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Constitutional Recognition of Indigenous Australians in a Preamble

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EXECUTIVE SUMMARY

In 2010 the Commonwealth Government promised to hold a referendum on ‘indigenous constitutional recognition’ at or before the next election. How such recognition should be given in the Constitution is a matter under consideration by an expert Panel appointed by the Commonwealth. One proposal is that Indigenous Australians be recognised in the existing Preamble to the *Commonwealth of Australia Constitution Act 1901* (UK) or a new preamble to be inserted in the Constitution. Another proposal is that a statement of values be included in a new preamble. This Report addresses these options.

Chapter 2 deals with the background and history of the existing Preamble in the *Commonwealth of Australia Constitution Act*, including the references to God, the Crown and the indissoluble federation. It considers the various proposals that have been made in the past for Indigenous recognition in the Preamble, and discusses how this has been achieved in three State Constitutions.

Chapter 3 provides a close analysis of preambles – their different purposes and how they have been used in statutory interpretation. A preamble, for example, may simply set out introductory facts. It may explain the objectives of those who passed the Act. It may be intended to persuade people to obey the law or explain how it should be enforced. It may have a political or symbolic role to fill. Chapter 3 then discusses the role of a preamble in a Constitution and the risks involved in extending beyond introductory facts to statements of values, beliefs and fundamental principles. Can a preamble that incorporates values and beliefs reach beyond platitudes? Can it really define the nation and our common values or beliefs, or is a quest for shared values and beliefs futile and bound to exclude or reject the values of minorities? Do we want to freeze existing values in a preamble and will they stand the test of time?

The critical issue with a preamble, however, is how the High Court might use it in the future in interpreting the Commonwealth Constitution. Australian precedents are not very helpful here, because the current Preamble doesn’t address values and beliefs and is the Preamble to a British Act of Parliament passed over a century ago, leaving its relevance limited. A new preamble, inserted in the Constitution, which contained broad values, beliefs or fundamental principles, might be used in quite different ways. Chapter 3 notes the international trend in courts to giving constitutional preambles a substantive effect. It provides four case studies of how the courts have used and developed the preambles of the United States, Canada, India and France.

Chapter 4 analyses the legal issues concerning the amendment of the existing Preamble and the insertion of a new preamble in the Constitution itself. It considers the source of power to amend the existing Preamble. While there are doubts as to whether a constitutional referendum under s 128 of the Constitution could amend the existing Preamble, it could certainly be amended by legislation passed by the Commonwealth at the request of all the State Parliaments. This route, however, would confound the expectations of the people for a referendum and breach the Prime Minister’s promise, so

a referendum would appear to remain a political requirement, even though it might not in itself be effective. Amending the existing Preamble would also make little sense unless it was intended to explain substantive changes made in the text of the Constitution. It is not possible to change the original intent of the framers of the Constitution by making a later change to the Preamble. To what extent should an amended Preamble be used to change the interpretation of provisions in the text of the Constitution that have not been expressly amended?

Different issues arise if a new preamble is to be inserted in the text of the Constitution. From a structural point of view, it would be placed after the words of enactment, within the substantive text of the Constitution, with the possible result that it would be held to be legally enforceable unless it was made clear otherwise. An issue also arises as to whether the two preambles could co-exist and which ought to take priority. The greatest difficulty, however, would be in settling the text of a new preamble, as there will be great pressure to include recognition of numerous groups (eg war veterans), causes (eg the environment) and institutions (eg local government). It could result in an unseemly and divisive political auction for constitutional recognition

Chapter 5 examines more closely the potential implications of a new or amended preamble and how they might be limited, either through careful wording or the inclusion of a clause that limits the use of the preamble in constitutional interpretation. On the one hand there are genuine concerns about how a preamble might be used by the courts, especially if it includes rights or broad principles such as equality or human dignity. On the other hand, a clause limiting the effect of a preamble is likely to be regarded as undermining the purpose and standing of the preamble. The challenge is to balance both of these concerns, so that the preamble is not perceived as a Trojan Horse intended to smuggle substantive rights into the Constitution that would not be approved by the people if expressly asked, or as an empty gesture devoid of meaning or substance.

Chapter 6, in conclusion, asks what is intended to be achieved by recognition of Indigenous Australians in the Constitution. If substantive rights are sought, they should be included in the text of the Constitution and the preamble should then be used to explain and introduce them. The preamble should not be disconnected from the text of the Constitution and promise more than it can legitimately deliver. What is critical to any constitutional reform proposal is that there be transparency in intent and clarity in meaning.

CHAPTER 1 – INTRODUCTION

During negotiations on the formation of a new government from the hung Parliament in 2010, the Prime Minister, Julia Gillard, entered into agreements with the Greens and the independent, Andrew Wilkie, that included a promise that a Gillard Government would work collaboratively with others towards holding a referendum during the 43rd Parliament on ‘indigenous constitutional recognition’.¹ If that promise is to be met, a referendum will be held before or at the next election, which is due to be held by 30 November 2013 at the latest.²

The Commonwealth Government has established an ‘expert panel’ to lead community consultation and report to the Government in December 2011 on possible options for constitutional change to give effect to Indigenous constitutional recognition.³ The Panel is required to have regard, amongst other things, to the form of constitutional change, the implications of any proposed changes and advice from constitutional law experts. The Panel issued a Discussion Paper in May 2011. It set out the four principles that the Panel has adopted to guide its assessment of any proposal:

- It must contribute to a more unified and reconciled nation.
- It must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples.
- It must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums.
- It must be technically and legally sound.⁴

There are many ways in which Indigenous Australians could be recognised in the Constitution. The expert panel’s Discussion Paper sets 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 s 51(xxvi) of the Constitution, the repeal of s 25 of the Constitution and the insertion of an agreement-making power in the Constitution.⁵

¹ Agreement between the Australian Greens and the ALP, 1 September 2010, para. 3(f); and Agreement between the Hon Julia Gillard and Mr Wilkie, 2 September 2010, para. 3.2(f). The Coalition had also earlier promised a referendum on Indigenous recognition at the 2013 election: P Karvelas and L Hall, ‘Coalition to put Aboriginal Recognition to a Referendum’, *The Australian*, 10 August 2010.

² This is the latest possible date for a general election. The earliest possible date for a joint Senate and House election is 3 August 2013: <http://www.aec.gov.au/FAQs/Elections.htm#dates> [viewed 23 August 2011]. Normally an election would be held at some time between these dates. However, there is also a significant possibility of an earlier election, given the Government’s minority status and the possibility of a loss of confidence in the Government or the House becoming unmanageable.

³ Commonwealth, ‘Constitutional Recognition of Indigenous Australians – Expert Panel Terms of Reference’: http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Documents/Constitutional_recognition6.pdf [viewed 23 August 2011].

⁴ *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p 16.

This paper, however, is confined in its scope to the proposal to recognise Indigenous Australians in a preamble to the Constitution. 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.’⁶ 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.’⁷

In exploring proposals for Indigenous constitutional recognition in a preamble, this paper does not deal with the political, social and philosophical issues concerning whether Indigenous Australians *should* be recognised in the Constitution. Rather, it deals with the legal issues involved from a number of different perspectives. It is therefore directed primarily at the Panel’s fourth principle – that the proposal be legally sound.

Chapter 2 of this report 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.

Chapter 3 examines the role of preambles in statutes and Constitutions and the use made of them by the courts. It includes comparative material, examining how constitutional preambles have been used in the United States, Canada, India and France as well as Australia.

Chapter 4 deals with the legal, structural and technical issues concerning the amendment of the existing Preamble or the insertion of a new preamble, including the power to make these changes and the method of its exercise.

Chapter 5 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 a constitutional preamble.

⁵ *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, pp 17-20.

⁶ *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p 17.

⁷ *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p 17.

CHAPTER 2 – HISTORY AND BACKGROUND

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* (UK), 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 Constitutional Conventions in the 1890s. The 1891 draft of the Preamble, while similar to the final version, referred to the *colonies* agreeing to unite,⁸ rather than the 'people' of the colonies in the final version. The change from the colonies to the people of the colonies is in part the consequence of the change in the manner by which that agreement was to be achieved – from the legislative agreement of the Australasian colonies to an agreement of the people through referenda. It is also, in part, a recognition of the power and significance of the words 'We, the people' in the United States Constitution.⁹ In Australia, implications and inferences have been drawn from the fact that the Constitution derives from the agreement of the people, rather than the colonies.¹⁰

⁸ See also the draft preambles prepared by Andrew Inglis Clark and Charles Kingston in 1891, both of which refer to the uniting of the Australian colonies, not the people: J Williams, *The Australian Constitution – A Documentary History*, (MUP, 2005), pp 80 and 117; and J Williams, 'The Republican Preamble: Back to the Drawing Board?' (1999) 10 PLR 69, 70.

⁹ J A La Nauze, *The Making of the Australian Constitution*, (MUP, 1972) p 128, noting that the change was suggested by Mr Quick in the drafting committee with reference to the US example. Quick's other suggestion that the words 'invoking Divine Providence' be inserted, was rejected.

¹⁰ See, eg: *Victoria v Commonwealth* (1971) 122 CLR 353, 370 (Barwick CJ); 395 (Windeyer J); *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-7 (Deane J); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 442 (Deane J); *Breavington v Godleman* (1988) 169 CLR 41, 123 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 484 and 486 (Deane and Toohey JJ); *Capital*

Another interesting change made in the drafting is that the 1891 draft referred to the colonies agreeing to unite ‘in one Federal Commonwealth under the Crown’,¹¹ whereas the final version added the description ‘indissoluble Federal Commonwealth’. This was a reflection upon the American civil war and the ‘fearful cost’ at which the principle of indissolubility was established in the United States.¹² William McMillan argued at the 1897 Convention that what was needed was ‘not a temporary, but an indissoluble union, and I trust that that which was left out of the preamble of the American Constitution will be included in ours.’¹³ The drafting committee responded by inserting the word ‘indissoluble’.¹⁴ The word ‘indissoluble’ was therefore included to make it clear that the union was intended to be permanent and that secession was not permissible.

An early 1891 draft included a statement in the preamble that ‘the powers and privileges and territorial rights of the several existing Colonies shall not be diminished, except in respect of such surrenders as are necessary or incidental to the powers and authority of the Commonwealth’.¹⁵ This was later removed, presumably because it was more appropriate as a substantive clause than an expression in the preamble. It is now reflected in s 107 of the Constitution.

The most significant change, however, was the insertion of ‘humbly relying on the blessing of Almighty God’. This was a consequence of many public petitions which sought the recognition of God in the Constitution.¹⁶ The framers of the Constitution were reluctant to insert a reference to God in the Constitution, initially voting against the inclusion of a reference to ‘invoking Divine Providence’.¹⁷ The objection was made that it makes religion ridiculous to have the form without the substance and that inserting such words in the Constitution would do more harm than good.¹⁸ Edmund Barton thought that ‘there are some occasions on which the invocation of the Deity is more reverently left out than made’ and that it was not for the framers of the Constitution to say whether voters were invoking the blessing of God or not when voting in the referendum. He concluded

Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 41-2 (Brennan CJ).

¹¹ Note that the 1891 drafts by Andrew Inglis Clark and Charles Kingston both referred to unity under the Crown of the United Kingdom of Great Britain and Ireland. This element was included in all drafts from the start. See: J Williams, *The Australian Constitution – A Documentary History*, (MUP, 2005), pp 80 and 117.

¹² J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 293; and Helen Irving (ed), *The Centenary Companion to Australian Federation* (CUP, 1999) p 410.

¹³ *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, p 217, per Mr McMillan.

¹⁴ Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) pp 21-2.

¹⁵ J Williams, *The Australian Constitution – A Documentary History*, (MUP, 2005), p 167.

¹⁶ 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 *The New Federalist*, 78, 79-80; Scott Bennett, *The Making of the Commonwealth* (Cassell Australia Ltd, 1971), p 106.

¹⁷ *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, p 1741.

¹⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, p 1186, per Mr Douglas.

that ‘We cannot say that the voters have invoked Divine guidance on the subject, even after that act has occurred; how much less can we say it now by way of prediction?’¹⁹

Nonetheless, popular support for a reference to God was taken up by the colonial legislatures, with most suggesting the inclusion of an acknowledgement of ‘Almighty God as the Supreme Ruler of the Universe’ and the source of Government. The Victorian Parliament suggested the insertion of the phrase ‘in reliance upon the blessing of Almighty God’. It was this suggestion, when later proposed by Mr Glynn (with the qualifying recognition of humility) that was finally reluctantly approved by the Constitutional Convention at the Melbourne session in 1898.²⁰ Dr Quick pointed out that the words ‘could be subscribed to not only by Roman Catholics and Protestants, but also by Jews, Gentiles, and even by Mahomedans’. They were intended to apply universally – not just to Christians.²¹ Others were concerned, however, that such a reference to God could lead to the Commonwealth Parliament legislating on the subject of religion.²² This led to the inclusion of s 116 in the Commonwealth Constitution, limiting the Commonwealth’s power to enact laws with respect to religion.

Quick and Garran observed that the preamble contains eight affirmations and declarations:

- i. The agreement of the people of Australia.
- ii. Their reliance on the blessing of Almighty God.
- iii. The purpose to unite.
- iv. The character of the Union – indissoluble.
- v. The form of the Union – a Federal Commonwealth.
- vi. The dependence of the Union – under the Crown.
- vii. The government of the Union – under the Constitution.
- viii. The expediency of provision for the admission of other Colonies as States.²³

Quick and Garran noted that some of these statements find legislative expression in the Constitution, while others do not. Of those not included in the substance of the Constitution, some were simply statements of fact (eg that the people agreed to unite and that in doing so they relied on the blessing of Almighty God). Quick and Garran also noted the impropriety of ‘attempting to frame a clause designed to give legislative recognition of the Deity.’²⁴ The indissolubility of the union and its dependence on the Crown, however, were regarded by Quick and Garran as more than statements of fact.

¹⁹ *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, p 1186, per Mr Barton.

²⁰ Glynn apparently noted in his diary that its insertion was chiefly intended to gain greater public support for federation: M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 385.

²¹ *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, p 1736, per Mr Quick. On the intent to embrace all monotheistic religions, see: Helen Irving (ed), *The Centenary Companion to Australian Federation* (CUP, 1999) p 410.

²² *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, p 1741, per Sir John Downer.

²³ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 286.

Rather, they comprised statements of fundamental principle intended to affect the interpretation of the Constitution.

Quick and Garran speculated that because s 128 of the Constitution permitted its local amendment, the framers decided to include a reminder at the front of the Constitution 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.²⁵ 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.’²⁶

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 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 preamble of instruments which suggest more than they achieve’.²⁷ 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.²⁸

²⁴ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 287.

²⁵ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 294. See also: *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ).

²⁶ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 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 Attorney-General (Qld)* (1917) 23 CLR 457, 474 (Isaacs J). See also: M Kirby, ‘The Australian Referendum on a Republic – Ten Lessons’ (2000) 46 *Australian Journal of Politics and History*, 510, 513-4.

²⁷ Patrick McM Glynn, ‘Secession’ (May-June 1906) 3 *Commonwealth Law Review* 193, 204. See also: Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) pp 27-30 on the framers’ intent in inserting the word in the preamble.

²⁸ George Winterton, ‘An Australian Republic’ (1988) 16 MULR 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; M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 390. See also: Stephen Gageler and Mark Leeming, ‘An Australian Republic: Is a Referendum Enough?’, (1996) 7 PLR 143, 146. Note, however, the issue in India, discussed below, as to whether the power to alter the Constitution extends to the alteration of its Preamble.

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.²⁹ 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*.³⁰

In the early 1990s, ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner all supported constitutional recognition of Indigenous Australians.³¹

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’.³² 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 a preamble to include an ‘acknowledgment of the unique contribution of the indigenous peoples to Australia’.³³

In 1999 the Prime Minister, John Howard, proposed that a new preamble be inserted in the Constitution itself, 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

²⁹ See also calls for the negotiation of a treaty or makarrata. See, eg, ‘The Barunga Statement’ (1988) 1(33) *Aboriginal Law Bulletin* 16; and Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (Federation Press, 2005).

³⁰ *Final Report of the Constitutional Commission*, (AGPS, Canberra, 1988), pp 101-10.

³¹ 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.

³² *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 1, pp 46-7.

³³ Constitutional Centenary Foundation, ‘*We the people of Australia...*’ *Ideas for a New Preamble to the Australian Constitution*, (CCF, February 1999) pp 5-6.

