# Appendices

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### A.1 Fixed terms of Parliament

Labor proposed fixed four-year terms in its 2019 Federal election campaign.[[1]](#endnote-1)

And as was the case for ‘one-vote one-value’, not for the first time. Similar proposals, including simultaneous elections for the House of Representatives and Senate, were put by the Hawke Government in 1988 – along with local government recognition and (effectively) a bill of civil rights. The 1988 referendum questions followed – but did not reflect recommendations of - a lengthy review of the Constitution by a Constitutional Commission.[[2]](#endnote-2)

The Government decided to put these matters to referendum *before* receiving the Commission’s report. The Commission recommended a maximum four-year term of the House of Representatives and eight-year term of the Senate. It did not recommend a fixed four-year term for both. Timing of the referendum appears to have been driven by the Bicentenary celebrations.

A four-year term was said to lead to fewer elections, facilitate Government consideration of important issues and remove Prime Ministerial ‘advantage’. Fixed-terms apply in NSW, Victoria, South Australia and the ACT.[[3]](#endnote-3)

The one-vote one-value idea - electorates not varying by over 10% - was triggered by the ALP’s dislike of Queensland’s ‘gerrymander’ which had kept the Coalition in power there with a low vote.[[4]](#endnote-4)

The opposing argument was: a four-year term linking House of Representatives and Senate elections could lead to more elections. When the House was dissolved, the Senate would follow:

*‘This proposal would strip the Senate of its powers and independence. A Prime Minister would be able to sack the entire Senate whenever it disagrees with the Government or votes against bad laws This proposal, under the guise of a four-year term is an attack on the integrity and independence of the Senate. This integrity and independence provides the fundamental checks and balances necessary to a truly democratic Parliament[[5]](#endnote-5)*

The one-vote one-value was portrayed as a matter for the States.

The referendum outcome was an ‘*unprecedented failure*’. The national ‘Yes’ vote for fixed terms was 32.9%, the second lowest on record with a ‘no’ majority in every State. The result was partly ascribed to the Government’s lukewarm support – the ‘yes’ case was led by the Attorney General, not Prime Minister Hawke. Campaign mistakes led to a belief the effect of the proposals would be considerably more than claimed. The Government was described as ‘*arbitrary and arrogant’*, while the Opposition exhibited ‘*petulant negativism*.’

A 2008 Parliamentary research paper suggested a fixed three-year term proposal might be more acceptable. It implied the 1988 result was partly due to the proposal extending tenures of Parliamentarians and weakening the Senate. However, that same paper noted Mr Mackerras’ view:

*‘Throughout the 20th century, Australia had a three-year term at federal level. Was Australia really so badly governed last century? Of course not. So if it ain t broke, don t [try to] fix it.’*

A re-run of the 1988 proposal – 4-year terms of the House of Representatives and simultaneous House and Senate elections – would fail all the proposed criteria; importance, clarity, failure effect, likelihood of success. This is irrespective of whether Senate terms are shortened to 4 years or lengthened to 8 years.

### A.2 Republic

The most recent referendum, in 1999, proposed replacing (the representative of) a hereditary monarch by an elected head of state (President); Australia becoming a republic.

Central to any debate about heads of state is the question of their powers. In Australia, the republic proposal was presumed to leave these unchanged.

Among these powers are: approval of legislation; appointment of Governments, Ministers and Departmental heads; declaration of e.g. war; calling elections.[[6]](#endnote-6)

The head of state is also head of the Executive Government. Post the events of late 1975, the better view is the head of state should follow the advice of the Government - those holding confidence of the majority of members of the House of Representatives.

The republic proposal differed from prominent international models such as the United States or France. In those a President is elected directly by the people.

In Australia the proposal was for the head of state to be elected by a two-thirds Parliament majority; that fraction presumably aimed at ensuring the President was not captive to the Government.

Proposing Parliamentary rather than popular election avoids creating a new locus of power and competition between President and Prime Minister. Popular election could create expectations of differences between the ‘old Government’ (the majority in the House of Representatives) and the President. Then, if responsible Government was to be maintained, popular election would require further substantial Constitutional changes.[[7]](#endnote-7)

Therein lay one issue with the proposal. It was the product of a compromise supposedly not intended to have any substantive effect on the way Australia is governed - it was said to be merely symbolic. And only partly thus - even were it carried, the States would continue to have governors and monarchical government.

However, the proposal went well beyond symbolism in giving the Government power to dismiss the President. This provided substance to the claim the proposal was for a politicians’ republic.[[8]](#endnote-8)

Many, particularly in affluent areas, earnestly felt the proposal’s symbolism was greatly important. The proposal was pushed strongly including by senior political figures, former Prime Ministers from both sides of politics and the media. Several newspapers recommended a ‘yes’ vote.[[9]](#endnote-9)

Symbolism or not, most Australians took a different view. Williams argued voting was characterised by deep division between wealthy, educated, inner city areas (yes) and the rest of Australia (no). Some of the largest ‘yes’ vote counts were in Liberal seats, some of the largest ‘noes’ in Labor seats.

In the 2019 Federal election, Labor proposed a plebiscite on a ‘republic’ to be followed by a referendum. The issues of election and *dismissal* of the President were not addressed. A proposal for a republic in which the Government can dismiss the President would fail on the criteria of clarity, effect of failure, likelihood of success.

### A.3 Aboriginal issues

#### A.3.1 Introduction

There have been calls for referendums on Aboriginal (called Indigenous or First Nations) matters including ‘recognition’.[[10]](#endnote-10)

As is the case for the term ‘independent’ the key questions about ‘recognition’ are: about what? to what effect?[[11]](#endnote-11)

Issues surrounding Indigenous interests are not unique to Australia. Similarities with the United States, Canada and New Zealand include interactions of a comparatively small Indigenous population and many different clan groups with (English) legal systems.

There are several overlapping stages in the current Australian debate, heightened by the High Court’s decision in Mabo. A first – prolonged - stage concerned seeking agreement and support among Aboriginal groups for a broad concept to start to deal with their recognition concerns. This culminated with a 2017 Constitutional Convention and the Uluru statement which called for a First Nations Voice ‘*enshrined’* in the Constitution.[[12]](#endnote-12)

A second stage involved consideration of this concept among experts, including academics, to produce a proposal for Government consideration. This led to a Referendum Council report of 2017.

Given the Commonwealth Government’s premature rejection of the expert proposal, a third stage of political reconsideration was needed. This was initiated by a Joint Parliamentary Committee whose report was published in late 2018.[[13]](#endnote-13)

Further stages are needed to bring the Voice proposal to reality. Government acceptance of the proposal is important, yet at present some of its members appear to be going out of their way to misunderstand and misrepresent what has been recommended. This will make even more difficult critical stage - of convincing the wider Australian community of the necessity for any change.[[14]](#endnote-14)

#### A.3.2 Mabo and Wik

Important context starts with the High Court decisions in Mabo (1992) and Wik (1996) regarding ‘native title’ to land. In those cases, an issue was whether government needs to act to degrade or extinguish such title. Alternatively, whether such title was extinguished by colonisation and could only arise (again) with government action.[[15]](#endnote-15)

In Mabo, the court recognised occupation of the continent prior to British colonisation in 1788. It held a ‘native title’ can co-exist with Australian (English) land law. Such title differs from those familiar in English common law, such as fee simple. It relates to rights on particular land to engage in practices that had been continuously observed since well before colonisation by clan groups.[[16]](#endnote-16)

To the extent colonisation interfered with these practices, native title is diminished.

The decision was a substantial new development in law and overturned previous Australian legal opinions. Although by a 5:1 majority, the decision was highly controversial with fears about implications of widespread native title claims.[[17]](#endnote-17)

The majority’s view, notably of Justice Brennan, reflected concerns about extreme unfairness of other results and drew on North American legal authority.

The dissent in Mabo argued correction of previous injustice is a matter for the political system rather than the judiciary, pointed to difficulties in running two title systems on single lands and referred to Indian legal authority.

The Court’s decision in Wik confirmed Mabo. Wik considered whether ‘pastoral’ leases – Crown grants to use land for grazing for a limited period and subsequently surrendered - extinguished native title. Prime Minister Keating had previously indicated Commonwealth belief pastoral leases did extinguish title, and there are claims he had agreed not to pursue this in legislation.[[18]](#endnote-18)

However, a 4:3 Court majority held that as such leases did not grant exclusive occupancy, they did not extinguish native title. This was controversial, with several senior politicians either defending or attacking the decision – some in what were claimed hysterical terms. The expectation was for a large number of new native title claims - it was said 42% of Australia was under pastoral leases. There were suggestions of a referendum on native title.[[19]](#endnote-19)

#### A.3.3 Legislative confirmation of the cases

Mabo and Wik recognised certain Indigenous rights in relation to land – native title. The cases have significant Federal implications. Actions diminishing native title were likely to have been by States or their colony-predecessors. Nonetheless, the Constitution s.51 (xxvi) gives the Commonwealth power to make laws in relation to race. A result of the 1967 referendum is this power extends over Aboriginals – the States already had such powers.

In 1993 Parliament, on instigation of the Keating Government and after a heated debate, ‘confirmed’ Mabo. Legislation taking effect on 1 January 1994 established a Native Title Tribunal, and gave Indigenous native title claimants a right to be consulted on use of relevant land.[[20]](#endnote-20)

The legislation was challenged by Western Australia in 1995. The High Court held the Commonwealth legislation to be valid on grounds including the race power.[[21]](#endnote-21)

1996 saw the High Court decision on Wik. The Coalition, led by Mr John Howard, won Government. Representatives of the One Nation Party were elected to Parliament - its leader claimed her election was due to anti-Aboriginal-benefits sentiment.[[22]](#endnote-22)

The new Government developed a response to Wik called a ‘10-point plan’ which supposedly was aimed to provide certainty to parties interested in native title. Prime Minister Howard claimed aspects of the plan confirmed the common law, but at the same time said:

*‘The Wik decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre’[[23]](#endnote-23)*

Parliament passed a modified version of the plan in 1998. This attracted great interest [[24]](#endnote-24)

#### A.3.4 Intervention, closing the gap

During the early 2000s the Tribunal worked its way through cases, and other matters occupied newspaper front-pages. Among the issues faced by the Tribunal have been determining the composition and authorised representation of clan groups.

The many separate clan groups prior to colonisation appear to have had no Australia-wide forum or authority. Although the Mabo case concerned limited clan groups, it is now seen by many as a first important step on a road to ‘reconciliation’ and ‘self-determination’ at a national level.[[25]](#endnote-25)

In 2007, the Howard Coalition Government initiated the Northern Territory National Emergency Response – call the ‘intervention’ - in certain Aboriginal communities in the Northern Territory. [[26]](#endnote-26)

The trigger was reports of systemic child abuse not dealt with by the Territory authorities; claims of a ‘failed state’. The intervention included restrictions on alcohol, pornography, use of some welfare benefits, increased policing and acquisition of some Aboriginal townships developed on native title. The policy was controversial. Differing views about its various elements and motivations were expressed very strongly. Speculation about motives included: racism; land grabs; patriarchy; party politics; law and order. Irrespective of motives, the intervention had negative connotations for ‘self-determination’.[[27]](#endnote-27)

Legal authority for the intervention has been referenced to Constitution s.122 - powers over Territories. There are claims the intervention extended beyond the Northern Territory. The validity of such extension would need to rest on powers other than s.122, possibly the race power. The subsequent Labor Government continued the intervention.

