THE CONSTITUTIONALITY OF THE UNILATERAL SECESSION OF AN AUSTRALIAN STATE

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1 INTRODUCTION

The possibility that an Australian State might one day seek to unilaterally secede from the Commonwealth has always held an ambiguous position in the political and constitutional folklore of Australia. On the one hand, such a notion conjures up visions of rampant political idiosyncrasy so ludicrous as to provoke little more than amused disbelief. On the other, even to pose the conceptual question of the disintegration of the painstakingly constructed and laboriously maintained Australian federal structure is to raise an issue almost too distasteful to contemplate. The status of secession as both a political and constitutional topic has thus essentially been that of a joke, but of a joke which, when fully considered, might be regarded as being in thoroughly bad taste.

The object of this article is to consider whether the unilateral secession of an Australian State, (that is, a secession relying for its validity solely upon an Act passed by the relevant State's own Parliament), would be consistent with the provisions of the constituent document of the Australian Federation, the Commonwealth of Australia Constitution Act 1900 (Cth). It is of course clear that were an inconsistency to arise between a State Act providing for secession and the Constitution Act, the former would be void to the extent of the inconsistency. This would follow both from the application of s 5 of the Constitution Act itself,[1] and from the operation of s 2 of the Colonial Laws Validity Act.[2] The question which must be answered, however, is whether such an inconsistency would in fact exist.

All writers who have considered this question are unanimous in holding the view that the unilateral secession of a State would be inherently inconsistent with the terms of the Constitution Act, and thus entirely unlawful. However, considerable confusion exists as to precisely which provision of the Act would give rise to such inconsistency. One school of thought points to the preamble, with its reference to the agreement of the Australian colonies to unite in "one indissoluble Federal Common-

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[1] Section 5 of the Constitution Act provides that the Constitution Act shall be binding on the Courts, judges and people of every State, 'notwithstanding anything in the laws of any State'.

[2] Section 2 of the Colonial Laws Validity Act has the effect of striking down State legislation which is "repugnant" to an Imperial Act of paramount force which applies to that State. The Constitution Act is, of course, such an Act. See eg R Lumb, *The Constitutions of the Australian States* (4th ed 1976) at 91-92. It may be noted that it was agreed by the 1982 Premiers Conference that legislation would be requested of the Parliament of the United Kingdom which ended the subordination of the States to United Kingdom legislation applying by paramount force. Identical legislation would simultaneously be passed by the Commonwealth Parliament pursuant to s 51(xxxviii) of the Constitution. (See Attorney-General's press release dated 25/6/1982; 22/6/1983; and 17/7/1983. Such legislation would doubtless involve the repeal of s 2 of the Colonial Laws Validity Act in its application to the Australian States. However, it may confidently be assumed that a provision analagous to s 8 of the Statute of Westminster 1931 would preserve the operation of s 2 as regards the Constitution Act. (The text of the proposed *Australia Bill* is not yet publicly available.)

wealth". Among those who appear to have found in the preamble a prohibition upon the unilateral secession of a State are Quick and Garran,[3] Lane,[4] Enright[5] and Marshall.[6] Other authorities have preferred to locate any inconsistency with unilateral secession in what are referred to as the "covering clauses" of the Act.[7] This view was adopted by Moore[8] and Castles,[9] and was incidentally expressed by the Joint Select Committee of the Imperial Parliament which considered (and rejected) the petition of Western Australia to secede in 1935.[10]

The approach adopted in this article will be to consider in turn the claims of the preamble and covering clauses of the Constitution Act as bars to the unilateral secession of a State. The question of whether any provisions of the Constitution proper would likewise constitute such a bar will also be considered.

2 THE PREAMBLE AS A BAR TO UNILATERAL SECESSION

(i) *General*

In reading the Constitution Act, the first provision of obvious relevance to the issue of unilateral secession is the preamble. Indeed, it is the preamble which contains the only directly obvious reference in the Act to the question of secession, in that it recites the agreement of the Australian colonies to unite in an "indissoluble" Federal Commonwealth.[11] The question which thus arises is whether the inclusion of the word "indissoluble" in the preamble thus constitutes an express and effective prohibition of the unilateral secession of an Australian State? In answering this question, it will first be necessary to detail the claims made for the preamble in this respect, and then to assess these claims in the light of the principles which guide the courts in their interpretation of the Constitution Act, both as an ordinary Act of the British Parliament, and as the constituent document of the Australian Federation.

(ii) *Claims Made for the Preamble*

The widest claim which has been made for the preamble is that it, of its own independent operation, is inconsistent with and therefore prohibits the unilateral secession of an Australian State. The argument that the preamble itself provides an insuperable barrier to unilateral secession appears to have first been mooted, if only by implication, by Quick and

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[3] J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 293.

[4] P Lane, *An Introduction to the Australian Constitution* (2nd ed 1977) 223.

[5] C Enright, *Constitutional Law* (1972) 52.

[6] G Marshall, *Parliamentary Sovereignty and the Commonwealth* (1962) 114-115.

[7] Sections 1-9 of the Constitution Act.

[8] W Moore, *The Constitution of the Commonwealth of Australia* (2nd ed 1910) 603.

[9] A Castles, "Limits on the Autonomy of the Australian States", (1962) Pub L 175, 177.

[10] United Kingdom, "Report of the Joint Select Committee to Inquire into the Receivability of the Petition of the State of Western Australia to Secede from the Commonwealth of Australia" *Parliamentry Papers* 1935 (H L) 75, para 6. Western Australia did not attempt to secede unilaterally, but rather sought to achieve secession by legislation of the Imperial Parliament.

[11] For a detailed history of the drafting of the Preamble as regards secession see G Craven, "An Indissoluble Federal Commonwealth? The Founding Fathers and the Secession of an Australian State" (1983) 14 Mel Uni L R 281.

Garran in *The Annotated Constitution of the Australian Commonwealth*.[12] The authors of that highly influential work centred their entire discussion of the question of unilateral secession around their consideration of the expression "indissoluble" in the preamble. They thus focussed their own attention, and that of their readers, upon the preamble as the paramount provision of the Constitution Act dealing with the issue of unilateral secession. No other provision of the Act was pointed to as being relevant in this respect.

Quick and Garran dealt with the preamble by embarking upon a historical analysis of the American experience of unilateral secession. The American Doctrine of Secession was referred to as "political heresy".[13] Quotations of a stirring character celebrating the anti-secessionist victory were approvingly made.[14] Finally, the American case of *Texas* v *White*[15] was drawn upon for the proposition that the American Constitution prohibited secession, and that it did so through its preamble.[16] It only remained to make the application of these authorities, American though they were, to the Australian provision.

This Quick and Garran failed to do. Having undertaken this extensive review of the American experience of unilateral secession, they simply put it aside, and contented themselves with remarking that the word "indissoluble" might operate as a brake upon the amending power contained in s 128 of the Constitution, an entirely different issue.[17] The point to be made, is that the overwhelming impression left by a reading of Quick and Garran is that the preamble of the United States Constitution prohibited the unilateral secession of an American State, and that similar reasoning could be applied to the preamble of the Australian Constitution Act. To this admittedly limited extent, Quick and Garran gave support to the view that the preamble might be an effective bar to unilateral secession, and that it might be so of its own independent effect.

Other writers have been less reticent in espousing the cause of the preamble as a bar to unilateral secession. Enright in his *Constitutional Law*[18] writes:

> There is no provision in the Constitution permitting unilateral secession by a State. The preamble to the Constitution recites that the people of New South Wales . . . have agreed to unite in one dissoluble Federal Commonwealth . . . From this it is obvious that while federation did not entail a surrender of all power by the colonies, this surrender could not be revoked by a state on its own motion.