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'.³⁴ 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.³⁵ The referendum question failed, with 60% voting against it and only 39% 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'.³⁶

During the 2007 election campaign, the Prime Minister, John 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.³⁷ Kevin Rudd, as Opposition Leader, offered bipartisan support to this proposal, regardless of the outcome of the election.³⁸ Despite support for this proposal at the 2020 Summit³⁹ and its inclusion in the ALP's National Platform,⁴⁰ no substantive action appears to have been taken on this proposal during the Rudd Government's term in office. The Gillard Government, however, has now established an Expert Panel on Constitutional Recognition of Indigenous Australians to report upon proposals for constitutional reform in December 2011.

Recognition of Indigenous Australians in State Constitutions

Before there was recognition of Indigenous Australians in State Constitutions, such recognition occasionally arose in the preambles to State legislation concerning Aboriginal people. An example is the *Aboriginal Land Rights Act 1983* (NSW). Its preamble provides:

³⁴ *Constitution Alteration (Preamble) 1999*. For a discussion on the history of the draft preamble, see: M McKenna, A Simpson and G Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 *UNSWLJ* 382.

³⁵ P H Lane, 'Referendum of 1999', (1999) 73 *ALJ* 749, 750.

³⁶ *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (December 2000), Ch 10, Recommendation 3.

³⁷ The Hon J Howard, 'The Right Time: Constitutional Recognition for Indigenous Australians', Sydney Institute, 11 October 2007.

³⁸ K Rudd and J Macklin, 'Media Statement', 11 October 2007.

³⁹ *Australia 2020 Summit – Final Report* (Department of the Prime Minister and Cabinet, Canberra, May 2008), pp 341-2.

⁴⁰ ALP National Platform and Constitution 2009, Chapter 11, para. 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.'

WHEREAS:

- (1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines:
- (2) Land is of spiritual, social, cultural and economic importance to Aborigines:
- (3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:
- (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation:

More recently, the State Constitutions of Victoria, Queensland and New South Wales have been amended to recognise Indigenous Australians.⁴¹ 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.⁴² 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 3/5 majority of both Houses of Parliament.⁴³

The New South Wales *Constitution Act 1902* (NSW) was amended in 2010⁴⁴ to include the following provision:

2 Recognition of Aboriginal people

- (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State’s first people and nations.

⁴¹ See also the preamble to the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the recommendation of the WA Law Reform Commission to include a provision in the WA Constitution recognizing the unique status of Aboriginal people to Western Australia: WA Law Reform Commission, *Aboriginal Customary Laws*, Report No 94, 2006, pp 73-4.

⁴² See: *Constitution Act 1975* (Vic), s. 1A; and *Constitution Act 1902* (NSW), s. 2.

⁴³ 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 s 6 of the *Australia Acts*. It is doubtful whether the States have any other capacity to entrench laws. See further: A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), Chapter 5.

⁴⁴ *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW).

- (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
- (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
 - (b) have made and continue to make a unique and lasting contribution to the identity of the State.
- (3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

This section was inserted after a process involving the preparation of a draft Bill, a discussion paper, public submissions upon that Bill and consultation, leading to a revised Bill that was passed by both Houses.⁴⁵ Unlike the Victorian provision which refers only to recognition by the Parliament, the NSW provision undertakes parliamentary recognition ‘on behalf of the people of New South Wales’.

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’.

This Preamble was not originally included in the 2001 Act. While the Queensland Constitutional Review Commission recommended in favour of the inclusion of a preamble,⁴⁶ its recommendation was not adopted. Later, the Legal, Constitutional and Administrative Review Committee decided against a preamble for the time being. The reasons it gave included the following:

- the public input received by the Committee demonstrates insufficient support for a preamble to the Queensland Constitution;
- uncertainty exists as to how such a preamble should or might be used to interpret the Constitution, particularly if that preamble contained statements of values or aspirations;
- concerns exist about the time, effort and public money required to develop and enact a preamble and whether these resources might be better directed to other competing needs for reform...;

⁴⁵ For a more detailed outline of the process, see: Gareth Griffith, ‘The Constitutional Recognition of Aboriginal People’, (December, 2010) *Constitutional Law and Policy Review* 70.

⁴⁶ Queensland Constitutional Review Commission, *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*, Brisbane, February 2000, pp 28-9.

- there is a lack of consistency between the content of the Queensland Constitution and the proposed aspirational elements of the preamble;
- given the nature of the consolidated Queensland Constitution, a preamble enacted now could not set out the reasons for the enactment of the provisions in their original form; and
- given that the adoption of a preamble by the people of Queensland would be conditional on their broad support for the wording of that preamble, significant and prolonged consultation would be required to develop the form and text.⁴⁷

In 2008, however, the Queensland Government asked a parliamentary committee to draft a preamble which included an aspirational statement on the commemoration of 150 years since the founding of Queensland. The Law, Justice and Safety Committee drafted a preamble, as required, but noted that a majority of public submissions were against the inclusion of a preamble.⁴⁸

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, 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 recognition of Indigenous Australians in their Constitutions, although in both cases these provisions are 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.⁴⁹ New South Wales has also included in that list any right to review an administrative action.⁵⁰ 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.'⁵¹

⁴⁷ Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 23.

⁴⁸ Qld Law Justice and Safety Committee, *A Preamble for the Constitution of Queensland 2001*, Report No 70, September 2009, p 15. See also: Gareth Griffith, 'The Constitutional Recognition of Aboriginal People', (December, 2010) *Constitutional Law and Policy Review* 70, 73.

⁴⁹ *Constitution Act 1975* (Vic), s. 1A(3); *Constitution of Queensland 2001* (Qld), s. 3A.

⁵⁰ *Constitution Act 1902* (NSW), s. 2(3).

CHAPTER 3 – THE ROLE OF A PREAMBLE AND ITS INTERPRETATION

The role of a preamble in ordinary legislation

A preamble ‘walks in front’ of a statute.⁵² It is an introductory statement that may fulfil a variety of roles. First, its function may be ‘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’.⁵³ For example, the *Papua New Guinea Independence Act 1975* (Cth) recites in its preamble how Papua New Guinea came to be administered by Australia, the role of the League of Nations mandate and the United Nations Charter, the vote of the House of Assembly for independence and the intention that Papua New Guinea become an independent Sovereign nation.⁵⁴ The type of facts included in a preamble may include the events to which the law is a response, the details of inter-governmental negotiations and agreements which led to the making of the law⁵⁵ or the consultations that have occurred in the lead up to the enactment of the law.⁵⁶ As Roach has noted, a ‘description of the processes of consultation can add legitimacy to the legislation and affirm to the relevant parties the important role that they played in the legislation’, giving them ‘a sense of ownership and participation in the legislative process’.⁵⁷

Secondly, its function may be to explain the purpose of a statute or the intention of Parliament in enacting it. It can be, therefore, the ‘key to open the minds of the makers of the Act and the mischiefs which they intended to redress’.⁵⁸ It explains why the law

⁵¹ Megan Davis and Zrinka Lemezina, ‘Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?’ (2010) UNSWLJ 239, 261.

⁵² George Winterton, ‘A New Constitutional Preamble’ (1997) 8 PLR 186. See also the debate about whether a preamble ‘walks before the Constitution’ in: *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, [545] (Shelat and Grover JJ) and [1524] (Khanna J)

⁵³ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 284; Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (Little, Brown & Co, Boston, 2nd ed, 1902) p 92. See also: S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, London, 7th ed, 1971) p 199.

⁵⁴ See also the history of the governance of Norfolk Island, the Cocos Islands and Christmas Island, set out in the preambles to the *Norfolk Island Act 1979* (Cth), the *Cocos (Keeling) Islands Act 1955* (Cth) and the *Christmas Island Act 1958* (Cth).

⁵⁵ See, for example the preambles of: *Financial Agreement Validation Act 1929* (Cth); *Canberra Water Supply (Googong Dam) Act 1974* (Cth) and *Sewerage Agreements Act 1974* (Cth), all of which refer to inter-governmental agreements within Australia. See also the preambles of: *Privacy Act 1988* (Cth), the *Antarctic Treaty (Environment Protection) Act 1980* (Cth), the *Historic Shipwrecks Act 1976* (Cth) and the *World Health Organization Act 1947* (Cth) regarding the implementation of international agreements, treaties or recommendations.

⁵⁶ See, eg, the preamble to the *Aboriginal Affairs (Arrangements with the States) Act 1973* (Cth), which refers to consultation with the States.

⁵⁷ Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 145.

⁵⁸ *Stowel v Lord Zouch* (1816) 1 Plowden 352, 369; 75 ER 536, 560. See also: J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 284.

was enacted and what it was intended to achieve.⁵⁹ It may be directed at those who are to implement the law (eg Ministers and Governments),⁶⁰ enforce the law (eg the police) or apply it (eg the courts) by informing them of what is intended⁶¹ or how the law ought to be applied.⁶²

Thirdly, the function of a preamble may be to persuade people, so that they understand, respect and obey the law. Its function may therefore be educative⁶³ as well as exhortatory. Plato, in his dialogue on *The Laws*, distinguished between the text of the law, which imposes obligations and duties by way of ‘dictatorial prescription’ and the preface to the law, being the preamble, which persuades people to obey the law by placing them in a more co-operative frame of mind towards the aim of the law.⁶⁴ A preamble may therefore provide an opportunity, particularly where the subject-matter of a law is controversial, to explain to the people, in language that they understand,⁶⁵ what the law is intended to achieve, in order to gain their support and co-operation. A Canadian example is the *Nisga’a Final Agreement Act* 2000 (Canada), the preamble of which explained that ‘the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is of significant social and economic importance to Canadians’.⁶⁶ An Australian equivalent is the *Aboriginal and Torres Strait Islander Act* 2005 (Cth), the preamble of which declares the intention of the people of Australia to rectify the consequences of past injustice, the ‘wish’ of the Australian people to reach a ‘real and lasting reconciliation’ with Aboriginal people and Torres Strait Islanders and the ‘firm objective’ of the Australian people that policies be developed that will overcome the disadvantage of Aboriginal people and Torres Strait Islanders to facilitate the enjoyment of their culture.

The potential problem with such a use of a preamble, however, is that the preamble may become little more than a political slogan and may ‘oversell’ the legislation if it promises

⁵⁹ See, for example, the preambles to the *Builders Labourers’ Federation (Cancellation of Registration) Act* 1986 (Cth); the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth); and the *Agricultural and Veterinary Chemicals Act* 1994 (Cth).

⁶⁰ See, eg, the preamble to the *Supported Accommodation Assistance Act* 1994 (Cth) which expresses Parliament’s intention as to how the Minister and Government should act.

⁶¹ See, eg, the preamble to the *Housing Assistance Act* 1996 (Cth) which contains a detailed list of Parliament’s various intentions in enacting the Act and the factors it had taken into account.

⁶² See, eg: the preamble to *Sydney Harbour Federation Trust Act* 2001 (Cth) which states that the Trust ‘will transfer suitable land’ to New South Wales; and the preamble to the *Crimes At Sea Act* 2000 (Cth).

⁶³ See, eg, the preamble to the *Australian Citizenship Act* 2007 (Cth) which is intended to educate immigrants about the effect of citizenship.

⁶⁴ Plato, *The Laws*, (trans Trevor J Saunders, Penguin Books, 1970) p 185.

⁶⁵ See Orgad on the educational role of a short preamble written in accessible language: Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, 722. Note Roach’s criticism that preambles usually fail in their educational task because the language used is often archaic (eg commencing with the word ‘Whereas’) and is not accessible to ordinary people: Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 141. See also Poplawska’s complaint that the Polish Preamble showed that ‘devotion to traditional, pompous and sometimes not sufficiently clear language prevailed over care for clarity of the language of the law’: Ewa Poplawska, ‘Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland’ (2011) 52(1) *Acta Juridica Hungarica* 40, 41.

⁶⁶ For this and other Canadian examples, see: Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 142.

far more than the substance of the law achieves. This is particularly the case where a preamble sets out aspirations which are not matched by practical measures in the substantive part of the law. The risk is that the preamble produces the opposite effect from that desired, by causing cynicism and distrust. Roach has given as an example the preamble to a free-trade agreement which expressed the intention to ‘strengthen the unique and enduring friendship’ between the two countries and promote ‘productivity, employment, financial stability and the improvement of living standards’.⁶⁷

Fourthly, a preamble may be used to respond to an event or a court decision⁶⁸ in a way that makes clear the intent of the Parliament. In Canada, for example, there have been several occasions where preambles have been used in legislation responding to a Supreme Court decision (usually in relation to the application of the *Canadian Charter of Rights and Freedoms*) to explain the Parliament’s intent.⁶⁹ The preamble might also recognise the different, and possibly conflicting, purposes of the Parliament. For example, the preamble to the *War Crimes Act 1945* (Cth) states that the Act is a response to concerns that war criminals might have come to Australia. It further states that it is appropriate that persons accused of war crimes be brought to trial but that it is ‘essential in the interests of justice’ that they be given a fair trial. It therefore indicates the type of balancing of public interests that the Parliament undertook in enacting the law.

Fifthly, a preamble may have a political role. As Lord Thring noted, ‘[s]ometimes a preamble is inserted for political reasons when the object of an Act is popular and admits of being stated in a telling sentence or sentences’.⁷⁰ It might therefore be used to justify an enactment by reference to political policy. However, the political role of preambles can be taken too far. In Germany, during the Third Reich, preambles were used as a means of informing the public of the ideological basis for laws ‘and were sometimes of more importance for the interpretation of a concrete act of legislation than the wording of the bill itself.’⁷¹

Finally, a preamble may have a symbolic role. It may be used to give recognition to a group or to attempt to satisfy the concerns of groups that they have been previously overlooked or badly treated, without making any substantive changes to the law. The intention is to redress grievances and ‘create social capital and a sense of belonging’.⁷²

⁶⁷ *Canada-United States Free Trade Agreement Implementation Act 1996* (Canada). See: Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 148.

⁶⁸ See, eg, the preamble to the *Native Title Act 1993* (Cth).

⁶⁹ Examples first arose in the 1990s, when the courts struck down laws because they did not adequately protect the rights of the accused while the Parliament was more concerned with protecting the rights of victims. See: Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 138.

⁷⁰ Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (Little, Brown & Co, Boston, 2nd ed, 1902) p 93.

⁷¹ In some cases the preambles conflicted with the substance of the legislation and appeared to be intended to undermine the legislation: Micheal Silagi, ‘The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law’, (2011) 52(1) *Acta Juridica Hungarica* 54, 55.

⁷² Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 150.

The recognition of Indigenous Australians in a preamble,⁷³ or indeed local government or multiculturalism or war veterans or others falls into this category. Roach sums it up by observing:

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.⁷⁴

The potential effect of a preamble may be even more damaging if the form of recognition given is half-hearted or undermined by qualifications. One of the most extraordinary preambles to a Commonwealth law is the preamble to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* which states that the *Victorian* Government acknowledges certain things, including that traditional Aboriginal rights to certain areas are deemed never to have been extinguished, but then goes on to state that 'the Commonwealth does not acknowledge the matters acknowledged by the Government of Victoria' but has agreed to the enactment of the Act. This surely undermines both the interpretative and symbolic role of the preamble.

The interpretative use of a statutory preamble

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 statutory 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.⁷⁵ 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'.⁷⁶ In *Craies on Statute Law*, the

⁷³ See, eg, the preamble to the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth).

⁷⁴ Kent Roach, 'The Uses and Audiences of Preambles in Legislation' (2001) 47 *McGill Law Journal* 129, 149.

⁷⁵ Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) pp 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, London, 7th ed, 1971) pp 201-2: 'if the meaning of the enactment is clear and unequivocal without the preamble, the preamble can have no effect whatever'; and *Re Tan Boon Liat* (1976) 2 *Malayan Law Journal* 83, 85 (Abdoolcader J): 'Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it.'

⁷⁶ *Wacando v Commonwealth* (1981) 148 CLR 1, 15-16 (Gibbs CJ). See also: *Salkeld v Johnson* (1848) 2 Exch 256; 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 where the Earl of Halsbury stated that 'if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment'.

warning is given ‘that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital’.⁷⁷

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.⁷⁸ The preamble forms part of the ‘whole’ and should therefore be consulted as a guide to the ‘purpose’ of the statute.⁷⁹ Mason J put this view in *Wacando v Commonwealth* 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.⁸⁰

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.⁸¹

Parliament, by making clear its intention, can therefore potentially ‘use preambles as a vehicle to engage in an enterprise that is somewhat closer to adjudication than legislation’.⁸² The extent to which a Parliament can instruct a court upon how it is to interpret a law remains a matter of dispute.⁸³

⁷⁷ *Powell v The Kempton Park Racecourse Co Ltd* [1899] AC 143, 185 (Lord Davey); *Re Tan Boon Liat* (1976) 2 *Malayan Law Journal* 83, 85 (Abdoolcader J); S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, London, 7th ed, 1971) p 202.

