



## Constitutional Recognition of Aboriginal People

by Gareth Griffith

### 1 Proposed constitutional amendment

For the purpose of honouring and recognising the unique historical position of Aboriginal people in this State, the NSW Government proposes to amend the *Constitution Act 1902* (NSW) by the insertion of a new section 2A. The proposed section reads as follows:

- (a) The People and Parliament of New South Wales acknowledge and honour the Aboriginal people as the first people and nations of the State, and
- (b) The People and Parliament of New South Wales recognise that Aboriginal people have a spiritual, social, and cultural relationship with their traditional lands and waters and have made a unique and lasting contribution to the identity of New South Wales.
- (c) Nothing in this section creates in any person any legal right or gives rise to any civil cause of action, or affects the interpretation of this Act or any other law in force in New South Wales.

In a [media release](#) dated 16 June 2010 the Premier said that 'Constitutional recognition reminds us that the determination to close the gap in a range of indicators continues'. The

Minister for Aboriginal Affairs, Paul Lynch, said the proposal was 'about acknowledging history, what's happened in the past and it's also about truth telling'.

Elsewhere the Minister for Aboriginal Affairs is reported as saying 'There's no reason why you can't do symbols and also practical measures at the same time'. He added that 'Once Parliament resumed in September, a bill would be introduced to amend the Constitution'.<sup>1</sup>

For Linda Burney, Minister for the State Plan and Minister for Community Services, and the first Aboriginal Australian elected to the NSW Parliament, constitutional recognition 'is another significant step in recognising Aboriginal people in NSW'. Ms Burney stated:

This formal recognition is very important to the Aboriginal community. It's a sign of respect and it has come at a time when the issue of racism has reared its ugly head again. This constitutional recognition will go some way to healing wounds.<sup>2</sup>

The proposal has been welcomed by the NSW Aboriginal Land Council, with

its Chairwoman Bev Manton commenting:

It has taken 108 years to recognise Aboriginal people in the NSW Constitution. That's obviously a very long wait, but it's extremely heartening that the Keneally Government has recognised the importance of this symbolic gesture.<sup>3</sup>

## 2 Discussion Paper 2010

The [NSW Department of Aboriginal Affairs](#) has invited submissions on the proposal, which close on 11 August 2010. To assist in this process a [Discussion Paper](#) has been provided.

The paper outlines recent events, including Prime Minister Rudd's apology in 2008 to the Stolen Generation. Cited, too, is the resolution passed in 2009 by the Local Government Association of NSW Annual Conference calling for the NSW and Commonwealth governments to insert Preambles into their respective constitutions recognising the Aboriginal and Torres Strait Islander Peoples as the First Peoples of this Country. Following consultation and negotiation, these Preambles were to reflect:

the aspirations of Aboriginal and Torres Strait Islander Peoples as the First people.

Cited further in the Discussion Paper are the present NSW and selected Commonwealth laws that recognise Aboriginal People and provide some expression of their aspirations, either by way of a Preamble to a statute<sup>4</sup> or as part of its legislative 'objects'.<sup>5</sup>

## 3 Social Justice Report 2008

Also noted in the above [Discussion Paper](#) was the commentary on constitutional reform in the Aboriginal

and Torres Strait Islander Commissioner's [Social Justice Report 2008](#). The Commissioner observed with reference to the Commonwealth Constitution:

It is widely considered part of the 'unfinished business' of reconciliation to provide recognition of the first nations status of Indigenous peoples in the Preamble to the Constitution. Such a change would be of great symbolic importance to Indigenous peoples. There is currently bipartisan support for this to occur.

The Council for Aboriginal Reconciliation has recommended that a new Preamble should recognise Aboriginal and Torres Strait Islander peoples as the original owners and custodians, and acknowledge the history of dispossession that many have suffered since colonisation.

On this issue the Commissioner commented:

In my view, amending the Preamble to the Constitution would be of great symbolic importance, and go some way to redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.

## 4 Constitutional Commission Report 1988

Arguments to this effect, at State and federal level, are by no means new. Federally, for example, the 1987 report of the Individual and Democratic Rights Advisory Committee to the Constitutional Commission recommended the insertion of a new Preamble to the Commonwealth Constitution.