Vagner appears to ascribe a similar affect to the preamble,[19] as does Lane.[20] To all these writers, the preamble seems to be determinative of the question of unilateral secession.

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[12] *Supra* n 3, 294-4.
[13] *Ibid* 292.
[14] *Ibid* 293.
[15] 7 Wall 700, 725 (1869).
[16] *Supra* n 3, 293.
[17] *Ibid*. But see R Garran, *Prosper the Commonwealth* (1958) 200, where Sir Robert Garran directly attributes the indissolubility of the Australian Federation to the preamble.
[18] *Supra* n 5, at 52.
[19] W Vagner, *The Federal States and their Judiciary* (1976) 32.
[20] *Supra* n 4.

Expression of this view has not been confined solely to texts. Dr Morgan, when appearing for the State of Western Australia before the Joint Select Committee in London on the question of the receivability of that State's petition for secession, seemed grudgingly to be of the view that a unilateral secession would have been precluded by the reference in the preamble to an "indissoluble Federal Commonwealth".[21] Although concerned directly only with matters regarding the petition for secession legislation by the Parliament of the United Kingdom, the Select Committee itself noted in passing that a State could not secede unilaterally, and referred to the Commonwealth as being "indissoluble".[22]

It is therefore clear that the inclusion of the word "indissoluble" in the preamble has, on a number of occasions, been used as the basis of an argument against the constitutional validity of the unilateral secession of an Australian State. This argument runs that as the preamble recites the indissolubility of the Commonwealth, the unilateral secession of a State would be unlawful, involving as it would just such a dissolution. The validity of this argument rests upon the correctness of interpreting the Constitution Act so as to allow the preamble to have this direct and independent effect of prohibiting unilateral secession, much as if it were a substantive provision contained within the body of the Act itself. It should be noted that the essence of such an argument is that the preamble alone is relied upon, quite independently of any other provision of the Constitution Act.

The immediate question is whether such an interpretation is correct. The Constitution Act is, in form, an Act of the British Parliament. It is also however, a written constitution, intended to provide for the government of a nation. To validly interpret the preamble in the manner described above, one of two things must be shown to be the case. Either, that the preamble may be used in such a fashion under the ordinary rules regulating the interpretation of British Statutes, or, if this is not so, that some relevant exception to these rules exists insofar as they relate to the construction of Acts which are also written constitutions. Each of these possibilities will be considered in turn.

(iii) *The Use of the Preamble as Part of a British Statute*

The basic rule for the interpretation of British statutes has long been clear. An Act of Parliament will be construed according to the intention of the Parliament which passed it. If the words are themselves precise and unambiguous, the only concern of a court will be to interpret them according to their natural and ordinary meaning. This rule, laid down in the *Sussex Peerage Claim*,[23] has been received as doctrine both by the Privy Council, and the High Court of Australia.[24] It requires a court, obviously enough, to construe an Act according to the intention of

[21] E Russell, "The Western Australian Secession Petition — Arguments before the Select Committee" (1935) 9 ALJ 141, 143.

[22] United Kingdom, "Report of the Joint Select Committee to Inquire into the Receivability of the Petition of the State of Western Australia to Secede from the Commonwealth of Australia" *Parliamentary Papers* (1935) H L 75, 76 para 6.

[23] (1884) 11 Cl & Fin 85, 143.

[24] *Cargo ex Argos* (1873) LR 5 PC 134, 153; *Dixon* v *Todd* (1904) 1 CLR 320, 326; see also S G Edgar (ed) *Craies on Statute Law* (7th ed 1971) 64-65.

Parliament. In attempting to discern that intention, the court must first have regard to the words of the particular section of the statute itself. If these words admit of only one meaning, then that is the end of the matter, and the court need go no further. Only in the case of an ambiguity will the court go beyond the words of the section under consideration. It is within the context of this fundamental rule that the question of the use of preambles as aids in the interpretation of statutes must be raised.

A preamble is prefatory to the words of the actual enactment to which it relates, and consists of a recital of the facts operative upon the collective mind of Parliament when it enacted the legislation in question.[25] Thus, it is said to be in the preamble to an Act that "the mischief to be remedied and the scope of the Act" are described.[26] It would appear that a preamble is part of the statute which it precedes,[27] though this has not always been held to be the case.[28] Whatever the position of a preamble as part of the relevant statute, it is clear that a preamble does not form part of the corpus, or enacted part, of the Act concerned.[29] In short, while a preamble may be part of the statute as a whole, because it precedes the enacting clause it does not form part of the substantive enactment.

It follows from the application of the rule in the *Sussex Peerage Claim*,[30] that the terms of a preamble cannot affect the unambiguous words of an enactment. Such words must be construed according to their own clear meaning, without any gloss imported from another source. It likewise follows from the very nature of a preamble as being a part of the statute which is not part of the actual enactment, that it cannot have the direct and immediate effect of a provision contained within the enacting parts. The question thus arises as to whether a preamble has any role at all to play in the interpretation of statutes.

The foundation case on this question is that of *Stowel* v *Lord Zouch*.[31] In considering the part to be played by the preamble, Dyer CJ stated that it "was a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress".[32] At first sight, this dictum may seem to accord an almost pre-eminent importance to the preamble of a statute, setting it up as a standard against which to test other portions of the Act. But this is not the case. The analogy drawn by Dyer CJ was between the preamble to a statute and a key, and this is significant. A "key" to unlock the minds of the makers of a statute will only be necessary if those minds are initially locked or closed to the court, and this will not be so if the words of the statute are clear. Only if the words are unclear or ambiguous themselves will it be necessary to resort to such a device. Thus, to *Stowel* v *Lord Zouch*[33] may be traced the genesis of the rule relating to use of preambles in the interpretation of statutes, this rule being that recourse

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[25] Craies, *ibid* 41.
[26] *AG* v *HRH Prince Ernest Augustus of Hanover* [1957] AC 436.
[27] See *Davies* v *Kennedy* (1869) IR 3 Eq 668, 697.
[28] See *Mills* v *Wilkins* (1704) 6 Mod 62.
[29] *Overseers of West Ham* v *Iles* (1883) 8 App Cas 386, 388.
[30] (1884) 11 Cl & Fin 85.
[31] (1562) Plowd 353; 75 ER 536.
[32] *Ibid* 369; 560.
[33] *Ibid*.

may only be had to the preamble in the event that the words of the section under consideration have first been found to be unclear or ambiguous.[34]

This rule was adhered to and expounded by the English Courts as part of the accepted general body of rules regulating statutory interpretation throughout the nineteenth century. In the *Sussex Peerage Claim*,[35] Lord Tindal CJ said:

> If the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense . . . But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to have recourse to the preamble.

Lord Halsbury expressed a similar view in *Powell* v *Kempton Park Racecourse Co.*,[36] where he stated:

> Two propositions are quite clear — one that a preamble may afford useful light as to what a statute intends to reach, and another, that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

By the end of the nineteenth century, the rule had been clearly established[37] that a court would only resort to the preamble in interpreting a statute if the words of the section being considered were unclear or ambiguous. Thus, to invoke the preamble a court had to proceed by way of two separate steps. It had firstly to construe the words of the section, and determine if they were sufficiently clear and unambiguous. Only if an ambiguity could in fact be said to exist would the court proceed to the second step, and consult the preamble.[38] Preambles thus came to play a minimal role in statutory interpretation.