⁷⁸ 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.

⁷⁹ *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J); M Handler, B Leiter and C 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 MULR 184, 189; and Elmer A Driedger, *Construction of Statutes*, (Butterworths, Toronto, 2nd ed, 1983) p 146.

⁸⁰ *Wacando v The Commonwealth* (1981) 148 CLR 1, 23 (Mason J).

⁸¹ See the detailed argument put by Winckel on this point: Anne Winckel, ‘The Contextual Role of a Preamble in Statutory Interpretation’ (1999) 23 MULR 184, 187-91.

⁸² Kent Roach, ‘The Uses and Audiences of Preambles in Legislation’ (2001) 47 *McGill Law Journal* 129, 153.

⁸³ For example, in the 1990s there was an attempt to include a s 15AAA in the *Acts Interpretation Act* 1901 (Cth), stating that where a provision would have both an invalid application and at least one valid application, it is the Parliament’s intention that the provision is not to have the invalid application but to have every valid application. This proposal was dropped after comments by judges in oral argument before the High Court that it may take the role of the Parliament too far in instructing judges on the exercise of the judicial power. See: A Blackshield and G Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) p 580.

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.⁸⁴

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.

The role of a preamble in a Constitution

Is the role of a preamble in a Constitution greater than, or at least different from, that of a preamble to a statute? It has often been argued that a preamble is more significant in a Constitution than a statute.⁸⁵

Like statutory preambles, constitutional preambles may have a number of different purposes, leading to problems arising from the fact that they seek to serve conflicting masters.⁸⁶ Some parts of a preamble may be intended to be symbolic, some parts may be intended to express fundamental constitutional principles or agreed values and other parts might be purely aspirational. To what extent can a court make use of a preamble and does it need to distinguish between those parts of a preamble that are intended to express aspirations and those that are intended to express existing principles and values? Where a preamble to a Constitution refers to matters not dealt with in the text of the Constitution, must it be ignored by a court, because it is of no aid in addressing a constitutional ambiguity, or can it be used by a court, as in Canada, to ‘fill in the gaps’ in the written Constitution and to support constitutional implications that limit legislative and executive powers?

⁸⁴ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, Legal Books reprint 1995) p 284. See also: *Wacando v The Commonwealth* (1981) 148 CLR 1, 15-16 (Gibbs CJ); and Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988) Vol 1, pp 102-3.

⁸⁵ Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 2; Lorne Sossin, ‘The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*’ (2003) 52 UNBLJ 227, 230; and J W Penney and R J Danay, ‘The Embarrassing Preamble? Understanding the “Supremacy of God” and the *Charter*’ (2006) 39 UBCL Rev 287, 296.

⁸⁶ J Williams, ‘The Republican Preamble: Back to the Drawing Board?’ (1999) 10 PLR 69. Williams, at 70-1, attributed four potential roles to a constitutional preamble: (1) an historical record; (2) normative statements about the nature of the polity; (3) aspirational statements; and (4) inspirational statements.

If a preamble simply states facts, such as those facts that caused the Constitution to come into being, then the issue of how it might be interpreted does not arise. Craven argued at the 1998 Constitutional Convention that a ‘preamble should recite statements of fact – euphonic, useful and uniting statements of fact’. He rejected the inclusion of vague terms and values in the preamble, both for the reason of how they might be interpreted in the future and because they would set up arguments that would prove fatal to the referendum, as had happened in 1988.⁸⁷

The notion that a constitutional preamble should contain values, beliefs and aspirations has largely derived from the United States Constitution and other later Constitutions, such as those of India, Ireland and South Africa, which used the preamble to their Constitution to mark a major change in the constitutional life of the nation, such as union, independence or the end of apartheid. Sir Harry Gibbs noted that such a momentous change has not occurred in Australia and that the ‘circumstances that may have made it appropriate to include a statement of beliefs and values in other Constitutions do not exist in Australia’.⁸⁸

Nonetheless, 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.⁸⁹

The Queensland Legal, Constitutional and Administrative Review Committee, after discussing the role of statutory preambles, observed:

However, a preamble to a constitution may have a more extensive role. It may set out the beliefs and values which are accepted by the people in adopting the

⁸⁷ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, pp 472-3.

⁸⁸ Sir Harry Gibbs, ‘A Preamble: The Issues’ *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11), 88.

⁸⁹ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, pp 520-1; and G Winterton, ‘The 1998 Constitutional Convention: A Reprise of 1898?’ (1998) 21(3) UNSWLJ 856, 862. See also the view that a preamble ‘can capture and chart, in a pithy and quotable form, the history and aspirations of a nation’: M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 382.

Constitution. Accordingly, matters which might be included in a constitutional preamble include the source, authority and history of the constitution, the system of government it establishes, and the principles or values it espouses. A preamble to a constitution might also seek to unify and promote shared commitment to that constitution. It can be symbolic, inspirational or aspirational in nature.⁹⁰

A number of criticisms have been levelled at the notion of including shared values and aspirations in the Constitution. The first is the concern that the exercise will sink to a statement of platitudes with no real meaning. The Queensland Constitutional Review Commission, for example, while accepting that a constitutional preamble should ‘affirm certain widely-held values’, made this conditional on the avoidance of ‘platitudes, excessive controversy and lengthy shopping lists that are likely to date quickly’.⁹¹ A subsequent parliamentary committee was asked by the Queensland Government to include an ‘aspirational’ statement in a draft preamble regarding the 150th anniversary of the establishment of Queensland. John Pyke, in his submission to the Committee, observed: ‘Constitutional principles belong in [a preamble]; general back-slapping or day-dreaming do not’.⁹²

Jeremy Webber has disputed the usefulness of attempts in a preamble to ‘define’ the nation:

I think that we should not attempt to use our Constitution to try to define what all Australians believe, or what this country is all about. Such efforts almost always misfire. Either they end up overdefining the nation, so that they include things that all Australians manifestly do *not* believe, or they veer into platitudes, so that they affirm values that are common to any industrialised democracy.... If we try to define Australia, we are very likely to end up with a caricature, a dumbed-down version of what this country is all about.⁹³

Another criticism is that the quest for shared values is futile. At best, a preamble could only set out values shared by a majority, excluding the strongly held views of others, so that rather than being a unifying force, a preamble may be a means of excluding or rejecting the values of minorities. Webber has argued that ‘[w]e do *not* share the same values, and we do not have to in order to be part of the same political community’. He considered that it would be a ‘pretty bland country’ if we did.⁹⁴ The Australian Institute of Aboriginal and Torres Strait Islander Studies also argued in its submission to the Queensland Legal, Constitutional and Administrative Review Committee that ‘[b]y only

⁹⁰ Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 4.

⁹¹ Queensland Constitutional Review Commission, *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*, Brisbane, February 2000, p 29.

⁹² Submission No 178 to Qld Law Justice and Safety Committee, *A Preamble for the Constitution of Queensland 2001*, Report No 70, September 2009, p 11.

⁹³ Jeremy Webber, ‘Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform’ (1999) 21 *Sydney Law Review* 260, 267.

⁹⁴ Jeremy Webber, ‘Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform’ (1999) 21 *Sydney Law Review* 260, 274.

asserting the values of the majority we privilege their values and risk alienating and ignoring the rights and interests of minorities'.⁹⁵

A further concern is that a preamble will freeze values in the Constitution. Community values change over time and any values listed in a preamble might soon become out of date and an inappropriate source of interpretation for a court. If the framers of our Constitution had included their values and beliefs in the Constitution in 1901, which might have included racial discrimination and discrimination against women, would we want our Constitution to be interpreted in their light today? If not, is it not rather presumptuous to expect that the beliefs and values of today will stand the test of time and ought to be entrenched in the Constitution?

Winterton has argued that any principles or values included in a preamble must 'be enduring and not foreseeably liable to obsolescence. The preamble should not read like a catalogue of political correctness.'⁹⁶ Sir Harry Gibbs has also argued that it 'would be unwise to incorporate in a Preamble ideas which may be in favour today, but out of favour tomorrow, thus attempting to force future generations to accept notions current at present.'⁹⁷ In India, for example, the Preamble was amended to state that India is a socialist nation. There may come a time when this statement ceases to match the political reality.

The most commonly expressed concern, however, is that the inclusion in a 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 wish, including finding entrenched implications that limit existing legislative and executive powers. Experience in the United States, Canada, India and France, as discussed below, is enough to give some credence to this concern. In the United States, the inclusion in the preamble of a large number of aspirational objectives, many of which conflict, has given judges a constitutional smorgasbord from which to pick and choose whichever constitutional objective suits their own view in a particular case. In Canada, the Supreme Court has gone so far as to use fundamental principles discerned from the preamble to 'fill in the gaps' in the written Constitution. In India, an Act of Parliament or even a constitutional amendment that conflicts with the 'basic structure' of the Constitution, as set out in the Preamble, may be held invalid. In France, the originally non-binding Preamble has become, by judicial interpretation, a positive source of legal rights. 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

⁹⁵ Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 17.

⁹⁶ George Winterton, 'A New Constitutional Preamble' (1997) 8 PLR 186, 189.

⁹⁷ Sir Harry Gibbs, 'A Preamble: The Issues' *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11) 95.

constitutional interpretation. The courts rely, more and more, on preambles as sources of law.⁹⁸

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.’⁹⁹ He also observed that Constitutions are essentially compromises between different principles. The specific provisions in a Constitution are reflections of the balancing of competing principles and interests undertaken by the framers of the Constitution. It is wrong to treat constitutional provisions as ‘inadequate expressions of more general principles’ that may be discerned from a preamble.¹⁰⁰ Corbett has added that the fact that Constitutions are compromises also means that a Constitution rarely expresses a single point of view and that the courts should not try to fix that which cannot be fixed.¹⁰¹

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 in its interpretation of the values and principles inserted in a constitutional preamble. It is potentially a way of leveraging the people into constitutional changes that they would not otherwise accept.

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.¹⁰²

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

⁹⁸ Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, 715.

⁹⁹ Jeffrey Goldsworthy, ‘The Preamble, Judicial Independence and Judicial Integrity’, (2000) 11(2) *Constitutional Forum* 60, 62.

¹⁰⁰ Jeffrey Goldsworthy, ‘The Preamble, Judicial Independence and Judicial Integrity’, (2000) 11(2) *Constitutional Forum* 60, 63.

¹⁰¹ S M Corbett, ‘Reading the Preamble to the *British North America Act, 1867*’ (1998) 9(2) *Constitutional Forum* 42, 45.

¹⁰² Jeremy Webber, ‘Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform’ (1999) 21 *Sydney Law Review* 260, 270. See also: Leslie Zines, ‘Preamble to a Republican Constitution’ (1999) 10 PLR 67, 68, where he states that individual rights belong in the body of the Constitution and that this applies to the subject of equality.

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.¹⁰³

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’.¹⁰⁴ 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.

Interpretation of the Preamble to the United States Constitution

The Preamble of the United States Constitution, while not long, is aspirational in nature¹⁰⁵ and contains a number of competing objects. It provides:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The United States Supreme Court has been largely restrained in its use of the Preamble to the United States Constitution.¹⁰⁶ The primary authority is *Jacobson v Commonwealth of Massachusetts*¹⁰⁷ where Harlan J observed:

Although that preamble indicates the general purposes for which the people obtained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless,

¹⁰³ Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 14, quoting from a submission by Mr Geoffrey Fisher.

¹⁰⁴ J Williams, ‘The Republican Preamble: Back to the Drawing Board?’ (1999) 10 *PLR* 69, 72.

¹⁰⁵ On the non-legal symbolic value of the Preamble to the United States Constitution, see: Craig Lawson, ‘The Literary Force of the Preamble’ (1988) *Mercer Law Review* 879.

¹⁰⁶ Indeed, the Supreme Court has been subject to criticism for being too restrained in its use of the preamble: M Handler, B Leiter and C Handler, ‘A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation’ (1990) 12 *Cardozo Law Review* 117, 122-3; and Eric Axler, ‘The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights’ (2000) 24(2) *Seton Hall Legislative Journal* 431.

¹⁰⁷ 197 US 11 (1905).

apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom.¹⁰⁸

This much-cited passage has been used as authority for the proposition that the Preamble is not itself the source of substantive rights.¹⁰⁹ Justice Harlan gave as authority for this proposition, Story's *Commentaries on the Constitution*. Story, however, also contended that it was proper to resort to the preamble where the text of the Constitution was ambiguous. He observed:

It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.¹¹⁰

Story argued that if there were two equally plausible interpretations of a constitutional power, one restrictive and one more liberal, if one were to promote the common defence and one would defeat it, then the interpretation that promoted the object of the Preamble should be adopted.¹¹¹

The difficulty with this approach, however, has been that the various objects set out in the Preamble are vague and broad and their objects are often incompatible.¹¹² Himmelfarb, in analysing all the cases dealing with the preamble, has noted that in most cases the same phrase can be and has been used to reach opposite conclusions. For example, in relation to the object of forming 'a more perfect union', Himmelfarb observed:

Justices who read the phrase as an indication that the Framers' goal was merely to form a *more perfect* union than had existed under the Articles of Confederation can use it to defeat federal claims and vindicate the powers of state governments. Justices who read the phrase as an indication that the Framers' goal was to fundamentally transform the less perfect Confederation into a more perfect *Union* can use it to justify broad federal powers and defeat competing state claims.¹¹³

¹⁰⁸ 197 US 11, 22 (1905)

¹⁰⁹ Note Himmelfarb's assertion that in at least two earlier cases, *Hepburn v Griswold* 75 US (8 Wall) 603 (1870) and *Mahon v Justice* 127 US 700 (1888), Justices of the Supreme Court had used the preamble as a direct source of a limitation of federal and State legislative power: Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 175, 185 and 207. Since *Jacobson*, however, the Supreme Court has confined its use of the preamble to rhetoric or the interpretation of ambiguous provisions. For a list of cases in which the preamble has been used as an interpretative aid, see: M Handler, B Leiter and C Handler, 'A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation' (1990) 12 *Cardozo Law Review* 117, 120-1.

¹¹⁰ Joseph Story, *Commentaries on the Constitution of the United States* (2nd ed, 1851), p 326.

¹¹¹ Story, *Commentaries on the Constitution of the United States* (2nd ed, 1851), pp 327-8.

¹¹² Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 131.

¹¹³ Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 166.

The meaning of the Preamble's objects, given their generality, is in the eye of the beholder. For example, the object of securing 'the blessings of liberty for ourselves and our posterity' has been used both to support the 'war on terror'¹¹⁴ on the one hand and civil liberties for the military,¹¹⁵ on the other. It has also been used to support the right to an abortion¹¹⁶ and the right to life.¹¹⁷

Not only do single objects lead to conflicting constitutional interpretations, but the different objects set out in the preamble may themselves conflict. Himmelfarb has pointed out that when it comes to conflicts between individual rights and the rights of democratic majorities through their legislatures, different outcomes can occur depending upon which objects of the Preamble are employed:

[W]hile "establish[ing] Justice" and "secur[ing] the Blessings of Liberty" are liberal concepts – which is to say they have to do with individual rights – "insur[ing] domestic Tranquility," "provid[ing] for the common defence," and "promot[ing] the general Welfare" are majoritarian concepts – which is to say, they have to do with the exercise of government power.

Thus, while some Justices have invoked the preamble's "establish Justice" and "secure the Blessings of Liberty" language to support a broad interpretation of the Bill of Rights in general and those provisions of the Bill of Rights dealing with criminal procedure in particular, other Justices have invoked the preamble's "insure domestic Tranquility" language to support a *narrow* interpretation of those same provisions.¹¹⁸

After undertaking a close analysis of the Supreme Court's use of the preamble, Himmelfarb 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. Thus in addition to the problem of determining with any degree of confidence the precise meaning of "Justice" or "general Welfare," there is the problem of deciding whether to uphold a law because the "common defence" requires it or to invalidate the law because it is inconsistent with the Blessings of Liberty."¹¹⁹

¹¹⁴ C Dean McGrath Jr, 'The Genius of the Constitution: The Preamble and the War on Terror' (2005) 3 *Georgetown Journal of Law and Public Policy* 13

¹¹⁵ *Greer v Spock* 424 US 828, 852 (1976) (Brennan J, dissenting).

