1900 (Imp), section 9 of which contains the *Commonwealth Constitution*. This Preamble and the enacting clause provide as follows:

Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Although this is the preamble to a British Act of Parliament, it was drafted in Australia and debated at the 1897-8 Constitutional Conventions. Its form remained relatively stable throughout the process. The only major changes made were:

1. the introduction of the word 'indissoluble', in recognition of the blood spilt in the American Civil War;⁷
2. the reference to the agreement of 'the people' (rather than the Colonies), in recognition of the role the people would play in approving of the *Constitution* by way of referendum and the power of the phrase 'We, the people' in the preamble to the *United States Constitution*;⁸ and
3. the insertion of the reference to God, which was a reluctant response to public petitions.⁹

Quick and Garran noted that of the eight affirmations and declarations contained in the Preamble, some, such as references to federalism and the Crown, are reflected in the text of the *Constitution*, while others, such as the reference to the agreement to unite, were simply statements of fact that could not be given substantive effect in the text of the *Constitution*.¹⁰ For instance, they noted the impropriety of 'attempting to frame a clause designed to give legislative recognition of the Deity'.¹¹ The indissolubility of the union

and its dependence on the Crown, however, were regarded by Quick and Garran as more than statements of fact. Rather, they comprised statements of fundamental principle intended to affect the interpretation of the *Constitution*.

Quick and Garran speculated that because section 128 of the *Constitution* permitted its local amendment, the framers decided to include a reminder at the front of the *Constitution Act* that the union was intended to be permanent and that no alteration should be 'suggested or attempted' that was inconsistent with the continuity of the union.¹² The reference to an 'indissoluble Federal Commonwealth' was, in their view, included to express the intent of the framers of the *Constitution* and to influence its subsequent interpretation.

Equally, Quick and Garran saw the reference to the 'Crown' in the Preamble as recognition of the fundamental role of the Crown in the *Constitution* and as having an ongoing effect. They argued that constitutional amendments to establish a republic might be regarded as 'repugnant to the preamble' as they would 'involve a breach of one of the cardinal understandings or conventions of the Constitution, and, indeed, the argument might go so far as to assert that they would be *ultra vires* of the Constitution, as being destructive of the scheme of Union under the Crown contemplated in the preamble'.¹³

Others, however, have been critical of this very wide view of the intent and application of the Preamble. Patrick Glynn, the delegate to the Constitutional Convention who had moved for the insertion of God in the Preamble, saw the reference to an 'indissoluble Federal Commonwealth' in the Preamble as 'one of those preliminary flourishes addressed to the conscience, which are to be found in the preambles of instruments that suggest more than they accomplish'.¹⁴ Gageler and Winterton, amongst others, have also argued that as a Preamble is not part of the substantive law, it cannot prohibit the enactment of a constitutional amendment.¹⁵

B History of Proposals to Recognise Indigenous Australians in the Preamble

The call for the recognition of Indigenous Australians in the *Commonwealth Constitution* first became significant in the late 1980s.¹⁶ The Advisory Committee on Individual and Democratic Rights advised the Constitutional Commission in 1987 to include in a new preamble a statement that 'Australia is an ancient land previously owned and occupied

by Aboriginal peoples who never ceded ownership'. The Constitutional Commission, however, recommended against the inclusion of an additional preamble in the Constitution and against the alteration of the existing Preamble in the *Commonwealth of Australia Constitution Act*.¹⁷

In the early 1990s, the Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner all supported constitutional recognition of Indigenous Australians.¹⁸

In 1998 the Constitutional Convention recommended the enactment of a new preamble to the Constitution which included 'acknowledgement of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders'. It also recommended that certain matters be considered for inclusion in the preamble, including 'recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia's Indigenous peoples'.¹⁹ The Constitutional Centenary Foundation, through its 'Preamble Quest', which invited members of the public to write a preamble and state which elements they supported, found that the overwhelming preference was for the preamble to include an 'acknowledgment of the unique contribution of the indigenous peoples to Australia'.²⁰

In 1999 the Prime Minister, John Howard, proposed that a new preamble be inserted in the *Constitution*, leaving intact the existing Preamble in the *Commonwealth of Australia Constitution Act*. The first draft of that proposed preamble, prepared by Mr Howard and the poet Les Murray, included the statement: 'Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures'. This draft preamble was revised in a negotiation with the Australian Democrats in order to achieve its passage by the Senate. The revised preamble, which was put to the people in a referendum, stated amongst other things that the Australian people commit to this *Constitution*: 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'.²¹ The proposed preamble also contained what Lane has described as a 'miscellany of facts' and 'a credo of beliefs' that went beyond the customary role of a preamble.²² The referendum question failed, with 60 per cent voting against it

and only 39 per cent in favour of it. It was not supported by a majority in any state or territory.

In 2000, the Council for Aboriginal Reconciliation, in its *Final Report*, recommended that a referendum be held to 'recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution'.²³

During the 2007 election campaign, Prime Minister Howard, announced in a speech to the Sydney Institute that if he were re-elected he would hold a referendum to amend the Preamble to the *Constitution* to incorporate a statement of reconciliation which recognises Indigenous Australians, their history and special place in our nation.²⁴ Kevin Rudd, as Opposition Leader, offered bipartisan support for this proposal, regardless of the outcome of the election.²⁵ Despite support for this proposal at the 2020 Summit,²⁶ and its inclusion in the ALP's National Platform,²⁷ no substantive action appears to have been taken on this proposal during the Rudd Government's term in office. The Gillard Government, however, established the Expert Panel on Constitutional Recognition of Indigenous Australians to report upon proposals for constitutional reform and has committed money to Reconciliation Australia to 'build public awareness and community support for constitutional recognition of Indigenous Australians'.²⁸

C Recognition of Indigenous Australians in State Constitutions

The state constitutions of Victoria, Queensland and New South Wales have been recently amended to recognise Indigenous Australians.²⁹ The Victorian and New South Wales provisions are substantive provisions in the relevant *Constitution Act*, that recognise the status of the Aboriginal people of the state, their relationship with their traditional lands and their contribution to the state.³⁰ The Queensland provision is included in a new Preamble to the *Queensland Constitution*.

The Victorian *Constitution Act 1975* had an existing Preamble which outlined the history of the enactment of the *Constitution*, but made no reference to Aboriginal people. While the Preamble was left unchanged, sub-section 1A(1) was inserted in the *Constitution Act* in 2004 to acknowledge that the events set out in the Preamble 'occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria'. Sub-section 1A(2) then gives

the Parliament's recognition to Aboriginal people as original custodians of the land, their unique status, their relationship with their traditional lands and waters and their contribution to the identity and wellbeing of Victoria. The provision is purportedly entrenched, so that it may only be amended or repealed by a special three-fifths majority of both Houses of Parliament.³¹

The New South Wales *Constitution Act 1902* was amended in 2010³² to include a similar form of recognition of Aboriginal people in its text. Unlike the Victorian provision, which refers only to recognition by the Parliament, the New South Wales provision undertakes parliamentary recognition 'on behalf of the people of New South Wales'.³³

Queensland, in contrast, has dealt with recognition through the insertion of a preamble in its *Constitution of Queensland 2001*, rather than a specific provision in the text of the *Constitution*. The Preamble, amongst other things, provides that the people of Queensland 'honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community'.

The Preamble was enacted without asking the people of Queensland to vote upon it in a referendum or plebiscite. Unlike the *Commonwealth Constitution*, additions can be made to state constitutions without a referendum, as long as manner and form requirements are not breached. However, given the lack of public support for a preamble, as found by the various inquiries into the subject,³⁴ the force of the preamble's assertions about what the people of Queensland 'intend', 'adopt', 'honour', 'determine', 'acknowledge' and 'resolve' is undermined by the fact that their agreement was never directly asked or given. Nor, indeed, were the people of Victoria or New South Wales asked to assent to the recognition of Aboriginal people in their constitutions, although in both cases these provisions were couched in terms of parliamentary recognition or recognition by the parliament on behalf of the people, rather than directly by the people.