This approach was followed in Australia as in England. In *Bowtell* v *Goldsbrough, Mort & Co Ltd*[39] Griffith C J stated that the plain words of an enactment could "never be affected" by the preamble. Only where the words themselves were uncertain, and then only "in a proper case", would the preamble be consulted. In both *Dixon* v *Todd*,[40] and *The President, &, of the Shire of Arapiles* v *The Board of Land & Works*,[41] the Chief Justice cited the *Sussex Peerage Claim*[42] for the proposition that the preamble to a statute could only be employed in the case of a manifest ambiguity. Thus, the rule relating to the use of preambles was quickly endorsed by the High Court.

Only one serious attempt has been made to modify this well established rule of statutory interpretation, and that occurred in the case of *Attorney-*

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[34] Thus, the dictum expressed by Dyer, CJ in *Stowel* v *Lord Zouch* is perfectly consistent with the rule in the *Sussex Peerage Claim*, *supra* n 23.

[35] (1884) 11 Cl & Fin 85.

[36] (1897) 2 QB 242, 269.

[37] *See Overseers of West Ham* v *Iles supra* n 28; *Mason* v *Armitage* (13) Ves 25; *Lees* v *Summersgill* (17) Ves 508.

[38] Craies, *supra* n 25, 205. The preamble would therefore not even be consulted if the words of the section under consideration did not reveal an ambiguity. Thus, in the case of clear words, the preamble was ignored.

[39] (1906) 3 CLR 444, 451.

[40] (1904) 1 CLR 320.

[41] (1904) 1 CLR 679, 686

[42] (1884) 11 Cl & Fin 85.

General v *HRH Prince Ernest Augustus of Hanover*.[43] In that case,[44] the House of Lords purported to re-state the law relating to preambles, but did so in terms considerably more favourable to their use in the course of statutory interpretation than those laid down in the cases already considered.

The leading speech was that of Lord Simonds. His Lordship stated that while it was certainly the task of the courts to find the intention of Parliament from the words of the enactment, such words could never be understood in isolation.[45] When construing a statute, a court should first inform itself of "the general legal context" surrounding the statute, and this context would include the preamble. A provision of a statute could not be understood until that statute had been read in its entirety, and accordingly, no statement as to the ambiguity or otherwise of the statute could be made until the whole of the statute — including the preamble — had been consulted.[46] The other Law lords delivered speeches which were in substantial agreement with that of Lord Simonds.[47]

The chief consequence of accepting Lord Simonds' reasoning would be the considerable elevation in the importance of preambles as aids in the interpretation of statutes. Rather than operating as secondary 'fail-safes' in the process, they would be consulted and considered simultaneously with the substantive provisions of the relevant statute. This would inevitably give them vastly increased significance and destroy the system of two-tiered consideration advanced in the *Sussex Peerage Claim*,[48] and other older authorities. Effectively, preambles could be used to directly supplement the meaning of enactments, rather than to solve their previously determined ambiguity.

It is submitted, however, that *Attorney General* v *HRH Prince Ernest Augustus of Hanover*[49] does not effect such a revolution in the law relating to preambles. Firstly, the authority of the case is far from certain. It was held of the statute under consideration in that case that the enacted words were themselves unambiguous and clear,[50] and they were given effect in defiance of a quite inconsistent preamble. It is therefore arguable that the case could have been disposed of merely upon the point of the interpretation of the relevant section, and that the comments of their Lordships relating to the use of preambles were therefore *obiter dicta*.

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[43] [1957] AC 436.

[44] The facts of that case were as follows: The provision concerned was cl 16 of the Princess Sophia Naturalization Act 1705 (Imp), which provided that the Electress Sophie 'and all persons lineally descended from her' were to be natural born subjects of the Kindom of England. Prince Ernest Augustus of Hanover, a descendent of the Electress, sought a declaration that he was a British subject by virtue of the statute. The Attorney-General, in opposing the making of the declaration, relied on the fact that the preamble referred to the naturalization only of the 'issue of the body' of the Electress.

[45] [1957] AC 436, 463.

[46] *Ibid*.

[47] *Ibid* 465 *per* Lord Norman; 471 *per* Lord Morton: 472 *per* Lord Tucker; 473-474 *per* Lord Somervell.

[48] (1884) 11 cl & fin 85.

[49] [1957] AC 436.

[50] See [1957] A C 436; 463 *per* Lord Simmonds; 468 *per* Lord Normand; 470-471 *per* Lord Somervell.

Secondly, these same comments are in reality quite irreconcilable with the rules laid down in the *Sussex Peerage Claim*[51] and *Powell* v *Kempton Park Racecourse Co*,[52] both of which (together with many other older authorities)[53] clearly lay down the two-step test for the use of preambles.

Thirdly, subsequent legal learning has not been so inclined to abandon the older tests. While the editor of *Maxwell on the Interpretation of Statutes*[54] was prepared to unreservedly adopt the reasoning of the House of Lords, the editors of *Craies on Statute Law*,[55] and the fourth edition of Lord Halsbury's *The Laws of England*[56] were not. Furthermore, in the subsequent case of *Ward* v *Hollman*,[57] Lord Parker, CJ was willing to abandon the reasoning of the House of Lords to the extent of stating that it was "impossible" to look at the preamble of an Act as controlling the operative words unless those words were themselves first found to be ambiguous, an effective restatement of the two-tier test in the *Sussex Peerage Claim*.[58]

Finally, whatever the position in England, the old approach continues to enjoy the approval of the High Court of Australia. In *Wacando* v *Commonwealth of Australia*,[59] Gibbs CJ (with whom Aickin and Wilson JJ agreed), approved the rule in *Bowtell* v *Goldsbrough Mort & Co Ltd*,[60] stating that a preamble could not be referred to in order to affect the meaning of the clear and unambiguous words of the enactment.[61] Accordingly, it may be stated with a fair degree of certainty that the law is that the preamble of a statute can only be called in aid of the interpretation of that statute if the words of the relevant section are themselves determined to be ambiguous and uncertain.[62]

Having thus formulated the rule applicable to the use of preambles generally in the task of statutory interpretation, we may now consider the consequences that the application of such a rule would have upon the argument that the preamble to the Constitution Act operates as a direct and immediate bar to the unilateral secession of an Australian State. The assumption being made for the time being is that as an Imperial Act, the Constitution Act should be interpreted according to such ordinary rules of statutory interpretation.

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[51] (1884) 11 Cl & Fin 85.

[52] (1897) 2 Q B 242.

[53] *Supra* n 37; and see F Dwarris, *A General Treatise on Statutes* (2nd ed 1948) 503-504.

[54] P Longman (ed) *Maxwell on the Interpretation of Statutes* (12th ed 1969) 7.

[55] *Supra* n 25, 203-206.

[56] *Halsbury's Laws of England* (4th ed) xxvi, 494. 'The rule is that it [the preamble] may not be used to control of qualify enactments which are themselves precise and unambiguous, but if doubt exists as to the meaning of a particular enactment, recourse may be had to the preamble to ascertain the reasons for the statute, and hence the intentions of Parliament'.

[57] [1964] 2 QB 580, 587.

[58] (1884) 11 Cl & Fin 85.

[59] (1981) 148 CLR 1, 15-16; *contra* 23 *per* Mason J; see also D Pearce, *Statutory Interpretation in Australia* (1974), 51-52.

[60] (1906) 3 CLR 444.