There exists a brief Preamble to the Commonwealth Constitution which,

other than declaring that the Federal Commonwealth is to be indissoluble, does not contain any aspirational or fundamental foundations. As explained by Quick and Garran, the Preamble affirms:

- The agreement of the people of Australia;
- Their reliance on the blessing of Almighty God;
- The purpose to unite;
- The character of the union – indissoluble;
- The form of the union – a Federal Commonwealth;
- The dependence of the union – under the Crown;
- The government of the union under the Constitution; and
- The expediency of provision for admission of other colonies as States.<sup>6</sup>

In addition to this existing Preamble, the Advisory Committee recommended recitals as part of the Constitution proper which would have included the declaration:<sup>7</sup>

Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership.<sup>8</sup>

The Advisory Committee considered in this respect that:

the Preamble should acknowledge the historical truth of the settlement of Australia by Europeans in 1788. It is appropriate to recognise in the Preamble that prior to the arrival of European settlers Australia was owned by the Aboriginal people. Such recognition in the Constitution would be an act of good faith and symbolic importance in furthering reconciliation between Aboriginal and non-Aboriginal Australians.<sup>9</sup>

In the event, the recommendation to insert an additional Preamble was not adopted by the Constitutional Commission in its Final Report of 1988. Specifically in relation to the 'Aboriginal' component of that recommendation, the Commission observed:

At this stage we note that there are real difficulties in preparing an appropriate recital and that words such as 'owned' and 'ceded' need to be carefully considered in this context.

More generally, the Commission declined to support the alteration of the present Preamble on three main grounds:

- the difficulty of isolating the fundamental sentiments which Australians of all origins hold in common;
- the difficulty of reaching agreement on an appropriate form of words with regard to recognition of Australia's Indigenous peoples; and
- writing a new Preamble would only make sense if the Constitution were to be rewritten.<sup>10</sup>

## 5 1999 Commonwealth Preamble referendum and beyond

The debate about a new Preamble to the Commonwealth Constitution continued throughout the 1990s, the decade in which the High Court ruled in the *Mabo*<sup>11</sup> and *Wik*<sup>12</sup> cases and native title legislation was passed at the Commonwealth and State level.<sup>13</sup> At this time several draft Preambles were suggested by, among others, the Council for Aboriginal Reconciliation (1995), Lowitja O'Donoghue (1996), Malcolm Turnbull (1996) and George Winterton (1996).<sup>14</sup>

This debate came to a head during the 1998 Constitutional Convention, the main agenda item at which was the case for and against a republic. The Convention also proposed a new Preamble to the Commonwealth Constitution. One element of this proposal was:

acknowledgement of the original occupancy and custodianship of Australia by Aboriginal and Torres Strait Islanders.

One year on, in February 1999, Prime Minister John Howard, declared his support for a new Preamble, telling the House of Representatives:

I think that as we approach the Centenary of Federation there are a growing number of Australians - Liberal and Labor, republican and anti-republican alike - who would like to see embedded in the basic document of this country some recognition of the prior occupation of the landmass of Australia by the indigenous people.<sup>15</sup>

Mr Howard personally drafted the proposed Preamble, in collaboration with the poet Les Murray. The final version made reference to:

honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.

It was this wording that was submitted to referendum on 6 November 1999, the same day as the republic referendum. In terms of the referendum campaigns, the republic issue overshadowed the Preamble. In respect to the latter, however, the focus was very much on the reconciliation process and the

constitutional recognition of Indigenous Australians, with other issues in the broad ranging Preamble proposal being largely overlooked.<sup>16</sup> A key issue was the failure of the proposal to recognise Aboriginal 'custodianship' of the land, as suggested by the Constitutional Convention and supported at the time by the Labor Party.<sup>17</sup> A further issue was the lack of consultation with Indigenous people. In the event, the referendum question on the Preamble was defeated in every State and Territory, with a national No vote of 60.7 per cent, and a State No vote of 57.86 per cent in NSW.<sup>18</sup>