In all three cases, a provision was included in the state constitution to the effect that the parliament does not in the preamble/section: (a) create in any person any legal right or give rise to any civil cause of action; or (b) affect in any way the interpretation of this Act or of any other law in force in

the state.³⁵ These provisions have been criticised, especially as most provisions in state constitutions are not entrenched, reducing the risk of judges being able to draw constitutional implications that bind the legislative powers of the state parliament. Moreover, in most cases a parliament could legislate to override a court interpretation which went beyond the intention of the state parliament. Davis and Lemezina have observed that '[a] new preamble, immediately followed by a non-justiciability clause, is disingenuous and has the potential to disaffect Indigenous people further from the legal and political mainstream'.³⁶

III The Role of a Constitutional Preamble and Its Interpretation

A The Role of a Preamble in Ordinary Legislation

A preamble in a statute may have a number of different roles. Its function may be:

1. to 'explain and recite certain facts which are necessary to be explained and recited, before the [provisions] contained in an Act of Parliament can be understood';³⁷
2. to explain the purpose of a statute or the intention of parliament in enacting it³⁸ (it can be, therefore, the 'key to open the minds of the makers of the Act and the mischiefs which they intended to redress';³⁹
3. to persuade people, so that they understand, respect and obey the law⁴⁰ (its function is therefore educative⁴¹ as well as exhortatory);
4. to respond to an event or a court decision⁴² in a way that makes clear the intent of the parliament;
5. to justify the Act by reference to particular political policies or promises;⁴³ and
6. to fulfil a symbolic role, to recognise neglected groups, to redress grievances and 'create social capital and a sense of belonging'.⁴⁴

In relation to this last category of symbolic recognition, Roach has observed:

The optimist would defend this use of preambles as an attempt to respect differences among the population even when one group's interests are not really being addressed in the legislation. The pessimist would argue that acknowledgement of a group in a preamble that is not supported in the text of legislation is a recipe for disappointment and cynicism.⁴⁵

B The Interpretative Use of a Preamble in Statutes and Constitutions

The interpretative use to which a preamble may be put by a court remains a subject of contention. While it is generally accepted that a preamble has no positive force and therefore cannot be applied on its own as a positive law, there is debate about how and when a preamble may be employed in the interpretation of the statute which it introduces. On the one hand, it has often been stated that a preamble can only be used to resolve ambiguity and that where the provisions of a statute are plain and clear, no recourse can be had to the preamble.⁴⁶ For example, Gibbs CJ stated in *Wacando v Commonwealth* that while the preamble suggested that the section was intended to have a narrower meaning, 'if the words of the section are plain and unambiguous their meaning cannot be cut down by reference to the preamble'.⁴⁷ In *Craies on Statute Law*, the warning is given 'that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital'.⁴⁸ It has also been argued that if the preamble itself is ambiguous, it cannot aid the interpretation of an Act.⁴⁹

On the other hand, it has been argued that it is a rule of statutory interpretation that statutes are to be read as a whole and construed in a manner consistent with their purpose.⁵⁰ The preamble forms part of the 'whole' and should therefore be consulted as a guide to the 'purpose' of the statute.⁵¹ Justice Mason put this view in *Wacando* as follows:

It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.⁵²

According to this argument, resort may be had to a preamble as part of the context of the whole Act to interpret words of generality and identify ambiguity in addition to resolving ambiguity.⁵³

Quick and Garran, writing in 1901, appear to have combined both the strict and liberal approaches to the use of preambles, noting that a preamble:

usually states, or professes to state, the general object and meaning of the Legislature in passing the measure. Hence it may be legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act, whenever the enacting parts are, in any of these respects, open to doubt. But the preamble cannot either restrict or extend the legislative words, when the language is plain and not open to doubt, either as to its meaning or its scope.⁵⁴

The problem with constitutions is that unlike ordinary statutes, their language is necessarily general in nature and therefore conducive to ambiguity and the use of a preamble to resolve the ambiguity, regardless of how strictly the rules of interpretation apply. Hence the preamble to a constitution is more likely to have an active interpretative role than the preamble to a Dog Act.

A preamble to a constitution might also be a guide to the 'original intent' of the framers of a constitution, although it also opens up questions as to why limitations that might be implied from a preamble were not included by the framers in the text of the constitution if they were intended. Constitutions tend to be documents of compromise that do not represent one coherent philosophy or 'intent', so a general purpose expressed in the preamble should not be used to cut down express words in the text that were the subject of negotiation and compromise.

C Constitutional Preambles: Values, Aspirations and Rights

It is now a well-entrenched popular view that a preamble to a constitution should go beyond mere facts into the realm of shared values and aspirations. At the Constitutional Convention of 1998, Professor George Winterton noted that there are three basic purposes for a constitutional preamble:

The first is to state what is the purpose of the Constitution. Our Constitution was adopted by the people before the enactment at Westminster, so it ought to say that it is based upon popular sovereignty, which is a fact and which the High Court and many others have recognised. If we do change to a republic, it ought to say that. The second is a statement of who we are. That ought to indicate the people who constitute the Australian community, including the indigenous people and, if one wishes to state it, the fact we

are a multicultural or diverse nation. ... The third and most important, in this context, is how we would wish others to see us and how we see ourselves. Here, I think values that unite us and help to give a picture at the beginning of our national constituting document are appropriate.⁵⁵

A number of criticisms have been levelled at the notion of including shared values and aspirations in the *Constitution*. They include:

- that the preamble will sink to a statement of meaningless platitudes, ‘general back-slapping’, or a ‘dumbed-down’ caricature of the country;⁵⁶
- that the values and aspirations included in a preamble will be frozen and become outdated and inappropriate in the future;⁵⁷ and
- that we do not all share the same values, so a preamble could only set out the values shared by a majority, excluding the strongly held views of minorities and potentially alienating them and fracturing national unity.⁵⁸

The most commonly expressed concern, however, is that the inclusion in a constitutional preamble of relatively innocuous statements, such as support for the ‘rule of law’ or a principle of ‘equality’ might empower judges to reinterpret the *Constitution* in whatever manner they wished, including finding entrenched implications that limit existing legislative and executive powers. This concern is supported by international experience.⁵⁹ As Orgad has observed the judicial trend is for courts to make increasingly substantive use of preambles:

A global survey of the function of preambles shows a growing trend toward its having greater binding force – either independently, as a substantive source of rights, or combined with other constitutional provisions, or as a guide for constitutional interpretation. The courts rely, more and more, on preambles as sources of law.⁶⁰

Goldsworthy has noted, commenting on the Canadian position, that there are no limits on unwritten principles that can be divined from a preamble and that they ‘can be held to expand or mutate according to the judges’ confidence in their ability to divine “contemporary values” – which in practice means their own values’.⁶¹ Similarly, Himmelfarb, after undertaking a close analysis of the United States Supreme Court’s use of the Preamble, concluded:

The preamble, in short, can be used to support both sides of almost any constitutional issue. This is so not only because the preamble’s language is so abstract and open-ended, and hence susceptible of more than one plausible interpretation, but also because the six objects of government enumerated in the preamble are often in conflict.⁶²

In France, the Constitutional Council has transformed a non-binding aspirational Preamble into a tool for striking down legislation as invalid⁶³ and in India the Supreme Court has given aspects of the Preamble such a status that they cannot be altered by constitutional amendment.⁶⁴

In the Australian context, the underlying issue here is not so much a suggestion that judges cannot be trusted, but rather that the Australian people might be persuaded to insert warm fuzzy motherhood statements into a preamble that can then be used in substantive matters in ways of which the people would never approve if directly asked. This is the Trojan horse theory of the preamble: if you can’t achieve a bill of rights through constitutional amendment or even legislation, you achieve it through the judiciary’s future interpretation of the values and principles inserted in a prettily wrapped gift of a constitutional preamble.

Webber, amongst others, has noted that some at the 1998 Constitutional Convention appeared to see the inclusion of a reference to ‘equality’ in a new preamble as a way to produce a bill of rights by judicial interpretation. He observed:

The adoption of a bill of rights by stealth would not be appropriate, and if that is the objective, equality is best left out of the preamble. If the democratic process cannot produce a bill of rights by conscious action, one should not be created by covert means supplemented by judicial fiat.⁶⁵

A similar view was put in a submission to the Queensland Legal, Constitutional and Administrative Review Committee:

Statements in the preamble should not be cast in the language of rights and freedoms unless such rights and freedoms are guaranteed in the Constitution. It would be bogus for the preamble to promise more than the Constitution will deliver. The preamble should not be regarded as some sort of substitute for a bill of rights, for by its very nature it would be a very inadequate substitute.⁶⁶

As John Williams has noted with respect to the inclusion of rights in a preamble to the *Constitution*, it is 'their absence in the Constitution, rather than their inclusion in the preamble, which is at the heart of the problem'.⁶⁷ In other words, the content of a preamble should match the content of the text of a constitution and that problems only arise where the two are mismatched.