¹¹⁶ *Doe v Bolton* 410 US 179, 210 (1973) (Douglas J, concurring).

¹¹⁷ Raymond Marcin, "Posterity" in the Preamble and a Positivist Pro-Life Position' (1993) 38 *American Journal of Jurisprudence* 273.

¹¹⁸ Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 205-6 [footnotes excluded].

¹¹⁹ Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 203.

Hence the Preamble to the United States Constitution can be used by judges to support virtually any constitutional interpretation that a judge wishes to give. Nonetheless, it has been used relatively sparingly in the United States and is not regarded as a decisive factor in American constitutional interpretation.¹²⁰ This may be because the Bill of Rights gives much greater and more legitimate scope for broad interpretation, so that there is no real need to use the Preamble in this manner.

Interpretation of the Preamble to the Canadian Constitution

The *British North America Act* 1867, now known as the *Constitution Act* 1867 (Canada), contains the following preamble:

WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by the Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

The Canadian *Constitution Act* 1982 contains a much briefer Preamble,¹²¹ which simply provides:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

The Canadian courts have been more inclined than the United States Supreme Court to find substantive constitutional measures in their constitutional preambles, including what some have regarded as an ‘implied bill of rights’.¹²² This was particularly so prior to the enactment of the *Canadian Bill of Rights* and its successor, the *Canadian Charter of Rights and Freedoms*. The phrase in the 1867 Preamble that refers to a ‘Constitution similar in Principle to that of the United Kingdom’ has been used to import into the Canadian Constitution ‘rights’ such as those found in British constitutional statutes which

¹²⁰ Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, 721.

¹²¹ As the first part of the *Constitution Act* 1982 (Canada) is the Canadian Charter of Rights and Freedoms, this preamble is also often described as the preamble to the Charter.

¹²² Peter W Hogg, *Constitutional Law of Canada*, (Thomson Carswell, 5th ed, 2007) Vol 2, para 34.4(c).

then override contrary legislation of the Canadian Parliament.¹²³ An example is *Rex v Hess (No 2)*,¹²⁴ where O'Halloran JA observed that the Preamble to the Canadian Constitution adopted the constitutional principles in the written constitution of the United Kingdom reflected in *Magna Carta*, the *Petition of Right*, the *Bill of Rights* and the *Act of Settlement*. As a consequence he held that a criminal law concerning the grant of bail was 'beyond the competence of Parliament or any provincial Legislature to enact'.¹²⁵ In this case the Preamble, by impliedly importing 'constitutional principles' from British legislation, was used to strike down an ordinary law.

In *Reference Re Alberta Statutes*, three Justices of the Canadian Supreme Court used the Preamble to support a form of implied freedom of political communication. Duff CJ, with whom Davis J agreed, noted that the Preamble 'shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom' and that it 'contemplates a parliament working under the influence of public opinion and public discussion'.¹²⁶ Duff CJ concluded that if any attempt were made by a province 'to abrogate [the] right of public debate or to suppress the traditional forms of exercise of the right' it would be incompetent as it would be repugnant to the *British North America Act*.¹²⁷ Cannon J also relied on the Preamble as support for his conclusion that 'freedom of discussion is essential to enlighten public opinion in a democratic State' and that political communication must be 'untrammelled'.¹²⁸ The enactment of the *Canadian Bill of Rights* and later the *Canadian Charter of Rights and Freedoms* made this use of the Preamble redundant. However, the Canadian courts have still relied on the Preamble to 'fill gaps' in the constitutional structure of Canada.

One of the most prominent examples is *New Brunswick Broadcasting Co v Nova Scotia*, where McLachlin J, for the majority, used the Preamble to support the proposition that the rules of parliamentary privilege form part of the Constitution of Canada.¹²⁹ Her Honour saw the reference in the Preamble to a 'Constitution similar in Principle to that of the United Kingdom' as constitutionally guaranteeing parliamentary governance¹³⁰ along with other fundamental constitutional principles, including parliamentary privilege. Her Honour observed:

The principles constitutionalized in this manner were seen to be unwritten and unexpressed; I do not understand the entrenchment of written rights guarantees, or the adoption of specific written instruments, to negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested. This is

¹²³ See further, J Carlisle Hanson, 'The Preamble to the British North America Act', (1952) 5 *UNB Law Journal* 9.

¹²⁴ (1949) 1 WWR 586; 4 DLR 199.

¹²⁵ (1949) 1 WWR 586, 596.

¹²⁶ [1938] SCR 100, 132-2. See also *Switzman v Elbling* [1957] SCR 285 where similar views were expressed by Rand J at 306-7 and Abbott J at 327-8; and *OPSEU v Ontario* [1987] 1 SCR 2, 25 (Dickson CJ) and 57 (Beetz J).

¹²⁷ [1938] SCR 100, 134.

¹²⁸ [1938] SCR 100, 145.

¹²⁹ [1993] 1 SCR 319; (1993) 100 DLR (4th) 212.

¹³⁰ [1993] 1 SCR 319; (1993) 100 DLR (4th) 212, 263.

not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*.¹³¹

The other prominent example is *Reference re Remuneration of Judges* where Lamer CJ, whose judgment was joined by L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ, held that the 1867 Preamble supports a principle of judicial independence which rendered invalid a law reducing the pay of judges of inferior courts (as part of a public service austerity measure).¹³² His Honour observed that 'the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867*.'¹³³ He then stated:

Under normal circumstances preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language. The preamble to the Constitution Act, 1867, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates "the political theory which the Act embodies". It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.¹³⁴

His Honour then explained how a number of constitutional doctrines, including the doctrine of full faith and credit, the doctrine of paramountcy of federal laws and the doctrine of the rule of law, as identified by the Supreme Court, could all be characterised as deriving from the Preamble.¹³⁵ His Honour also derived a constitutional requirement of parliamentary government from the Preamble, which requires that Members of Parliament be elected by the people. He also regarded the requirements of parliamentary government as supporting a constitutional principle of freedom of political speech that Parliament is incompetent to abrogate.¹³⁶ Lamer CJ noted that the Preamble had been used 'by some members of the Court to fashion an implied bill of rights, in the absence of any express indication of this effect in the constitutional text'.¹³⁷

Lamer CJ concluded:

¹³¹ [1993] 1 SCR 319; (1993) 100 DLR (4th) 212, 264-5. Cf the observation of Sopinka J at 245 that '[o]ne would expect something more than a general reference to "a Constitution similar in Principle" in a preamble in order to have this effect'.

¹³² [1997] 3 SCR 3; 150 DLR (4th) 577.

¹³³ [1997] 3 SCR 3; 150 DLR (4th) 577, [94].

¹³⁴ [1997] 3 SCR 3; 150 DLR (4th) 577, [95] (excluding references).

¹³⁵ [1997] 3 SCR 3; 150 DLR (4th) 577, [97]-[99].

¹³⁶ [1997] 3 SCR 3; 150 DLR (4th) 577, [102]-[103].

¹³⁷ [1997] 3 SCR 3; 150 DLR (4th) 577, [103].

These examples – the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech – illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.¹³⁸

The Preamble, therefore, while not a source of positive law, establishes the principles upon which the Constitution is based and those principles, according to Lamer CJ, can be used to fill gaps in the constitutional scheme and invalidate laws enacted by Canadian legislatures, both federal and provincial. This approach has been the subject of sustained criticism.¹³⁹ Goldsworthy, for instance, has argued that the majority ‘used – or rather, misused – the Preamble of Canada’s *Constitution Act, 1867* as a rationalization for inventing a sweeping new constitutional principle of judicial independence.’¹⁴⁰ He pointed out that while it might be legitimate to see the Preamble as providing corroborating evidence of an existing principle, in this case the only evidence of the existence of such a principle was the Preamble itself. The Preamble was therefore given an effect as if it were positive law.¹⁴¹

Corbett has also criticised this judgment, describing the majority’s conclusion as ‘to say the least, somewhat surprising’. He pointed out that the Preamble to the 1867 Act was intended to serve the interests of the Empire and that in ‘light of the demise of those interests, it must, therefore, be approached in the present with a good deal of caution’.¹⁴² He also pointed to one of the inherent contradictions in the judgment – the notion that the Preamble allows the courts to be involved in constitutional gap-filling ‘is at odds with the idea of “a Constitution Similar in Principle to that of the United Kingdom” insofar as it recognises constitutional supremacy rather than parliamentary supremacy and grants to the courts the authority to say what the constitution means.’¹⁴³

¹³⁸ [1997] 3 SCR 3; 150 DLR (4th) 577, [104].

¹³⁹ Even those supportive of the outcome have criticized the reasoning. Walters, for example, while supporting the use of fundamental law, noted that there are some British constitutional principles that would be unsuitable for incorporation into the Canadian Constitution and that it is misleading to suggest that the framers of the Constitution selected which ones must apply. Ultimately it is the judges who will make this decision. See Mark D Walters, ‘The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law’ (2001) 51 *University of Toronto Law Journal* 91, 103.

¹⁴⁰ Jeffrey Goldsworthy, ‘The Preamble, Judicial Independence and Judicial Integrity’, (2000) 11(2) *Constitutional Forum* 60.

¹⁴¹ Jeffrey Goldsworthy, ‘The Preamble, Judicial Independence and Judicial Integrity’, (2000) 11(2) *Constitutional Forum* 60, 61.

¹⁴² S M Corbett, ‘Reading the Preamble to the *British North America Act, 1867*’ (1998) 9(2) *Constitutional Forum* 42, 43.

¹⁴³ S M Corbett, ‘Reading the Preamble to the *British North America Act, 1867*’ (1998) 9(2) *Constitutional Forum* 42, 44, fn 14.

The Preamble to the *Constitution Act* 1982 (Canada), while being much shorter, contains two propositions which are pregnant with interpretative possibilities – being the ‘supremacy of God’ and the ‘rule of law’.¹⁴⁴ Sossin has described this Preamble as a paradox, as it recognises the sovereignty of both God and law.¹⁴⁵ It has also been argued that the 1982 Preamble contradicts substantive clauses of the Charter, such as the right to freedom of religion.¹⁴⁶

While the ‘supremacy of God’ has been largely neglected by the Canadian Supreme Court, it has been the subject of academic arguments that it recognises inalienable rights derived from sources beyond the State, which cannot be completely abrogated or removed, no matter how pressing the government objective might be.¹⁴⁷ According to this interpretation, ‘God’ loses religious significance¹⁴⁸ and instead represents a form of natural law based upon human dignity, which imposes human rights. This natural law, as identified by the supremacy of God recognised in the Preamble, is then beyond legislative power to remove.¹⁴⁹

The ‘rule of law’, however, has been the basis for court rulings striking down legislation¹⁵⁰ or suspending a declaration of invalidity for a period to prevent the chaos that would result if laws were immediately held invalid.¹⁵¹

¹⁴⁴ Note also the more extensive preamble to the *Canadian Bill of Rights* 1960 (Canada), the first recital of which provides: ‘The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions...’

¹⁴⁵ Lorne Sossin, ‘The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*’ (2003) 52 UNBLJ 227, 229. Compare the Preamble to the German Basic Law which refers to ‘responsibility before God and Men’: Micheal Silagi, ‘The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law’, (2011) 52(1) *Acta Juridica Hungarica* 54, 61.

¹⁴⁶ Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, 723.

¹⁴⁷ J W Penney and R J Danay, ‘The Embarrassing Preamble? Understanding the “Supremacy of God” and the *Charter*’ (2006) 39 UBCL Rev 287, 288-9.

¹⁴⁸ See, in the United States, the notion of ‘ceremonial deism’, where references to ‘God’ in pledges or oaths are regarded purely as ceremonial in nature, having an historical foundation but no longer any religious meaning: *Elk Grove Unified School District v Newdow* 542 US 1, 37 (2004) (O’Connor J); Steven Epstein, ‘Rethinking the Constitutionality of Ceremonial Deism’ (1996) 96 *Columbia Law Review* 2083; and Caroline M Corbin, ‘Ceremonial Deism and the Reasonable Religious Outsider’ (2010) 57 *UCLA Law Review* 1545.

¹⁴⁹ J W Penney and R J Danay, ‘The Embarrassing Preamble? Understanding the “Supremacy of God” and the *Charter*’ (2006) 39 UBCL Rev 287, 322-2.

¹⁵⁰ *Christie v Attorney-General of British Columbia* (2005) 262 DLR (4th) 51, where it was held that access to justice formed part of the ‘rule of law’ as set out in the Preamble and that a law that impeded access to justice was therefore invalid. Note that this decision was overturned by the Supreme Court in *Attorney-General of British Columbia v Christie* [2007] 1 SCR 873, where it was held that the ‘rule of law’ did not include a general right to legal counsel but may do so in particular types of cases.

¹⁵¹ *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 750; 19 DLR (4th) 1.

Interpretation of the Preamble to the Indian Constitution

The preamble to the Indian Constitution was adopted on 17 October 1949. In its original form, it provided:

WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY, of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Interestingly, the preamble was the last part of the Constitution adopted by the Constituent Assembly. The reason that it was adopted last, rather than first, was to ensure that it was in conformity with the substantive provisions of the Constitution, as adopted. For example, a suggested amendment to insert the words ‘In the name of God’ in the Preamble was rejected on the ground that it would be inconsistent with the freedom of religion clause that had already been adopted.¹⁵²

The Preamble was amended in 1977 to add the words ‘socialist secular’ to the description of the nation, so it now reads that the people have resolved to constitute India into a ‘sovereign socialist secular democratic republic’. In addition the reference to the ‘unity of the Nation’ was augmented so that it now reads ‘the unity and integrity of the Nation’.¹⁵³ Some have been critical of this change and the motives behind it. Datar has described it as ‘a political gimmick during the infamous Emergency of 1975-1977’.¹⁵⁴

One of the reasons why the interpretation of the Preamble of the Indian Constitution is particularly relevant is the fact that unlike most preambles, it has been amended after it was first adopted. Orgad has argued that the 1977 ‘changes brought about a constitutional revolution and have been interpreted since to formally provide India with a social character’.¹⁵⁵

¹⁵² R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 68.

¹⁵³ Forty-Second Amendment to the Indian Constitution, which came into effect on 3 January 1977.

¹⁵⁴ Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 1.

¹⁵⁵ Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 714, 728.

There was initially doubt as to whether the Indian Preamble could be altered at all. If the Preamble was not part of the Constitution, then it would not be subject to the amendment mechanism set out in the Constitution. In 1960 the Supreme Court held that the Preamble to the Constitution did not form part of the Constitution.¹⁵⁶ However, the Supreme Court altered its position in 1973 in the case of *Kesavananda Bharti v State of Kerala*.¹⁵⁷ It held that the Preamble was part of the Constitution and therefore fell within the scope of the amending power, except to the extent that its clauses form part of the ‘basic structure or framework’ of the Constitution. The ‘basic structure’ of the Constitution, which can be found both from clauses in the Preamble and provisions in the substantive text of the Constitution (including Part III on fundamental rights and Part IV on directive principles), cannot be changed by constitutional amendment. Equally, no laws can detract from the basic structure of the Constitution. Hence, any law that is inconsistent with the ‘basic structure’ of the Constitution, as set out in the Preamble, will be invalid. The consequence is that while the Indian courts have accepted that the Preamble cannot give rise to substantive laws, any statutes that are inconsistent with the parts of the Preamble that set out the ‘basic structure’ of the Constitution will be invalid. This has given the Indian Supreme Court enormous power in the interpretation and application of the basic structure doctrine.

The basic structure of the Constitution includes matters such as the supremacy of the Constitution, the sovereign, democratic, republican and secular nature of the State, the separation of powers and the federal system.¹⁵⁸ The list of features of the basic structure has expanded over time.¹⁵⁹ Many of the features of the basic structure are to be found in the Preamble, but some, such as federalism and the separation of powers, are not.¹⁶⁰

If the Preamble contains, in part, the basic structure of the Constitution, can it be amended and can amendments themselves form part of the ‘basic structure’ in the future? The validity of the 1977 amendments to the Preamble was challenged in *Minerva Mills Ltd v Union of India*.¹⁶¹ The Indian Supreme Court upheld the validity of the amendments as they built upon the existing basic structure, rather than undermining it. Chandrachud CJ argued:

Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succour to its foundations.... These amendments furnish the most eloquent example of how the

¹⁵⁶ *Re Berubari Union of India* (1960) 3 SCR 250; AIR 1960 SC 845.