In its Final Report in 2000 the Aboriginal Reconciliation Council recommended that the Commonwealth Parliament prepare legislation for a referendum which seeks to:

recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution.<sup>19</sup>

Shortly before the November 2007 federal election, then Prime Minister John Howard said that, if re-elected, a referendum would be held to recognise Indigenous Australians in the Preamble to the Commonwealth Constitution. Responding to this, then Deputy Opposition Leader, Julia Gillard, was reported as saying that 'a similar proposal had been in Labor's election platform for a very long time, and the Party would support the Liberal plan'.<sup>20</sup>

In July 2010 Mick Gooda, the Aboriginal and Torres Strait Islander Commissioner, renewed the call for the constitutional recognition at the Commonwealth level, writing:

Constitutional reform is more than just symbolism. The positive effect on our self-esteem, the value of our

culture and history, and the respect it marshals from others can make real differences to the lives of indigenous Australians everywhere.<sup>21</sup>

## 6 Reform at the State level

A parallel debate has occurred at the State level. The Queensland Constitutional Convention, held in June 1999, resolved that the Constitutions of each State should include a Preamble, which should be concise, inspirational and aspirational and should acknowledge:

the past;  
the custodianship of indigenous peoples; and  
equality before the law.<sup>22</sup>

In 2006, the Western Australian Law Reform Commission report into Aboriginal Customary Law recommended 'constitutional recognition of the unique status and contribution of Aboriginal people to WA'.<sup>23</sup>

### 6.1 Victoria 2004

The first State to respond to the call for constitutional recognition was Victoria, in the form of the [Constitution \(Recognition of Aboriginal People\) Act 2004](#) [the 2004 Act]. Unlike its NSW counterpart, the Victorian *Constitution Act 1975* includes a Preamble which basically narrates the legislative process by which Victoria was established in 1855 as a self-governing colony with responsible government. The 2004 Act inserted a new s 1A into the *Constitution Act 1975*, of which s 1A(1) provides the following statement:

The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation,

recognition or involvement of the Aboriginal people of Victoria.

There is therefore an acknowledgement that the colony's Aboriginal people played no part in the making of the Victorian *Constitution Act 1855*. Note that this acknowledgement is made by 'Parliament' alone, which remains the focus of legal sovereignty under the Victorian Constitution (see section 7.2 below).

Section 1A(2) of the 2004 Act then provides:

The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

- (a) have a unique status as the descendants of Australia's first people; and
- (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.

The provision stops short of recognising either 'dispossession' (as in the Preamble to the *Native Title Act 1993* (Cth)) or 'ownership' of the land by Indigenous people. Otherwise it is quite broad in scope, referring to:

- 'custodianship' of land;
- the concept of 'first people' as recommended by the Aboriginal Reconciliation Council, which has echoes of the Canadian reference to 'First Nations';<sup>24</sup>
- the multi-faceted relationship of Aboriginal people with their traditional lands and waters, which otherwise finds

- expression in native title law;  
and
- the particular contribution made by Aboriginal people to Victoria's 'identity and well-being'.

By s 1A(3) this constitutional recognition of Aboriginal people is not intended to have any legal effect. It provides:

The Parliament does not intend by this section—  
(a) to create in any person any legal right or give rise to any civil cause of action; or  
(b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

Emphasising the symbolic yet significant nature of the 2004 Act, Premier Bracks said in the relevant Second Reading speech:

While the bill will not confer any legal rights, it is an important step towards reconciliation between Victorian indigenous and non-indigenous communities.<sup>25</sup>

Underlining its importance, the Victorian Premier added that, by the insertion of s 18(2)(aa) into the *Constitution Act 1975* (Vic), the amendment would be subject to entrenchment. Mr Bracks explained:

The bill provides for the amendments to be entrenched by a special three-fifths majority to enable the provisions to form an important and enduring part of the Constitution.

## 6.2 Queensland 2010

The [Constitution \(Preamble\) Amendment Act 2010](#) (Qld) [the 2010 Act] is the latest instalment in the lengthy process of constitutional

consolidation undertaken in Queensland since the 1990s (the 2010 Act amends the [Constitution of Queensland 2001](#)). Over the past decade or so consideration of a constitutional Preamble has been the subject of several inquiries by parliamentary committees and other bodies:

- the Queensland Constitutional Review Commission (1999-2000);
- the Legal, Constitutional and Administrative Review Committee – *Hands on Parliament* (2003);
- the Legal, Constitutional and Administrative Review Committee – [A preamble for the Queensland Constitution?](#) (2004); and
- the Law, Justice and Safety Committee – [A preamble for the Constitution of Queensland 2001](#) (2009).