IV Amending the Existing Preamble or Inserting a New Preamble

A Amending the Existing Preamble

The existing Preamble is representative of the circumstances in which the *Commonwealth of Australia Act* was enacted in 1900. It has ceased to be an accurate statement of the current position. It refers to 'the people of New South Wales, Victoria, South Australia, Queensland and Tasmania' but does not mention the people of Western Australia, as they had not yet decided to join the federation at the time the Act was enacted. It refers to unity 'under the Crown of the United Kingdom of Great Britain and Ireland', but that particular Crown ceased to exist when Ireland became a republic. It may not even be correct today to state that the people of the states are united in a federal Commonwealth 'under the Crown of the United Kingdom', as it would now be regarded as the 'Crown of Australia'.

Some aspects of the Preamble, however, remain important, such as the reference to an 'indissoluble Federal Commonwealth'. Others remain contentious, such as the reference to reliance on 'the blessing of Almighty God',⁶⁸ and the Crown. The Preamble, in its current state, can be explained by its date and place in our constitutional history, leaving many of these fields of argument fallow.⁶⁹

If an attempt is made to update one part of this Preamble to give it a living operation rather than an historic one, then it raises questions as to how the rest of the preamble is to be regarded. If Indigenous Australians are to be recognised in the Preamble, then should not Western Australia be recognised too? Should the reference to the Crown be amended so that it refers to the Crown of Australia? Should God remain, and if so might a reference to God bring the notion of natural law and inalienable rights into the *Constitution*, as has been suggested in other countries?⁷⁰ Should the federation be indissoluble, or under the Crown, or a federation at all?

Even if these questions are not addressed, a more fundamental one does need to be addressed. What is the role of the Preamble? Is it to set out the background to the enactment of a law and what was intended to be achieved by it, at the time it was enacted? If so, the recognition of Indigenous Australians in that Preamble would be inappropriate as one cannot change history and the level of recognition given to Indigenous Australians in the past. It would arguably only seem relevant to change the existing Preamble if it were to introduce and explain changes being made to the substantive text of the *Constitution Act*.⁷¹ This point was made by Sir Maurice Gwyer in *Bhola Prasad v King Emperor*:

we doubt very much whether a Preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at by the Court for the purpose of discovering what the true intention of the Legislature was at the earlier date. A Legislature can always enact that the law is, and shall be deemed always to have been, such and such; but that is a wholly different thing from imputing to dead and gone legislators a particular intention merely because their successors at the present day think that they might or ought to have had it.⁷²

The Queensland Bar Association recognised a similar problem with respect to the insertion of a preamble into the *Queensland Constitution* years after its enactment. It submitted:

A preamble itself was not considered necessary at the time when the Queensland Constitution was enacted. This preamble, if enacted would always be nothing more than an afterthought that may serve only to unsettle, in ways not readily predictable, the interpretation of provisions in the Queensland Constitution. It could never be, as in other constitutional instruments, a lofty statement of the ideals that had inspired a people to choose to be governed under the terms of that instrument.⁷³

The same is true with respect to the amendment of the existing Preamble to the *Commonwealth of Australia Constitution Act* or the insertion of a new preamble in the Constitution. It can never be an explanation of why the *Constitution* was adopted or the aspirations of the people upon approving its adoption. At best, it could explain the aspirations of the Australian people at a fixed point in Australia's constitutional history. If this is the aim, then the whole content of the Preamble would have to be reassessed to make it a coherent statement that

can be read in the context of the time in which it is updated or inserted.

Some have queried whether it is sufficiently respectful to place recognition of Indigenous Australians in the Preamble, along with everything else. The Western Australian Law Reform Commission contended that it was preferable to recognise Aboriginal people in a stand-alone provision in the body of the *Constitution*, rather than in a preamble. A preamble would normally contain a number of other elements, leading to dispute about its scope and the reference to Aboriginal people could be regarded merely as an 'add-on rather than a genuine provision of the Constitution'.⁷⁴ The Commission added that a dedicated provision would be a sign of 'due respect' and a true reconciliatory gesture.⁷⁵

(i) Power to Amend the Preamble and the Required Method

At the 1998 Constitutional Convention it was recognised that there had long been doubts about whether section 128 of the *Commonwealth Constitution* could be used to amend the Preamble to the *Commonwealth of Australia Constitution Act*.⁷⁶ The orthodox view is that section 128 cannot be used to amend the Preamble and the covering clauses.⁷⁷ There are two reasons why this is so. First, section 128 expressly refers to the alteration of 'this Constitution', not the *Commonwealth of Australia Constitution Act*. The distinction between the two was maintained in the *Statute of Westminster 1931 (Imp)* and the *Australia Acts*.⁷⁸ On its face, section 128 does not permit the amendment of the *Commonwealth of Australia Constitution Act*.

Secondly, at the time of Federation it was accepted that any constitutional amendment under section 128 that was repugnant to a British law of paramount force, such as the *Commonwealth of Australia Constitution Act*, would be rendered invalid by the *Colonial Laws Validity Act 1865 (Imp)*. While the *Statute of Westminster* lifted the application of the *Colonial Laws Validity Act* to Commonwealth laws, section 8 of the *Statute of Westminster* expressly preserved the *Commonwealth of Australia Constitution Act* from amendment by virtue of any power granted by the *Statute*. Hence, the Commonwealth Parliament, through its ordinary legislative powers or section 128 of the *Constitution*, still had no power to amend the *Commonwealth of Australia Constitution Act*. That position could have been altered by the *Australia Acts*, which could have repealed section 8 of the *Statute of Westminster* if

it was desired to do so. However, while other provisions of the *Statute of Westminster* were repealed,⁷⁹ section 8 was not. Instead, section 15 was inserted in the *Australia Acts* which established the sole way of altering the *Statute of Westminster*, and hence the means of providing for the amendment or repeal of the *Commonwealth of Australia Constitution Act*, including its Preamble.

Some have argued that section 128 of the *Commonwealth Constitution* must be interpreted broadly as Australia is an independent sovereign nation and must therefore have the power to amend or repeal all its foundational constitutional documents.⁸⁰ This argument had some force prior to the enactment of the *Australia Acts*. However, since those Acts provided a means for amending the *Commonwealth of Australia Constitution Act*, and since that means is described in the *Australia Acts* as the *only* means of doing so,⁸¹ then there is a very strong argument that section 128 should not be interpreted in a manner that is inconsistent with the *Australia Acts*. Hence the use of section 128 to amend or repeal the Preamble directly would be legally doubtful and therefore unwise.⁸²

Section 15(1) of the *Australia Acts*, however, sets out a method for amending section 8 of the *Statute of Westminster*, and through it, the Preamble to the *Commonwealth of Australia Constitution Act*. It requires the enactment of Commonwealth legislation passed at the request or with the concurrence of the parliaments of all the states. It further states that, subject to sub-section 15(3), this is the *only* way to amend the *Statute of Westminster*. Hence the safest way of amending the Preamble would be for all the states to enact laws requesting the enactment of a Commonwealth law, which amended section 8 of the *Statute of Westminster* in such a way as to permit the amendment or repeal of the Preamble.

This would mean, however, that the Preamble could be amended without the direct approval of the people through a referendum. This outcome may be politically objectionable as it would deprive the people of their say.⁸³ While constitutional recognition of Indigenous Australians occurred in three states without a referendum, it would seem likely that there would be objections if this occurred at the national level.

It would be possible, however, to use section 15(1) of the *Australia Acts* to amend section 8 of the *Statute of Westminster* to provide for the repeal of the Preamble to take place only

after a referendum is held and passed by the requisite majorities. Such a referendum would not be held under section 128 of the *Constitution*, as it would not be an alteration of 'this Constitution'. Rather, it would be held in accordance with the requirements of the amended section 8 of the *Statute of Westminster*.