In 2008, Labor Prime Minister Rudd provided an apology for the removal of some children from Aboriginal parents between around 1900 to the 1970s, part of an assimilation policy, to the ‘stolen generation’. Among other things, the apology involved recognition that clan groups were and are important to many Indigenous people.[[28]](#endnote-28)

Further amendments to native title legislation made in 2007 and 2009. These largely dealt with administrative matters although they have consequences for individuals and groups.[[29]](#endnote-29)

A significant initiative of Labor was ‘closing the gap’. The ‘gap’ refers to differences in social outcomes of Indigenous and other Australians indicated by differences in statistical results. In 2008, the Commonwealth and States, led by Australia’s peak (informal) Council of Australian Governments, initiated actions intended to reduce differences in the most important gaps. Pressure was to be kept on Governments by public reporting of progress.[[30]](#endnote-30)

The actions included Government (funded) programs administered by Government bureaucracies. A result was the familiar problem of tension between centralisation implied by public accountability and the ability to deal with local circumstances.

Infrastructure Australia provided advice on Indigenous infrastructure, parts of which present challenges due to the remoteness of relevant communities. By 2012 it argued for greater involvement and responsibility of communities, rather than detailed government determination of infrastructure, and for communities to be assisted to meet accountability etc. standards.[[31]](#endnote-31)

‘Closing the gap’ initiatives largely failed. A new direction seeking greater community involvement is to be attempted consistent with Infrastructure Australia’s 2012 views. The ‘new’ Infrastructure Australia – post 2014 – reaffirmed the importance of community (not merely Indigenous) involvement in remote infrastructure and put some focus on government practices.

#### A3.5 Commonwealth Aboriginal advisory bodies

Significant Commonwealth interest in Indigenous affairs started in the early 1970s, following the 1967 referendum. The Department of Aboriginal Affairs was established in 1973. Its roles, like other Departments was to advise Government on policy and administer programs. It is claimed this was accompanied by a shift in policy from assimilation to self-determination where:

*‘self-determination is the principle of Indigenous people being involved in decision-making about, and the management of, their own affairs’.*[[32]](#endnote-32)

In 1973, the Government established an Aboriginal Advisory Council whose members were elected by Indigenous people. This was succeeded by a similarly elected Conference which became a vocal advocate, sometime to the discomfort of their electors and Governments. It was disbanded in 1985.

The Aboriginal and Torres Strait Islander Commission, combining representative and administrative functions, commenced in 1990. Opposition Leader Mr John Howard opposed its formation as:

*‘the misguided notion of believing that if one creates a parliament within the Australian community for Aboriginal people, one will solve and meet all of those problems.’*

A later paper observed the Commission’s dual functions created conflicting accountabilities – to its electorate and the Government. It also claimed the Commission’s lack of discretion was a problem. Together with the Commission’s high profile this led to it being a scapegoat for policy failures.

A review in 2003 recommended changes to – rather than abolition of - the organisation. The recommendations aimed at greater connection with local communities and a clearer division between representative and administrative functions. However, both Mr Howard’s Government and the Opposition wanted the Commission abolished, which it was in 2005.

Abolition of the Commission was subsequently criticised by various participants in the debate including the Human Rights Commission, Indigenous interests and (reportedly) the then Minister.[[33]](#endnote-33)

Since that time there has been no Commonwealth mandated Aboriginal elected body, although there has been a ‘peak’ representative body – a corporation - the National Congress of Australia’s First Peoples, reputedly welcomed by some, criticised by others and not supported with Government funding post 2016.[[34]](#endnote-34)

#### A.3.6 Uluru statement and Referendum Council

More recent events are the ‘Uluru statement’ and a Referendum Council both in 2017.

The Uluru statement resulted from a constitutional convention comprising many Aboriginal and Torres Strait Island clan group representatives. There was very little dissent.[[35]](#endnote-35)

The Uluru statement called for a called for a ‘Voice to Parliament’ and a ‘truth-telling’ commission. The ‘Voice’ was sought to be created by Constitutional change i.e. referendum, the commission by legislation. The Voice is intended to be an advisory body.

The Referendum Council, a group of prominent Australians including one former Chief Justice of the High Court, was appointed by the Commonwealth. It produced a report in June 2017. The Voice concept was supported by the Council as a ‘*single, modest and substantive*’ Constitutional change assisting the advance the Indigenous self-determination seen as important by the United Nations.[[36]](#endnote-36)

While the Council did not recommend particular functions for the Voice, it argued a veto power over proposed legislation would be unacceptable. It also considered unacceptable a requirement for Parliament to consult the Voice on all matters affecting Indigenous Australians. It suggested the Voice should monitor Commonwealth use of the race and Territories powers.

The Council recommended administrative details of the Voice be dealt with by legislation, not by referendum. It recommended other matters of great importance to Indigenous Australians be handled outside Constitutional change. This would include other aspects of recognition.

While this view – to (not) deal with all recognition matters by referendum - is fundamental to the Indigenous referendums issue, the Council did not spell out the reasons for its views.[[37]](#endnote-37)

#### A.3.7 Response to Uluru statement

The Government did not accept the Referendum Council’s proposals. The Opposition agreed a referendum is important, however, it did not define a precise topic. Arguments on the issues lacked accuracy. The Government wrongly claimed the voice would constitute a 4th arm of Government – a ‘third chamber of Parliament’. Some commentary – seemingly in favour of the Voice – perhaps inadvertently supported that view by saying the proposal was for a voice *on* legislation.[[38]](#endnote-38)

Nonetheless a broad direction for recognition was forming. Importantly, this was from the most basic of principles - proponents and beneficiaries identifying and agreeing what they want. The threshold matter of clan groups providing a largely unified national view has now been passed. However, the scope and intention of recognition is not clear to the public, and is being clouded by a variety of opinions.[[39]](#endnote-39)

#### A.3.8 Parliamentary Committee

In March 2018, a Joint Select Committee was established to consider the Uluru Statement, recommendations of the Referendum Council and to ‘*recommend options for constitutional change’*. It said the Uluru Statement was:

‘a *major turning point……*

*Not only did it bring a new element, The Voice, into the debate but it rejected much that had gone before in terms of proposals for constitutional recognition.*

*The rejection of all previous proposals was a shame because there were previous proposals which would command broad political support; but we acknowledge that at Uluru they seem to have been taken off the table.’* [[40]](#endnote-40)

Its final report, November 2018, recommended the Voice concept and emphasised its application beyond a national forum and national legislation. It acknowledged different views as to which of referendum, legislation or public education should be the next step. It recommended the next step be a process of co-design of the Voice, with some emphasis on ensuring the Voice carried local opinions, prior to legal formulation. It concluded:

*‘it is difficult to proceed to referendum today on The Voice when this Committee has received no fewer than 18 different versions of constitutional amendments which might be put at a referendum…..*

*the Committee is unable to recommend either approach (referendum or legislation) at this time. Instead, the Committee is of the view that a process of co-design…. should be undertaken and concluded before this question is considered and resolved….*

*Following the co-design, the Committee tasks the Australian Government with balancing the urgency for a Voice against the likelihood of referendum success, and determining whether to proceed with the implementation of a First Nations Voice via legislation, executive action, or a referendum.’*

And in reference to views of the wider community:

*‘for some the conversation is well advanced, while for others it is just beginning.’*

The Joint Select Committee’s recommendations were bipartisan. An addition made by Liberal Senator Stoker cautioned about assuming the Constitution could deal with emotions or practical problems. The Greens dissented, arguing a referendum should be held prior to design of the Voice.[[41]](#endnote-41)

The Government’s response to the Committee recommendations has been confused. The relevant Minister promised a referendum within three years, yet later comments by others suggest otherwise. The former Chief Justice on the Referendum Council affirmed his support for the Voice and debunked the Government’s claim of it being a third chamber of Parliament. The former Minister who started that claim admitted error and apologised. However, this appears unheeded by some in Government.[[42]](#endnote-42)

#### A.3.9 Assessment – overview

My interpretation, drawing on the above outline, follows.

In less than clear circumstances, proposals for Constitutional change with substantial or complex implications could work against proponent goals.

The Voice, however, may be a relatively simple change. A key issue may be association in the public mind with other causes and complexities. Its design might be relatively simple, but its achievement could be delayed if it is conflated with other issues and goals such as raised below, some of which were considered in the Joint Select Committee’s report.[[43]](#endnote-43)

#### A.3.10 Assessment - other causes - disavowing racism

One such goal might be a wish to publicly disavow racist elements in Australian law and society. Many consider this a worthy goal.

Arguments to delete Constitution s.25 – races disqualified from voting - point toward such an aim. The present section could allow States in some circumstances to disenfranchise Aborigines – although such circumstances and intentions do not exist today. Arguments to modify or delete s.122, the Territories power, made against the backdrop of the 2007 intervention, do likewise.[[44]](#endnote-44)

However, these arguments do not address the race power s.51(xxvi) which, on the surface, seems the first logical step in disavowal of racism.

The 1967 referendum modified the race power to include (not exclude) Aboriginals. While several High Court justices have indicated the power can only be used to advantage someone, the law on that matter is not settled. Also unclear is the extent to which a beneficial-only interpretation of the power would disqualify elements of the intervention.[[45]](#endnote-45)

To remove the Commonwealth’s ability to rely on the race power for an action such as the intervention, part of the 1967 referendum may need to be undone – preventing the Commonwealth from making laws regarding Aboriginals. Yet removal of the race power would render illegal Commonwealth programs that use race as criteria for e.g. funding.[[46]](#endnote-46)

It may be many Commonwealth programs to deal with Aboriginal issues could be supported by other powers, such as social security. However, were the race power revoked, eligibility criteria for direct Commonwealth benefits and services could not be race-based. Race-based programs etc. may then need to be via s.96 grants to States – some of whom have been defendants in native title claims.

#### A.3.11 Assessment - other causes - precluding reversal?

The 1967 referendum and statements of prior occupation and rights embodied in national court decisions and legislation are forms of formal, legal recognition. Public practices such as flying of Aboriginal flags, ‘renaming’ of places, ‘welcome to country’ ceremonies and NAIDOC week are forms of regular public recognition. Further use of the term ‘recognition’ implies a desire for more for Indigenous people.

One possibility is the word ‘Indigenous’ may differ from the term ‘Aboriginal’. The Constitution presently only refers to the latter, however, some pronouncements treat these words interchangeably. Moreover, the legal test used for race/clan is the same: a person who identifies as an Aboriginal and is accepted by an Aboriginal community as an Aboriginal.[[47]](#endnote-47)

A more likely possibility is concern that at some future time the Commonwealth might legislate to reduce Aboriginal rights recognised by the courts or codified or created by legislation. Rights inserted in the Constitution would be far more difficult to reverse.[[48]](#endnote-48)

The process for doing so would be a referendum. However, such an approach would involve a deep irony; among reactions of conservative opponents to the Keating Government’s legislation were proposals for a referendum on Aboriginal land rights.

Such a process does not answer the question of what those rights might be – or what should be recognised.

It appears that for a long time – until the Uluru statement etc - the search for a referendum question about recognition preceded determination of what Indigenous peoples want – what recognition means to them. One result was that an array of ideas – some apparently inconsistent – were put into the public domain.

In a beyond-the-Voice referendum the extremely long, convoluted and contested Indigenous rights debate would come into play. The debate has involved terminology and concepts unfamiliar to – and liable to be misunderstood by – the general public.

Contrary to popular belief, and views promoted by those who should know better, some such ideas – like the Voice – are not novel to Australia’s system of government. For example, the Government’s claim that a Voice would create a 4th arm of Government misrepresented the proposal which was for an advisory body – of which there are plenty. It also ignored the 4th arm of Government created by the Constitution at the outset of Federation – the Inter-State Commission.[[49]](#endnote-49)

The case of the Inter-State Commission, however, shows problems with both sides of the argument. While it is a 4th arm *still* recognised in the Constitution, a lack of budget and tasking from the Government made it ineffective. If the Inter-State Commission is an example, Constitutional enshrinement is no guarantee a Voice will make sounds.