As explained by the Law, Justice and Safety Committee in its 2009 report, Queensland's *Constitution Act 1867* contained a Preamble, basically setting out the scope and nature of parliamentary and executive powers within an Imperial context. This Preamble was repealed by the *Constitution of Queensland 2001*.

The question then was whether a new and more 'aspirational' Preamble should be included in the 2001 Act. In its 2000 report the Queensland Constitutional Review Commission had recommended that there should be a Preamble to the Queensland Constitution 'to emphasise the new foundations of the State's constitutional regime' and that it should 'affirm certain widely-held values'. Its proposal included the declaration:

In a spirit of reconciliation, we recognise the contribution of both Aboriginal and Torres Strait Islander peoples as the original occupants and custodians of this land.<sup>26</sup>

On the other hand, the Legal, Constitutional and Administrative Review Committee in its 2004 report recommended against the inclusion of a Preamble in the Queensland Constitution citing, among other reasons, 'the apparent lack of public support for a preamble'.<sup>27</sup>

Then, again, in September 2009 the Law, Justice and Safety Committee recommended in favour of a Preamble, this despite the fact that 'the majority of public submissions' did not support the proposal and 'felt that a preamble was neither required nor necessary'.<sup>28</sup> In respect to the 'Indigenous' component of the proposed Preamble, the Committee adopted the suggestion provided to it by the Queensland Aboriginal and Torres Strait Islander Advisory Council, as follows:

[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.<sup>29</sup>

Express reference is not made here to 'custodianship', still less to the more problematic concept of 'ownership'. On the other hand, possession is implied by the reference to 'the First Australians, *whose lands, winds and waters we all now share*' (emphasis added). The Queensland Government adopted the formulation suggested by the Queensland Aboriginal and Torres Strait Islander Advisory Council. In the

relevant [Second Reading speech](#) Premier Bligh said:

As we celebrate Queensland's 150th anniversary, we also acknowledge that Queensland's Aboriginal and Torres Strait Islander people have been the custodians of Queensland for significantly longer.<sup>30</sup>

The Premier added:

unique among the states and territories of Australia, Queensland is home to two distinct Indigenous peoples, our Aboriginal people and our Torres Strait Islander people.

The 'Indigenous' component to the [2010 Act](#) is part of a broadly worded Preamble which conforms to the contemporary preference for 'inspirational' and 'aspirational' statements of this kind (an early example of which is the Preamble to the US Constitution).<sup>31</sup> The full text of the Queensland Preamble reads:

The people of Queensland, free and equal citizens of Australia—

(a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and

(b) adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; and

(c) 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; and

(d) determine to protect our unique environment; and

(e) acknowledge the achievements of our forebears, coming from many

backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and (f) resolve, in this the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.

As in the Victorian case, a new s 3A was inserted into the Constitution of Queensland 2001 exempting, in the Premier's words, 'the use of the preamble as an aid for interpreting the Constitution or any other Queensland law'. The provision is in substantively the same terms as s 1A(3) of the *Victorian Constitution Act 1975*.

Unlike the Victorian case, the new Queensland Preamble is not an entrenched provision of the Constitution. Neither a special parliamentary majority nor a referendum would be required to either repeal or amend it.

On the issue of a referendum, the Premier informed the Parliament that the Solicitor-General had confirmed that no appeal to the popular will was required for the insertion of the Preamble into the Queensland constitution.<sup>32</sup> An ordinary Act of Parliament was sufficient for the purpose. However, the Premier's comment did not address directly the following observation made by the Law, Justice and Safety Committee:

Public submissions received by the committee demonstrated minimal support for a preamble. There was a clear desire and preference for any proposed preamble to be approved by the people of Queensland by way of a referendum. In the absence of a comprehensive public consultation

process, a referendum is the only way to ensure any proposed preamble can claim to legitimately enjoy the support and approval of the people of Queensland. Accordingly, we believe that any proposed preamble ought to be put to the people of Queensland at a referendum.<sup>33</sup>

The observation would seem to apply with particular force where the Preamble purports to express the voice of '*The people of Queensland*' (and not that of the Parliament as in the Victorian case) and also adopts '*the principle of the sovereignty of the people*'.