[61] This conclusion is not affected by s 15AA of the Acts Interpretation Act 1901 (Cth), which requires the courts to prefer a purposive to a literal construction. In the first place, s 15AA would appear to be confined in operation to Acts of the Commonwealth Parliament. In the second, nothing in s 15AA, particularly in light of ss (2), authorizes any departure from the usual practice relating to preambles.

[62] *Supra* n 23.

The position may be put briefly. The fundamental result of the application of the ordinary rules of statutory interpretation is that the preamble could never operate as a direct prohibition of the unilateral secession of a State. The only way in which the preamble could be used would be to solve any ambiguity arising in a relevant part of the substantive enactments of the Constitution Act. Thus, the preamble would have, at best, a very secondary importance. It would first be necessary to identify a provision of the Constitution Act which could be regarded as being inconsistent with the unilateral secession of a State. In the event that this provision was ambiguous in its inconsistency, the preamble could then be used to resolve that ambiguity. But the preamble could not itself be utilized to give rise to any such inconsistency in the absence of an ambiguous provision in the substantive enactment. All this follows from the application to the preamble of the ordinary principles of statutory interpretation expressed in such cases as the *Sussex Peerage Claim* and *Bowtell* v *Goldsbrough Mort & Co Ltd*.[63] It would thus seem that statements such as those of Enright,[64] which appear to regard the preamble as a direct bar to unilateral secession, are quite incorrect.

The indirect use of the preamble to solve any ambiguity in the substantive provisions of the *Constitution Act* relevant to the issue of the unilateral secession of a State will be considered later, in the context of an analysis of the provisions in question.[65] It may be noted at this point, however, that severe problems will attend the use of the preamble even in this limited sense, and these problems will be considered in due course. Having seen that the preamble could not constitute a bar to unilateral secession of its own effect under the ordinary rules of statutory interpretation, it is now necessary to consider whether any special rules relating to the interpretation of constitutional instruments might enable it to have such an effect.

(iv) *The Use of the Preamble as Part of a Written Constitution*

What is undertaken here is not a detailed analysis of the principles guiding the judicial interpretation of the Constitution Act. Such an analysis is obviously far beyond the scope of this work. Rather, it is an examination of the question of whether, in considering the effect of the preamble to the Constitution Act, a court might be prepared to depart from the ordinary rules of statutory interpretation outlined above, and apply different criteria of construction which accorded to the preamble a more significant role regarding the issue of unilateral secession than it might otherwise play. Clearly, the court most likely to be concerned would be the High Court of Australia, and the basis for such a departure would be the status of the preamble as preceding a written Constitution.

It is first necessary to very briefly determine the basic principles to be applied by a court in the interpretation of the Constitution Act. The High Court has always had to deal with two contending influences, each competing for primacy. On the one hand, because the Constitution Act is a British statute, drafted according to the practices applicable to such

[63] (1906) 3 CLR 444.
[64] *Supra* n 5.
[65] Basically, ss (3) and (4); below 19-22.

statutes, it must be construed according to the ordinary rules of statutory interpretation developed by the British and Australian courts, and partially outlined above.[66] Such an approach leads to a literal and largely legalistic construction of the Constitution Act,[67] and would incidentally lead to the limited affect previously described being ascribed to the preamble. On the other hand, the Constitution Act is a document intended to provide in broad terms for the government of a nation, and thus must be construed liberally, so that it is capable of coping with changing circumstances. It is this second approach which might be thought to offer a possibility for the expansion of the scope of the preamble as a prohibition of unilateral secession.

While these two influences may be said to be in some degree in conflict with each other, neither has gained complete mastery. However, it is clear that the basic rule for the interpretation of the Constitution Act is that it will be construed fundamentally in accordance with the ordinary rules of statutory interpretation applicable to other British statutes. This basic rule will be tempered on occasions by the adoption of a less restrictive approach, but it nevertheless remains the cornerstone of the interpretation of the Constitution Act by the High Court.[68]

The High Court was not slow in announcing its adherence to the ordinary rules of statutory interpretation in its task of interpreting the Constitution Act.[69] In *Cooper* v *Commissioner of Income Tax (Queensland)*,[70] O'Connor J argued that there was no difference in the interpretation of the Constitution Act than in the interpretation of any other Act, and after some wavering over this principle, it was firmly entrenched in *Amalgamated Society of Engineers* v *Adelaide Steamship Co.*[71] In that case, it was made clear that the High Court would rely upon the ordinary rules of statutory interpretation in construing the Constitution Act, rather than upon any abstract theories as to the nature of a Federal Constitution.[72]

It cannot be denied, of course, that the full rigour of this rule has had to be modified. Thus in *Attorney General (NSW)* v *Brewery Employees Union*[73] Higgins J said:

> . . . although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a

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[66] For a brief outline of the contending influences operating upon the High Court, see C Howard, *Australian Federal Constitutional Law* (2nd ed 1972) 6-9.

[67] A slightly more liberal approach to the general question of statutory interpretation may be discerned in *Cooper Brooks (Wollongong) Pty Ltd* v *Federal Commissioner of Taxation* (1981) 147 CLR 297.

[68] Sir Owen Dixon went so far as to state in his inaugural speech as Chief Justice that he would be sorry to think that anyone might say that the interpretation of the Constitution was anything but legalistic; (1952) 85 CLR X.

[69] See *State of Tasmania* v *The Commonwealth and the State of Victoria* (1904) 1 CLR 329, 338 *per* Griffith C J.

[70] (1907) 4 CLR 1304, 1321.

[71] (1925) 28 CLR 128.

[72] In the *Engineers* case, (at 150), the High Court endorsed the decision of the Privy Council in *Webb* v *Outrim* [1907] AC 81, which held that the Constitution Act ought to be interpreted along 'the ordinary lines of statutory interpretation'.

[73] (1908) 6 CLR 569, 611-612.

> mechanism under which laws are made, and not a mere Act which declares what the law is to be.

In fact, in this classic passage Higgins J went a long way towards removing any conflict between the two views. His argument would seem to have been as follows. The ordinary rules of statutory interpretation should be applied to the Constitution Act. Such rules require that the court take into account the nature and scope of the Act, which in this case, is a written Constitution. Accordingly, the Constitution Act must be interpreted within the general context of its nature and purpose, and therefore widely, as a matter of ordinary statutory interpretation. The basic rule, however, is affirmed; the Constitution Act is to be interpreted according to the ordinary rules of statutory interpretation, taking into account, as they require, the nature of the act.

The application of this rule to the preamble of the Constitution Act inevitably leads to the conclusion that it would be regarded in the same way as the preamble of any other act — as an aid in the event of ambiguity, but not otherwise. Nothing in the rules laid down by the High Court for the interpretation of the Constitution Act could be used to justify it being given a wider effect. Indeed, in *Federated Saw Mills Employees* v *James Moore & Sons Pty Ltd*, Isaacs J dismissively referred to the preamble as merely containing "pious aspirations for unity".[74]

Even what may be termed the ('liberal') approach of Higgins J would not support the conclusion that the preamble could be construed so as to give it direct effect as a substantive prohibition upon unilateral secession. To give such an effect to the preamble would not be to interpret the Constitution Act according to the ordinary rules of statutory interpretation, taking care to accord the Act its widest effect, but rather to throw those rules to the four winds. Any requirement that the preamble be subject to the ordinary rules of statutory interpretation must lead to the conclusion that it may be used only in the case of ambiguity in the enacted provisions of the Constitution Act. To ascribe to it the effect of a substantive prohibition would necessarily be in direct conflict with these rules.