¹⁵⁷ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225. For a similar argument that the Polish Preamble cannot be amended, see: Ryszard Piotrowski, ‘The Importance of Preamble in Constitutional Court Jurisprudence’ (2011) 52(1) *Acta Juridica Hungarica* 29, 36-7.

¹⁵⁸ R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 108; and Sudhir Krishnaswamy, *Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine* (OUP, 2009) p 136.

¹⁵⁹ See the much longer list in: R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 112.

¹⁶⁰ Note the criticism that ‘the preamble is both under and over inclusive of the basic features of the Constitution’: Sudhir Krishnaswamy, *Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine* (OUP, 2009) p 154.

¹⁶¹ (1980) 2 SCC 591; AIR 1980 SC 1789.

amending power can be exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage.¹⁶²

Nonetheless, there has been academic criticism of an attempt retrospectively to change the intent of those who adopted the Constitution. Seervai, for example, has argued that while a preamble could be amended by inserting a provision that explains the intention of a subsequent Parliament or constituent body, it is historically false to attribute such an intention to those who originally adopted the Constitution.¹⁶³

Datar has also expressed concern that a future government might wish to remove the word 'socialist' from the Preamble, and might have the political support to do so, but might be prevented from doing so to the extent that the courts regard it as forming part of the 'basic structure' of the Constitution.¹⁶⁴ Datar argued that post-World War II, 'evidence clearly shows that socialism has ruined the economy of almost every developing country that has embraced it'.¹⁶⁵ His concerns reflect broader issues about 'freezing' political or philosophical principles in a preamble that might prove inappropriate over time. In the case of India, this is of even greater concern as there is no constitutional power to alter such principles once they become part of the 'basic structure'.

Other criticisms have been directed at the ambiguity of the words inserted in the Indian Preamble. The word 'socialist', for example, can have many meanings.¹⁶⁶ As Justice Lahoti of the Indian Supreme Court has noted, it can be used by reference to a dictatorship rather than a democracy.¹⁶⁷ Equally, the term 'secular' could be regarded as being anti-religion. Seervai, in criticism these amendments, argued:

Good drafting would require that ambiguous words should not be put into a Preamble without a reason and as far as one can see, there is no reason for putting in the word 'socialist' and the word 'secular', for the content of those concepts themselves would have to be found in the enacting parts of the Constitution, and by themselves the two words have certain associations which are inconsistent with the enacting provisions of our Constitution.¹⁶⁸

¹⁶² (1980) 2 SCC 591; AIR 1980 SC 1789, [23] (Chandrachud CJ).

¹⁶³ H M Seervai, *Constitutional Law of India – A Critical Commentary* (N M Tripathi, Bombay, 4th ed, 1991, Vol 1) p 276; and R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 23.

¹⁶⁴ Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 3.

¹⁶⁵ Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 4.

¹⁶⁶ H M Seervai, *Constitutional Law of India – A Critical Commentary* (N M Tripathi, Bombay, 4th ed, 1991, Vol 1) p 276.

¹⁶⁷ R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 23.

¹⁶⁸ H M Seervai, *Constitutional Law of India – A Critical Commentary* (N M Tripathi, Bombay, 4th ed, 1991, Vol 1) p 277; and R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p 24.

An attempt was made later to define these terms in the 44th amendment, but it was rejected by the Council of States,¹⁶⁹ leaving the interpretation of ‘socialist’ and ‘secular’ up to the courts. Basu has categorised some of the cases in the following terms:

It has been held that the word ‘socialist’:

- (a) read with Art 39(d) would enable the Court to uphold the constitutionality of laws of nationalisation of private property;
- (b) read with Art 14, [and] 16, would enable the Court to deduce a fundamental right to ‘equal pay for equal work’; or
- (c) read with Art 14, [would enable the Court] to strike down a statute which failed to achieve the socialist goal to the fullest extent; or which adopts a classification which is not in tune with the establishment of a welfare society.¹⁷⁰

The word ‘secular’ in the Preamble is also regarded as part of the ‘basic structure’ of the Constitution. Its insertion in the Preamble has been viewed as merely expressing in words an existing concept that was already embedded in India’s constitutional philosophy.¹⁷¹ It not only requires the equal treatment of all religions,¹⁷² but also impliedly demands that ‘religion has no place in politics’ and ‘no political party can simultaneously be a religious party’.¹⁷³ Hence, party manifestos and policies may not appeal to religion.¹⁷⁴

Interpretation of the Preamble of the Constitution of France

The Preamble to the Constitution of the Fifth French Republic (1958) provides:

The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the 1946 Constitution and to the rights and duties defined in the Charter for the Environment of 2004.

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic evolution.¹⁷⁵

¹⁶⁹ Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 2.

¹⁷⁰ Durga Das Basu, *Shorter Constitution of India* (Prentice-Hall of India, 10th ed, 1989) p 2.

¹⁷¹ *S R Bommai v Union of India* (1994) 3 SCC 1; AIR 1994 SC 1918, [28] (Ahmadi J).

¹⁷² Arvind P Datar, *Datar on Constitution of India* (Wadhwa & Co, New Delhi, 1st ed, 2001) p 3.

¹⁷³ *S R Bommai v Union of India* (1994) 3 SCC 1; AIR 1994 SC 1918, [365] (B P Jeevan Reddy J).

¹⁷⁴ See further: R C Lahoti, *Preamble – The Spirit and Backbone of The Constitution of India* (Eastern Book Co, Lucknow, 2004) p pp 54-5.

¹⁷⁵ Translation published by the French Assemblée Nationale: <http://www.assemblee-nationale.fr/english/8ab.asp> [viewed 14 August 2011].

The Preamble, while being itself insubstantial,¹⁷⁶ makes reference to rights contained in other documents, being:

- the 1789 Declaration of the Rights of Man, which includes rights to liberty, property, safety, resistance to oppression, equality before the law, freedom of expression, the presumption of innocence, protection from retrospective criminal laws and the freedom to do anything that does not cause harm to another that is not prohibited by law;
- the Preamble to the 1946 Constitution, which includes the duty to work and the right to employment, the right to strike, equality of men and women, the right to asylum, the protection of the health, material security, rest and leisure of children, mothers and elderly workers, equal access to instruction, vocational training and culture, and a duty on the State to provide free, public and secular education;
- the ‘fundamental principles acknowledged in the laws of the Republic’, as recognised by the 1946 Preamble,¹⁷⁷ which is an open-ended category of fundamental rights identified by the Constitutional Council¹⁷⁸ in pre-1946 statutes, including the right to freedom of association, due process, freedom of education, freedom of conscience, freedom of movement, the right to privacy and freedom of commerce and enterprise; and
- the Charter for the Environment, which includes the right to live in an environment which is balanced and respectful of the health of individuals and imposes duties to preserve the environment.

The reference to the Charter for the Environment was added on 1 March 2005 by way of constitutional amendment, so this is another example of a Preamble that has been amended since the Constitution was first enacted.

Historically the French Constitution was regarded as symbolic rather than enforceable and the courts had no power to strike down legislation as unconstitutional. The view of the separation of powers, taken after the French Revolution, was that the Parliament, as the representative of the people, was supreme and should not be interfered with by judges. It was considered that ‘any judicial refusal to give effect to an authentic act of the

¹⁷⁶ Reasons given for the absence of substance in the 1958 Preamble include a lack of time, the fact that the new Constitution was prepared by the Government rather than a Constituent Assembly, and the struggle experienced by the Constituent Assemblies of 1946 to formulate a declaration of rights and values, which no one wanted to replicate. A full blown Declaration of Rights was defeated in a referendum in May 1946, resulting in the ‘cobbled-together’ 1946 Preamble: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) pp 64 and 67.

¹⁷⁷ Troper has argued that this clause was inserted ‘to accommodate Catholics, who were anxious to preserve freedom of education and the right to operate private schools’. He observed that while it gives no precision about the nature of the principles or the laws in which they are contained, this did not matter at the time as the Preamble lacked legal character and could not be used by a court to decide a legal issue: Michel Troper, ‘Judicial Review and International Law’ (2003) 4 *San Diego International Law Journal* 39, 52. Bell saw the provision as intended ‘to smuggle in certain values, notably freedom of education, about which there was considerable disagreement in the Second Constituent Assembly of 1946’: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) p 69.

¹⁷⁸ The Conseil Constitutionnel (‘Constitutional Council’) is comprised of nine members, appointed by the President of the Republic and the Presidents of the two Houses. Its members are not legally qualified judges, although it operates as a quasi-constitutional court.

legislature would constitute an impermissible intervention by the judges in the legislative power'.¹⁷⁹ Bills of rights were usually included in the preamble to French Constitutions (including those of 1791, 1793, 1795, 1848 and 1946) but these rights had purely symbolic value and could not be used as a limitation on the legislative power of the Parliament.¹⁸⁰ As the French Parliament had plenary legislative power, which was not subject to any federal limitations or any rights limitations, even without the application of the doctrine of separation of powers there would have been no grounds upon which courts could strike down a law of the Parliament as unconstitutional.

The 1958 Constitution established a different constitutional structure. Legislative power was divided between the Parliament and the Executive. The Parliament could only legislate in relation to specific listed subjects (art 34), and the Executive could legislate by decree in relation to all other subjects (art 37). This meant that there needed to be a body to adjudicate upon the demarcation lines between the Parliament and the Executive. The French aversion to 'government by judges'¹⁸¹ led to the creation of the Constitutional Council, a non-judicial body which under art 61 of the Constitution can determine whether or not a law falls within the jurisdiction of the Parliament. Its decisions are not subject to appeal and are binding on the government and the courts (art 62).¹⁸² The drafters of the Constitution clearly did not intend the Council's jurisdiction to extend to determining the validity of laws based on conformity with any rights in the Preamble.¹⁸³

However, in 1971, the Constitutional Council struck down a law, not because it breached the jurisdiction of the Parliament under art 34, but because it conflicted with the right to freedom of association recognised by the Preamble.¹⁸⁴ The Council relied upon the reference to 'fundamental principles acknowledged in the laws of the Republic', which is mentioned in the 1946 Preamble and therefore incorporated in the 1958 Preamble. Beardsley has pointed out that in doing so the Council relied upon 'the least precise of possible constitutional sources', making the decision all the more remarkable.¹⁸⁵ He further noted that the 'existence of the constitutional right and its content was asserted, and with it the constitutional force of the Preamble, without argument or explanation in the [Council's] decision, beyond the laconic observation that freedom of association is included among the "fundamental principles".'¹⁸⁶

¹⁷⁹ James Beardsley, 'Constitutional Review in France', (1975) *Supreme Court Review* 189, 193.

¹⁸⁰ Marie-Pierre Granger, 'The Preamble(s) of the French Constitution: content, status, uses and amendment' (2011) 52(1) *Acta Juridica Hungarica* 1, 3.

¹⁸¹ James Beardsley, 'Constitutional Review in France', (1975) *Supreme Court Review* 189, 190.

¹⁸² Note that since a constitutional amendment in 2008 French courts may refer to the Constitutional Council any question arising in litigation as to the constitutional validity of a statute. See further: Marie-Pierre Granger, 'The Preamble(s) of the French Constitution: content, status, uses and amendment' (2011) 52(1) *Acta Juridica Hungarica* 1, 6.

¹⁸³ James Beardsley, 'Constitutional Review in France', (1975) *Supreme Court Review* 189, 220-222; John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) p 61.

¹⁸⁴ Constitutional Council Decision No. 71-44 DC: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html> [viewed 14 August 2011].

¹⁸⁵ James Beardsley, 'Constitutional Review in France', (1975) *Supreme Court Review* 189, 226.

¹⁸⁶ James Beardsley, 'Constitutional Review in France', (1975) *Supreme Court Review* 189, 226.

Granger has described this ruling as being a ‘rights revolution’ which ‘turned the “insignificant” 1958 Preamble into Russian dolls, revealing almost limitless constitutional resources’.¹⁸⁷ This was because the effect of the 1958 Preamble was extended beyond its words to the application of the rights in the 1789 Declaration, the rights in the 1946 preamble (which previously had been expressly stated to be non-justiciable)¹⁸⁸ and to the ‘fundamental principles’ recognised in the laws of the Republic prior to 1946.¹⁸⁹ Indeed, in this latter case, rights set out in ordinary statutes were given a constitutional status that allowed them to override later statutes.¹⁹⁰ To those rights have since been added the rights in the Charter for the Environment. As Granger has observed, given that all these rights were declared over a period of 200 years by different regimes with different ideologies, applying them as a cohesive form of supreme law may be difficult.¹⁹¹

The 1789 Declaration tends to focus on individual rights while the 1946 Preamble focuses on social and economic rights, and the two are not always complementary. For example, the 1789 Declaration protects property rights and declares that property should only be taken away on grounds of public necessity, whereas paragraph 9 of the 1946 Preamble provides that de facto monopolies should become the property of the State. When the question of the validity of nationalisation laws arose, the Constitutional Council gave the property rights in the 1789 Declaration priority.¹⁹² In contrast, when the validity of a law banning direct and indirect advertising of tobacco products was at issue, the Constitutional Council held that the right to health in the 1946 Preamble trumped the property rights, under the 1789 Declaration, of tobacco manufacturers in their trade names.¹⁹³

Older rights might also operate in a manner that is no longer regarded as appropriate. For example, the 1789 Declaration provides that all citizens are equally eligible for all public dignities positions and employment according to their abilities and without any distinction other than that of their virtues and talents. In the context of the French Revolution, this was intended to prevent appointments based upon birth and privilege. However, it has been held to prevent affirmative action.¹⁹⁴ It proved necessary to amend

¹⁸⁷ Marie-Pierre Granger, ‘The Preamble(s) of the French Constitution: content, status, uses and amendment’ (2011) 52(1) *Acta Juridica Hungarica* 1, 4.

¹⁸⁸ 1946 Constitution, art 92 – the Constitutional Committee (being the predecessor of the Constitutional Council) was prohibited from assessing the compatibility of laws with the 1946 Preamble.

¹⁸⁹ Marie-Pierre Granger, ‘The Preamble(s) of the French Constitution: content, status, uses and amendment’ (2011) 52(1) *Acta Juridica Hungarica* 1, 4-5.

¹⁹⁰ See Troper’s argument that this ‘leads to a paradox because a statute created on the basis of the Constitution has the same force as the Constitution itself’: Michel Troper, ‘Judicial Review and International Law’ (2003) 4 *San Diego International Law Journal* 39, 52.

¹⁹¹ Marie-Pierre Granger, ‘The Preamble(s) of the French Constitution: content, status, uses and amendment’ (2011) 52(1) *Acta Juridica Hungarica* 1, 7.

¹⁹² Constitutional Council Decision No 81-132 DC, re Nationalisation, 16 January 1982. See: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) p 68 and pp 273-5; L Neville Brown and John Bell, *French Administrative Law*, (Clarendon Press, Oxford, 5th ed, 1998) p 18.

¹⁹³ Constitutional Council Decision No 90-283 DC, re Tobacco and Alcohol Advertisements, 8 January 1991; John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) p 149.

¹⁹⁴ Constitutional Council Decision No 82-146 re local elections, 18 November 1982: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a82146dc.pdf [viewed 17 August 2011].

the Constitution in 1999 to permit affirmative action for women in relation to elective offices and again in 2008 to permit affirmative action for women in relation to positions of professional and social responsibility.¹⁹⁵ There is still no capacity for the Parliament to enact laws on affirmative action in favour of ethnic or racial minorities.¹⁹⁶

There is also difficulty in ascertaining the meaning of some of the rights and duties, especially those in the 1946 Preamble. This is in part because the 1946 Preamble was not intended to be justiciable at the time it was enacted, so there was no need for precision in drafting the rights it contained. What, for example, is meant by a ‘duty to work’ and the ‘right to employment’? To whom is the duty owed and against whom is the right exercisable? ‘Is unemployment unconstitutional?’¹⁹⁷

Since the landmark freedom of association case in 1971, the Constitutional Council has developed numerous rights which it derives from the Preamble and which therefore have a supreme status. These include:¹⁹⁸

- the right to freedom of higher education;¹⁹⁹
- the academic freedom of University Professors;²⁰⁰
- the requirement of pluralism of the media;²⁰¹
- the right to the protection of privacy of personal data;²⁰² and
- the right of access to the internet as a fundamental freedom.²⁰³

On the environmental front, part of the French carbon tax scheme was struck down on the ground that it breached equality rights by giving exemptions to certain industrial and polluting bodies. The exemptions were also held to breach various environmental requirements of the Charter.²⁰⁴ An attempt to use the Charter for the Environment as a

See further: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) pp 209-11 and pp 349-52.