## 7 The NSW proposal

In its present form the *NSW Constitution Act 1902* does not contain a Preamble. But of course the main purpose of this Act, which updated the Constitution to take account of NSW's new status as a State within a federation, was primarily to consolidate already existing constitutional statutes. Notably, the 1902 Act updated the *NSW Constitution Act 1855* which contained a lengthy recitals clause at its head setting out in narrative form the legal background to responsible government in the colony.

In any event, the proposal to insert a new s 2A into the *Constitution Act 1902* would not constitute a Preamble as such. Neither can it be classified as an 'objects' section, the modern day variant on the use of a Preamble to indicate the intended purpose(s) of legislation. Like its Victorian counterpart, proposed s 2A would form part of the preliminary provisions of the Constitution Act, sitting in the NSW case after the 'Repeals and savings' clause (s 2) and before 'Definitions' (s 3).



Inevitably, issues of detail and drafting arise, a number of which are canvassed below.

### 7.1 Comparing provisions:

Proposed s 2A bears an obvious similarity with s 1A(2) of the Victorian *Constitution Act 1975* and could be read as something of a truncated version of that provision. Unlike its Victorian counterpart it makes no reference to Aboriginal people as 'original custodians of the land'. Like the Victorian provision, it does recognise that 'Aboriginal people have a spiritual, social and cultural relationship with their traditional lands and waters' but stops short of including reference to an 'economic relationship'.

There is also no direct equivalent of s 1A(2)(a) of the Victorian Act which recognises 'the unique status' of Aboriginal people 'as the descendents of Australia's first people'. Quite what is meant by 'status' in this context may not be entirely clear and perhaps such terminology is best avoided.<sup>34</sup> On the other hand, borrowing from both its Queensland and Victorian counterparts, the NSW proposal does 'acknowledge and honour the Aboriginal people as the first people *and nations* of the State' (emphasis added).

In the legislative context discussed here, the additional reference to '*first...nations*' is original to the NSW proposal. 'Nations' is a term in regular usage in Canada but perhaps less so in Australia.<sup>35</sup> Having said that, the [Social Justice Report 2008](#) did refer to 'the first nations status of Indigenous peoples'.

The same report recommended acknowledgement of the 'history of dispossession that many have suffered

since colonisation'. This is not a feature of the Victorian, Queensland or NSW provisions discussed in this E-brief. While 'not denying its general truth', George Winterton advocated caution in the use of such terminology. This was in case reference to 'dispossession' should have 'unintended legal consequences' for native title claims made on 'the ground of continuous occupation of traditional lands'.<sup>36</sup>

### 7.2 The People and Parliament

Whereas the Queensland Preamble evokes the authority of 'the people', the Victorian legislation prefers to rely on the more traditional imprimatur of 'the Parliament'. Conversely, the NSW proposal combines reference to both 'The People and Parliament'. The fact that the proposal is to have no legal effect suggests that this reference to 'The People' is merely rhetorical. Presumably, it is not intended to indicate an alternative source of legal sovereignty. It also begs the question whether 'The People' includes the Aboriginal people of NSW or, read literally, is it the 'non-Aboriginal People' of NSW who 'acknowledge and honour' the Aboriginal people of the State?

What can be said is that the proposed reference to 'The People' is a new departure for the NSW Constitution Act. With its roots firmly grounded in the tradition of parliamentary sovereignty associated with the Westminster system of government, at present the Act makes no direct reference to the 'People'. It does of course provide for the testing of the popular will, in the form of a referendum. However, the Act's references in this context are not to the 'People' but to the 'electors' (ss 7A and 7B). The outcome of such plebiscites represents the will of the majority of

those qualified to vote, which accords with the pluralistic underpinnings of representative democracy.

### 7.3 Referendum

As in the Queensland context, reference to 'The People' in the NSW proposal raises the question whether the constitutional recognition of Aboriginal people should be voted on at a referendum. There is of course no legal requirement to submit the proposal to the electors. Rather, it would be a case of giving the electors the opportunity to confirm this symbolically important development.