Resort might be had to some jurisprudential theory that the preamble contains the grundnorm of the Constitution Act, and that its terms are therefore incontrovertible.[75] However, such a theory would be most unlikely to find favour with the High Court in light of its consistent approach to the interpretation of the Constitution Act.[76]

One related matter remains to be considered, and this is the relevance of the Convention Debates of the 1890s. Might it be possible to enhance the role to be played by the preamble on the question of secession by

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[74] (1910) 8 CLR 465, 535.

[75] *Cf* G Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) 114; see also R Garran, *Prosper the Commonwealth* (1958), 200.

[76] As previously stated, the United States Supreme Court was prepared to hold in *Texas* v *White* 7 Wall 700 (1869), that the preamble to the United States Constitution prohibited secession with its reference to 'a more perfect Union'. Such a decision would be of little assistance in the Australian context. The American preamble is quite different from the preamble to the Constitution Act, as were the circumstances of American Federation from those which applied in Australia. Furthermore, the reasoning in this post-Civil War case is as much attributable to the fact of the Northern Victory as to any rules of statutory interpretation or Constitutional law.

reference to the reported discussion of the terms of that provision by the Founding Fathers?

While the relative unimportance of the Convention Debates has often been stressed by various members of the High Court,[77] it would seem clear that the Debates may be referred to in order to "see the evil to be remedied"; in other words, to identify the purpose, as opposed to the meaning, of a given constitutional provision.[78] The question thus arises as to whether such a use of the Convention Debates would hold any implications for the use of the preamble as a bar to the secession of a State.

It is submitted that it would not. In the first place, the purpose behind the insertion of the word "indissoluble" in the preamble is irrelevant to the issue of the permissibility of a court's referring to the preamble in the construction of the Constitution Act. Regardless of whether or not the Founding Fathers saw the preamble as a bar to secession, the ordinary rules of statutory interpretation already detailed prevent its use in this way.

Secondly, it is most unlikely that an examination of the Convention Debates would indeed lead to the conclusion that the purpose behind the inclusion of the word "indissoluble" in the preamble was that of ensuring the existence of an effective constitutional barrier to a unilateral secession. The attitudes of the Founding Fathers towards the delicate subject of secession have recently been analysed by Craven.[79] He concludes that in all probability the Founding Fathers did not insert their reference to the indissolubility of the Commonwealth through any hope that such a reference would thereby render secession illegal, but rather in an understandable desire to express their hopes for the future, and to assist in the creation of a dignified opening to the Constitution.[80]

In support of this conclusion, Craven refers to the fact that many of the Founding Fathers were themselves experienced lawyers and accomplished draftsmen, who would have been well aware of the rules of statutory interpretation which precluded any reference being made to the preamble in the interpretation of the Constitution. He therefore concludes that it is most unlikely that the Founding Fathers would have placed anything intended as a substantive constitutional prohibition within the dubious confines of the preamble.[81] Support for this view may be found in the subsequent utterances of the Founding Fathers themselves. As was previously stated, Isaac Isaacs (in 1910) dismissed the preamble as containing merely "pious aspirations for unity,"[82] while Patrick McMahon Glynn, writing in 1903, referred to the indissolubility recited in the preamble as:

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[77] See eg *The Municipal Council of Sydney* v *The Commonwealth* (1904) 1 CLR 208, 213-214 *per* Griffith CJ; *A-G (Vic) Ex Rel Black* v *The Commonwealth* (1981) 146 CLR 559, 577-578 *per* Barwick CJ.

[78] *Ibid*; see also *Re Pearson; Ex parte Sipka* (1983) 45 ALR 1, 6 *per* Gibbs CJ, Mason and Wilson JJ.

[79] *Supra* n 11.

[80] *Ibid* 296-297.

[81] *Ibid*.

[82] *Federated Saw Mills Employees* v *James Moore and Sons Pty Ltd* (1910) 8 CLR 465, 635.

> . . . one of those preliminary flourishes addressed to the conscience, which are to be found in instruments which suggest more than they accomplish.[83]

It would thus seem reasonably clear that the purpose behind the inclusion of the word "indissoluble" in the preamble was not the prohibition of the secession of a State, and that the Convention Debates thus hold no joy for anyone seeking to assert the preamble as a substantive legal barrier to such action.

The basic position of the preamble, therefore, remains unaltered by a consideration of the Constitution Act as a written constitution. Nothing in the rules to be applied in the interpretation of a written constitution would, as regards the preamble, justify a departure from the position which exists under the ordinary rules of statutory interpretation.

Conclusion

The argument that the preamble of its own effect prohibits the unilateral secession of a State is, therefore, ill founded. As a matter of statutory interpretation, the preamble could only be used to clarify an ambiguous section of the enacted provisions of the Constitution Act. Nothing in the dicta of the High Court regarding the interpretation of that Act as a written constitution as well as an ordinary statute affects the correctness of this proposition. As stated, the use of the preamble to solve any ambiguity in relevant sections of the Constitution Act will be dealt with during the consideration of those sections. Thus, the position is that even after a reading of the preamble, it may still be said that there is nothing in the Constitution Act which is as yet inconsistent with the unilateral secession of a State.

3 RELEVANT PROVISIONS OF THE ENACTMENT

(i) *Sections 3 and 4 of the covering clauses*

Having rejected the preamble as a possible source of direct inconsistency between the Constitution Act and the unilateral secession of a State, we may pass to a consideration of other relevant provisions of that Act. The first of these provisions to be encountered are ss 3 and 4 of the covering clauses, and these sections are in fact the crucial provisions of the Constitution Act bearing upon the question of unilateral secession. As these two sections are those under which the Australian colonies were actually bound together, and under which the Federal Commonwealth of which they became States was erected, their precise terms are obviously of critical importance in determining the validity of the action of a State in attempting to unilaterally dissolve the Federal bond thus imposed. It is therefore necessary to carefully consider the terms of both these sections.

The relevant portions of the two provisions read as follows:

> 3 It shall be lawful for the Queen . . . to declare by proclamation that, on and after a day therein appointed . . . the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed

[83] P Glynn, "Secession" (1906) 3 Commonwealth Law Review 193, 204.

thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

4 The Commonwealth shall be established and the Constitution shall take effect on and after the day so appointed.

The proclamation referred to in s 3 was made on 17 September 1900, and the day appointed was 1 January 1900.[84]

Of the two sections, s 3 is the more significant for present purposes. The gist of s 3, is that it empowered the Queen to declare by proclamation that from a certain date the people of the Australian colonies would be united in a Federal Commonwealth. The legal basis of this union necessarily derives from s 3, not from the proclamation. The only effect of the proclamation was to declare the commencement of the enacted law contained in s 3; it could not itself make law.[85] Thus, it is under s 3 that the colonies were united, and it would therefore appear that it is this section which imposes the Federal bond on the former Australian colonies, and ultimately makes them component parts of the Commonwealth of Australia.[86]

However, although it united the Australian colonies in a Federal Commonwealth from the date designated in the proclamation, s 3 apparently did not actually establish that Commonwealth itself. This was achieved not by s 3, but by s 4, which provided for the establishment of the Commonwealth upon the same day as that given in the proclamation of the union of the colonies. Thus, ss 3 and 4 contain a rather cumbersome two-step process for the establishment of the Australian Federation. As the first step, s 3 provides for the union of the colonies in, but not the establishment of, a Federal Commonwealth. The two concepts of union and establishment are treated as being distinct. The second step, contained in s 4, is the actual establishment of the Commonwealth. Both events occur at the same moment, that moment being appointed in the same proclamation, but they are separate, the first deriving in law from s 3, the second from s 4.[87] The combined effect of the two sections and the proclamation is, however, clear enough. On and from 1 January 1901, the people of the former Australian colonies are united in a Federal Commonwealth under the name of the Commonwealth of Australia, which Commonwealth is established upon the same day. The actual union of the colonies into the Federal Commonwealth is pursuant to s 3; that Commonwealth is established by s 4.