The other possible alternative would be reliance on section 15(3) of the *Australia Acts* to support a Commonwealth referendum under section 128 of the *Constitution* that would amend the *Constitution* by conferring on the Commonwealth Parliament the power to repeal the Preamble. However, there are doubts about the validity and effectiveness of section 15(3)⁸⁴ which means that the section 15(1) approach is to be preferred, or a combination of both.

B Inserting a New Preamble in the Commonwealth Constitution

A number of bodies have suggested that instead of amending the existing Preamble of the *Commonwealth of Australia Constitution Act*, a new preamble should be inserted at the beginning of the *Constitution* itself. The Council for Aboriginal Reconciliation made this recommendation in 2000⁸⁵ and it is this proposal that was put forward in the Discussion Paper of the Expert Panel on Constitutional Recognition of Indigenous Australians.⁸⁶

(i) Structural Issues

A preamble is placed in an Act after the long title of the Act but before the words of enactment.⁸⁷ For example, the existing Preamble to the *Commonwealth of Australia Constitution Act* precedes the enacting words: 'Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:'. The placement of the preamble before the words of enactment shows that although it is part of the Act,⁸⁸ it is not part of the body of the Act and therefore does not have the force of a law, although it may be used to interpret the law.⁸⁹

The problem with inserting a new preamble in the *Commonwealth Constitution* is that it would not precede words of enactment,⁹⁰ and therefore would not be truly preambular. It would presumably be placed after the table of contents of the *Constitution* but before Chapter I. This is an anomalous

position for a preamble and adds uncertainty to its status, as it would be located within the substantive law. Moreover, this anomaly would be made worse if the existing Preamble remained intact, placed prior to the words of enactment while a separate preamble was then placed after the words of enactment. This might suggest a different status for the second preamble as it is located within the substantive part of the Act.

Given the potential uncertainty that would arise from the placement of a new preamble in the *Constitution*, after the words of enactment, consideration should be given to some kind of explicit statement as to the status of the preamble and its use.⁹¹

(ii) The Content of a New Preamble

The question of what matters should be included in a new preamble is controversial and inherently divisive. Unlike the existing Preamble, a new preamble would be an open slate upon which everyone could place a bid for inclusion. As Webber has observed, '[o]nce one includes Aboriginal people, why shouldn't one recognise multiculturalism? Once one recognises multiculturalism, why shouldn't one recognise those who fought in the war? A long contest for recognition then ensues.'⁹²

Local government bodies have recently been campaigning for constitutional recognition and this too received support from the Gillard Government for a referendum on the issue. However, a constitutional preamble that only recognised Indigenous Australians and local government would look most peculiar indeed. It would open up claims from other groups for recognition, leading to potential divisiveness arising from the inclusion of some and not others. As for determining the common values and aspirations of Australians to include in a preamble, that would be harder still.

Most Australians would probably agree that Aboriginal people and Torres Strait Islanders should be recognised in any new preamble.⁹³ However, the terms of that recognition may still be contentious. In 1998 one of the points of dispute was whether the word 'custodians' should be used when describing the relationship between Indigenous Australians and their land.⁹⁴ The difficulty will lie in finding a form of words that is supported by the vast majority of Indigenous Australians as well as a majority of Australian voters across the country and in a majority of states.

(iii) Disconnection between the Preamble and the Text of the *Constitution*

If one of the primary roles of a preamble is to introduce and provide a context in which to explain the text that follows, there is a significant conceptual problem with changing the preamble in a way that is not accompanied by associated changes to the text.⁹⁵

One of the problems with the 1999 referendum was the disconnection between the proposed preamble and the proposed republic. If the republic referendum had been passed, making relevant changes to the substance of the *Constitution*, it would have been appropriate to have a new preamble which explained and introduced those changes. However, the proposed preamble did not do so. It did not even mention a republic and was designed to be tacked on to an unamended *Constitution*. This undermined its status and usefulness as a preamble.⁹⁶

Winckel has suggested that:

In order to avoid proposing a preamble that is really nothing more than a 'Declaration of the People', it is arguably appropriate to wait until such a time as the constitutional text is being changed (for instance at the transition to a republic) before proposing another new preamble.⁹⁷

Cheryl Saunders has also argued that a preamble should match the substance of the *Constitution*. If it does so, there is no need for concern about how the preamble might be interpreted.⁹⁸ It is only where there is a disconnection between the preamble and the substance of the *Constitution* that issues of concern arise as to how the preamble might be interpreted and that there is a need to limit its application.

V Implications of a New or Amended Preamble and Attempts to Limit Them

One of the reasons why the High Court may have had such little regard for the existing Preamble is that it is not part of the *Constitution* itself, but rather the *Commonwealth of Australia Constitution Act*.⁹⁹ It is also outdated and inaccurate. If a new preamble were to be inserted in the *Constitution* itself, the Court might be more likely to make use of the preamble for the purposes of constitutional interpretation. In doing so, it would be acting consistently with the approach of other constitutional courts throughout the world.¹⁰⁰ The Court

might also be affected by the fact that a new preamble would have been very recently approved by the people and would therefore be a clear manifestation of their wishes, as opposed to the existing Preamble which was framed and approved over 100 years ago by people long since dead.

There is, however, a conceptual difficulty with the interpretation of a new or amended preamble which no longer reflects the intentions of those that enacted the substantive law, if the substantive law itself is not changed at the same time as the preamble. Is the intention of the body that enacted the new or amended preamble to be taken as affecting the meaning of the substantive provisions of the *Constitution*, even though no formal amendment is made to such provisions? In effect, can the 'original intent' of the framers of the *Constitution* be changed by the different intent of those who amended the Preamble or inserted a new preamble, without any change being made to the text of the *Constitution* itself?¹⁰¹

While there may be a principle of statutory interpretation that a preamble cannot affect the substantive provisions of an Act if the legislature intended to legislate beyond the scope of the preamble,¹⁰² this assumes that the same body exhibited intent with respect to both the preamble and the substantive law. How does this rule apply if the preamble is inserted or amended long *after* the substantive law was enacted? Moreover, whose intent is relevant with regard to a constitutional amendment? Is it the intent of the parliament that passed the referendum bill through both its houses (in which case a statement in the explanatory memorandum or the second reading speech might aid a court in assessing the interpretative role of the preamble)? Is it the intent of 'the people' who voted to approve the referendum? If it is the latter, then it becomes even more difficult to assign to the people a single intent, as they may have voted in a particular way for a large number of different reasons and not necessarily agreed with the reasons given by the parliament.

These complexities are in addition to the general concern that a preamble laden with values, principles and aspirations might be used in the future in unexpected and unwanted ways by a court to impose a constitutional interpretation that could only be changed by a successful referendum.

Two approaches have been taken towards mitigating these concerns. The first is to be careful with the wording of a preamble so that it is unlikely to support broad constitutional

interpretation. The second is to include a provision that prohibits the use of the preamble for interpretative purposes.¹⁰³

A Limitation of the Scope of the Preamble through Limited Wording

Gageler and Leeming, taking the first approach, warned that 'extreme care should be taken in considering what words might replace the present preamble' as a new one 'might have greater force'. They observed that the 'effect of the inclusion of broad statements of contemporary values, as has been repeatedly urged by numerous non-specialist commentators, would be highly uncertain'.¹⁰⁴

The Republic Advisory Committee noted in 1993 that words inserted in the Preamble 'may be regarded by the courts as embodying fundamental principles on which the Constitution is based and they therefore have the potential to influence the interpretation of the Constitution as a whole in ways not foreseen by their authors'. The Committee therefore recommended caution in the drafting of a preamble and chose itself to do no more than outline illustrative approaches.¹⁰⁵ The Constitutional Convention of 1998 also recommended that 'care should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution'.¹⁰⁶ For example, Prime Minister Howard raised a concern about the legal implications of the word 'custodianship' and was not prepared to use it in the preamble put to a referendum in 1999, despite heavy criticism.¹⁰⁷

Winterton has also argued that caution should be exercised to prevent the inclusion of words in a preamble that might have unintended legal consequences, including those to the disadvantage of Aboriginal people. He said:

Care should be taken to avoid inclusion of any provision which may have legal consequences, especially because some of those consequences are likely to be unintended and indeed unwelcome. Thus, many of the proposed new constitutional preambles include recognition of Aboriginal dispossession but, while not denying its general truth, it is suggested that such a provision would be unwise. ... [I]t could have unintended legal consequences deleterious to Aboriginal rights. Might it not be argued, for instance, that Aboriginal claims to native title on the ground of continuous occupation of traditional lands are untenable when the Constitution expressly asserts that Aborigines

were dispossessed from their traditional lands? Similarly, another favoured preambular provision recognising Aboriginal traditions or customary rights could conceivably be interpreted as limiting Commonwealth and/or State power to interfere with traditional practices considered incompatible with modern human rights principles.¹⁰⁸

One of the most commonly proposed values or principles to be included in a preamble is 'equality'. The problem, however, with adopting such a broad term is that it may be interpreted in ways that its proponents do not predict. 'Equality' can be interpreted as treating people uniformly and eliminating differentiation in treatment. This has occurred in France where it has been interpreted as preventing affirmative action.¹⁰⁹ As Webber has noted, the requirement of 'equality' can 'pose a significant barrier to indigenous rights' and that it has been used in this manner by political parties such as One Nation.¹¹⁰ Even if it is not interpreted by a court in such a manner, it may fuel arguments by those who oppose laws that provide for positive discrimination in favour of particular groups, fuelling dissent and division.

B Inclusion of a Clause Limiting the Use of the Preamble

Rather than avoiding the use of words which might have legal consequences, the 1999 referendum on a preamble proposed the insertion in the *Constitution* of a provision that made it clear that the preamble was to have no legal force and could not be used for the purpose of interpreting the *Constitution* or other laws.¹¹¹ At the 1998 Constitutional Convention it had initially been proposed that the 'Preamble should remain silent on the extent to which it may be used to interpret the provisions of the Constitution' but that 'care should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution'.¹¹² This gave rise to a concern that the language of the preamble would be hobbled and its role as an inspirational statement would be neutered. The idea of putting a clause elsewhere in the *Constitution* concerning the preamble's interpretation was intended to support the use of broad and aspirational language in the preamble without having to be concerned about the implications and without risking the loss of support for the referendum because of concerns about its potential impact.¹¹³

This approach has been the subject of sustained criticism. Winckel has argued that it was unnecessary because there

was 'little evidence to support the suggestion that the High Court would make unorthodox use of a new preamble'. She contended that a non-justiciability clause would 'create an impression of defensiveness and insincerity', making a 'mockery of the sentiments expressed in the preamble'.¹¹⁴ Zines has suggested that it may not be effective anyway, as judges are capable of finding values and aspirations contained in a preamble to be 'community values' which they could apply regardless of a privative clause.¹¹⁵ Davis and Lemezina have argued that a clause quarantining the effect of a preamble that recognises Indigenous Australians would render that recognition meaningless for many. They contended that 'it would effectively consign Indigenous people to the legal and political fringes, establishing for certain that they share no legitimate place in Australian public life'.¹¹⁶

Others have described a preamble stripped of its legal significance as 'hollow and hypocritical'.¹¹⁷ Reilly has argued that a preamble is an 'assertion by the people of values they aspire to' and that it is illogical 'to ensure that they are not constitutionally enforceable'.¹¹⁸ However, the opposite could easily be argued. If a preamble is 'aspirational' in nature, then it is an expression of a desire to achieve an end or ambition.¹¹⁹ It does not assert that the ambition has been achieved and must be enforced in a court of law. To make aspirations enforceable by courts would be regarded by many as going too far.¹²⁰ Indeed, they would not be aspirations if they were legally enforceable requirements.

Some have defended the inclusion of a provision that limits the legal effect of a preamble. Winterton did so on pragmatic grounds. He argued:

The Preamble addresses the entire Australian community – not just the High Court – and indeed the world community beyond it. If one believes, as the present writer does, that a preambular statement of fundamental civic values serves a useful moral, educational and socially unifying function, the Chapter III provision is surely a small price to pay for it.¹²¹

The issue is really that one must be clear about what it is that a new or amended preamble is intended to achieve. Is it intended to be a statement that serves a 'useful moral, educational and socially unifying function' or is it supposed to go further than that, and have a legal effect that influences the High Court's interpretation of other constitutional

provisions, statutes and the common law and perhaps even give rise to constitutional implications which limit the exercise of Commonwealth and state legislative power and require the common law to be developed in conformity with them?¹²² Either approach may be chosen, but it should be chosen knowingly, not imposed by subterfuge or left to fate.

If there is to be a non-justiciability clause, questions then arise as to its application. Should it simply provide that the terms of the preamble have no substantive effect or are non-justiciable?¹²³ Should it extend to the use of the preamble in constitutional interpretation or beyond that to the interpretation of ordinary statutes or the common law?¹²⁴ Should it extend to the interpretation of the existing Preamble as well as the new preamble (if there are to be two),¹²⁵ or should the existing Preamble still be able to be used in constitutional interpretation while the new one cannot?

VI The Expert Panel's Recommendations

The Expert Panel, in its report, recognised the problems with the amendment of the existing Preamble and decided not to recommend any alteration to it.¹²⁶ It also rejected the idea of inserting a new preamble to the *Commonwealth Constitution*. In doing so, it observed that there was 'too much uncertainty in having two preambles – the preamble to the Imperial Commonwealth of Australian Constitution Act 1900 ... and a new preamble'.¹²⁷ It also expressed concern about the possibility of disconnection between the preamble(s) and the text of the *Constitution* if there were no substantive change to the *Constitution*.¹²⁸

The Expert Panel pointed to the difficulty of devising a general preamble 'that would not be swamped by other topics urged by some as necessary and by others as contestable'.¹²⁹ It looked to the failure of the 1999 referendum and the problem of reaching agreement on shared values. It rejected the inclusion of a broad statement of values, noting that it would 'lead to an unhelpful debate over what should be included in the statement of values'. It also argued that there are 'potential ... legal consequences of a broad statement of values, which the Panel considers it unhelpful to explore at the present time'.¹³⁰

The Expert Panel noted the clause in the 1999 preamble proposal that would have stated that the new preamble had no legal effect. It rejected such an approach, declaring:

The Panel has concluded that any statement of recognition should not be accompanied by a 'no legal effect' clause. The Panel does not consider that it would be appropriate to include some form of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, and simultaneously to state that such recognition has no legal effect. Such an approach would amount to a giving and taking at the same time, and suggest that the statement of recognition was 'an empty gesture' or even tokenistic.¹³¹

The Expert Panel also found that there were 'too many unintended consequences from the potential use of a new preamble in interpreting other provisions of the Constitution'.¹³² It dealt with this problem by instead including a statement of recognition as a preamble to its proposed new section 51A. The Expert Panel observed:

The main advantages of this approach ... are that the preambular element would apply specifically and peculiarly to the new 'section 51A' legislative power. 'Section 51A', with its own embedded preamble, should prevent future interpreters of the Constitution from deploying the preamble to alter what would otherwise have been the meaning of other provisions in the Constitution. ... Another advantage of this approach is that it would ensure that a statement of recognition is directly associated with substantive change to the Constitution.¹³³

The Expert Panel's proposed section 51A is as follows:

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The question that then arises is how the acknowledgement of the 'need to secure the advancement of Aboriginal and Torres Strait Islander peoples' in the preamble to this section is intended to affect the power conferred on the Parliament. On its face, that power could be used to make laws that benefit or disadvantage Aboriginal and Torres Strait Islander peoples. The Expert Panel noted the 'strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples' so that it is a law for the 'benefit' or 'advancement' of those peoples. It stated that consistent with its legal advice, it proposed the use of the word 'advancement' in the preambular words to section 51A, rather than in the power itself, to 'ensure that the purpose is apparent, and would, as a matter of interpretation, be relevant to the scope given to the substantive power'.¹³⁴ The Panel seemed to assume that the word 'advancement' would to some extent qualify the power so that a court would have to assess whether or not a law was for the advancement of Aboriginal and Torres Strait Islander peoples. It said:

Based on the Panel's legal advice, the preambular language proposed by the Panel for 'section 51A' would make clear that a law passed pursuant to that power would be assessed according to whether, taken as a whole, it would operate broadly for the benefit of the group of people concerned, rather than whether each and every provision was beneficial or whether each and every member of the group benefited.¹³⁵

The Panel went on to note that this should 'not enable individual provisions in a broad scheme to be attacked as not beneficial if the law as a whole were able to be judged beneficial'.¹³⁶

It is not abundantly clear, however, that a court would reach the same conclusions as the Expert Panel.¹³⁷ First, as noted above, there are conflicting views about when and how a preamble may be used. Chief Justice Gibbs, in *Wacando*, took the view that 'if the words of the section are plain and unambiguous their meaning cannot be cut down by reference to the preamble'.¹³⁸ On this basis, the generality of the grant of power in proposed section 51A to make laws with respect to Aboriginal and Torres Strait Islander peoples could not be cut down by reference to the preamble. There does not appear to be any ambiguity in the terms of the grant. On the other hand, Mason J, in the same case, took a more liberal view, allowing a preamble to be taken into account in ascertaining the 'purpose' of a provision.¹³⁹ On this basis, the preamble might well be employed in interpreting the application

of proposed section 51A, but then it is a matter for a court to determine the boundaries of the scope of the power in that context. It is not possible to know how a court would interpret 'advancement', whether it would be assessed in relation to some or all Aboriginal and Torres Strait Islander peoples (however defined) or whether it would be assessed by reference to an entire Act or individual provisions. This is an uncertainty inherent in the proposal, which might give rise to difficulties in any referendum debate.

VII Conclusion

The Expert Panel was wise in avoiding the many problems that would have arisen if it had attempted to alter the existing Preamble or insert a new general preamble in the *Commonwealth Constitution*. By confining its statement of recognition to preambular words that introduce a substantive change in the text of the *Constitution*, it avoided the controversy involved in deciding what other matter should be included in a preamble, avoided a contentious debate about common values, confined the interpretative application of the preamble to a particular provision rather than the *Constitution* as a whole and ensured that the preambular words introduced and explained a new provision in the *Constitution*.

The Expert Panel does appear to assume, however, that the reference to 'advancement' in the preambular words to proposed section 51A will act as a form of qualification on the grant of power in that section and that a court will assess future laws with respect to Aboriginal and Torres Strait Islander peoples by reference to whether or not, overall, they are for the 'advancement' of those peoples. This gives rise to two contentious questions, to which the answers are unknowable in advance of such an amendment being enacted and tested in the courts. First, would a court use the preamble of section 51A to qualify the scope of the power? Secondly, if it does so, how would it apply the concept of advancement and how would this affect the validity of laws? For example, if a law was regarded as overall for the advancement of Aboriginal and Torres Strait Islander peoples, but was later amended so that the balance tipped the other way, would the entire law be rendered invalid? The answers to such questions cannot be known until the provision is tested in the High Court and that cannot occur until after it has been approved by a referendum and become part of the *Constitution*. Hence if this provision were put to a referendum in this form, voters would be asked to approve it

without being certain of its consequences. This is asking a lot more of voters than mere willingness to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution*.

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- * Professor, Faculty of Law, University of Sydney.
- 1 'A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition' (Discussion Paper, You Me Unity, May 2011) <<http://www.youmeunity.org.au>>.
 - 2 Ibid 17–20.
 - 3 Ibid 17.
 - 4 Ibid.
 - 5 Expert Panel on the Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) 110–31 <<http://www.youmeunity.org.au>> ('Expert Panel Report').
 - 6 Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' (Report No 2, Constitutional Reform Unit, University of Sydney, September 2011) <<http://ssrn.com/abstract=1922425>>.
 - 7 *Official Record of the Debates of the National Australasian Convention*, Adelaide, 29 March 1897, 217 (William McMillan); John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed) 293; Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999) 410.
 - 8 J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 128, noting that the change was suggested by Mr Quick in the drafting committee with reference to the United States example. Quick's other suggestion that the words 'invoking Divine Providence' be inserted, was rejected.
 - 9 Forty-nine petitions were presented to the Constitutional Convention, comprising 36,434 signatures. Most signatures came from the Presbyterian Church and the Church of England: Anne Winckel, 'Almighty God in the Preamble' (1999) 4 *New Federalist* 78, 79–80; Scott Bennett, *The Making of the Commonwealth* (Cassell Australia, 1971) 106.
 - 10 Quick and Garran, above n 7, 286.
 - 11 Ibid 287.
 - 12 Ibid 294. See also *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ).
 - 13 Quick and Garran, above n 7, 295. See further the suggestion that the Crown is so fundamental to the *Constitution* that it cannot be

- removed by an alteration of the state constitution: *Taylor v A-G (Qld)* (1917) 23 CLR 457, 474 (Isaacs J). See also Michael Kirby, 'The Australian Referendum on a Republic – Ten Lessons' (2000) 46 *Australian Journal of Politics and History* 510, 513–4.
- 14 P McM Glynn, 'Secession' (1906) 3 *Commonwealth Law Review* 193, 204. See also Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 27–30 on the framers' intent in inserting the word in the Preamble.
- 15 George Winterton, 'An Australian Republic' (1988) 16 *Melbourne University Law Review* 467, 475; Stephen Gageler, 'Amending the Commonwealth Constitution through Section 128 – A Journey through Its Scope and Limitations' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010) 6, 17; Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 *University of New South Wales Law Journal* 382, 390. See also Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 143, 146.
- 16 See also calls for the negotiation of a treaty or makarrata. See, eg, Indigenous owners and occupiers of Australia, 'The Barunga Statement' (1988) 1(33) *Aboriginal Law Bulletin* 16; Sean Brennan et al, *Treaty* (Federation Press, 2005).
- 17 Constitutional Commission, *Final Report* (1988) vol 1, 101–10 ('*Final Report of the Constitutional Commission*').
- 18 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [4.1]–[4.18]; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995) recommendation 7; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice Strategies and Recommendations* (1995) recommendation 1.
- 19 Commonwealth, *Report of the Constitutional Convention*, (CanPrint Communications, 1998), vol 1, 46–7 ('*Report of the Constitutional Convention*').
- 20 Constitutional Centenary Foundation, '*We the People of Australia...*' *Ideas for a New Preamble to the Australian Constitution*, (Constitutional Centenary Foundation, 1999) 5–6.
- 21 Constitution Alteration (Preamble) 1999 (Cth). For a discussion on the history of the draft preamble, see Mark McKenna, Amelia Simpson and George Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 *University of New South Wales Law Journal* 401.
- 22 P H Lane, 'Referendum of 1999' (1999) 73 *Australian Law Journal* 749, 750.
- 23 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge – Final Report* (2000) ch 10, recommendation 3 ('*CAR Final Report*').
- 24 John Howard, 'The Right Time: Constitutional Recognition for Indigenous Australians', (Speech delivered at the Sydney Institute, 11 October 2007).
- 25 Kevin Rudd and Jenny Macklin (Media Statement, 11 October 2007).
- 26 Australia 2020 Summit, *Final Report* (May 2008) 341–2.
- 27 Australian Labor Party, *ALP National Platform and Constitution 2009*, ch 11 [18]. It states: 'Labor believes that the preamble to the Constitution should explicitly recognise Indigenous Australians and the core elements of Australia's history and democracy and appropriately expresses [sic] the values, aspirations and ideals of the Australian people'.
- 28 Jenny Macklin, 'Inroads Made in Closing the Gap and Achieving Constitutional Recognition' (Media Release, 15 February 2012) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2012/Pages/closing_the_gap_15feb2012.aspx>.
- 29 See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) preamble and the recommendation of the Law Reform Commission of Western Australia to include a provision in the Western Australian Constitution recognising the unique status of Aboriginal people to Western Australia: Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Report No 94 (2006) 73–4 ('*LRCWA Report*').
- 30 See *Constitution Act 1975* (Vic) s 1A; *Constitution Act 1902* (NSW) s 2.
- 31 The effectiveness of this entrenchment is doubtful, as a law amending s 1A is unlikely to be regarded as a law respecting the constitution, powers or procedure of the Parliament, so that its entrenchment is not supported by *Australia Act 1986* (Cth) s 6. It is doubtful whether the states have any other capacity to entrench laws. See also Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 268–322.
- 32 *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW).
- 33 *Constitution Act 1902* (NSW) s 2.
- 34 Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *A Preamble for the Queensland Constitution?* (Report No 46, November 2004) 23 ('*LCARC Report*'); Law, Justice and Safety Committee ('LJSC'), Parliament of Queensland, *A Preamble for the Constitution of Queensland 2001*, (Report No 70, September 2009) 15. See also Gareth Griffith, 'The Constitutional Recognition of Aboriginal People' (2010) 12 *Constitutional Law and Policy Review* 70, 73.
- 35 *Constitution Act 1975* (Vic) s 1A(3); *Constitution of Queensland 2001* (Qld) s 3A; *Constitution Act 1902* (NSW) s 2(3).
- 36 Megan Davis and Zrinka Lemezina, 'Indigenous Australians