### 7.4 Entrenchment

With the Victorian precedent in mind, there is the further question whether proposed s 2A should be entrenched. In NSW this may mean that it could only be repealed after it had been voted on at a referendum. In Victoria, entrenchment by a special three-fifths parliamentary majority would, it was argued, 'enable the provisions to form an important and enduring part of the Constitution'.<sup>37</sup>

One question is whether the recognition of Aboriginal people can be effectively entrenched under the NSW Constitution Act. This is because the requirement to comply with what are called 'manner and form' provisions is derived from s 6 of the *Australia Acts*. That section refers only to laws respecting the 'constitution, powers or procedure' of the Parliament. This begs the question whether laws that lie outside those subject areas, even if supposedly entrenched, could nonetheless 'be repealed or amended by ordinary legislation'.<sup>38</sup>

### 7.5 Legal effect

Proposed s 2A(c) is an exclusionary provision, stating that the constitutional

recognition of Aboriginal people does not create in any person any legal right or give rise to any civil cause of action, or affect the interpretation of the Constitution Act or any other law in force in New South Wales. It is substantively identical to the equivalent provisions in Victoria and Queensland. The NSW [Discussion Paper](#) presents this commentary on proposed s 2A(c):

The purpose of exclusionary provisions is to avoid any uncertainty around future legal actions, the interpretation or operation of the Constitution or other Acts. This means the statement is an enduring symbolic gesture of reconciliation between Aboriginal and non-Aboriginal people of NSW and does not create any legal liability on the part of the people or Parliament of NSW.<sup>39</sup>

## 8 Conclusion

The above comments relate largely to matters of detail and drafting. If proposed s 2A is adopted by the Parliament, NSW will be the third Australian State to amend its Constitution Act to recognise Aboriginal people.

<sup>1</sup> M Strohfeltdt, 'Constitution move hailed', *Koori Mail*, 16 June 2010.

<sup>2</sup> Premier of NSW, [News Release](#), 'Aboriginal People to be recognised in NSW Constitution'.

<sup>3</sup> M Strohfeltdt, n 1; NSW Aboriginal Land Council, [Media Release](#), 'First Australians finally recognised in NSW Constitution'.

<sup>4</sup> *Aboriginal Land Rights Act 1983* (NSW) [Aboriginal and Torres Strait Islander Act 2005](#) (Cth); and [Native Title Act 1993](#) (Cth).

<sup>5</sup> *Fisheries Management Act 1994* (NSW), s 3; *Water Management Act 2000* (NSW), s 3.

<sup>6</sup> J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 286.

<sup>7</sup> Presumably this would have followed the opening words of covering clause 9: *Final*