The most important risk of any referendum on recognition or symbolic matters is: the proposal may be rejected. This is essentially the concern felt by proponents of another matter of great significance to a ‘minority’ - marriage definition – represented as symbolic of ‘equality’. On that, a former High Court judge warned about the type of debate that might be unleashed during a public voting process and its effect on vulnerable people.[[50]](#endnote-50)

Neither claims of support for Indigenous recognition – for example in ‘VoteCompass’ - nor the results of the 1967 referendum refer to or avert this possibility. VoteCompass is more likely to reflect views of the ABC audience than the Australian electorate and its claims of support were not accompanied by an adequate definition of what recognition is. The 1967 referendum proposition did not face any opposition – the only case put was ‘yes’.

Nor do campaigns in the popular or social media necessarily forestall the possibility of damage by ‘debate’ or result. While the ‘yes campaign’ on ‘marriage equality’ is held to be a success by its proponents, the anti-Adani campaign was likely a larger failure in retarding a number of other popular causes – notably by helping to keep the Federal Coalition in office. Similarly, the media was largely in favour of the 1999 republic proposal and the preamble – both of which were decisively rejected by the people.[[51]](#endnote-51)

Already there has been some publicly stated opposition to recognition and (even) to the Voice.*[[52]](#endnote-52)*

Those who want recognition as a symbolic imperative - important to their identity and self-esteem - may be greatly harmed if it depends on a referendum that is not carried.[[53]](#endnote-53)

#### A.3.12 Assessment - other causes – internal-sovereignties, self-determination

Prior to the Uluru statement there were some calls for recognition of Indigenous sovereignty to the extent that Aboriginal customary civil and criminal law would exclude laws applying to other Australians.

Several attempts were made to have this call made into common law through court processes; these failed. One was considered an abuse of process in attempting to embroil the courts in political movements.[[54]](#endnote-54)

Calls for Aboriginal sovereignty continue, some claiming to be motivated by political – the Turnbull Government’s - rejection of the Uluru statement. Some claim association with ‘treaty’ matters.[[55]](#endnote-55)

The Uluru statement refers to sovereignty. It qualifies it as: ‘*a spiritual notion*’.

However, that is not likely to be how the word sovereignty is commonly understood by many who would vote at a referendum.

Previous statements including by activists, Prime Ministers and High Court justices set the ground for a scare campaign were any Indigenous referendum’s focus to shift to sovereignty, self-determination and treaty.

As is the case for the term ‘recognition’, the primary issue is: what is meant by sovereignty and self-determination?[[56]](#endnote-56)

Sovereignty is the ability to control affairs – to set rules. Its usual context is international – nations and states. Its operation is over specific territory – land. Relations between sovereign nation-states are governed by treaties. In Australia, the sovereign nation-state is the Commonwealth.

Indigenous sovereignty involving usurpation or abdication of Commonwealth or parliamentary law-making roles – the creation of a separate nation-state or dual system of government - is unlikely to be allowed.[[57]](#endnote-57)

Similarly, proposals of exclusive sovereignty - secession of an area or group of people from the Commonwealth - are unlikely to be acceptable no matter how well argued. They fall foul of one of the Constitution’s principles – indissolubility - as explained in Appendix 4.[[58]](#endnote-58)

Self-determination goes alongside sovereignty. Among the possible purposes of self-determination are: greater political power of a larger group of people; an ability to provide for or set special rules for a group of people.

A first question is whether rules for any group could conflict with Commonwealth or State law. Discussion about conflict between group rules and Australian law arises occasionally – for example concerns about ‘Sharia law’ and debate about the seal of the Catholic confessional.[[59]](#endnote-59)

Former Prime Minister Howard’s famous remark that a nation cannot have a treaty with itself is underpinned by one very specific notion of sovereignty and self-determination – external sovereignty. This is: exclusion of other nation-states (law making ability) from a defined territory. However, some academics claim different forms of sovereignty, including internal sovereignties, in relation to Indigenous issues.[[60]](#endnote-60)

An academic view of internal sovereignties offers a different perspective to self-determination and treaties than Prime Minister Howard took. In this, a group of people is recognised as a political entity by the nation-state, even though they continue to be subject to laws of the nation-state. This is already the case in Australia where the Commonwealth and States co-exist - where Australians are recognised as members of a State according to where they live.

An aspect of internal sovereignty and self-determination is a group determining its membership. Clubs and associations are familiar examples, the relevance of which is limited to a very few – often recreational – aspects of the day to day lives of members.

A matter which may be important to Indigenous people is: sharing day to day activities in a group. They may wish to collectively pursue most activities according to group practices and customs, including supervision of members and use and succession of property. This goes well beyond rules and activities of typical clubs and associations, to the extent of some groups living as a community.

If such a group comes to a formal agreement with government to deal with certain matters, the nation-state has implicitly recognised it. The formal agreement might be called a ‘treaty’.

In this context, (some) internal sovereignties relate to traditional practices and property not interrupted by colonisation, dispossession or ensuing laws.

There is a potential residue of groups’ original full sovereignties, analogous to potential residues of groups’ land rights known as native title. The potential arises if long-standing Indigenous forms of governance have been only partially interrupted by colonisation. An argument is: this residue places Indigenous peoples in a different position vis the nation-state than colonisers and later immigrants.

In this argument, recognition is of (pre-)existing rights creating a special relationship between certain Indigenous groups and the nation-state. It is not (simply) an emotionally charged claim of grievance or ‘dispossession’ and the recognition sought is not of previous wrongs or sympathy.

This may explain some Indigenous advocate references to ‘sovereignty never ceded’.

It is parlance which considers groups as nations if they occupied, to the exclusion of others, more or less distinct land areas prior to colonisation.

The fact of continuing traditional practices, on land over which a nation-state now exerts external sovereignty, is said to be special.[[61]](#endnote-61)

There is the possibility of many different such Indigenous groups. Examples given by Brennan et al are Canada, the United States and New Zealand, each of which, like Aboriginal Australia, has hundreds of ‘internal sovereignty’ seeking clan groups - tribes. Each is much smaller, less powerful and no threat to the nation-state.

Treaties could comprise: acknowledgement and promise of non-interference in matters for which group internal sovereignty has survived; creation of new internal sovereignty (or reconstitution of extinguished sovereignty) – delegation of responsibility – of other matters to the group.[[62]](#endnote-62)

Among the possible things self-determined in each clan group / community are education, child welfare, education, health, social services, policing, natural resources management and housing. A treaty with the nation-state could ‘delegate’ power and responsibility for the welfare of individuals in relation to such matters to the group / community. The nation-state might conclude treaties with many groups rather than a single one. Given Australia’s federation, the possibility is also of treaties between the States and groups e.g. for services over which the Commonwealth lacks power.[[63]](#endnote-63)

To establish a treaty, politicians in the nation-state would need to trust the relevant group / community to meet expectations. Presumably, this is among the reasons the intervention was seen by some as damaging to self-determinations.

There may be variation among groups and locations of matters for which self-determination is sought. Some groups are more capable of managing their own affairs than others. Also significant is the willingness of present members of the group to cede some power to others in a political entity.[[64]](#endnote-64)

Among the effects is reduced need for government bureaucracies to be involved in the everyday lives of individuals who may wish to live remotely from large settlements. This accords with the (former) Infrastructure Australia’s views in 2012 and the new direction for ‘closing the gap’.

#### A.3.13 Assessment – terminology: sovereignty, treaty

At present, the biggest obstacle to such concepts is likely to be terminology. Terminology of co-existing sovereignty, self-determination and treaty are used in some other places in the world and by Indigenous groups. However:

*‘By using a concept borrowed from Western legal and political thought, Indigenous advocates run the risk of their opponents selecting the most politically damaging interpretation available’.[[65]](#endnote-65)*

The language of sovereignty and treaty does not immediately make clear to ‘Western eyes’ what is sought – how and to what degree ‘Western interests’ are to be affected.

Great mischief could arise from this. Among potentially damaging interpretations is invasion of backyards(!) – refuted by one leading academic. However, another commentator raised concerns about what is behind talk of sovereignty, treaty etc. in arguments about the Voice presented in the Referendum Council.[[66]](#endnote-66)

The use of the singular rather than plural – e.g. ‘treaty’ instead of ‘treaties’ – at face value implies a wish for a single Aboriginal polity to deal with the Australian nation-state. Yet the High Court held there is no such polity:

*‘the contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.*’*[[67]](#endnote-67)*

While that case concerned a challenge to Australian sovereignty, its comments are not so qualified. A later case included:

*‘the assertion of sovereignty by the British Crown necessarily entailed … that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and … that is not permissible.’[[68]](#endnote-68)*

Another difficulty for a future Australia-wide single Indigenous ‘nation’ would arise from it being a new political entity, extending beyond any State, whose sovereignty relies on Commonwealth laws. In contrast, Aboriginality is presently defined by group identification – where the group is typically small and not nationwide – it is not defined by membership of a national body.[[69]](#endnote-69)

Contrary to Prime Minister Howard’s thinking, there may be considerable merit for all Australians in written formalisation of limited internal sovereignties, self-determinations and treaties not least to reduce the dead hand, waste and myopia of Government bureaucracies.

A proposal in words understandable by the Australian community has yet to be widely promulgated; to date it appears the target audience is Indigenous Australians and parties directly involved with them. The prevailing Indigenous view, however, is that the priority is establishment of the Voice.[[70]](#endnote-70)

#### A.3.14 Assessment - recognition as respect

Some commentary proposes recognition of prior-to-colonisation occupation is important – just like words ‘Indigenous’ and ‘First Nation’ - to a sense of identity and respect by self and others. Recognition in that sense would be symbolic but have no direct legal effect. Whether that is a matter for a Constitution is a matter for debate.

The claim the Constitution is symbolic is clearly wrong. Some view Australia’s Constitution as antithetical to symbolism. Whether a Constitution can have an effect on identity and respect is another question.[[71]](#endnote-71)

This points to a two-edged sword. The concern with any referendum question will be its consequence; its effect beyond symbolism. This is the central problem faced by proposals to amend the preamble – considered in the next section. Hence there are questions about how the Voice will be constituted. How will local clan groups be represented and how they can raise their concerns? Will other groups – minorities - seek their own ‘Voice’? And, if the Indigenous Voice is to be an advocate, is it appropriate for Government to promote lobbying activities? The last being a matter of concern to the beagle if not the Government or Opposition judging by their indifference to public servants sitting on the boards of organisations some regard as lobby groups.[[72]](#endnote-72)

The Referendum Council assumed recognition extends beyond the Voice. To the extent that is correct, even defeat of a referendum about the Voice might not fatally compromise Indigenous self-identification and self-esteem. However, that risk indicates how high the stakes will be in any referendum on an important Indigenous matter.