- and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) 33 *University of New South Wales Law Journal* 239, 261.
- 37 Quick and Garran, above n 7, 284; Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (Little, Brown, 2nd ed, 1902) 92. See, eg, the history of governance set out in the preambles to: *Norfolk Island Act 1979* (Cth); *Cocos (Keeling) Islands Act 1955* (Cth); *Christmas Island Act 1958* (Cth).
- 38 See, eg, the preambles to *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth); *Agricultural and Veterinary Chemicals Act 1994* (Cth).
- 39 *Stowel v Lord Zouch* (1569) 1 Plowden 352, 369; 75 ER 536, 560. See also Quick and Garran, above n 7, 284.
- 40 Plato, *The Laws* (Trevor J Saunders trans, Penguin Books, 1970) 185.
- 41 See, eg, *Australian Citizenship Act 2007* (Cth) preamble (which is intended to educate immigrants about the effect of citizenship); *Aboriginal and Torres Strait Islander Act 2005* (Cth) preamble.
- 42 See, eg, the *Native Title Act 1993* (Cth) preamble.
- 43 Thring, above n 37, 93.
- 44 Kent Roach, 'The Uses and Audiences of Preambles in Legislation' (2001) 47 *McGill Law Journal* 129, 150. See, eg, *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth) preamble.
- 45 Roach, above n 44, 149.
- 46 Craven, above n 14, 85–8. See also *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444, 451; S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, 7th ed, 1971) 202 ('if the meaning of the enactment is clear and unequivocal without the preamble, the preamble can have no effect whatever'); *Re Tan Boon Liat* (1976) 2 *MLJ* 83, 85 (Abdoolcader J) ('Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it').
- 47 *Wacando v Commonwealth* (1981) 148 CLR 1, 15–16 ('*Wacando*'). See also *Salkeld v Johnson* (1848) 2 Exch 256, 283; 154 ER 487, 499, where it was stated by Pollock CB that while the preamble is undoubtedly part of the Act and may be used to explain it, 'it cannot control the enacting part, which may, and often does, go beyond the preamble'; and *Powell v Kempton Park Racecourse Co* [1899] AC 143, 157 ('*Powell*') where the Earl of Halsbury stated that 'if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment'.
- 48 *Powell* [1899] AC 143, 185 (Lord Davey); *Re Tan Boon Liat* (1976) 2 *MLJ* 83, 85 (Abdoolcader J); Edgar, above n 46, 202.
- 49 *Eton College v Minister of Agriculture, Fisheries and Food* [1964] 1 Ch 274, 280 (Wilberforce J).
- 50 This is sometimes made explicit in statute. See, eg, *Interpretation Act 1984* (WA) s 31(1) which provides: 'The preamble to a written law forms part of the written law and shall be construed as a part thereof intended to assist in explaining its purport and object'. Similar provisions exist in Canada and New Zealand.
- 51 *Wacando* (1981) 148 CLR 1, 23 (Mason J); Milton Handler, Brian Leiter and Carole E Handler, 'A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation' (1990) 12 *Cardozo Law Review* 117, 128; Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 189; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th ed, 2006) 153.
- 52 (1981) 148 CLR 1, 23.
- 53 See the detailed argument put by Winckel on this point: Winckel, above n 51, 187–91.
- 54 Quick and Garran, above n 7, 284. See also *Final Report of the Constitutional Commission*, above n 17, vol 1, 102–3.
- 55 *Report of the Constitutional Convention*, above n 19, vol 4, 520–1. See also George Winterton, 'The 1998 Constitutional Convention: A Reprise of 1898?' (1998) 21 *University of New South Wales Law Journal* 856, 862. There is also the view that a preamble 'can capture and chart, in a pithy and quotable form, the history and aspirations of a nation': McKenna, Simpson and Williams, above n 15, 382.
- 56 John Pyke, Submission No 178 to the Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Inquiry into a Preamble for the Constitution of Queensland* 2001, May 2009, 5; Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 267.
- 57 Sir Harry Gibbs, 'A Preamble: The Issues' in *Upholding the Constitution: Proceedings of the Samuel Griffith Society, Volume 11* (Samuel Griffith Society, 1999) 95; George Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186, 189.
- 58 Webber, above n 56, 274; *LCARC Report*, above n 34, 17, discussing the submission of the Australian Institute of Aboriginal and Torres Strait Islander Studies.
- 59 For a more detailed study of international experience in the interpretation of constitutional preambles, see Twomey, above n 6.
- 60 Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 *International Journal of Constitutional Law* 714, 715.
- 61 Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 *Constitutional Forum* 60, 62.
- 62 Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 203.
- 63 Conseil constitutionnel [French Constitutional Council], decision

- n° 71-44 DC, 16 July 1971 reported in JO, 18 July 1971, 7114. See further James Beardsley, 'Constitutional Review in France' (1975) *Supreme Court Review* 189, 225–6; John Bell, *French Constitutional Law* (Clarendon Press, 1992) 149–51, 272–3; Marie-Pierre Granger, 'The Preamble(s) of the French Constitution: Content, Status, Uses and Amendment' (2011) 52 *Acta Juridica Hungarica* 1.
- 64 See the 'basic structure' doctrine as set out in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225. See further R C Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India* (Eastern Book, 2004) 108; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2009) 136.
- 65 Webber, above n 56, 270. See also Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10 *Public Law Review* 67, 68, where he states that individual rights belong in the body of the Constitution and that this applies to the subject of equality.
- 66 Geoffrey Fisher, Submission No 105 to the Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Inquiry into a Preamble for the Queensland Constitution*, 27 August 2004, 2, quoted in *LCARC Report*, above n 34.
- 67 John Williams, 'The Republican Preamble: Back to the Drawing Board?' (1999) 10 *Public Law Review* 69, 72.
- 68 Winterton has noted that the removal of reference to 'Almighty God' in a new preamble 'would open deep community divisions and, therefore, should not be contemplated': Winterton, above n 57, 188.
- 69 See, eg, the argument by Stephen Gageler that the preamble to the *Constitution* 'sets out to do no more than record the position at a moment in time': Gageler, above n 15, 17.
- 70 Jonathon W Penney and Robert J Danay, 'The Embarrassing Preamble? Understanding the "Supremacy of God" and the Charter' (2006) 39 *University of British Columbia Law Review* 287, 322–31; Micheal Silagi, 'The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law', (2011) 52 *Acta Juridica Hungarica* 54, 62. The Queensland Constitutional Review Commission, in recommending that there be no reference to God in a preamble to the *Queensland Constitution*, remarked 'The Commission was well aware that whilst the overwhelming majority of American state constitutions mentioned God it was usually as the source of natural rights. This idea which would run completely counter to the assumptions of a traditionally Diceyan constitution such as Queensland's. To take that initiative might appear to reopen the Bill of Rights issue which the Commission had consciously avoided.': Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that Relate to the Queensland Constitution* (2000) 33.
- 71 For example, if Australia were to become a republic, and the covering clauses were to be retained, but amended, then a change to the Preamble would also be appropriate.
- 72 [1942] AIR FC 17, 21 (Gwyer CJ).
- 73 *LCARC Report*, above n 34, 15.
- 74 *LRCWA Report*, above n 29, 73.
- 75 *Ibid.*
- 76 *Report of the Constitutional Convention*, above n 19, vol 4, 792.
- 77 Quick and Garran, above n 7, 994; Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 2nd ed, 1910) 603; Donald Kerr, *The Law of the Australian Constitution* (Law Book, 1925) 6; Commonwealth, Royal Commission on the Constitution, *Report* (1929) 288; H S Nicholas, *The Australian Constitution* (Law Book, 2nd ed, 1952) 388; W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 4th ed, 1970) 505–6; Geoffrey Sawer, 'The British Connection' (1973) 47 *Australian Law Journal* 113, 114; James A Thomson, 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal Law Review* 323, 333–4; Colin Howard, *Australian Federal Constitutional Law* (Law Book, 3rd ed, 1985) 3; Craven, above n 14, 160–1, 165–7; Mark Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134, 143–5; Gageler and Leeming, above n 15, 148–9. See also John McMillan, Gareth Evans and Haddon Storey, *Australia's Constitution: Time for Change?* (Allen & Unwin, 1983) 176, 359, where it is argued that section 128 could not be used to amend or repeal the Preamble or covering clauses, but could 'displace' their effect.
- 78 *Australia Act 1986* (Cth); *Australia Act 1986* (UK).
- 79 *Australia Act 1986* (Cth) s 12. On the question of whether such a repeal could validly have been made by the *Australia Act 1986* (Cth), or whether reliance must instead be placed on the *Australia Act 1986* (UK), see Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 388–94.
- 80 See, eg, E Campbell, 'An Australian-made Constitution for the Commonwealth of Australia' in *Report of Standing Committee D to the Executive Committee of the Australian Constitutional Convention* (1974) appendix H, 100; George Winterton, *Monarchy to Republic* (Oxford University Press, 1986) 124–5; *Final Report of the Constitutional Commission*, above n 17, vol 1, 120–3.
- 81 *Australia Act 1986* (Cth) s 15(1).
- 82 This was recognised by the Expert Panel on the Recognition of Indigenous Australians: *Expert Panel Report*, above n 5, 110.
- 83 Note the observation that 'there is an expectation manifest in democratic principles and the rule of law that the preamble be changed via referendum': 'Constitutional Reform and Indigenous Peoples: Options for Amendment to the *Australian Constitution*'