The wording of these two sections, but more particularly that of s 3, is crucial in determining the validity of the unilateral secession of an Australian State. As has been shown, it is s 3 which binds the people of the once colonies, now States, into the Federation which is established

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[84] Commonwealth of Australia Gazette 1901, 1.

[85] J Quick and R Garran, *supra* n 3, 331; *Ex parte Chavasse, Re Grazebrook* 34 LJ Bk 17.

[86] *Cf* W Moore, *supra* n 9, 603; J Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (1919) 125; Enright, *supra* n 4, 287; United Kingdom, "Report of the Joint Select Committee to Inquire into the Receivability of the Petition of the State of Western Australia to Secede from the Commonwealth of Australia," Parliamentary Papers (1935) HL 75, 76 para 6.

[87] *Cf* J Quick, *supra* n 55 at 215; J Quick and R Garran, *supra* n 3, 343; W Moore, *supra* n 8, 603; but see C Howard, *supra* n 66, 3.

by s 4. When asking the question of whether or not the repudiation of federation by a State through its unilateral secession would be consistent with the express terms of the Constitution Act, one is therefore necessarily asking whether such action by a State would be consistent with s 3, which imposed federation upon that State in the first place.

In answer to this question, it is submitted that the unilateral secession of a State would be fundamentally inconsistent with the words of s 3. This is so, because s 3 clearly provides that the colonies 'shall be united in a Federal Commonwealth' on and after a certain day. No term is set for that union, and the words used are those of unlimited futurity. Once the Australian colonies were bound in a Federal Commonwealth, and became States of that Commonwealth, none could seek to escape the burden thus imposed without running foul of s 3. That section imposes a continuing union upon the Australian States, and any attempt at unilateral secession would by definition conflict with its terms, in that it would clearly involve the dissolution of the union referred to.[88] It may also be noted that because the unilateral secession of a State would be inconsistent with s 3, it would likewise be inconsistent with s 4. This follows from the fact that s 4 establishes "the Commonwealth" on and after 1 January 1900. The entity thus established by s 4 is obviously the "Commonwealth of Australia" composed of the union of the Australian colonies effected by s 3,[89] and this is made clear by the definition of the phrase "The Commonwealth" in s 6. As the unilateral secession of a State would involve the dissolution of this Commonwealth, whose establishment would thus not continue "on and after" 1 January 1900, it would be inconsistent with s 4 as well as with s 3. However, it is upon the immediate inconsistency with s 3 that this article will concentrate.

Any argument that a unilateral secession was not in fact inconsistent with s 3 would probably seek to exploit the fact that s 3 makes no reference to the "indissolubility" or permanence of the federal union for which it provides. Such an argument would seek to draw an inference from the silence of the section on this point that the Union was, in some sense, not intended to be permanent. This argument would, however, be incorrect. It cannot be denied that the inclusion in s 3 of phrases such as "permanently united" or "an indissoluble Federal Commonwealth" would undoubtedly have put the matter beyond all question, and the omission of such phrases by the Founding Fathers may be deplored.[90] But they were not strictly necessary. The words of s 3, viewed alone, can ultimately bear only one meaning. That meaning is that the Australian colonies, now states, were united pursuant to the proclamation under s 3 in 1901, and most importantly, by the force of that section they continue to be united. The unqualified words "shall be united" impose an unqualified union. Nothing in s 3 gives any impression that the union it imposes is intended to be anything other than permanent and lasting. The language of the

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[88] This would seem to be the view of W Moore, *supra* n 8, 603, and A Castles, *supra* n 9, 177. The comments of the Western Australian Secession Committee would also seem to be explicable solely upon this basis; see Parliamentary Papers (1935) HL 75, 76 para 6.

[89] *Cf* R Lumb, "'The Commonwealth of Australia' — Constitutional Implications" (1979) 10 F L Rev 287, 294.

[90] See G Craven, *supra* n 11, 298-299.

section, cast as it is in terms of unlimited futurity, impels one to this conclusion. Until s 3 is amended or repealed in conformity with the law, the Australian states are part of the Commonwealth.[91] Exactly the same impression is to be gained from the words of s 4, establishing as it does the Commonwealth composed of those states "on and from a certain day". Thus, the unilateral secession of a State would undoubtedly conflict with s 3 of the Constitution Act.

It may be noted that if this view of s 3 is accepted, there will be no necessity to look to the preamble as the source of an even indirect inconsistency between the Constitution Act and the unilteral secession of a State.[92] The essence of the view outlined above is that s 3 is not in any real sense ambiguous, and that the unilateral secession of a State would conflict with it upon its very face. There would thus be neither the need nor the occasion to resort to the preamble, which would therefore be superfluous in this connection.

It might be thought that the argument for the indissolubility of the Australian Federation could be strengthened by admitting the ambiguity of the admittedly terse words of s 3, and then supplementing them by reference to the word 'indissoluble' in the preamble. However, it is submitted that quite apart from the fact that such a step would be entirely unnecessary, it would for a number of reasons potentially weaken s 3 as a bar to unilateral secession, rather than enhance it. The first of these reasons lies in the fact that the rule of statutory interpretation to the effect that a preamble may only be resorted to in the case of an ambiguity in the enacted words has been extended and elaborated upon by the courts. One of these extensions is to the effect that where the meaning of preamble is itself open to doubt, it cannot be used to affect the words of an enacted section, even if these words have themselves been held to be uncertain.[93] Accordingly, if one were to first admit the ambiguity of s 3 in order to bring in the preamble, and were then to discover that the preamble was itself ambiguous, one would simply have weakened s 3 to no advantage whatsoever.

That the preamble is ambiguous could conceivably be asserted. It might be argued, for example, that the word "indissoluble" is intended to directly qualify not the word "Commonwealth", but the word "federal." If this were the case, the preamble would look not to a Commonwealth that was indissoluble itself, but rather to a Commonwealth which was indissolubly "federal" in character. If the preamble were to be regarded as ambiguous in this sense, then it could not be referred to at all, even if s 3 were also held to be unclear.[94]

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[91] As one of the covering clauses, s 3 can only be amended or repealed by the Parliament of the United Kingdom; see J Quick and R Garran, *supra* n 3, 989; C Howard, *supra* n 6, 2-3; but see J Thomson, "Altering the Constitution: Some Aspects of Section 128" (1983) 13 F L Rev 323, 333-334.

[92] Nor, therefore, would there be any need to refer to the Convention Debates regarding the question of secession on this point.

[93] *Eg Powell* v *Kempton Park Racecourse Co* [1897] 2 QB 242, 269.

[94] Alternatively, it might be argued that the preamble was merely a pious aspiration to which no real meaning could be ascribed; *cf Federated Saw Mills Employees* v *James Moore and Sons Pty Ltd*, (1910) 8 CLR 465, *per* Isaacs J.