### A.4 Preamble

The 2019 National Schools Constitutional Convention considered: “*A new constitutional preamble for Australia*”. It resolved, by referendum of participants, to adopt a new preamble for the Australian Constitution.[[73]](#endnote-73)

Its proposed new preamble includes statements of identity and values. It was not accompanied by proposals to change substantive provisions in the Constitution. A lack of willingness to propose substantive changes has been associated with cowardice on the part of politicians.[[74]](#endnote-74)

#### A.4.1 Preambles

Preambles preface enactments - statute law. They are not operative provisions of the law, but seek to explain the circumstances in which the law was enacted. They also preface Constitutions where:

*‘their import is not confined strictly to the political arena. Culturally specific, their simple but direct language permeates the social and cultural fabric, a potential totem for state, community and individual’.[[75]](#endnote-75)*

Winterton argued three possible purposes for a preamble: state the purpose of the Constitution; state who ‘we’ are; state how we wish to be seen e.g. values that unite us.[[76]](#endnote-76)

One famous preamble is that of the United States Constitution:

*‘We the People of the United States, in Order to form a more perfect Union, establish Justice, insure*[*domestic Tranquility*](https://www.usconstitution.net/glossary.html#DOMTRAN)*, provide for the common*[*defence*](https://www.usconstitution.net/constmiss.html)*, promote the general*[*Welfare*](https://www.usconstitution.net/glossary.html#WELFARE)*, and secure the Blessings of Liberty to ourselves and our*[*Posterity*](https://www.usconstitution.net/glossary.html#POSTERITY)*, do*[*ordain*](https://www.usconstitution.net/glossary.html#ORDAIN)*and establish this Constitution for the United States of America.’[[77]](#endnote-77)*

Another is that of France which refers to ‘*the common ideal of liberty, equality and fraternity’.[[78]](#endnote-78)*

A former Chief Justice of Australia’s High Court argued: the American and French revolutions gave rise to an idea of a Constitutional preamble as a statement of a people's aspirations and values; as Australia has not had such a revolution its national identity is not defined by political declaration.[[79]](#endnote-79)

Perhaps better expressed as: ‘not defined, yet’ by such declaration.

One view is Constitutional statements of values in preambles provide for the ‘*national consciousness*’ - the who the ‘we’ is in ‘we the people’.[[80]](#endnote-80)

Aspirations and values can conflict, for example, between the rights of individuals and of society represented by the state. They can change over time, for example, women’s rights.

Matters in a preamble not matched by operative provisions pose a risk of judges taking a view of operative provisions enlightened by their own beliefs. The results can surprise.

#### A.4.2 Australia

The Australian Constitution does not have a preamble. The (British) Constitution Act 1900 does:

*‘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’:*

Among interesting features: the omission of Western Australia, due to it not agreeing the join the Federation at the time; reference to other Australasian colonies; reference to God, which created a debate leading to inclusion of religious freedom in the Constitution text (s.116).[[81]](#endnote-81)

It is said the preamble follows the 19th century British formula for statutory preambles.[[82]](#endnote-82)

While some argue the preamble should have no legal effect, Garran said it:

*‘.. may also be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly evolved opinions.’[[83]](#endnote-83)*

A 1996-97 Parliamentary Research paper saw the preamble in the British Constitution Act as:

*‘an appropriate reflection of the values and priorities which were prevalent at the time of federation. … it embodies the three unifying features of federation Australia: loyalty to the Crown, belief in God and the shared need to provide national unity for white Australians through the introduction of a federal government. The preamble had its origins in the National Australian Convention of 1891 and was further revised at the Australasian Federal Convention of 1897-1898 before finally being accepted in 1898, after colonial legislatures and petitioners successfully insisted on the inclusion of the blessing of 'Almighty God'.’*[[84]](#endnote-84)

This overstates the existing preamble. Rather, Quick and Garran discerned eight elements:

*‘1. The agreement of the people of Australia;*

*2. Their reliance on the blessing of Almighty God;*

*3. The purpose to unite;*

*4. The character of the union-indissoluble;*

*5. The form of the union-a Federal Commonwealth;*

*6. The dependence of the Union under the Crown;*

*7. The government of the Union under the Constitution; and*

*8. The expediency of provision for admission of other colonies as States.’*

Of these, only the underlined four are reflected in Constitutional provisions. Of those not so reflected, the first (1) is a statement of fact. The authors criticised the reference to God (2). This leaves indissolubility (4) and the Crown (5) as pure contextual principles.[[85]](#endnote-85)

None of the eight elements relate to ‘values’ as the term is understood today. The 1996-97 Research paper’s claim the preamble relates to white Australians is not supportable – the preamble does not mention colour or race - even if ‘white Australia’ was an essential circumstance surrounding the drafting of the Constitution, even if some claim the Constitution has been interpreted to that effect and even though there is a race power in the operative provisions.

The absence of values – especially modern ones - has been a source of criticism as well as praise. The criticisms are implied in drafting of new preambles (below). In summary:

*‘the Constitution does need a new ‘preamble’ (using the word in a wider sense than its technical one), and that it should be added either as part of the Recognition process or simply as part of a program of honestly asserting our national identity.’[[86]](#endnote-86)*

 Among the praises for the Constitution:

*‘The Australian Constitution has nothing to do with identity politics. It does not deal with substantive issues, as do other Constitutions such as the Irish Constitution – which was why the Irish people needed to hold a referendum on same-sex marriage. The Australian Constitution’s focus is procedural…..We need to recognise that the Constitution has served us so well because its basic function is procedural’.[[87]](#endnote-87)*

#### A.4.3 The 1999 preamble proposal - origins

The 1996-97 Parliamentary research paper claimed Constitutional cognoscenti believed a (new) preamble in the Constitution would benefit Australia.[[88]](#endnote-88)

A referendum on a particular new preamble accompanied the 1999 republic referendum. Impetus came from three sources: agitation for Indigenous ‘reconciliation’; the 1998 Constitutional Convention which focused on a republic; then Prime Minister Howard. There was tension between the goals of the relevant parties.[[89]](#endnote-89)

Indigenous reconciliation matters are outlined in Appendix 4.

The Constitutional Convention faced a formidable task:

*‘Much was being asked of a preamble at the Convention. Some wanted a creation myth, some a myth of nationhood. Others wanted a statement of historical truths or a democratic covenant, some kind of antidote to the breakdown of traditional systems of belief and traditional institutions, an alternative to 'crass materialism', a document in which the people would 'belong'. Unlike the flawed and grimy world of day-to-day partisan politics, many delegates hoped that a new preamble would be a means of lifting politics above cynicism and corruption. It should be something to revere-a tablet of stone to cherish. At times, it seemed as if the Convention was witnessing a profound change in the republic debate-a shift from pragmatism to poetry. Although many delegates who spoke in favour of a new preamble believed the preamble should be justiciable, they mentioned this rarely, preferring instead to couch their arguments in emotive language.*

*Of course, there were still delegates who were highly suspicious of the call for a new preamble, those who wanted to condemn such a call as an adolescent 'wish list' (Professor Dame Leonie Kramer) or a 'time bomb' to be set off by the High Court (Professor Greg Craven, Notre Dame University). Despite the many calls for a more uplifting preamble, the traditional Australian concern for practicalities was still in evidence. Bruce Ruxton (Returned Services League) reminded the Convention that a preamble should fit onto an A4 sheet of paper.’[[90]](#endnote-90)*

Its communique recommended a changed preamble.[[91]](#endnote-91)

Despite Prime Minister Howard opposing a republic, he took the view a new preamble was important. He wanted it to be 'republic neutral'. One implication was to heighten the prominence of Indigenous recognition over wide aspirations such as expressed in the United States or French preambles. Yet:

*‘Mr Howard later stated that he did not envisage the recognition of indigenous Australians going beyond acknowledgment of prior occupation to include words such as custodianship.’[[92]](#endnote-92)*

Mr Howard engaged Les Murray who drafted an initial version which included the term ‘mateship’ and referred to ‘prior inhabitation’. It was criticised as sexist and not really recognising Aboriginals. It was lengthy and included politically charged references to prejudice, fashion and ideology.[[93]](#endnote-93)

Many other people and organisations had drafted their own versions of preambles. Among these was the Opposition whose version was accepted by the non-Government parties holding the balance of power in the Senate.[[94]](#endnote-94)

Mr Howard Government then co-opted Aboriginal Senator Ridgeway (Australian Democrats) to help re-drafting.

#### A.4.4 The 1999 proposal

The result of the redrafting, referred to even more matters than the earlier version - including war, nation building, natural environment and independence. In comparison with the US and French examples it was verbose and short of substance:

*‘With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.*

*We the Australian people commit ourselves to this Constitution:*

*proud that our national unity has been forged by Australians from many ancestries;*

*never forgetting the sacrifices of all who defended our country and our liberty in time of war;*

*upholding freedom, tolerance, individual dignity and the rule of law;*

*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;*

*recognising the nation building contribution of generations of immigrants;*

*mindful of our responsibility to protect our unique natural environment;*

*supportive of achievement as well as equality of opportunity for all;*

*and valuing independence as dearly as the national spirit which binds us together in both adversity and success’.[[95]](#endnote-95)*

The Government's intention was to retain the existing Preamble in the Act, and have this added to the Constitution. The new draft preamble was supposed to be ‘non-justiciable’, with a new section to be added to the Constitution’s operative provisions to this effect. However, there was competing legal opinion on the effect of that proposed section.[[96]](#endnote-96)

Independent MP Peter Andren raised the first objection:

*‘At first, when this Preamble bill appeared in the House today, I looked at it and I thought it looked fairly good…… Then I thought I had better check just how it had emerged. I am not in the loop around this place, and I don't mind that, but today's events certainly show how far the people of Australia are out of the loop. They know nothing about this Preamble ….. There had been no consultation, apart from with the Democrats, on this. Aden Ridgeway, fine gentleman that he is, was the only Aboriginal input into this Preamble….. Gatjil Djerkurra…. is desperately disappointed about the word `custodianship' and it is the only one that should be included in such a Preamble. This has all been done in unholy haste ... the preamble should be a product of the people.’[[97]](#endnote-97)*

Mr Andren effectively led the referendum ‘no’ case which was: a rushed process; lack of public consultation; defective content; uncertain legal effect and:

*‘poor logic of a preamble which asked Australians to commit themselves to a Constitution which a separate referendum question was asking them to change.’*

Other public figures expressing opposition included Senator Bob Brown (Greens), former High Court Chief Justice Sir Harry Gibbs and the One Nation Party. Some commentators on Indigenous matters also criticised the proposal.[[98]](#endnote-98)

There practically wasn’t any campaign either for or against the preamble proposal – rather the interest was in the republic question.

The preamble question gained 39% support nationally – a poor result and less than the republic. Among the explanations: apathy; a ‘republic neutral’ preamble; the ‘politicians’ preamble’. And:

*‘Les Murray joked that the Australian people had mercifully taken it out the back and shot it. …..'The [Preamble]', said Murray, 'was slowly taken apart and turned into mush in a process of political compromise'.’[[99]](#endnote-99)*

#### A.4.5 Later consideration

Professor Williams’ and Hume’s book did not dwell on the preamble referendum.[[100]](#endnote-100)

However, others did. McKenna, Simpson and Williams were scathing about the referendum and the role of Prime Minister Howard who:

*‘saw the opportunity to detach the most important moral and symbolic issue in Australian politics from the republican cause’*

and whose initial draft:

*‘displayed no evidence of being influenced by anyone other than himself and his poet co-author’*

being:

*‘a preamble of which Ern Malley would have been proud.’[[101]](#endnote-101)*

They noted the Prime Minister ignored the Constitutional Convention’s recommendations and forgot about Tasmania. His effort at a later redraft was described as ‘bland and innocuous’ and poorly written.[[102]](#endnote-102)

Twomey (2010) reviewed the referendum in the context of considering the suitability of a preamble for Indigenous recognition. She noted some form of ‘recognition’ had been inserted into several State Constitutions. However, none had been put to popular vote. All were the results of Parliamentary deliberations.[[103]](#endnote-103)

In considering preambles more generally, she raised concerns including: increasing international judicial activism; preamble matters not being reflected in operative provisions; disingenuity of pretending a change in a preamble is not intended to have an effect; (implicitly) the hypocrisy of ‘non-judicial’ disclaimers. She also raised technical issues regarding the legal effect of a referendum for a preamble for Australia’s Constitution.