¹⁹⁵ Note that these amendments were made to art 1 of the 1958 Constitution, which is regarded by some as forming part of the Constitution. It now provides: ‘Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility’.

¹⁹⁶ Marie-Pierre Granger, ‘The Preamble(s) of the French Constitution: content, status, uses and amendment’ (2011) 52(1) *Acta Juridica Hungarica* 1, 8.

¹⁹⁷ John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) p 67.

¹⁹⁸ The following examples are discussed in: Marie-Pierre Granger, ‘The Preamble(s) of the French Constitution: content, status, uses and amendment’ (2011) 52(1) *Acta Juridica Hungarica* 1, 9-10. See also: Constantijn Kortmann, ‘The French Republic’ in Lucas Prakke and Constantijn Kortmann (eds), *Constitutional Law of 15 EU Member States*, (Kluwer, 2004) p 296.

¹⁹⁹ Constitutional Council Decision No 99-414 DC, Re Agricultural Orientation, 8 July 1999.

²⁰⁰ Constitutional Council Decision No 83-165 DC, re University freedoms, 20 July 1984; Constitutional Council Decision No 2010-20/21 QPC University freedoms, 6 August 2010. See also: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) pp 155-6.

²⁰¹ Constitutional Council Decision No 82-141 DC re Audiovisual Communication, 27 July 1982; Constitutional Council Decision No 84-173 re Cable Television, 27 July 1984; Constitutional Council Decision No 84-181 DC re Concentration, Financial Transparency and the Pluralism of the Press, 11 October 1984. See also: John Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992) pp 172-6.

²⁰² Constitutional Council Decision No 93-325 DC, re Immigration Laws, 13 August 1993.

²⁰³ Constitutional Council Decision No 2009-580 DC, HADOPI, 10 June 2009.

²⁰⁴ See Constitutional Council Decision No 2009-599 DC, 29 December 2009, paras 77-83:

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par->

defence by environmental activists prosecuted for destroying genetically modified crops was successful at first instance, but was reversed on appeal.²⁰⁵

France is an extreme example of a Preamble that was intended to give rise to no substantive rights being radically changed in its effect by a quasi-court using it to give itself the power to strike down legislation that does not conform to rights referred to in the Preamble. In doing so, the Constitutional Council greatly expanded its own powers. The fact that the Preamble was not drafted with a view to it being used in this way has inadvertently resulted in even greater power being held by the Constitutional Council, because it can pick and choose to determine which are the 'fundamental principles' in pre-1946 laws that should be given constitutional status and how these various rights and principles should be balanced.

Interpretation of the Preamble of the Commonwealth of Australia Constitution Act

So far the High Court, in its use of the Preamble to the *Commonwealth of Australia Constitution Act*, has largely referred to it in its historical role as a statement of fact at the time the Constitution was enacted or as incidental support for arguments that find their basis elsewhere in the text or structure of the Constitution or constitutional principle. This may be because the High Court has followed the more orthodox approach to the use of a constitutional preamble or it may simply be that there is little scope in the meagre statements of the current Preamble to find fundamental principles or values from which implications may be drawn or which may lead to an altered interpretation of constitutional provisions.²⁰⁶ Moreover, where implications might otherwise be drawn from references to federalism or the Crown, there are corresponding provisions in the text of the Constitution which can support such implications, leaving it unnecessary for the Preamble to do anything more than provide incidental support.

The reference to an 'indissoluble Federal Commonwealth' has been used, for example, to support arguments with respect to federalism, the continued independent existence of the States, the role of the territories in the federal system and cooperation between the constituent parts of the federation.²⁰⁷ As French CJ said in *Clarke v Federal Commissioner of Taxation*:

date/decisions-depuis-1959/2009/2009-599-dc/decision-n-2009-599-dc-du-29-decembre-2009.46804.html
[viewed 14 August 2011].

²⁰⁵ See further: Marie-Pierre Granger, 'The Preamble(s) of the French Constitution: content, status, uses and amendment' (2011) 52(1) *Acta Juridica Hungarica* 1, 15.

²⁰⁶ M McKenna, A Simpson and G Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 UNSWLJ 382, 392.

²⁰⁷ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 74 (Starke J); *Victoria v Commonwealth* (1971) 122 CLR 353, 386 (Menziez J); *Western Australia v Commonwealth* (1975) 134 CLR 201, 226 (Barwick CJ); *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 82 and 96-7 (Toohey J); *R v Hughes* (2000) 202 CLR 535, 561 (Kirby J); *Mobil Oil Australia Ltd v Victoria* (2002) 211 CLR 1, [104] (Kirby J). See further: M McKenna, A Simpson and G Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 UNSWLJ 382, 388.

The *Constitution* assumes the continuing existence of the States, their co-existence as independent entities with the Commonwealth, and the functioning of their governments. This assumption is readily inferred from the reference to “one indissoluble Federal Commonwealth” in the Preamble and the terms of ss 3, 5 and 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp) (68) and the provisions of Ch V of the *Constitution* itself.²⁰⁸

While his Honour drew an inference from the Preamble, it was also supported by other provisions in the covering clauses and the Constitution itself. Similarly, Justice Gaudron saw the Preamble as ‘reinforcing’ representative parliamentary democracy as a ‘fundamental part of the Constitution’ from which constitutional implications, such as implied freedom of political communication, could be drawn.²⁰⁹

Another common use of the preamble is as an expression of Australia’s nationhood, because the agreement was to unite in ‘one indissoluble Federal Commonwealth’, rather than a conglomeration of States.²¹⁰ The preamble has also been used as support for (and against) the conclusion that the basis of federation was ‘popular’, as the agreement to unite was made by the ‘people’ rather than the colonies.²¹¹

Reference has also been made by the High Court to the preambular statement that the Federal Commonwealth is ‘under the Crown’. It has been regarded as relevant to arguments about nationality,²¹² the status of Australia as a constitutional monarchy,²¹³ the enactment of laws protecting the Crown²¹⁴ and the recognition of separate Crowns within Australia.²¹⁵

On occasion, individual judges have been more assertive in their use of the Preamble. Murphy J, for example, took the view that:

the right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth. This right is so fundamental that it is not likely it would be hidden away in s. 92...²¹⁶

²⁰⁸ *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [15] (French CJ).

²⁰⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 210 (Gaudron J).

²¹⁰ *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

²¹¹ *Thomas v Mowbray* (2007) 233 CLR 307, [143] (Gummow and Crennan JJ); *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [159] (Gummow and Hayne JJ). Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, [52] (Kirby J); and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 180-1 (Dawson J).

²¹² *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, [55] (Kirby J); *Sue v Hill* (1999) 199 CLR 462, [159] (Gaudron J).

²¹³ *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [265] (Kirby J).

²¹⁴ *R v Sharkey* (1949) 79 CLR 121, 135 (Latham CJ). Although it is not clear, Latham CJ may have been trying to use the Preamble as a trigger for the application of s 51(xxxix). If so, his approach has not since been followed.

²¹⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

²¹⁶ *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J). Note that Murphy J, never a federalist, has conveniently deleted the reference to the ‘Federal’ Commonwealth.

While he characterized it as a fundamental right arising from the *fact* of the union of the people in an indissoluble Commonwealth, he still appeared to rely on the Preamble to support this constitutional implication.

The most controversial use of the Preamble by Justices of the High Court occurred in *Leeth v The Commonwealth*. Deane and Toohey JJ, dissenting, identified a constitutional implication of legal equality, the ‘conceptual basis’ of which they found in the Preamble and covering clause 3. They thought that the agreement of ‘the people’ meant ‘all the people’ and that ‘implicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact’.²¹⁷ In addition, they sought to ground the source of the ‘doctrine of legal equality’ in other parts of the text and structure of the Constitution, such as the doctrine of separation of powers. Brennan J also referred to the Preamble, arguing that it would be ‘offensive to the constitutional unity of the Australian people “in one indissoluble Federal Commonwealth”, recited in the first preamble to the *Commonwealth of Australia Constitution Act* 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties’ depending on the location of the court in which they were sentenced.²¹⁸

Justice Toohey, in *Kruger v Commonwealth*, maintained his view that the Preamble was the source of an implication of legal equality.²¹⁹ However, a majority of the High Court rejected the application of an implication of legal equality beyond the scope of Ch III of the Constitution.²²⁰

²¹⁷ (1992) 174 CLR 455, 486 (Deane and Toohey JJ). Note Winckel’s defence of the use of the Preamble made by Deane and Toohey JJ in *Leeth*: Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 646.

²¹⁸ (1992) 174 CLR 455, 475 (Brennan J).

²¹⁹ (1997) 190 CLR 1, 97 (Toohey J).

²²⁰ (1997) 190 CLR 1, 44-5 (Brennan CJ), 67 (Dawson J, McHugh J agreeing), 113 (Gaudron J), 154 (Gummow J).

CHAPTER 4 - AMENDING THE EXISTING PREAMBLE OR INSERTING A NEW PREAMBLE

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’. The second part of the Preamble, which refers to provision for admission into the Commonwealth of ‘other Australasian colonies and possessions of the Queen’, has also ceased to be relevant. No such colonies or possessions exist today. Instead, one might refer now to the admission of Australian territories.

Some aspects of the Preamble, however, remain important. The reference to the Federal Commonwealth being ‘indissoluble’ is a significant break upon arguments in favour of secession and is the only indicator in the Constitution as to whether it is intended to accommodate secession. The use of the term ‘Federal Commonwealth’ is also important as it characterises the Commonwealth as one based upon a system of federalism.²²¹ The reference to ‘the people’ of the colonies, rather than the polities themselves, lends support to notions of popular sovereignty.

Yet other aspects of the Preamble remain contentious, such as the reference to reliance on ‘the blessing of Almighty God’. Those who do not believe in God or who regard such a reference to God as being confined to a Christian God, might find it alienating²²² or regard it as inappropriate for a country where freedom of religion is mandated by the Constitution. In Germany, for example, ‘moderate as well as orthodox theologians ... find it presumptuous to have God invoked in a secular constitution’.²²³ Silagi has argued

²²¹ See the argument about the use of the term ‘Federal Commonwealth’ in the drafting of the *Australia Acts 1986*: A Twomey, *The Australia Acts 1986 – Australia’s Statutes of Independence* (Federation Press, 2010), p 182.

²²² Note that some countries have attempted to accommodate different views. The Preamble to the Albanian Constitution hedges its bets ‘with faith in God and/or other universal values’. The Preamble to the Polish Constitution says: ‘We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources...’ The Preamble itself, however, was included at the last minute so that a reference to God could be made in the Constitution, as an inducement for voters to support it in a referendum: Ewa Poplawska, ‘Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland’ (2011) 52(1) *Acta Juridica Hungarica* 40, 41.

²²³ Micheal Silagi, ‘The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law’, (2011) 52(1) *Acta Juridica Hungarica* 54, 63.

that ‘it seems that respect and esteem for God should make us hesitate to invoke Him carelessly in the secular and profane context of any secular Basic Law or Constitution’.²²⁴ Moreover, references to ‘God’ in preambles to Constitutions have tended to lose their religious aspect, while attracting arguments they impose a form of natural law which cannot be overridden by statute.²²⁵ Others, however, have regarded the continuing invocation of God in the Preamble as very important, as was evident at the 1998 Constitutional Convention.²²⁶ 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.’²²⁷

Similarly, the reference to the Crown in the Preamble is regarded as essential to some and irrelevant or even objectionable to others, as the ongoing republican debate has shown.

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.²²⁸ Sir Harry Gibbs has argued that ‘it would be absurd to amend that preamble by an Australian law passed in 1999’.²²⁹

Absurd, or not, 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 or is it blasphemous to co-opt God as supporting an essentially secular Constitution? Might a reference to God bring the notion of natural law and inalienable rights into the

²²⁴ Micheal Silagi, ‘The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law’, (2011) 52(1) *Acta Juridica Hungarica* 54, 63.

²²⁵ J W Penney and R J Danay, ‘The Embarrassing Preamble? Understanding the “Supremacy of God” and the Charter’ (2006) 39 *UBCL Rev* 287, 322-2; and Micheal Silagi, ‘The Preamble of the German Grundgesetz – Constitutional Status and Importance of Preambles in German Law’, (2011) 52(1) *Acta Juridica Hungarica* 54, 62.

²²⁶ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 1, p 46 and Vol 4, pp 527-8. See also: M McKenna, A Simpson and G Williams, ‘With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24 *UNSWLJ* 382, 383.

²²⁷ George Winterton, ‘A New Constitutional Preamble’ (1997) 8 *PLR* 186, 188.

²²⁸ See, for example, the argument by Stephen Gageler that the preamble to the Constitution ‘sets out to do no more than record the position at a moment time’: S Gageler, ‘Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations’, in S Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010), 6, 17.

²²⁹ Sir Harry Gibbs, ‘A Preamble: The Issues’ *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11), 89.

Constitution, as has been suggested in Canada and in the United States?²³⁰ 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. This point was made by Sir Maurice Gwyer in *Bhola Prasad v King Emperor*:

[W]e 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.²³¹

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 Act.²³² It would therefore explain the intent of the later Parliament that put the provisions to a successful referendum, providing a source of ‘original intent’ in relation to the interpretation of those new provisions.

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.²³³

²³⁰ 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*, Brisbane, February 2000, p 33.

²³¹ (1942) FCR 17, 29 (Federal Court of India); AIR (29) 1942 FC 17, 21 (Gwyer CJ).

²³² 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.

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 later 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'.²³⁴ The Commission added that a dedicated provision would be a sign of 'due respect' and a true reconciliatory gesture.²³⁵

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 s 128 of the Commonwealth Constitution could be used to amend the Preamble to the *Commonwealth of Australia Constitution Act*.²³⁶ The orthodox view is that s 128 cannot be used to amend the Preamble and the covering clauses.²³⁷ There are two reasons why this is so. First, s 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 and the *Australia Acts* 1986. On its face, s 128 does not permit the amendment of the *Commonwealth of Australia Constitution Act*.

²³³ Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 15.

²³⁴ WA Law Reform Commission, *Aboriginal Customary Laws*, Report No 94, 2006, p 73.

²³⁵ WA Law Reform Commission, *Aboriginal Customary Laws*, Report No 94, 2006, p 73.

²³⁶ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, p 792.

²³⁷ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1995 (1901 reprint), p 989; Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, Melbourne, 2nd ed, 1910), p 603; D Kerr, *The Law of the Australian Constitution* (Law Book Co, 1925) p 6; *Report of the Royal Commission on the Constitution* (Cth Gov Printer, Canberra, 1929) p 288; H S Nicholas, *The Australian Constitution* (Law Book Co, 2nd ed, 1952) p 388; W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 4th ed, 1970) pp 505-6; G Sawyer, 'The British Connection' (1973) 47 ALJ 113, 114; J Thomson, 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal Law Review* 323, 333-4; C Howard, *Australian Federal Constitutional Law* (3rd ed, 1985) p 3; Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) pp 160-1 and 165-7; M Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134, at 143-5; S Gageler and M Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 PLR 143, 148-9. See also: J McMillan, G Evans and H Storey, *Australia's Constitution – Time for Change?* (Allen & Unwin, 1983) pp 176 and 359 where it is argued that s 128 could not be used to amend or repeal the Preamble or covering clauses, but could 'displace' their effect.

Secondly, at the time of federation it was accepted that any constitutional amendment under s 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* 1931 (Imp) lifted the application of the *Colonial Laws Validity Act* to Commonwealth laws, s 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 s 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 s 8 of the *Statute of Westminster* if it was desired to do so. However, while other provisions of the *Statute of Westminster* were repealed,²³⁸ s 8 was not. Instead, s 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 s 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.²³⁹ This argument had some force prior to the enactment of the *Australia Acts* 1986. 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,²⁴⁰ then there is a very strong argument that s 128 should not be interpreted in a manner that is inconsistent with the *Australia Acts* 1986. Hence the use of s 128 to amend or repeal the Preamble directly would be legally doubtful and therefore unwise.

Section 15(1) of the *Australia Acts*, however, sets out a method for amending s 8 of the *Statute of Westminster*, and through it, the Preamble to the Constitution. 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 subsection 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 s 8 of the *Statute of Westminster* in such a way as to permit the amendment or repeal of the Preamble.

For example, when the republic campaign was taking place in 1999, the Victorian Government proposed the repeal of the existing Preamble, to avoid the possibility of the

²³⁸ *Australia Acts* 1986, 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), pp 388-94.