The second reason for not abandoning the certainty of s 3 in favour of the preamble, relates to the question of just what a consideration of s 3 and the preamble read together might be taken to reveal as to the true intention of the framers of the Constitution Act. If, on the basis that s 3 is ambiguous, one places it beside the preamble in order to determine what light may be shed on the question of unilateral secession by their comparison, the immediately obvious fact is that while the phrase reads "indissoluble Federal Commonwealth" in the preamble, it becomes merely "Federal Commonwealth" in s 3.

While one might argue from such a comparison that the word "indissoluble" ought to be imported into s 3, a directly opposite argument of some force simultaneously arises. Given that the word "indissoluble" is used in the essentially prefatory preamble, but is not used in the enacted provision of s 3, does this not show by implication a legislative intention to exclude the concept of indissolubility from that very section of the Constitution Act which achieved union? To argue thus is merely to say that a preamble may shed light on an enacting provision in more ways than one. Significantly, in *Attorney-General* v *HRH Prince Ernest Augustus of Hanover*,[95] the House of Lords held that the fact that the qualification contained in the preamble had not been placed in the enacted parts of the statute in question was an indication not of an oversight, lack of clarity or ambiguity, but rather of a legislative intention to exclude that qualification from the enacted section.[96] In this connection also, therefore, recourse to the preamble might not only prove most unhelpful in arguing against a right of unilateral secession, but actually provide material for the assertion of such a right.[97]

The third negative factor with regard to the usefulness of the preamble, arises from an analysis of the usual use of preambles as aids in the interpretation of ambiguous enacted sections. Almost invariably, preambles have been used only to expand or contract the class of persons or things to which the Act in question applies, and usually the latter. For example, in *Attorney-General* v *HRH Prince Ernest Augustus of Hanover*,[98] the question was whether the relevant Act was to apply to all lineal descendants of the Electress Sophie, or whether the preamble could be used to contract that class so as to include only those descendants born in her lifetime. Likewise, in *Emanuel* v *Constable*,[99] the issue was whether the provisions of the Act concerned applied generally to wills, or whether the preamble could contract the scope of the Act so that it applied only to wills devising land.

In the case of the preamble to the Constitution Act, no mere contraction or expansion of scope would be involved. Rather, to insert the word

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[95] [1957] AC 436.

[96] Such an embarrassing conclusion would be supported by a comparison of the well drafted s 3 with the somewhat haphazard preamble. Whereas s 3 carefully makes reference to the possible entry of Western Australia the preamble simply fails to refer to that State at all. Accordingly, s 3 is far more resonant of careful thought by the framers of the Constitution Act than the preamble.

[97] If, on the other hand, s 3 was held to be unambiguous, the preamble could not be used to create an ambiguity; *supra* n 85.

[98] [1957] AC 436.

[99] (1827) 3 Russ 436.

"indissoluble" into s 3, assuming that section to be ambiguous, would be to import into the Constitution Act a principle of grave and fundamental importance. On the assumption that s 3 is in fact ambiguous, it is to be doubted whether a portion of the statute extraneous to its enacted parts could be utilized to import a provision of so vital a character into the Constitution Act, in the absence of any other legislative direction. Thus, in view of these limitations upon the acceptable use of the preamble, to admit the ambiguity of s 3 of the Constitution Act in order to bring it into play would be both an unnecessary and a counter-productive course to adopt. In any event, the view taken here is that s 3, quite independently of the preamble, is fundamentally inconsistent with the unilateral secession of a State.

One further issue arises specifically in relation to the effect of s 3, and for the sake of convenience it may be dealt with here. It is sometimes said that s 3 of the Constitution Act "expended" its force at Federation, and had no continued operation thereafter. If this were true, it would presumably follow that technical inconsistency with the words of s 3 would not attract the consequences outlined earlier in this chapter with regard to the operation of s 5 of the Constitution Act, and s 2 of the Colonial Laws Validity Act. In short, the force of s 3 being expended, it would provide no bar to the unilateral secession of a State. It is obviously necessary for the purpose of this discussion to determine the correctness of this argument.

The view that s 3 expended its force at Federation has been put by Lumb in relation to the possible use of s 128 of the Constitution to amend the covering clauses of the Constitution Act.[100] Professor Lumb did not analyse the words of the section to support his proposition, and cited no supporting authorities. However, Enright[101] seems to agree with Lumb, arguing that once the proclamation under s 3 had been made, the juristic force of that section was "spent".

It is submitted that upon an ordinary reading of the words of s 3, this argument is patently incorrect. Section 3 provides that the people of the colonies shall be united "on and after a certain day". These are, as has been noted, words of futurity. The words used are not "on" a certain day, which might indicate a particular and therefore past moment of time, but "on and after" that day. These words thus signify the imposition of a continuing unity, commencing at a particular moment of time, but extending indefinitely into the future. Put another way, the words of s 3 provide for both an immediate act of union, which necessarily occurred and expired at the same moment, and also for a continuing state of union between the Australian States, which extends indefinitely beyond that moment and applies at this present time. Accordingly, s 3 remains an operative provision of the Constitution Act, imposing as it does this continuing bond of union. As the unilateral secession of a State would involve the breach of this bond, it would be inconsistent with the Constitution Act. The same analysis applies to s 4.

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[100] R Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 F L Rev 148, 159.

[101] *Supra* n 5, 287; *cf* C Howard, *supra* n 6, 3.

There is ample support for the view that s 3 has a continuing operation. This continued operation seems to have been assumed both by the Royal Commission into the Constitution,[102] and the Joint Select Committee which enquired into the receivability of the petition of Western Australia to secede.[103] Likewise, Marshall in his *Parliamentary Sovereignty and the Commonwealth*[104] takes the view that the force of s 3 is not expended. Again, Moore specifically adopts the position that s 3 is of continuing force, and would thus bar the dissolution of the Commonwealth.[105] It would thus appear that the view that the force of s 3 was expended at Federation is not correct, and that the effect of that section would therefore be that the unilateral secession of an Australian State would be inconsistent with the provisions of the Constitution Act.

(ii) *Other Provisions*

It must be noted, however, that the unilateral secession of a State would also be inconsistent with at least one other provision of the Constitution Act, although that inconsistency would admittedly ultimately be dependent upon s 3. That provision is s 51 of the Constitution. Section 51 provides that the Commonwealth Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to some thirty-nine enumerated matters, including such matters as defence,[106] coinage[107] and external affairs.[108]

Section 51 thus gives to the Commonwealth Parliament legislative jurisdiction over "the Commonwealth" in respect of the subject matters which it contains. "The Commonwealth" is defined by s 6 to mean "the Commonwealth of Australia as established under this Act". This is the Commonwealth which is provided for in s 3 and established in s 4, "the body politic, consisting of the territories, populations and governments of the States".[109] Clearly, therefore, s 51 gives to the Commonwealth Parliament the power to make laws having force in the territories of the States enumerated in s 3, provided only that those laws relate to one of the subjects contained in that section.

It follows from this, that any law enacted by the Parliament of a State which sought to deny or restrict the power of the Commonwealth Parliament to pass legislation applying in that State pursuant to s 51 would be inconsistent with that section, and thus with the Constitution Act itself, with all the consequences in law which this would involve.

It can hardly be denied that legislation purporting to effect the unilateral secession of a State would presumably be seeking to do precisely this. The essence of any secession legislation would be that after a certain date,

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[102] Commonwealth of Australia, *Report of the Royal Commission on the Constitution of the Commonwealth* (1929) 230.

[103] Above n 9, 76, para 6.

[104] *Supra* n 6.

[105] *Supra* n 5.

[106] Section 51(vi).