Pyke (2016) also considered the preamble question in the context of Indigenous recognition. He acknowledged the influence of Twomey’s article – and that the expert panel on recognition had rejected the preamble route. However, he challenged some of its analysis including on technical issues.[[104]](#endnote-104)

In his view the referendum failed because of ‘dreadful drafting’ of the preamble rather than concerns about its effects. However, he appeared to suggest the draft would have had a substantive effect:

*‘but*if*it had been adopted, it seems to me that it*might*have eventually been accepted as achieving some sort of new constitutional settlement..’.*

He noted over 60 percent of people surveyed by the panel wanted a ‘recognition’ change to the Constitution’s preamble and operative provisions, yet the panel avoided this in favour of a more radical provision. He also reviewed evidence presented on international trends in judicial use of preambles and concluded:

*‘if the politicians want to draft sweeping idealistic statements in a preamble without matching them with substantive amendments, and we the people decide to approve them, then we are*inviting*the courts to use the preamble in ‘adventurous’ ways.  If we do the more cautious thing, and match what we say in a preamble with the principles already stated or implied in the Constitution and with possible new substantive sections, there is no problem.’*

#### A.4.6 Conclusions

The central issue revolves around the nature of the Constitution. It has political origins but its import is as a legal document. However, many – including Prime Minister Howard – appear to view it as more: a ‘basic document’.[[105]](#endnote-105)

Two questions are immediately obvious:

1. Can any part of a ‘basic document’ have no legal implication?
2. Should a ‘basic document’ cover all the basic matters?

The better opinion on question (1) appears to be ‘no’.

The better opinion on question (2) also appears to be no. Fundamental Australian practices are neither in the Constitution nor the draft preambles presented here. These matters include the Prime Minister, Cabinet Government, conventions such as the ‘caretaker period’, the Council of Australian Governments and, perhaps most importantly, the almost universal aspiration that the tiers of government work together.

Twomey’s analysis raises a further intriguing question: is a referendum for a new preamble in fact a referendum on the entire Constitution?

The question arises from an implication of introducing a new broad preamble while retaining the provisions of a long extant Constitution. How can proponents of the preamble know better about relevant circumstances and values than those who drafted the Constitution? And if the High Court presently refers to Federation debates to ascertain the meaning of Constitutional provisions will it refer to debates about a preamble that states the people’s commitment to all of the Constitution – given the people making the commitment live in 2019 rather than at the end of the 19th century?[[106]](#endnote-106)

Some commentators claim the preamble referendum failed because of a faulty process and lack of public interest – the latter leading to a ‘don’t know, vote no’ result.

An implication: a better process, involving proper public consultation, might increase prospects for success.

However, the public popularity of drafting – and denigrating - proposals suggests contrasting agendas about values and about what a preamble should do and what it should contain. This is demonstrated by the conflict between Mr Howard and Gatjil Djerkurra over ‘custodianship’.

Many (would-be) participants in the referendum processes saw a purpose of a preamble as advancing unity.

Yet, apparently, they could not help but include their own cause – which sometimes was assumed to be both worthy and widely shared e.g. ‘mateship’, ‘equality’ or ‘inclusive’. Their expectation must have been that the cause is to be advanced i.e. that the preamble should have some (legal) effect.

This reveals a fundamental problem: many see a preamble as a clandestine opportunity to not only sign-up people to their values, but to change the (operation of the) Constitution to permanently reflect those values.

Among the results of a mismatch between preamble and Constitutional provisions: unpredictability and greater judicial power at the expense of the people. Twomey provides examples of Canada and India of results regarded as undesirable. Twomey’s critic, Pyke, agrees with this point.

For the purposes of this article, unless the preamble’s motive is overt it is impossible to argue it important. With agendas hidden by a lack of proposed changes to operative provisions, most preamble proposals have lacked merit. There seems no particular consequence of rejection of a preamble proposal.

While some argue a preamble is needed for Indigenous reconciliation, the relevant Referendum Council did not come to that conclusion. It preferred that be dealt with outside the Constitution; with only a ‘Voice to Parliament’ being put to referendum.[[107]](#endnote-107)

It is reported Australia’s civic conversation has become more fractured since the 1999 referendum. There are new causes and ‘values’ such as ‘(inter/trans)gender’ equality and climate change. Social media is a forum for rage and misinformation about ‘values’ re law, human rights, religion etc. Personal sensitivities are high and some take offence at what previously would have been regarded as innocuous remarks and even at the national anthem which they regard as ‘non-inclusive’.[[108]](#endnote-108)

Professor Williams’ concerns of scare campaigns wrecking referendum chances are probably higher now than at the time of his writing. The divide between ‘elites’ and ‘Australians’ - which he argued was a cause of the republic referendum failing – has likely grown sharper and wider in recent years; it was a matter contributing to results in the most recent Federal election.[[109]](#endnote-109)

In these circumstances there is little merit or hope for a preamble that intends to express societal ‘values’ – particularly those as verbose as offered to Australia in the 1990s. The best chance for success is one limited to facts or matters dealt with by the Constitution.

This means the best way to advance causes such as Indigenous recognition is via legislation or referendum to change operative provisions of the Constitution. In the latter case, a preamble explaining the circumstances of the change might be of some use. Otherwise a preamble referendum is unlikely to succeed.

It also means the proponents of ‘preamble-only’ Constitutional changes, such as Mr Howard, were wrong and Australia was well served by the results of the referendum.

### A.5 Local government

Stated purposes of local government recognition include improving accountability and co-operation with State and Commonwealth tiers.

Another purpose is to allow the Commonwealth to provide public monies without the agreement of the relevant State. Some unkindly refer to that as enabling pork barrelling.[[110]](#endnote-110)

At present the Commonwealth may seek to provide public monies to (particular) local governments via s.96 conditional State grants - i.e. a grant on condition that monies are forwarded to a local government, perhaps for some defined purpose. The condition is to be set by Parliament, and the relevant State can decide whether or not to accept the condition.

One effect of recognising local government would be to remove the requirements of s.96 for Commonwealth grants. Legislation would still be needed to allow for payments to local governments, but it might be ‘umbrella’ type legislation used for other Commonwealth programs.[[111]](#endnote-111)

Local government recognition might reduce the importance of States. For example, if accepted, the Commonwealth could make grants to a local government with conditions unacceptable to the relevant State.

Two referendums have been held on this subject; in 1974 and 1988. Neither were carried.

In the early 2000s local government agitated for another referendum, culminating in a local government Constitutional convention in 2010. The deal that allowed Labor to form Government after that year’s Federal election included a promise to hold referendums on recognition of local government and Indigenous Australians alongside the 2013 elections.

Neither was held. The Indigenous issue is considered in Appendix 3.

The local government proposal supposed to be put in 2013 has been described by an eminent Constitutional lawyer as:

*‘one of the most inept attempts at constitutional change in Australia’.[[112]](#endnote-112)*

To initiate the process, the Government convened an expert panel which was given a short timeframe to report. The panel recognised the significance of a High Court judgement delivered in 2009, *Pape*, which cast doubt on existing Commonwealth practices of providing public monies to local government such as through the Roads to Recovery Program.[[113]](#endnote-113)

The panel developed several recognition options; financial, democratic, symbolic and cooperative. It cautiously recommended financial recognition given the limited time until the 2013 election.

In 2012, another High Court decision, *Williams (No.1)*, added to the doubts initiated by *Pape*. A Joint Select Committee was formed late in that year and by majority in March 2013 recommended a referendum for financial recognition. The outcome was a proposal to amend s.96 as follows:

*‘the Parliament may grant financial assistance to any State,* ***or to any local government body formed by a law of a State****, on such terms and conditions as the Parliament thinks fit’[[114]](#endnote-114)*

However, key assumptions made by the Select Committee majority proved incorrect. It assumed ongoing bi-partisan support for local government recognition, but this did not last. It assumed the Commonwealth could negotiate support from most States but this did not occur.

The Committee majority also took the view the proposal was mere codification of Commonwealth power. In effect it had to due to some concurrent Commonwealth assertions in the High Court. In the event these assertions were rejected in 2014 by the High Court in *Williams (No. 2)*, but not before scathing criticism of the referendum proposal from academics - including for the idea that almost all funding to explain the proposal to the public would be devoted to the ‘yes’ case.[[115]](#endnote-115)

The change of Prime Ministers in 2013 prevented the question being put at the election that year.

Some commentary suggests the issue is likely to be raised again. The claimed benefit is validation of current fiscal support for local government, taken to be important after the Williams (No.2) case.

While there may be local government pressure for this, I do not agree with the implied claim. Current fiscal support, via Commonwealth grants to local government through the States, would be valid if set by Parliament. Williams (No.2) should not be a problem.

Hence, the underlying intentions lie elsewhere: ensuring adequate local government finances, or by-passing State Governments. The former – more money - is not a matter for Constitutional change. The latter involves much more than mere financial arrangements if it is to be anything other than more pork barrelling.

The issue of local government recognition is, by itself, unimportant. The proposal put to date also lacked clarity, and a re-run would likely fail.

However, a comprehensive proposal extending beyond local government, to explicitly alter the powers of the States would be both important and may have merit. The likelihood of it passing may be low, however the effect of failure (criteria (c)) – a return to business as usual – would be insignificant.

### A.6 Regions, cities

#### A.6.1 Background

Regional promises featured prominently in the recent election campaign; usually these related to offers of gifts from the Commonwealth.

This might appear a natural progression from many years of Commonwealth talk about ‘regional’ and ‘urban’ policies. That this remains mere talk reflects a lack of Commonwealth regional and urban powers and inability to offer zone-based income taxation. Hence, its authority to fulfil many of these promises is in question.[[116]](#endnote-116)

The Commonwealth already has power to declare regions for certain purposes. For example, it has declared world heritage areas under the External Affairs power of s.51(xxxix). However, this does not create a power for the Commonwealth to generally legislate for, or (therefore) fund, regions or cities.[[117]](#endnote-117)

The Commonwealth can make grants to regions or cities but generally only through State Governments and the use of Constitution s.96.

The States say they are in a better position than the Commonwealth to determine priorities. However, most regional policy appears to be driven by electoral reasons. The States also author plenty of anti-regional policies such as the NSW Government inspired restrictions on Newcastle port.

The direct effect of Commonwealth politicians making regional and urban promises is to muddle accountabilities between Commonwealth and States. The Commonwealth gets called into many problems created by the States – the latest being failures in respect of apartment construction.[[118]](#endnote-118)

The long-term result of this governance problem is to degrade advisory capability, making both tiers of government less able to address challenges.[[119]](#endnote-119)

#### A.6.2 Regions

One way of addressing such questions would be a referendum on a proposed Commonwealth power for regions. This could be framed along the lines of the local government proposal:

*‘the Parliament may grant financial assistance to any State,* ***or to any region nominated by a law of a State****, on such terms and conditions as the Parliament thinks fit’[[120]](#endnote-120)*

In Australia, the term ‘region’ is used to denote locations outside the five metropolitan areas. Even large urban areas may be in regions, for example Newcastle and Canberra. One difficulty with a referendum on regions is the framing of an appropriate question – an appropriate Constitutional definition of ‘region’.

State identification of areas as regions might bypass this difficulty. However, this may create other issues as States have many laws which may identify regions. For example, there are laws concerning the environment, water supply, energy, town planning. Some States appoint Ministers for various regions, for example, in NSW there is a Minister for the Hunter. There is a possibility such indirect identification might trigger Commonwealth power were the above proposition passed at an Australian referendum.

The Commonwealth can only provide grants to legal persons. Regions are not of themselves such persons. Relevant legal persons might include local governments, catchment authorities etc. Hence the effect of the above proposal may be problematic.