- (Research Brief No 3, Indigenous Law Centre, 2011) 3.
- 84 See the considerable debate on the subject: George Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 120; Gageler and Leeming, above n 15; Geoffrey Lindell and Dennis Rose, 'A Response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?"' (1996) 7 *Public Law Review* 155; Sir Anthony Mason, 'Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *University of New South Wales Law Journal* 750, 754; Anne Twomey, 'Amending the Preamble to the Constitution' (2008) 10 *Constitutional Law and Policy Review* 31; Gageler, above n 15, 15–16; Twomey, above n 79, 408–10.
- 85 *CAR Final Report*, above n 23, ch 10, recommendation 3.
- 86 'A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition', above n 1, 17. Cf 'Constitutional Reform and Indigenous Peoples', above n 83, which appears to assume that recognition would be in the Preamble to the *Commonwealth of Australia Constitution Act*: at 3.
- 87 F A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) 731, 744; N J Singer and J D S Singer, *Statutes and Statutory Construction* (Thomson West, 7th ed, 2007) 290.
- 88 *Salkeld v Johnson* (1848) 2 Exch 256, 283; 154 ER 487, 499; *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 467; Craven, above n 14, 85; Winckel, above n 51, 205–6.
- 89 Craven, above n 14, 85.
- 90 Anne Winckel, 'A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics' (2001) 24 *University of New South Wales Law Journal* 636, 642.
- 91 This could be done in the second reading speech, the explanatory memorandum, the material sent to voters in the Yes/No case or in the text of the Constitution.
- 92 Webber, above n 56, 270–1.
- 93 A Newpoll survey in February 2011 found that 75 per cent of persons surveyed were in favour of the constitutional recognition of Indigenous Australians: 'A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition', above n 1, 8. See also the polling data in *Expert Panel Report*, above n 5, 70–1.
- 94 McKenna, Simpson and Williams, above n 21, 407; Winckel, above n 90, 642; Patrick Dodson, '1999 Vincent Lingiari Memorial Lecture: Until the Chains are Broken' (2000) 5(2) *Australian Indigenous Law Reporter* 73.
- 95 Gibbs, above n 57, 90–1.
- 96 Winckel, above n 90, 643.
- 97 *Ibid* 644.
- 98 Evidence to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 1 May 2008, 60. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming Our Constitution: A Roundtable Discussion* (2008) 55.
- 99 McKenna, Simpson and Williams, above n 15, 392.
- 100 See further Orgad, above n 60.
- 101 See further the comment by Greg Craven that 'it makes no sense to amend the existing preamble because a preamble in law is a statement of intention of the legislature that passed the relevant Act when it was made. We can no more amend the intention of the founding fathers or the intention of the imperial statesmen of the time than we can fly to the moon': *Report of the Constitutional Convention*, above n 19, vol 4, 472.
- 102 Winckel, above n 90, 640.
- 103 McKenna, Simpson and Williams, above n 15, 395.
- 104 Gageler and Leeming, above n 15, 147.
- 105 Republic Advisory Committee, *An Australian Republic – The Options* (Commonwealth Government Printer, 1993) vol 1, 137.
- 106 *Report of the Constitutional Convention*, above n 19, vol 1, 47.
- 107 Winckel, above n 90, 641; Davis and Lemezina, above n 36, 257–8; McKenna, Simpson and Williams, above n 21, 407, 410.
- 108 Winterton, above n 57, 187–8.
- 109 Conseil constitutionnel [French Constitutional Council], decision n° 82-146, 18 November 1982 reported in JO, 19 November 1982, 3475. See also Bell, above n 63, 209–11, 349–52.
- 110 Webber, above n 56, 266.
- 111 The Constitution Alteration (Preamble) 1999 (Cth) would have inserted in the Constitution, in addition to a preamble, s 125A which stated: 'The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.'
- 112 *Report of the Constitutional Convention*, above n 19, vol 4, 791.
- 113 *Ibid* 803.
- 114 Winckel, above n 90, 646.
- 115 Zines, above n 65, 68.
- 116 Davis and Lemezina, above n 36, 261.
- 117 Alex Reilly, 'Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21 *University of New South Wales Law Journal* 903, 904; McKenna, Simpson and Williams, above n 15, 396.
- 118 Reilly, above n 117, 904.
- 119 *The Concise Oxford Dictionary of Current English* (Clarendon Press, 9th ed, 1995).
- 120 See, eg, the argument by Dr Paul Reynolds that to make an aspirational preamble justiciable risks 'over codifying these beliefs and/or imposing a legalistic interpretation on them': *LCARC Report*, above n 34, 11.

- 121 Winterton, above n 55, 863.
- 122 See, eg, the effect of the implied freedom of political communication derived from *Commonwealth Constitution*, ss 7, 24.
- 123 See, eg, *Constitution of Ireland* art 45, which provides that certain principles of social policy 'shall not be cognisable by any Court under any of the provisions of this Constitution'; *Constitution of India* art 37, which provides that certain provisions 'shall not be enforceable by any court'.
- 124 Note that the recommendation of the 1998 Constitutional Convention only extended to constitutional interpretation, whereas the provision put to a referendum in 1999 included reference to the interpretation of 'this Constitution or the law in force in the Commonwealth or any part of the Commonwealth'.
- 125 The 1999 referendum on a preamble contained a clause to limit the effect of the new preamble 'to this Constitution', but did not apply to the existing Preamble: see McKenna, Simpson and Williams, above n 21, 411.
- 126 *Expert Panel Report*, above n 5, 110.
- 127 *Ibid* xiii, 116.
- 128 *Ibid* 117.
- 129 *Ibid* 116.
- 130 *Ibid* 121.
- 131 *Ibid* 115.
- 132 *Ibid* xiii, 117.
- 133 *Ibid* 118–19.
- 134 *Ibid* 131, 150.
- 135 *Ibid* 150.
- 136 *Ibid* 151.
- 137 For further analysis on this point, see Anne Twomey, 'Indigenous Constitutional Recognition Explained – The Issues, Risks and Options' (Constitutional Reform Unit, University of Sydney, January 2012) <http://sydney.edu.au/law/cru/documents/2012/Indigenous_Recognition.pdf>.
- 138 (1981) 148 CLR 1, 15–16 (Gibbs CJ).
- 139 *Ibid* 23 (Mason J).