[107] Section 51(xii).

[108] Section 51(xxix).

[109] R Lumb, "The Commonwealth of Australia — Constitutional Implications" (1979) 10 FL Rev 287, 294; see also Constitutional Act s 6: "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

the power of the Commonwealth Parliament to legislate for the State concerned would cease altogether. Such legislation would thus be entirely inconsistent with s 51, containing as it does an affirmative grant of power to the Commonwealth to legislate, within its limits,[110] for the States whose names appear in s 3.

It is, of course, clear that this inconsistency between the unilateral secession of a State and s 51 of the Constitution is ultimately derived from s 3. It is that section which effectively, via s 6 and s 4, defines "the Commonwealth" as being composed of the six former colonies whose names it recites, and thus subjects the States to the legislative powers of the Commonwealth Parliament contained in s 51.[111] The inconsistency of s 51 with unilateral secession is, therefore, a derivative of, and dependent upon, s 3.

Further possible inconsistencies might arguably arise as a consequence of the definition of the phrase "the States" in s 6. Under that section, the States are (*inter alia*):

> . . . such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia as for the time being are parts of the Commonwealth . . .

While the unilateral secession of a State would not appear to be immediately inconsistent with s 6 itself, which apparently contemplates that one of the original States could, at some future time, cease to be part of the Commonwealth,[112] an indirect inconsistency might well occur with one of the provisions of the Constitution proper which impose liabilities, duties or restrictions upon "the States".

Such a provision is s 73 (ii), which gives the High Court of Australia jurisdiction to hear appeals from the Supreme Court "of any State". If a State were to pass a law for its own unilateral secession, such a law would almost certainly seek to expressly or impliedly exclude the possibility of an appeal from the Supreme Court of that State to the High Court. At the time when the law for unilateral secession would be passed, the State would still be undeniably "for the time being a part of the Commonwealth". Accordingly, the Supreme Court of that State would be a Court to which s 73 (ii) would apply. To the extent that the law for unilateral secession conflicted with s 73 (ii), it would thus be inconsistent with the Constitution Act, with all the consequences that this would entail. Similar arguments might well be equally applicable to such sections as s 75 (original jurisdiction of the High Court), s 92 (freedom of interstate trade), and s 114 (the raising of military forces by the States). Once again, it may be noted that this possible inconsistency with provisions of the Constitution proper is ultimately dependent upon the terms of one of the covering clauses, in this case s 6. Were the name of the State concerned to be omitted from that section, no resultant inconsistency with any of the above provisions of the Constitution would occur.

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[110] *Ibid.*

[111] Section 51 gives the Commonwealth Parliament power to legislate for the Commonwealth. Section 6 defines the Commonwealth as being the Commonwealth of Australia 'as established under this Act'. Section 4 clearly establishes that Commonwealth as being physically composed of the territories of the Colonies set out in s 3.

[112] Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed 1976) 542.

It may be noted that there might be one further legal obstacle in the way of a State which sought to embark upon the course of unilateral secession. This obstacle could arise in the following way. The legislative powers of the State Parliaments are granted by their various Constitution Acts.[113] The formulations of these grants differ, some conferring power to make laws for the "peace order and good government" of the State concerned,[114] others giving competence to legislate "for and in" the relevant state.[115] However, all are variations upon the single theme that the Parliament of a State is possessed of a general power to make laws "for" the State under its control.[116]

It could conceivably be argued that a law of a State which purported to provide for the secession of that State would not be a law for, say, "the peace order and good government of New South Wales", or a law "in and for Victoria", but rather a law for the peace, order, and good government of the Commonwealth. Such an argument would base itself upon the fact that a law for secession, involving as it would the partial dissolution of the Commonwealth, would be a law which was primarily of reference to the Commonwealth, rather than of reference to the State which sought to secede. It could then be argued that as the Parliaments of the States have no power with reference to the Commonwealth, such a law would simply be void as being *ultra vires*. Such an argument would presumably derive some comfort from the views expressed by Dixon J. regarding the legislative powers of the States in *In re Foreman & Sons Pty Ltd; Uther* v *Federal Commissioner of Taxation*.[117] However, given the view taken in this article regarding the clear inconsistency between the secession of a State and the provisions for the Constitution Act, it is not necessary to pursue this argument further.

It is conceivable, of course, that all these apparent difficulties could be discharged by the presence in the Constitution Act of a provision expressly authorizing the unilateral secession of a State. However, there would appear to be only one provision of the Constitution Act which could even tentatively be raised as authorizing the secession of an Australian State. That provision is s 107, which reads as follows:

> 107. Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively rested in their Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the admission or establishment of the State, as the case may be.

It is extremely difficult to devise an interpretation of s 107 which would support the validity of the unilateral secession of a State, but such an interpretation might be advanced as follows. Section 107 preserves the powers of a former Colonial Parliament in the Parliament of the State which it became.[118] Obviously, the old Colonial Parliaments never had the

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[113] R Lumb, *supra* n 2, 80.
[114] Eg Constitution Act (NSW) s 5; Constitution Act (WA) s 2.
[115] Eg Constitution Act (Vic) s 16
[116] R Lumb, *supra* n 2, 80; *R* v *Burah* (1878) 3 App Cas 889; *Powell* v *Apollo Candle Co* (1884) 10 App Cas 282.
[117] (1947) 74 CLR 508, 530-531.
[118] See *James* v *Commonwealth* [1936] AC 578.

power to pass legislation for their colonies to secede from the Commonwealth, if only because the Commonwealth did not then exist.[119] However, the old Colonial Parliaments were competent to effect the entry of their respective colonies into the Commonwealth. Accordingly, there is a corresponding power, preserved by s 107, to take them out again. The fallacy of such an argument is, however, immediately apparent. The Colonial Parliaments never in fact had the legal power to effect the entry of the colonies into the Federation provided for under the Constitution Act. That entry was effected by the legislative will of the Parliament of the United Kingdon.[120] Thus, the argument outlined above must fail. It seems clear that there is no other provision of the Constitution Act which could in any way be pointed to as authorizing the unilateral secession of a State, and thus resolving the previously mentioned inconsistencies between the terms of that Act and such action.

4 CONCLUSION

The position after a consideration of the relevant provisions of the Constitution Act would thus appear to be as follows. As a matter of primary importance, it is clear that s 3, and thereby s 4, is fundamentally inconsistent with the unilateral secession of a State. This is so without any elaboration of s 3 by the preamble. It would likewise seem clear that an indirect effect of s 3, when taken together with ss 4 and 6, is that s 51 of the Constitution is derivatively inconsistent with the existence of a right of unilateral secession. In addition, the definition given to the phrase "the States" by s 6 would probably give rise to further consequent inconsistencies with other provisions in the body of the Constitution. Accordingly, it is apparent that the purported unilateral secession of an Australian State would conflict with the terms of the Commonwealth of Australia Constitution Act, and for this reason be invalid and of no effect in law. Whatever their political status, therefore, the ritual threats of secession occasionally made by disgruntled State Premiers may confidently be consigned to the realms of constitutional fantasy.

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[119] *Cf In re Foreman & Sons Pty Ltd*; *Uther* v *Federal Commissioner of Taxation* (1947) 74 CLR 508, 530-531 *per* Dixon J.

[120] See *Worthing* v *Rowell & Muston Pty Ltd* (1969) 123 CLR 89, 125 *per* Windeyer J; *Victoria* v *The Commonwealth* (1971) 22 CLR 353, 370-371 *per* Barwick C J.