There also is a practical difficulty. A proposition aimed at supporting the legality of Commonwealth gifts to non-metropolitan regions would need to be carried by an electorate which mostly does not live there. Most Australians live in the metropolitan areas; the referendum proposition could be presented as them providing monies to regional areas.

Such a change may have greatest chance of acceptance if its subject matter and location is limited and made specific. For example, for defined purposes not presently mentioned by Constitution s.51 – such as energy. And in a limited area such as north of the Tropic of Capricorn.

Such proposals may be welcome by new States movements that arise from time to time whose aim is to break the perceived shackles imposed by State Governments and the dominance of capital city interests. At the time of Federation there was an expectation new States would be created, and the structure of the Constitution facilitates this. The Constitution does allow the Commonwealth to set conditions on new States, and this might be some avenue for additional powers in those places.[[121]](#endnote-121)

#### A.6.3 Cities

Despite calls for regional development, most commentators take the view that the most urgent issues lie in the metropolitan areas.

Yet after decades of research, pronunciation of the importance of cities and widespread urging for a greater Commonwealth role in urban affairs, a proposition is yet to be made to how Commonwealth urban powers - and therefore responsibilities - should be defined.

Most calls for greater Commonwealth involvement come from vested interests - urbanistas. Most relate to pork barrelling. Previous attempts at Commonwealth involvement in cities are hardly case studies in successful public policy. The most recent ‘initiative’, ‘city deals’, perverts the concept established in the United Kingdom. No matter how well intentioned - at least in Sydney - it has been a showcase for Commonwealth negligence and bad faith.[[122]](#endnote-122)

A referendum for additional Commonwealth powers in cities would face the same type of issues as one for regions. For example, would powers over cities extend beyond metropolitan areas to the larger regional centres like the Gold Coast, Newcastle and Geelong? Each of which is substantially larger than Hobart or Darwin.

Or might Commonwealth powers extend to essentially rural local government areas which have the word ‘city’ in their title. The City of the Shoalhaven is one example.[[123]](#endnote-123)

#### A6.4 Regions and cities

To deal with the region/city delineation problem it might be suggested the Commonwealth should gain power over regions and cities.

Such an approach would involve a greater transfer of power from the States than envisaged in the unsuccessful proposals to recognise local government.[[124]](#endnote-124)

A broad power could virtually annul the Constitutional limitations on the scope of the Commonwealth and would be inconsistent with purposes of Federation such as minimising differences in the national treatment of political regions.

The concept of the Commonwealth having all relevant powers over particular areas powers is inconsistent with the design of the Constitution, Australia’s Federation and its nature as a national tier of government. It also breaches the public policy principle of subsidiarity.[[125]](#endnote-125)

All of the Commonwealth’ explicit powers are based on functions. The Commonwealth has no direct power over places, with the possible exception of Territories. Commonwealth activities affect places, and places can be used in the exercise of the functions – for example defence bases, international airports, marine parks and territorial seas. However, its influence on these areas is an implication of substantive head of power.[[126]](#endnote-126)

The has been no discussion about functions which would justify a Commonwealth locality-based role such as for cities, possibly because such functions do not exist or because ‘funding’ is mistakenly thought to be a function. Regarding the latter, Williams (No.2) made clear that funding is not a separate power or function of the Commonwealth – it can only arise from valid legislation or implied powers.[[127]](#endnote-127)

Hence, the issue of Commonwealth involvement in regions and cities is important but not for the reason proponents put. Rather present policy is a negative influence on Australia and its democracy.

#### A.6.4 The alternative route

Those who seek Commonwealth regional/city funding without State agreement have an alternative to a new power for the Commonwealth – the creation of new States. This is allowed for in Constitution ss.121 and 124:

***121. New States may be admitted or established***

*The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.*

***124. Formation of new States***

*A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.*

Some history of these provisions, and of attempts to make new States, is discussed in Rienstra and Williams. [[128]](#endnote-128)

The provisions are similar to those in the United States’ Constitution. There, five new States have been carved out of pre-existing States – but none in the last 150 years.[[129]](#endnote-129)

At the time of Australia federating there were expectations of new States and subdivision of existing States. Two were in Queensland – North and Central – which appears to be a reason for Queensland shunning some of the pre-Federation debates and a Queensland Parliamentary resolution. Several were mentioned in NSW – Riverina, Monaro and North NSW /New England.

North NSW appears to have been the better organised of attempts. Stirrings commenced soon after Federation and continued in earnest until the late 1960s. A current local member, Mr Joyce, raised the matter again in 2014.

For a time, Northern NSW set up its own pseudo-parliament. The proposed new State was the focal point of two Royal Commissions initiated by NSW – one (1925) advised against any new States on economic grounds, the other (1935) recommended State referendums.

A State referendum regarding North NSW was held in 1967 and failed, attracting 46% of votes. Among the offered reasons was inclusion of Newcastle in the proposed new State – rural areas may have viewed Newcastle as not that much more remote (in distance, lifestyle and politics) than Sydney, and the Newcastle population was largely against the proposal.

### A.7 Transport

#### A.7.1 Background

The Commonwealth has powers over navigation, and interstate and international transport. It has used these powers extensively in relation to aviation regulation and cabotage, airports, Tasmanian freight, and the establishment of a rail track company. However, the direction of its funding is to activities outside these areas – especially roads.

Its road funding was challenged in 1923 with the result being one of the more brief and curious High Court decisions.[[130]](#endnote-130)

Present national policy is implemented largely by a Council of Australian Governments Ministerial Council and s.96 grants to the States.

Of especial note is the frantic clean-up of the legal basis of Commonwealth programs following the Williams cases.[[131]](#endnote-131)

#### A.7.2 Previous referendums

To date there have been four referendums touching on transport: trade and commerce (2); essential services; aviation.

Referendums in 1911 and 1913 sought to expand Commonwealth trade and commerce powers to intra-state matters. The 1911 referendum included this with proposals for industrial relations and corporations in a single question.[[132]](#endnote-132)

The 1913 referendum had separate questions for each of these proposals. The result was close; 49.4% voted three of six States voted ‘yes’.

The ‘yes’ case was: international, interstate and intrastate trade and commerce are inextricably linked; the division of power between Commonwealth and States was artificial. This argument was later repeated in the High Court. Leading figures of the Court such as Justice Dixon recognised the argument, however:

*"the express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce".[[133]](#endnote-133)*

The 1926 essential services referendum sought to give the Commonwealth power to intervene if there was an interruption in services essential for industry. Such services could have included transport. The interruptions in mind were labour strikes. The referendum was defeated.[[134]](#endnote-134)

The 1937 referendum on aviation sought to extend Commonwealth power to intra-state aviation. This too was defeated.[[135]](#endnote-135)

Subsequent attempts by the Commonwealth to legislate for its involvement in intra-state aviation services failed; a 1976 High Court case setting out principles that imply a referendum is needed to expand the Commonwealth’s powers if it is to pursue many of the matters currently in vogue outside of cooperation with the States via s.96.[[136]](#endnote-136)

#### A.7.3 Failure to pursue goals

The situation of the Commonwealth in land transport is similar to that of regions and cities.

The years of policy statements, documents, promises and funding – have not produced any proposal for responsibility, let alone one that could be put for public endorsement. The only attempt at a ‘policy’ were funding programs – the National Highway scheme and Auslink.[[137]](#endnote-137)

Yet the situation in transport is worse than for regions and cities. The Commonwealth persistently fails to meet Federation themes for Commonwealth activities - facilitation of interstate etc. trade and commerce, railway standardisation – are shunned. The failures are bi-partisan.[[138]](#endnote-138)

Labor talks excitedly about city transport. The Coalition wants ‘congestion busting’. Both topics involve indeterminate matters over which the Commonwealth has no direct powers.[[139]](#endnote-139)

Neither Labor nor the Coalition have sought actual responsibilities for these matters and neither have hinted at a stable Commonwealth role. While possibly well intentioned, they appear to merely seek more targets for pork barrelling.

In these circumstances, expanding Commonwealth powers to legitimise current transport and infrastructure policy directions would be fraught. It would de facto endorse the current neglect.

1. <https://www.alp.org.au/policies/>

<https://www.alp.org.au/media/1539/2018_alp_national_platform_constitution.pdf> [↑](#endnote-ref-1)
2. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-2)
3. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp15> [↑](#endnote-ref-3)
4. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-4)
5. Australian Electoral Commission, YES or NO? Referendums. Saturday 3 September 1988. The cases For and Against, Canberra, 1988, p. 9 [↑](#endnote-ref-5)
6. Constitution Chapter II. Powers and functions of the Australian head of state are discussed at: <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Powers_and_Functions_of_the_Governor-General> [↑](#endnote-ref-6)
7. Responsible government involves Executive Government accounting to the Legislature Parliament and Parliament to the people see: <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/link.aspx?_id=F6543C82D421495790CD0187CAEB7F46&_z=z> [↑](#endnote-ref-7)
8. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-8)
9. The Hon Justice Michael Kirby AC CMG Justice of the High Court of Australia, *The Australian Republican Referendum 1999 - Ten Lessons*; Address to Faculty of Law, University of Buckingham, 3 March 2000 at [http://www.lawfoundation.net.au/ljf/app/&id=DF4206863AE3C52DCA2571A30082B3D5](http://www.lawfoundation.net.au/ljf/app/%26id%3DDF4206863AE3C52DCA2571A30082B3D5) [↑](#endnote-ref-9)
10. A recent article is at: <https://theconversation.com/indigenous-recognition-in-our-constitution-matters-and-will-need-greater-political-will-to-achieve-90296> [↑](#endnote-ref-10)
11. ### <https://www.thejadebeagle.com/submission-to-aps-review-2019.html>:

### *‘In the transport and infrastructure field there are claims about the independence of public sector organisations and advice. However, most show a mistaken understanding of the purpose of independence which is to reduce potential conflicts of private interest and public duty rather than to marshal capital from many individual shareholders. The relevant question is: independent from whom? The answer should be: those who stand to make a private benefit from the public duties of the organisation.’*

 [↑](#endnote-ref-11)
12. This outline is (over) simplified for exposition. The Constitutional Convention was set up on request from the Referendum Council. Matters presented to the Convention had developed from an Expert Panel on Constitutional Recognition of Indigenous Australians and the Parliamentary Committee. A fuller outline is at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement> [↑](#endnote-ref-12)
13. The Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples at <https://www.aph.gov.au/constitutionalrecognition> [↑](#endnote-ref-13)
14. For example, Prime Minister Morrison reportedly referring to a ‘third chamber’ of Parliament: Stan Grant, *Ken Wyatt, man in the crosshairs of history*, Sydney Morning Herald, July 13-14 2019. [↑](#endnote-ref-14)
15. Mabo and Others v Queensland [1992] HCA 23

The Wik Peoples v State of Queensland & Ors; The Thayorre People v State of Queensland& Ors [1996] HCA 40. [↑](#endnote-ref-15)
16. Dr John Gardiner-Garden, *Defining Aboriginality in Australia*, Social Policy Group 3 February 2003 at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10>.

One claim is there are over 500 distinct clan groups with separate customs and languages, accounting for around 2.4% of Australia’s population: <https://www.australia.gov.au/about-australia/our-country/our-people>. The clans are shown on a map at the Australian Institute for Aboriginal and Torres Strait Islanders Studies <https://aiatsis.gov.au/explore/articles/aiatsis-map-indigenous-australia> [↑](#endnote-ref-16)
17. For example: Dr John Gardiner-Garden, *The Mabo debate - a chronology,* 12 October 1993 Parliamentary Research Service Background Paper Number 23. The Mabo case also considered the question of compensation for actions that led to diminution of native title. It was rejected by a 4:3 majority. [↑](#endnote-ref-17)
18. See: Denis Rose: *The 10 point plan its Constitutional validity* (1998) 17 AMPLJ at <http://www.austlii.edu.au/au/journals/AUMPLawJl/1998/51.pdf> and

[*SIXTH REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND The Native Title Amendment Bill 1996*](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/ntlf/completed_inquiries/1996-99/report_06/contents)

at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/ntlf/completed_inquiries/1996-99/report_06/c02>.