²³⁹ See, for example: 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, at p 100; G Winterton, *Monarchy to Republic*, (OUP, Melbourne, 1986), pp 124-5; and Constitutional Commission, *Final Report of the Constitutional Commission*, (AGPS, Canberra, 1988), Vol 1, pp 120-3.

²⁴⁰ *Australia Acts* 1986, s 15(1).

Constitution ending up with two preambles (one in the Constitution and the other in the *Commonwealth of Australia Constitution Act*). The *Constitution (Requests) Bill 1999* was introduced into the Victorian Parliament on 26 May 1999. It proposed the use of s 15(1) of the *Australia Acts 1986* to amend s 8 of the *Statute of Westminster* by adding the following proviso to the end of s 8:

Nothing in this section prevents the amendment of the Commonwealth of Australia Constitution Act by omitting the Preamble or by repealing sections 2 to 8.

The intention was for other States to enact identical request legislation to allow the repeal of the Preamble. However, as the Howard Government showed no interest in repealing the existing Preamble, the other States took no action. It is, however, a model of what could be done. The reference to the omission of the Preamble, rather than its repeal, was a consequence of debate about whether a preamble can be ‘repealed’ if it is not a substantive part of an Act.²⁴¹

The Victorian proposal would have allowed, however, for the omission of the Preamble to take place by way of Commonwealth legislation, presumably supported by a ‘nationhood’ power or s 2 of the *Statute of Westminster*. This would have meant that the direct approval of the people through a referendum would have been avoided (although the State request legislation would have been contingent on the passage of the republic referendum, so the people would at least have had some say in the matter). If such an approach were taken to the constitutional recognition of Indigenous Australians, it might be regarded as politically objectionable as it would deprive the people of their say. This would be particularly so, given the public expectation of a referendum and the political promise of one.²⁴² It may also undermine the political force of the change if it was not seen to have the manifest support of the people through their votes. Nonetheless, constitutional recognition of Indigenous Australians occurred in three States without a referendum and without any public exhibition of concern.²⁴³

It would be possible, however, to use s 15(1) of the *Australia Acts* to amend s 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 s 128 of the Constitution, as it would not be an alteration of ‘this

²⁴¹ Note, however, that in the United Kingdom, preambles have routinely been repealed as part of statute law revision programs. Interestingly, the view has been taken that the repeal of a preamble has no effect upon the interpretation of the statute in which it was contained, as it may still be taken into account in statutory interpretation: *Powell v Kempton Park Racecourse Co* [1897] 2 QB 242, 269; P St J Langan, *Maxwell on The Interpretation of Statutes* (Sweet & Maxwell, London, 12th ed, 1969) p 9; and S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, London, 7th ed, 1971) p 206.

²⁴² Note the observation that ‘there is an expectation manifest in democratic principles and the rule of law that the preamble be changed via referendum’: Indigenous Law Centre ‘Constitutional Reform and Indigenous Peoples – Options for Amendment to the *Australian Constitution*’ Research Brief No 3, 2011, UNSW, p 3.

²⁴³ It is likely, however, that much of the population of these States did not know that the legislation had been enacted. Nor is there the same public expectation that amendments to State Constitutions require a referendum.

Constitution'. Rather, it would be held in accordance with the requirements of the amended s 8 of the *Statute of Westminster* and would, technically speaking, be a plebiscite.

The other possible alternative would be reliance on s 15(3) of the *Australia Acts* to support a Commonwealth referendum under s 128 of the Constitution that would amend the Constitution by conferring on the Commonwealth Parliament the power to repeal the Preamble. Section 15(3) provides:

Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon the Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.

The problem with s 15(3), however, is that on its face, it does not confer power. It merely qualifies the limitation in s 15(1) that would otherwise set out the *only* method of amending s 8 of the *Statute of Westminster*. One still has to look beyond s 15(3) for the *power* to amend the Constitution in such a way as to confer power on the Commonwealth Parliament to amend the *Statute of Westminster*. It is doubtful that such a power exists. While some have argued that s 15(3) of the *Australia Act* 1986 (UK) confers such a power (while s 15(3) of the *Australia Act* 1986 (Cth) is invalid), others have argued that no such power is conferred and that s 15(3) of the *Australia Act* 1986 (UK) is ineffective.²⁴⁴ The consequence is that there is considerable doubt about the application of s 15(3) of the *Australia Acts*, making this method of amending the Preamble vulnerable to a divisive constitutional challenge. The s 15(1) method of amendment or repeal is therefore to be preferred.

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* 1900, a new preamble should be inserted at the beginning of the Constitution itself. The Council for Aboriginal Reconciliation made this recommendation in 2000²⁴⁵ and it is this proposal that is put forward in the Discussion Paper of the Expert Panel on Constitutional Recognition of Indigenous Australians.²⁴⁶

²⁴⁴ See: G Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 120; S Gageler and M Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *PLR* 143; G Lindell and D Rose, 'A response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?"' (1996) 7 *PLR* 155; Sir A Mason, 'Constitutional Issues Relating to the Republic as they Affect the States' (1998) 21 *UNSWLJ* 750, 754; A Twomey, 'Amending the Preamble to the Constitution', (2008) 10(2) *CLPR* 31; S Gageler, 'Amending the Commonwealth Constitution through Section 128 – A Journey through its Scope and Limitations', in S Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010), 6, 15-16; and A Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence*, (Federation Press, 2010) 408-10.

²⁴⁵ *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (December 2000), Ch 10, Recommendation 3.

Structural issues

Before considering the substance of any preamble to be inserted in the Commonwealth Constitution, there are also structural issues to consider. Structural issues are important, because the High Court takes constitutional structure into account as well as the text in interpreting the Constitution.

A preamble is placed in an Act after the long title of the Act but before the words of enactment.²⁴⁷ 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:’. It is then followed by section 1, which sets out the short title to the Act. Similarly, the preamble to the *Australia Act 1986 (Cth)* is followed by the enacting words: ‘Be it therefore enacted by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia as follows:’. The placement of the preamble before the words of enactment shows that it is not a substantive part of the Act. It does not have the force of a law, although it may be used to interpret the law.

The view has in the past been taken that because a preamble precedes the enacting clause, it has not been enacted and therefore is not part of the Act.²⁴⁸ It is generally accepted, at least since the mid nineteenth century, that this is not the case.²⁴⁹ A preamble is as much a part of a Bill that is enacted as any other provision.²⁵⁰ However, the fact that the preamble is placed before the enacting clause indicates that it is not part of the substantive law and therefore does not have a positive or binding legal effect.²⁵¹ Its role is therefore explanatory or interpretative.

²⁴⁶ *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p 17. Cf Indigenous Law Centre ‘Constitutional Reform and Indigenous Peoples – Options for Amendment to the *Australian Constitution*’ Research Brief No 3, 2011, UNSW, which appears to assume at p 3 that recognition would be in the Preamble to the *Commonwealth of Australia Constitution Act*.

²⁴⁷ F A R Bennion, *Bennion on Statutory Interpretation*, (Lexis Nexis, 5th ed, 2008), pp 731 and 744; N J Singer and J D S Singer, *Statutes and Statutory Construction*, (Thomson West, 7th ed, 2007), p 290.

²⁴⁸ For a list of authorities, see: N J Singer and J D S Singer, *Statutes and Statutory Construction*, (Thomson West, 7th ed, 2007), pp 290-1. See also: *Mills v Wilkins* (1704) 6 Mod Rep 62, 62-3; 87 ER 822, 823 (Holt CJ). In India, this view was taken initially in *Re Berubari Union of India* (1960) 3 SCR 250; AIR 1960 SC 845. It was reversed, however, in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

²⁴⁹ *Salkeld v Johnson* (1848) 2 Exch 256; 154 ER 487, 499; *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 467; Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) p 85; and Anne Winckel, ‘The Contextual Role of a Preamble in Statutory Interpretation’ (1999) 23 MULR 184, 185, 205-6.

²⁵⁰ This is sometimes confirmed in legislation. See: *Acts Interpretation Act 1954* (Qld), s 36; *Acts Interpretation Act 1915* (SA), s 19; and *Interpretation Act 1984* (WA), s 31, all of which state that the preamble forms part of the Act. Note also that a preamble may be amended and repealed: F A R Bennion, *Bennion on Statutory Interpretation*, (Lexis Nexis, 5th ed, 2008), p 733; Anne Winckel, ‘The Contextual Role of a Preamble in Statutory Interpretation’ (1999) 23 MULR 184, 205.

²⁵¹ Gregory Craven, *Secession: The Ultimate States Right* (MUP, 1986) p 85.

The problem with inserting a new preamble in the Commonwealth Constitution is that it would not precede words of enactment²⁵² and therefore 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.

At the Constitutional Convention in 1998, it was decided that the existing Preamble in the Constitution Act should be retained intact and that a new preamble should be inserted in the Constitution. It was also proposed that the new preamble contain ‘concluding language to the effect that “[We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution”’.²⁵³ There would have been ambiguity as to whether these words were intended to amount to an enactment clause which stated that the Constitution had been re-enacted anew as an act of sovereignty of the Australian people, or whether it was merely a reassertion of commitment to an existing Constitution contained in s 9 of a British Act of Parliament.²⁵⁴ The retention of the existing preamble and words of enactment would have added to the confusion of what was intended.

The Constitutional Convention also recommended that the covering clauses be repealed, with those having continuing force being moved into the Constitution itself.²⁵⁵ This would have meant that there would have been the existing Preamble to the *Commonwealth of Australia Constitution Act*, followed by the words of enactment which referred to the Queen’s most Excellent Majesty, followed by s 9 which states ‘The Constitution of the Commonwealth shall be as follows:’, followed by a table of contents, a different republican preamble and then a republican Constitution. It would have been a most peculiarly constructed document.

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.

The appropriateness of having two preambles

It appears that the reason why the 1998 Constitutional Convention proposed that the existing Preamble be retained was to preserve the historic explanation of the original

²⁵² Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 642.

²⁵³ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 1, p 46. Cf the *Constitution Alteration (Preamble)* 1999, which had no enacting words at the end, but commenced the second recital with the words ‘We the Australian people commit ourselves to this Constitution’.

²⁵⁴ Note Winckel’s argument that ‘commit’ is passive in nature and ‘is indicative of a constitution being imposed from above, rather than one being authorized by the will of the people’: Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 643.

²⁵⁵ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 1, p 46.

enactment of the *Commonwealth of Australia Constitution Act*. Some, such as Gareth Evans, took the view that it was not worthwhile ‘to fiddle around rewriting the language in a now spent, effectively, Imperial Act of 98 years ago’.²⁵⁶

Others, however, such as George Winterton, thought it ‘would look bizarre having two preambles’ and ridiculous to have two references to ‘Almighty God’. He thought it ‘would present a very muddled and confused picture to the world’. He preferred to build upon the existing preamble.²⁵⁷

The existence of two preambles may also lead to interpretative issues. If the content of the two preambles conflicts, which is to take priority? Can the new preamble, being later in time, override the existing Preamble, or does the existing Preamble prevail because of its status as part of a law of paramount force? If the new preamble is to be subject to a restriction upon its use by the courts, what impact, if any, would this have on the use of the old Preamble? Can the two preambles be combined to lead to implications that neither alone could support? Again, some kind of clarification of intent would be helpful.

The content of a new preamble

The question of what matters should be included in a new preamble is controversial and inherently divisive. As noted above, some will campaign for the inclusion of a reference to ‘Almighty God’, whereas others will strongly object to it and feel alienated from such a preamble. The Constitutional Commission noted the submission that the ‘recognition of the equality of men and women is of equal significance to the recognition of Aboriginal prior ownership and the diversity of cultures which have formed this nation’.²⁵⁸ Others might dispute this assessment or the continuing necessity to make statements about gender equality. Some groups will be likely to campaign for the inclusion of reference to the protection of the environment,²⁵⁹ while others will express concern as to the potential consequences of such an inclusion.²⁶⁰

²⁵⁶ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, p 793.

²⁵⁷ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, pp 793 and 796. See also: G Winterton and M McKenna, ‘Two Preambles is Stretching the Mateship’, *The Australian*, 22 April 1999, p 13, where they stated that: ‘A Constitution with two preambles, contradictory in both substance and style, would be clumsy and confusing’.

²⁵⁸ Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988) Vol 1, p 106.

²⁵⁹ See, for example, the reference in the Czech preamble to the Charter of Fundamental Rights and Basic Freedoms to ‘responsibility towards future generations for the fate of all life on Earth’, which has an environmental dimension: Jan Kudrna, ‘Two Preambles in the Czech Constitutional System’ (2011) 52(1) *Acta Juridica Hungarica* 25. See also the Preamble to the French Constitution, discussed above.

²⁶⁰ International experience has shown that environmental rights contained in preambles or unenforceable ‘directives’ or ‘principles’ in Constitutions have increasingly been treated by courts as enforceable: C Bruch, W Coker and C Van Arsdale, ‘Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa’, March 2001: http://pdf.wri.org/ea_bbruch.pdf [viewed 30 August 2011].

Most Australians would probably agree that Aboriginal people and Torres Strait Islanders should be recognised in any new preamble.²⁶¹ 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.²⁶² 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.

The other great difficulty will be determining who else should be recognised in the preamble to the Constitution. As Webber has observed:

Once 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.²⁶³

The Constitutional Commission also pointed to the difficulty not only of ascertaining what fundamental sentiments Australians of all origins hold in common, but also why reference to some matters should be included in the preamble while other matters, which are important to different groups of people, are not.²⁶⁴

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 all sorts of other groups for recognition, leading to potential divisiveness arising from the inclusion of some and not others. It would also give rise to the potential for a political auction, with groups that hold greater political sway, through political donations or party membership or significant populations in marginal electorates, gaining recognition in a proposed preamble while others do not.

Such a process would be a recipe for failure at a referendum. Even if it succeeded at a referendum, it would potentially be the source of future division and conflict. Kudrna has warned that a constitutional preamble should be drafted in a ‘modest form, more to connect than to divide’. He noted that the ‘more complex the text is, the more dangers of

²⁶¹ A Newpoll survey in February 2011 found that 75% of persons surveyed were in favour of the constitutional recognition of Indigenous Australians: *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p 8.

²⁶² M McKenna, A Simpson and G Williams, ‘With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24 *UNSWLJ* 382, 407, Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 *UNSWLJ* 636, 642; Patrick Dodson, ‘Until the Chains are Broken – 1999 Vincent Lingiari Memorial Lecture’ (2000) 5(2) *Australian Indigenous Law Reporter* 73.

²⁶³ Jeremy Webber, ‘Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform’ (1999) 21 *Sydney Law Review* 260, 271.

²⁶⁴ Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988) Vol 1, p 109. See also: Republic Advisory Committee, *An Australian Republic – The Options*, (Cth Gov Printer, 1993) Vol 1, p 141.

discontent it contains'. He stressed that 'stability of the constitution is one of its basic values' and that sometimes 'it is better not to mention a controversial topic in favour of general success'.²⁶⁵

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. This is because the new preamble would not explain the new text. Sir Harry Gibbs has argued that:

A Preamble cannot exist in isolation; if a new preamble is to be considered at all, it should be considered in relation to the provisions of the constitutional amendments which it is intended to introduce.²⁶⁶

He thought that recitals in a preamble that would not explain or introduce anything in the text of the Constitution 'would be irrelevant to the provisions of the Constitution and out of place in it'.²⁶⁷

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.²⁶⁸

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.²⁶⁹

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

²⁶⁵ Jan Kudrna, 'Two Preambles in the Czech Constitutional System' (2011) 52(1) *Acta Juridica Hungarica* 19, 28.

²⁶⁶ Sir Harry Gibbs, 'A Preamble: The Issues' *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11), 90.

²⁶⁷ Sir Harry Gibbs, 'A Preamble: The Issues' *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11), 90.

²⁶⁸ Anne Winckel, 'A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics' (2001) 24 UNSWLJ 636, 643.

²⁶⁹ Anne Winckel, 'A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics' (2001) 24 UNSWLJ 636, 644.

interpreted.²⁷⁰ 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.

²⁷⁰ Cth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Committee Hansard*, 1 May 2008, LCA 60. See also: House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming Our Constitution: A Roundtable Discussion*, June 2008, p 55.

CHAPTER 5 – 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*.²⁷¹ 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. The Court might also be influenced 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 a different intent of those who amend the Preamble or insert a new preamble, without any change being made to the text of the Constitution itself?²⁷²

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,²⁷³ 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

²⁷¹ M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 392.

²⁷² 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*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, p 472.

²⁷³ Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 640.