- Report of the Constitutional Commission*, 1988, Vol One, p 104.
- <sup>8</sup> Individual and Democratic Rights Advisory Committee to the Constitutional Commission, *Report on Individual and Democratic Rights Under the Constitution*, 1987, p 30.
- <sup>9</sup> Individual and Democratic Rights Advisory Committee, n 8, p 72.
- <sup>10</sup> *Final Report of the Constitutional Commission*, 1988, Vol One, pp 109-110; M McKenna, A Simpson and G Williams, 'First words: the Preamble to the Australian Constitution' (2001) 24(2) *UNSW Law Journal* 382.
- <sup>11</sup> *Mabo v The State of Queensland [No 2]* 175 CLR 1.
- <sup>12</sup> *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.
- <sup>13</sup> *Native Title Act 1993 (Cth)*; *Native Title (NSW) Act 1994*.
- <sup>14</sup> For the texts of these and other suggested Preambles to the Commonwealth Constitution see – M McKenna, *First words: a brief history of public debate on a new Preamble to the Australian Constitution 1991-99*, Commonwealth Parliamentary Library Research Paper 16/1999-2000; G Winterton, 'A new constitutional Preamble' (1997) 8(3) *Public Law Review* 186.
- <sup>15</sup> *Commonwealth Parliamentary Debates (HR)*, 8 February 1999.
- <sup>16</sup> For one commentary on the proposal see – H Gibbs, 'Some thoughts on the Constitutional Convention' (1998) 21(3) *UNSW Law Journal* 882.
- <sup>17</sup> The then Labor Opposition had proposed an alternative Preamble that made reference to: 'Recognizing Indigenous Australians as the original occupants and custodians of our land' – McKenna, n 14. See the discussion in - Parliament of Queensland, Legal, Constitutional and Administrative Review Committee, *A preamble for the Queensland Constitution?* 2004, p 11.
- <sup>18</sup> For a commentary on these events see McKenna, n 14. See also: M McKenna, 'The tyranny of fashion: John Howard's Preamble to the Australian Constitution' (1999) 10(3) *Public Law Review* 163; L Zines, 'Preamble to a republican constitution' (1999) 10 *Public Law Review* 67; H Gibbs, 'Some thoughts on the Constitutional Convention' (1998) 21(3) *UNSW Law Journal* 882; and M McKenna, A Simpson and G Williams, n 10.
- <sup>19</sup> *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament*, December 2000, p 105.
- <sup>20</sup> 'Referendum should've been held in 2000: ALP', *SMH*, 12 October 2007; 'Indigenous leaders question PM timing', *The Daily Telegraph*, 12 October 2007.
- <sup>21</sup> M Gooda, 'Indigenous inclusion is good for our constitution' *SMH*, 9 July 2010.
- <sup>22</sup> Queensland Constitutional Review Commission, *Issues Paper – For the possible reform of and changes to the Acts and Laws that relate to the Queensland Constitution*, July 1999, p 1312.
- <sup>23</sup> Noted in the 2010 NSW *Discussion Paper*. The recommendation was based on the Victorian legislation.
- <sup>24</sup> See the *Assembly of First Nations* website.
- <sup>25</sup> *Victorian Parliamentary Debates (Assembly)*, 26 August 2004, p 186.
- <sup>26</sup> Queensland Constitutional Review Commission, *Report on the possible reform and changes to the Acts and laws that relate to the Queensland Constitution*, February 2000, p 29 and p 90.
- <sup>27</sup> Parliament of Queensland, Legal, Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, November 2004, p 23.
- <sup>28</sup> Parliament of Queensland, Law, Justice and Safety Committee, *A preamble for the Constitution of Queensland 2001*, 2009).
- <sup>29</sup> *A preamble for the Constitution of Queensland 2001*, n 28, p 9.
- <sup>30</sup> *Queensland Parliamentary Debates*, 24 November 2009, p 3476.
- <sup>31</sup> This reads: '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'.
- <sup>32</sup> *Queensland Parliamentary Debates*, 24 November 2009, p 3476.
- <sup>33</sup> *A preamble for the Constitution of Queensland 2001*, n 28, p 17.
- <sup>34</sup> In Canada the term 'status Indians' has a precise statutory meaning under the federal Indian Act. Only 'status Indians' can claim 'the right to live on Indian reserves and various other Indian Act privileges': PW Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed supplemented, 2007, [28.3].
- <sup>35</sup> See the *Assembly of First Nations* website. In Canada the federal government is responsible for indigenous affairs. Under s

91(24) of the Canadian *Constitution Act 1867* the Federal Parliament has express power over 'Indians, and Lands reserved for Indians'. Section 35 of the Canadian *Constitution Act 1982* recognises and affirms 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada' who are defined to include 'the Indian, Inuit and Metis peoples of Canada'. Section 25 provides that the Charter of Rights is not to be construed as derogating from 'aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.

<sup>36</sup> G Winterton, 'A new constitutional Preamble' (1997) 8(3) *Public Law Review* 186 at 188.

<sup>37</sup> *Victorian Parliamentary Debates (Assembly)*, 26 August 2004, p 186. Entrenchment by a special parliamentary majority could also be adopted in NSW.

<sup>38</sup> A Twomey, 'Manner and form limitations on the power to amend State constitutions' (2004) 15(3) *Public Law Review* 182-186.

<sup>39</sup> Whether such provisions can be guaranteed to achieve their intended objects is a matter of some debate among legal scholars. Professor Zines offered some sceptical reflections on the issue in relation to the more broadly worded Preamble proposed in 1998 by the Commonwealth Constitutional Convention: L Zines, 'Preamble to a republican constitution' (1999) 10(1) *Public Law Review* 67.

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