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.²⁷⁴

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’.²⁷⁵

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.²⁷⁶ 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’.²⁷⁷ 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.²⁷⁸

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,

²⁷⁴ M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 395.

²⁷⁵ S Gageler and M Leeming, ‘An Australian Republic: Is a Referendum Enough?’ (1996) 7 PLR 143, 173.

²⁷⁶ Republic Advisory Committee, *An Australian Republic – The Options*, (Cth Gov Printer, 1993), Vol 1, p 137.

²⁷⁷ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 1, p 47.

²⁷⁸ Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 641; Megan Davis and Zrinka Lemezina, ‘Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?’ (2010) UNSWLJ 239, 257-8; M McKenna, A Simpson and G Williams, ‘With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24 UNSWLJ 382, 407 and 410.

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.²⁷⁹

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 or it can be regarded as requiring or permitting different treatment when differences arise. Webber has noted that 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.²⁸⁰ 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. This has proved the case in France where equality rights derived from the Preamble of the 1958 French Constitution have been interpreted as prohibiting affirmative action.

Another common proposal is the recognition and protection of 'human dignity'. While in its generality, few would reject the importance of the maintenance of human dignity, when it comes to its specific application, it has been used to support judicial decisions on numerous controversial subjects, such as the prohibition of capital punishment, support for abortion rights and the recognition of same-sex marriages.²⁸¹ The inclusion of a provision on the protection of human dignity in a proposed constitutional preamble would therefore be likely to side-track debate over the preamble into controversial ethical issues, making its success in a referendum unlikely.

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.²⁸² At the 1998 Constitutional

²⁷⁹ George Winterton, 'A New Constitutional Preamble' (1997) 8 PLR 186, 187-8.

²⁸⁰ Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 266.

²⁸¹ See the detailed discussion of cases in: Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 724.

²⁸² The *Constitution Alteration (Preamble)* 1999 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.'

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’.²⁸³ 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.²⁸⁴

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’.²⁸⁵ 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.’²⁸⁶

Others have described a preamble stripped of its legal significance as ‘hollow and hypocritical’.²⁸⁷ 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’.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰

²⁸³ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, p 791.

²⁸⁴ *Report of the Constitutional Convention*, (CanPrint Communications, 1998), Vol 4, Transcript of Proceedings, p 803.

²⁸⁵ Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 646.

²⁸⁶ Megan Davis and Zrinka Lemezina, ‘Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?’ (2010) UNSWLJ 239, 261.

²⁸⁷ Alex Reilly, ‘Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values’ (1998) 21(3) UNSWLJ 903, 904; M McKenna, A Simpson and G Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 UNSWLJ 382, 396.

²⁸⁸ Alex Reilly, ‘Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values’ (1998) 21(3) UNSWLJ 903, 904.

²⁸⁹ *The Concise Oxford Dictionary of Current English* (Clarendon Press, Oxford, 9th ed, 1995).

²⁹⁰ 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’: Qld, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46, November 2004, p 11.

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.²⁹¹

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?²⁹² Either approach may be chosen, but it should be chosen knowingly, not imposed by subterfuge or left to chance.

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?²⁹³ 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?²⁹⁴ Should it extend to the interpretation of the existing Preamble as well as the new preamble (if there are to be two),²⁹⁵ or should the existing Preamble still be able to be used in constitutional interpretation while the new one cannot?

Limitation provisions have been included in the Constitutions of each of the three States that have recognised Indigenous Australians, including the new Preamble to the Queensland Constitution. While such a provision might avoid unanticipated consequences, it also has the effect of undermining the purpose and standing of the preamble or provision, making it a largely empty gesture.

²⁹¹ G Winterton, ‘The 1998 Constitutional Convention: A Reprise of 1898?’ (1998) 21(3) UNSWLJ 856, 863.

²⁹² See, eg, the effect of the implied freedom of political communication.

²⁹³ See, eg, art 45(1) of the Irish Constitution which provides that certain principles of social policy ‘shall not be cognizable by any Court under any of the provisions of this Constitution’ and art 37 of the Indian Constitution which provides that certain provisions ‘shall not be enforceable by any court’.

²⁹⁴ 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’.

²⁹⁵ 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: M McKenna, A Simpson and G Williams, ‘With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24 UNSWLJ 382, 411.

Would an expansively worded preamble or a limitation clause affect the High Court's constitutional interpretation?

Those who see the need for a clause limiting the use of a constitutional preamble point to the Canadian Supreme Court and its use of a constitutional preamble to establish an implied Bill of Rights.²⁹⁶ Winterton has noted that the Canadian example shows that the Constitutional Convention's concerns about judicial creativity were 'not fanciful'.²⁹⁷ He also observed that 'caution should be exercised in including [principles, values or aspirations] because of their potential employment by the judiciary in interpreting the Constitution.'²⁹⁸

Two responses, however, have been given as to why a limitation clause is unnecessary. The first is that the High Court interprets the Constitution very broadly in any case, so that it is doubtful that the addition of an 'expansively worded preamble' would 'add anything where the court approaches the Constitution in this way'.²⁹⁹ Similarly, McKenna, Simpson and Williams have noted that some judges, 'most notably Murphy J', have managed to find implied rights in the Constitution regardless of the existence or otherwise of a preamble. They have argued that a justiciable preamble would therefore be unlikely to make any difference.³⁰⁰ On this basis, an expansive preamble would have very little effect and there is therefore no need to worry about including a limitation clause.

However, for the most part the implication of rights by judges such as Murphy J is to be found in dissenting judgments and has not received majority support. Even implied rights or freedoms supported by the majority have been reinterpreted in order to tether them directly to the text and structure of the Constitution.³⁰¹ A constitutional preamble, recently approved by majorities at a referendum, is likely to be a far more persuasive and authoritative source of implications than provisions enacted over 100 years ago.³⁰²

²⁹⁶ See also the judicial interpretation of the constitutional preambles in India and France, discussed above.

²⁹⁷ G Winterton, 'The 1998 Constitutional Convention: A Reprise of 1898?' (1998) 21(3) UNSWLJ 856, 864.

²⁹⁸ George Winterton, 'A New Constitutional Preamble' (1997) 8 PLR 186, 188. See also Sir Harry Gibbs' view that 'the High Court might use a preamble... as the basis for an interpretation leading to extensive constitutional change, unless effectively prohibited from doing so': Sir Harry Gibbs, 'A Preamble: The Issues' *Upholding the Constitution – Proceedings of the Samuel Griffith Society* (1999, Vol 11), 91.

²⁹⁹ Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988) Vol 1, p 109. Note, however, the argument in the United States that the generality of the terms of the Preamble invites the expansive interpretation of federal powers: Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 201. Hence, a preamble may confirm or entrench such an approach.

³⁰⁰ M McKenna, A Simpson and G Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 UNSWLJ 382, 398. See also the view that 'preambles offer little power as an instrument of legal change': Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) UNSWLJ 239, 260.

³⁰¹ *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), 182-3 (Dawson J), 231 (McHugh J) and 285 (Gummow J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

³⁰² Winterton has recorded Sir Anthony Mason's observation that a 'constitutional recital of values would be an extremely authoritative statement': G Winterton, 'The 1998 Constitutional Convention: A Reprise of 1898?' (1998) 21(3) UNSWLJ 856, 864.

The alternative argument is that a limitation clause would itself have very little effect as the High Court could get around it if it wished to do so. Leslie Zines has observed:

Whatever one thinks of the Convention's attempt to prevent judicial use of the preamble, I doubt whether it would be effective. It would, for example, be open to judges to find those very values or aspirations to be community values if they arrived at that conclusion from other sources, such as their own experience or intuition.³⁰³

This, of course, would depend upon the extent to which community values can be appropriately used in the interpretation of the Constitution, which remains a matter of contention.³⁰⁴ Moreover, as McKenna, Simpson and Williams have argued, a judge who uses the preamble as a legal tool in the face of an express constitutional prohibition 'could attract personal criticism and perhaps even cause a loss of public confidence in the courts'.³⁰⁵

Another argument that has been put is that if the High Court is to interpret the Constitution by reference to values and fundamental principles, then it is more democratic that the people determine what they are and approve them in a referendum. Reilly has argued: 'Given that interpretation is uncertain and inevitably infused by the values of the interpreters, a society is well advised to expressly state the fundamental principles which must inform the decisions of the Courts'.³⁰⁶ The approval of principles and values by the people in a referendum increases their democratic legitimacy.³⁰⁷ How those values and principles are used, however, is another matter.

McKenna, Simpson and Williams have argued that a new preamble could cause the High Court to narrow its otherwise broad interpretation of legislative powers, by finding, for example, that s 51(xxvi) only supports laws that benefit a particular race.³⁰⁸ Davis and Lemezina have also argued that 'a preamble that gives proper recognition to past dispossession, as well as the principle of equality, could be useful in constructing the limits of the race power'.³⁰⁹ In contrast, Winckel has noted that a new preamble that referred to democracy and representative government, might be interpreted as supporting

³⁰³ Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10 PLR 67, 68. See also: J Williams, 'The Republican Preamble: Back to the Drawing Board?' (1999) 10 PLR 69, 72, noting that a limitation clause 'would appear to be ineffectual against similar implications found within the text and structure of the Constitution'.

³⁰⁴ See, eg, *Neindorf v Junkovic* (2005) 222 ALR 631, [9] (Gleeson CJ); and *Roach v Electoral Commissioner* (2007) 233 CLR 162, [158] (Hayne J).

³⁰⁵ M McKenna, A Simpson and G Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 UNSWLJ 382, 412.

³⁰⁶ Alex Reilly, 'Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21(3) UNSWLJ 903, 907.

³⁰⁷ Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 269.

³⁰⁸ M McKenna, A Simpson and G Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 UNSWLJ 382, 398.

³⁰⁹ Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) UNSWLJ 239, 259.

a broad interpretation of s 51(xxvi) that allowed ‘the elected representatives in the legislature to implement the views of the electorate.’³¹⁰ Winckel concluded:

This potential arbitrary use of a preamble in constitutional interpretation highlights why it is inadvisable to progressively accord a preamble any more than the traditional interpretive role with its attendant qualifying principles, as developed by the common law courts.³¹¹

The American experience is relevant here. In the United States the majoritarian elements of the Preamble have been sometimes used to limit express constitutional rights found in the Bill of Rights. For example, in *Wayte v United States*, the Supreme Court accepted that government regulation of free speech is valid when, amongst other things, it furthers an important or substantial government interest. In this case, the ‘motivating purpose’ in the preamble of providing for the common defence of the United States justified the regulation of free speech because ‘[u]nless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning’.³¹² If an Australian preamble were to contain a mixture of objects that support individual rights and collective rights on the one hand (eg through the recognition of the ongoing rights of indigenous Australians) and majoritarian rights on the other (eg through the recognition of representative and responsible government) then it should not necessarily be assumed that those favouring individual or collective rights will prevail.

In the United States, Himmelfarb has argued that there are two approaches to the relevance of the preamble. The legal realist sees the preamble as unimportant because its phrases are invoked to support an outcome predetermined by the judge. For example ‘[i]f a Justice wants to invalidate a pro-prosecution rule of criminal procedure, he will quote the preamble’s “establish Justice” language; but if a Justice wants to *uphold* that same rule, she will quote the preamble’s “insure domestic Tranquility” language.’³¹³ This argument is similar to that put by Winterton and the Constitutional Commission – that one way or another the High Court will use whatever principles it wishes to employ, regardless of whether they are in a constitutional preamble or not.

The alternative argument, according to Himmelfarb, is that the preamble is ‘all-important’ because it is an ‘invitation to federal judges to be creative in their constitutional interpretation; the very presence of the preamble at the head of the Constitution indicates that it is permissible – perhaps even mandatory – for federal judges to effect an evolutionary development of constitutional law...’³¹⁴ This argument is more akin to that raised by Craven at the 1998 Constitutional Convention.

³¹⁰ Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 642.

³¹¹ Anne Winckel, ‘A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics’ (2001) 24 UNSWLJ 636, 642.

³¹² 470 US 598, 620 (1985) (Powell J). Justices of the Supreme Court have also used the ‘insure domestic Tranquility’ object in the preamble to ‘defeat the claims of the accused, the indicted and the convicted’ through a narrow interpretation of the Bill of Rights: Dan Himmelfarb, ‘The Preamble in Constitutional Interpretation’ (1991) 2 *Seton Hall Constitutional Law Journal* 127, 179-80.

³¹³ Dan Himmelfarb, ‘The Preamble in Constitutional Interpretation’ (1991) 2 *Seton Hall Constitutional Law Journal* 127, 208.

As Himmelfarb has argued, the answer probably lies between the two extremes. In the case of the High Court some judges have in the past been far more liberal with their use of sources and principles in constitutional interpretation than others. Some have felt constrained to deal with the text and structure of the Constitution and the intentions of the framers. A new and expansive preamble, for the latter type of judges, may indeed liberate them by providing a textual source to support broader interpretation of provisions than they might otherwise have been prepared to accept. Hence a new or amended preamble is more likely to affect these judges rather than the ones who are liberal in their use of sources for constitutional interpretation to begin with. What is critical, however, is that the number of judges affected by a preamble might well be sufficient to turn a minority position into a majority one.

³¹⁴ Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2 *Seton Hall Constitutional Law Journal* 127, 208.

CHAPTER 6 – WHAT IS RECOGNITION IN A PREAMBLE INTENDED TO ACHIEVE?

The ultimate issue is what is recognition of Indigenous Australians in a constitutional preamble intended to achieve? It is only when there is a consensus on this point that other issues, such as whether or not there should be a limitation clause, can be resolved.

Winckel, in discussing the campaign in the 1890s for the recognition of God in the Preamble to the *Commonwealth of Australia Constitution Act* noted that there were mixed intentions behind this campaign. For some, it was a matter of religious piety, for others it involved an increase in status and for others still it opened up the possibility that the Commonwealth Parliament might legislate with respect to religious matters such as Sunday observance.³¹⁵ The framers of the Constitution were so concerned about the latter possibility that they included an express provision in s 116 to prevent this from occurring.

Winckel has observed that there are similarities with the debate concerning the recognition of Indigenous Australians.³¹⁶ For some it is a matter of redressing historical wrongs or an increase in status, while for others there is a strategic agenda concerning the potential use of the preamble in the future to aid the interests of Aboriginal people through constitutional interpretation or implied rights. There needs to be some kind of clarity about what is sought to be achieved, so that the method chosen to recognise Indigenous Australians is best matched with the likely achievement of the intended ends. Winckel's concluding observation was that the common lesson to be learnt from the past is that 'the search for justice and truth can never find its satisfaction in the mere text of a Constitution.'³¹⁷

Davis and Lemezina have observed that 'while Indigenous peoples want recognition in the preamble this should not be a substitute for, or at the expense of, substantive and concrete recognition in the operative text of the *Constitution*.'³¹⁸ They have noted that Indigenous rights are insecure as they can be overridden by Parliament and that the entrenchment of Indigenous Rights in the Constitution therefore 'remains the central pursuit of the Indigenous rights agenda'.³¹⁹ The Council for Aboriginal Reconciliation also expressed concern that constitutional recognition be seen as the beginning of a broader process, rather than 'an easy symbolic step which would be all that was needed to address constitutional issues for Indigenous peoples'.³²⁰

If recognition in a constitutional preamble is consistent with, and explains, substantive constitutional amendments, then many of the arguments about the role and use of the

³¹⁵ Anne Winckel, 'Almighty God in the Preamble', (1999) 4 *The New Federalist*, 78, 83.

³¹⁶ Anne Winckel, 'Almighty God in the Preamble', (1999) 4 *The New Federalist*, 78, 83.

³¹⁷ Anne Winckel, 'Almighty God in the Preamble', (1999) 4 *The New Federalist*, 78, 83.

³¹⁸ Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) UNSWLJ 239, 240 and 265.

³¹⁹ Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) UNSWLJ 239, 242.

³²⁰ Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995), p 36. See also: Garth Nettheim, 'Reconciliation and the Constitution', (1999) 22 UNSWLJ 625, 627.

preamble will resolve themselves. However, if there is to be a significant disparity between the preamble and the text of the Constitution, then that is when serious problems arise.

Many things are necessary to achieve constitutional reform. Bipartisan support is important, as is grass roots support. Constitutional reforms need to be seen as coming from the people, not being imposed from on high. It is also important to establish the *need* for reform and to have a clear narrative that explains what is needed and why. Critical to constitutional reform, however, is transparency as to intention and clarity in the meaning of any constitutional amendment. Without these, a referendum is unlikely to succeed, despite all the goodwill in the world.