The later thoughts of then Prime Minister Keating – who claimed he disagreed with but stated the Commonwealth’s position – are at

<https://www.smh.com.au/politics/federal/the-10-point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html> [↑](#endnote-ref-18)
19. Reactions to the decision (in 1997) are summarised at <http://classic.austlii.edu.au/au/journals/NativeTitleNlr/1997/7.pdf>. One of the dissenters in the High Court was Justice Brennan. [↑](#endnote-ref-19)
20. Native Title Act (1993) at <http://www5.austlii.edu.au/au/legis/cth/consol_act/nta1993147/>. [↑](#endnote-ref-20)
21. Western Australia was the last to be British settled. It was independent of the other colonies and had the largest area of land subject to native title. Just prior to the Commonwealth legislation, Western Australia passed a law which aimed to extinguish native title and provide statutory rights instead. If the Commonwealth’s native title legislation was valid the State’s law would be inconsistent with the Commonwealth’s Racial Discrimination Act (1975) and therefore invalid. Vines, Prue, *"Western Australia and Native Title - Western Australia v Commonwealth"* [1995] AUJlHRights 9; (1995) 2(1) Australian Journal of Human Rights 127 at <http://classic.austlii.edu.au/au/journals/AUJlHRights/1995/9.html> [↑](#endnote-ref-21)
22. <https://www.smh.com.au/politics/federal/pauline-hansons-1996-maiden-speech-to-parliament-full-transcript-20160915-grgjv3.html> [↑](#endnote-ref-22)
23. See: John Howard’s Amended 10 point Wik plan, May 8 1997 at <https://australianpolitics.com/1997/05/08/howard-amended-wik-10-point-plan.html> [↑](#endnote-ref-23)
24. See Jeff Kildea, Native Title: *A Simple Guide A Paper for those who wish to understand Mabo , the Native Title Act, Wik and the Ten Point Plan*, July 1998 at <https://www.hrca.org.au/wp-content/uploads/2008/05/native-title-a-simple-guide.pdf>. [↑](#endnote-ref-24)
25. The Attorney General’s Department explanation of ‘self-determination’ is at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoselfdetermination.aspx>

Other examples of views are at: <http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/1992/12.pdf>

<http://press-files.anu.edu.au/downloads/press/p229161/pdf/ch082.pdf>

<https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>

<https://www.abc.net.au/news/2013-10-21/bellear-indigenous-sovereignty/5032294> [↑](#endnote-ref-25)
26. The intervention, for example: <https://www.humanrights.gov.au/publications/social-justice-report-2007-chapter-3-northern-territory-emergency-response-intervention> [↑](#endnote-ref-26)
27. <https://theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198>

<https://www.creativespirits.info/aboriginalculture/politics/northern-territory-emergency-response-intervention>

<https://www.theaustralian.com.au/nation/indigenous-drive-at-dead-end-warren-mundine-and-noel-pearson/news-story/7243c4af3457bd62df7d944c94ec2fca> [↑](#endnote-ref-27)
28. The stolen generation issue is outlined at: <https://www.reuters.com/article/us-australia-aborigines-stolen-factbox/factbox-key-facts-about-australias-stolen-generations-idUSSYD20665020080213>.

Prime Minister Rudd’s apology is at: <https://www.theaustralian.com.au/news/nation/full-transcript-of-pms-speech/news-story/3143dac870aec0145901e575ae79cc3b>

A take on the apology is at: <https://www.smh.com.au/politics/federal/10-years-on-rudds-apology-to-the-stolen-generation-20180213-h0vznh.html> [↑](#endnote-ref-28)
29. Among potential administrative issues (with real effects) will be: proof of standing for native title; multiple contesting claimants; identification of all potential claimants; groups and their representation; disagreements among claimants. [↑](#endnote-ref-29)
30. *Closing the Gap Report 2019* at <https://ctgreport.pmc.gov.au/sites/default/files/ctg-report-2019.pdf?a=1>.

The program commenced in 2008, underpinned by Commonwealth-State intergovernmental agreements. By 2019 there were seven targets. Progress was on track for two: early childhood education (target: 95% enrolment); year 12 attainment (halve the gap). Progress was not on track for: life expectancy (target: close the gap); child mortality (halve the gap); school attendance (close the gap); reading and numeracy (halve the gap); employment (halve the gap). The 2019 report suggests the initiative was not successful. From 2014 reports were published by the Prime Minister’s Department. Among claimed reasons for failure of the program:

*‘the strategy has only partially, and disjointedly been implemented. There have been too many policy changes, retreats and inconsistencies. Secondly, although the strategy was initially a 20-plus year program, it was effectively abandoned after five years. The revolving door of prime ministers and Indigenous affairs ministers over the years and cuts of more than $500m to Indigenous affairs in the 2014 Federal Budget, have all had a devastating impact. The health and wellbeing of our people is not, and never should be, framed as an intractable problem. Political intransigence and lack of will is by far the greater problem.’*

June Oscar, Rod Little: *Time to reset*Closing the Gap*: ‘policy paralysis is not an option’,* February 2018, The Mandarin, <https://www.themandarin.com.au/88187-closing-the-gap-urgent-need-to-reset/>

The 2019 report indicates a new arrangement with greater involvement of local communities – as sought by Indigenous groups - will be tried. [↑](#endnote-ref-30)
31. From its inception as a Council in 2007, Infrastructure Australia expressed concern about ‘essential Indigenous infrastructure’ being one of the seven themes it drew to Governments’ attention. In 2012, it noted 131,000 (26%) of Indigenous people lived in remote communities. It claimed the ‘gaps’ (see note xx above) are the result of inadequate health, housing and educational infrastructure and services, with inadequate roads, water, power and telecommunications also contributing. It sought a goal of remote Indigenous communities having similar access to infrastructure and non-Indigenous communities of comparable size and location. It argued fundamental reform is needed for this, including a greater say of communities. It argued for a new policy framework which would:

*‘change the paradigm of what some would characterise as benevolent paternalism to one which is culturally respectful, empowered and self-determining. Remote indigenous communities will need to be supported in taking on significantly greater responsibilities. Governance arrangements will need to make individuals, communities, governments and other stakeholders confident there is a strong likelihood of improved outcomes……’.*

Infrastructure Australia, *Progress and Action, Report to the Council of Australian Governments 2012.* <https://www.infrastructureaustralia.gov.au/policy-publications/publications/files/P195_IACOAG_2012_Chapter4_7_WS.pdf>

It is unclear what happened to the proposed framework. Post 2014 the (new corporate-style) Infrastructure Australia placed the issue within a wider *Remote and Indigenous Communities:*

*‘Indigenous communities in remote areas face many of the same infrastructure challenges as remote communities more generally. Rather than comment on remote Indigenous policy, Infrastructure Australia is better placed to advise on remote infrastructure solutions. With the right solutions, all remote communities will benefit’.*

Infrastructure Australia, *Australian Infrastructure Plan, February 2016* at <https://www.infrastructureaustralia.gov.au/policy-publications/publications/files/Australian_Infrastructure_Plan.pdf>

It reaffirmed the importance of (remote) community input into infrastructure and focused more on government practices in its Australian Infrastructure plan:

*‘All governments should work together to improve the coordination of essential service delivery and infrastructure investment via local, state and territory government. ■ States and territories should tender the provision of economic infrastructure services and pool investments across communities to establish scale and attract more private sector innovation. ■ All governments should work together with the private sector to replace diesel generation with renewable energy wherever affordable and efficient. ■ All governments should develop tailored plans to maximise the benefits of the NBN for remote communities. ■ All governments should consider investments that support the recent COAG investigation into land administration and use and the White Paper on Developing Northern Australia actions on land, which aim to increase the economic independence of remote Indigenous communities. ■ All governments should make greater use of local expertise to sustain infrastructure investments ….’*

Infrastructure Australia, *Australian Infrastructure Plan Fact Sheet, Remote & Indigenous Communities,* February 2016

<https://www.infrastructureaustralia.gov.au/policy-publications/publications/files/IA_J16-2330_Fact_Sheet_Remote_and_Indigenous_v1.1.pdf> [↑](#endnote-ref-31)
32. Angela Pratt, Scott Bennett**,** *The end of ATSIC and the future administration of Indigenous affairs,* **9 August 2004**

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> [↑](#endnote-ref-32)
33. Dr William Jonas AM, 6 April 2004 at <https://www.humanrights.gov.au/about/news/media-releases/statement-atsic>

Indigenous interests at: <https://www.theaustralian.com.au/archive/in-depth/we-should-have-kept-atsic-lowitja-odonoghue/news-story/e50d1593353d0cbeab9f41b0784d2afc> and <https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-representative-bodies>

Then Minister, Amanda Vanstone: 2004 views at <https://www.abc.net.au/pm/content/2004/s1089204.htm>

2018 views at <https://www.abc.net.au/news/corrections/2018-08-22/amanda-vanstone-atsic/10152046>. [↑](#endnote-ref-33)
34. E.g. see note 2 at <https://en.wikipedia.org/wiki/National_Congress_of_Australia%27s_First_Peoples> and

<https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-representative-bodies> [↑](#endnote-ref-34)
35. <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>

Context is at : <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement> [↑](#endnote-ref-35)
36. *Final Report of the Referendum Council,* June 2017 at: <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> [↑](#endnote-ref-36)
37. The reason for the comparatively lengthy background discussion (to this point) is the Referendum Council did not explain its view about not dealing fully with recognition by referendum. An explanation of the recommendation may lie in the background discussion and the implications this may have on the possible question and potential result of a definitive recognition referendum. [↑](#endnote-ref-37)
38. <https://theconversation.com/why-the-government-was-wrong-to-reject-an-indigenous-voice-to-parliament-86408> [↑](#endnote-ref-38)
39. <https://www.abc.net.au/news/2019-05-03/vote-compass-federal-election-voice-to-parliament/11071384> [↑](#endnote-ref-39)
40. The Committee was to

*‘‘recommend options for constitutional change and any potential complementary legislative measures which meet the expectations of Aboriginal and Torres Strait Islander peoples and which will secure cross party parliamentary support and the support of the Australian people’.* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report>

Its recommendations were:

	1. *In order to achieve a design for The Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples, the Committee recommends that the Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples.**The co-design process should:*

*consider national, regional and local elements of The Voice and how they interconnect;*

*be conducted by a group comprising a majority of Aboriginal and Torres Strait Islander peoples, and officials or appointees of the Australian Government;*

*be conducted on a full-time basis and engage with Aboriginal and Torres Strait Islander communities and organisations across Australia, including remote, regional, and urban communities;*

*outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation;*

*consider the principles, models, and design questions identified by this Committee as a starting point for consultation documents; and*

*report to the Government within the term of the 46th Parliament with sufficient time to give The Voice legal form.*

	1. *The Committee recommends that, following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice.*
	2. *The Committee recommends that the Australian Government support the process of truth-telling. This could include the involvement of local organisations and communities, libraries, historical societies and Aboriginal and Torres Strait Islander associations. Some national coordination may be required, not to determine outcomes but to provide incentive and vision. These projects should include both Aboriginal and Torres Strait Islander peoples and descendants of local settlers. This could be done either prior to or after the establishment of the local voice bodies.*
	3. *The Committee also recommends that the Australian Government consider the establishment, in Canberra, of a National Resting Place, for Aboriginal and Torres Strait Islander remains which could be a place of commemoration, healing and reflection.* [↑](#endnote-ref-40)
41. Senator Stoker’s observations included the following:

*‘Indeed, I am deeply concerned that, for those who expect Constitutional recognition to be a panacea for this diverse bag of practical problems, they are bound for disappointment.*

*Practical problems require practical solutions. It is for this reason that I see potential in local representative organisations that can advise governments on the adaptation or tailoring of government programs to local needs. In remote communities, or where the dominant culture differs greatly from that contemplated by the design of programs in Canberra or other cities, this can add substantial value. I hope that the co-design process recommended by the JSCCR reveals constructive ways of engaging Indigenous expertise and local knowledge so that government engagement and resources can have their most positive possible impact. A ‘Voice’ (to use the words of the Statement from the Heart) to government of that nature has the potential to improve the efficiency of service delivery and be more effective in helping to ‘close the gap’, particularly in regional and remote communities.*

*It is for the same reason – practicality – that I maintain a scepticism of some of the proposals for Constitutional recognition.*

*The course of submissions revealed that there was an absence of consensus among Indigenous communities about what the various proposals for Constitutional recognition could achieve and indeed what their objectives were. Some believed it would be an important symbol, others saw it as a vehicle for countering discrimination against indigenous people. Some saw it as a part of the healing process for past wrongs, others saw it as a vehicle for treaty. Some saw it as a way to entrench a role for Indigenous people in government decision-making. There were, no doubt, even more objectives than those I have summarised.*

*No one considered, in their submission, this question: what is the purpose of our Constitution? If the purpose of our Constitution is to make us feel a peace with history, a model to insert a preamble might make sense (though we note their legal effect is substantially more complex than mere symbolism). If the purpose is to say something about our national identity, and the people, events and causes that make it up, then several of the amendment proposals might have value. But if the purpose of our Constitution is to mechanically allocate the powers and functions of a federal government and to define its relationship with the States – and that is its purpose – then all bar one of the proposals for amendment is misconceived.*

*I do not deny that there is a deep emotional attachment to the idea of Constitutional recognition in the hearts of the vast majority of the people who provided evidence to the committee. The difficulty is that the Constitution is not an emotional document; indeed, to insert emotion in a document with a legal purpose and operation is one that invites judicial activism.*

The Greens dissent included:

*‘The Greens do not agree that the design of the Voice should be finalised prior to a referendum on the concept itself.*

*‘…as suggested by the Cape York Institute, holding a referendum on the principle of the Voice would likely increase the chance of success:*

*The referendum can in this way be won on the readily digestible principle that Indigenous peoples should have a fair say in political decisions made about them, their rights and their affairs, without getting bogged down in highly complex institutional design detail which is properly a matter for legislation, not the Constitution.*

*Several submitters noted that the establishment of the High Court of Australia followed this model.*

*No constitutionally-mandated institution exists where the legislation has preceded the creation of the power. All institutions created by a power have been constitutionally mandated. Why would the establishment of the Voice be the one exercise of a power where the institution will be created prior to the power? That’s been the way with the High Court of Australia or even the Inter-state Commission.’* [↑](#endnote-ref-41)
42. Deborah Snow, *Leaders ‘in the long game’*, Sydney Morning Herald, July 13-14, 2019. Former Chief Justice Gleesons views are at: <https://insidestory.org.au/why-i-support-a-voice-to-parliament/> <https://insidestory.org.au/why-i-support-a-voice-to-parliament/> . Former Minister Joyce: <https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament> [↑](#endnote-ref-42)
43. The Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples considered some at its report section 4; Constitution ss.25, 51(xxvi), extra Constitutional declaration (by statute) of recognition. It concluded widespread support for changing the former would be lacking in the absence of other substantive Constitutional change, and Indigenous non-acceptance of the latter in the absence of Constitutional recognition: <https://www.aph.gov.au/constitutionalrecognition>

And <https://theconversation.com/constitutional-reform-made-easy-how-to-achieve-the-uluru-statement-and-a-first-nations-voice-116141> [↑](#endnote-ref-43)
44. ‘*COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25*

*Provision as to races disqualified from voting*

*For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted*.’

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/coaca430/s25.html> [↑](#endnote-ref-44)
45. From Sarah Pritchard, *The ‘race’ power in section 51(xxvi) of the Constitution* (2011) 15 (2) AILR:

*The debate leading up to the 1967 referendum suggests that it was generally assumed that the purpose of the amendment to section 51(xxvi) was to confer on the Commonwealth Parliament power to make laws for the benefit of Aboriginal and Torres Strait Islander people. However, in 1983 in Commonwealth v Tasmania, 53 Mason J held that the power enabled Parliament to make laws ‘(a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community, and (b) to protect the people of a race in the event that there is a need to protect them’. This echoed the earlier judgment of Stephen J in Koowarta v Bjelke-Petersen, 54 in which his Honour held that the power enabled laws because of both ‘the special needs’ of the people of a particular race, as well as ‘the special threat or problem they present’.55 In 1988, in its Final Report, the Constitutional Commission noted that until section 51(xxvi) was amended in 1967, Parliament could ‘pass special and discriminating laws’ relating to the people of any race. The Commission referred to a number of decisions in recent years in which judges had observed that laws made under section 51(xxvi) ‘may validly discriminate against, as well as in favour of, the people of a particular race’.*

Two of the four justices who considered the issue in *Kartinyeri v Commonwealth* [1998] HCA 22 (Gaudron, Kirby) thought laws could not disadvantage a race. Justice Gaudron, however, qualified this by accepting that power to repeal the operation of a law is implied in the power to make that law – hence a law which removed a previously granted advantage is valid. The other two justices appeared to think laws could disadvantage a race provided they were not a manifest abuse of power. See: Nettheim, Garth “*The Hindmarsh Bridge Act Case: Kartinyeri v Commonwealth*" [1998] IndigLawB 48; (1998) 4(12) Indigenous Law Bulletin 18 [↑](#endnote-ref-45)
46. Dr John Gardiner-Garden, Joanne Simon-Davies, *Commonwealth Indigenous-specific expenditure 1968–2012*

28 September 2012

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/IndigenousExpend>  [↑](#endnote-ref-46)
47. <https://indigenousfoundations.arts.ubc.ca/terminology/>;

Dr John Gardiner-Garden, *Defining Aboriginality in Australia*, Social Policy Group, 3 February 2003, at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10>’ [↑](#endnote-ref-47)
48. MEGAN DAVIS AND ZRINKA LEMEZINA, *INDIGENOUS AUSTRALIANS AND THE PREAMBLE: TOWARDS A MORE INCLUSIVE CONSTITUTION OR ENTRENCHING MARGINALISATION? 2010,* UNSW Law Journal Volume 33(2)

SHIREEN MORRIS, *‘THE TORMENT OF OUR POWERLESSNESS’: ADDRESSING INDIGENOUS CONSTITUTIONAL VULNERABILITY THROUGH THE ULURU STATEMENT’S CALL FOR A FIRST NATIONS VOICE IN THEIR AFFAIRS, 2018,* UNSW Law Journal Volume 41(3) [↑](#endnote-ref-48)
49. However, the body of the Joint Committee report only raised examples of Indigenous (advisory) organisations. It did note two suggested options (6 and 7) for a Voice referendum were modelled on the InterState Commission. The Greens’ dissent mentioned the InterState Commission.

*Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples,* November 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2freportjnt%2f024213%2f26813>

See also: Stephen Gagelar, *The Interstate Commission and the Regulation of Trade and Commerce under the Australian Constitution* at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/2017_28_PLR_205_Gageler.pdf> [↑](#endnote-ref-49)
50. See for example: [https://www.abc.net.au/news/2016-08-22/same-sex-marriage-plebiscite-dangerous-precedent:-michael-kirby/7771940](https://www.abc.net.au/news/2016-08-22/same-sex-marriage-plebiscite-dangerous-precedent%3A-michael-kirby/7771940) and

<https://www.outinperth.com/michael-kirby-argues-plebiscite/> [↑](#endnote-ref-50)
51. <https://www.thejadebeagle.com/election-2019.html> [↑](#endnote-ref-51)
52. The Joint Committee said it:

*‘is aware that there is not universal support for the constitutional enshrinement of a First Nations Voice to Parliament.*

*Some Aboriginal and Torres Strait Islander individuals expressed discomfort with the idea of being included in a document which they felt had been instrumental in their dispossession….*

*Concerns were also raised regarding the principle of specifically acknowledging one group of Australians, as separate to other Australians, within the Constitution.*

*Mr Morgan Begg, Research Fellow at the Institute of Public Affairs, stressed that Australia is a ‘liberal democracy’ and that as such, every adult may equally influence civil society by voting to elect representatives to state and federal parliaments and to local government. He argued that….*

*Amending the Constitution to establish a body giving a Voice to Parliament for one group is divisive and undemocratic. The Australian Constitution is the founding document of the Australian nation, and every Australian should be treated equally under it…*

*The creation of a body to exclusively represent one group formally elevates members of that group above others*

*the Institute of Public Affairs would prefer to repeal section 25 and section 51(xxvi) of the Australian Constitution to remove all notion of distinguishing between Australians based on the concept of ‘race’’.*

*Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples,* November 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2freportjnt%2f024213%2f26813> [↑](#endnote-ref-52)
53. <https://www.abc.net.au/news/2019-05-03/vote-compass-federal-election-voice-to-parliament/11071384>

<https://www.sbs.com.au/news/long-overdue-shorten-stands-by-indigenous-referendum-plan-despite-criticism> [↑](#endnote-ref-53)
54. [COE v. THE COMMONWEALTH OF AUSTRALIA and THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND](https://jade.io/article/188346) [1979] HCA 68; notable also for Justice Murphy claiming some settlement practices amounted to attempted genocide.

In Coe v Commonwealth (No 2) (1993) 214 CLR 422 Chief Justice Mason (sitting alone) held:

*“The Aboriginal people are subject to the laws of the Commonwealth… They have no legislative, executive or judicial organs by which sovereignty might be exercised…the contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible to maintain in law…..The decision of*[*Mabo v Queensland (No 2)*](http://www.unistudyguides.com/wiki/Mabo_v_Queensland_%28No_2%29)*rejects the notion that any the indigenous have sovereignty which is adverse to the Crown’s, or that they are a ‘domestic and dependant nation’ which is entitled to self government ….. and full rights.*

Walker v New South Wales [1994] HCA 64 considered a contention that Aboriginal criminal law could sit aside Australian criminal law. Chief Justice Mason held:

*There is nothing in the recent decision in Mabo (No. 2)… to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent. Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, Mabo (No.2) rejected that suggestion. …*

*It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters…. not only to all persons ordinarily resident within the country, but also to foreigners temporarily visiting. And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose’.* [↑](#endnote-ref-54)
55. For example <https://theconversation.com/indigenous-treaties-are-meaningless-without-addressing-the-issue-of-sovereignty-98006>. One interpretation of the Uluru statement is a sovereignty claim see: <https://www.eurekastreet.com.au/article/royal-visit-s-model-for-aboriginal-sovereignty>.

<https://www.sbs.com.au/nitv/living-black/article/2018/07/05/dastardly-deeds-betrayal-and-stalking-horses-noel-pearson-opens?cid=inbody:noel-pearson-fumes-after-welfare-policy-blindside-by-queensland-government> [↑](#endnote-ref-55)
56. An introduction is at <https://www.sbs.com.au/nitv/explainer/explainer-what-treaty> [↑](#endnote-ref-56)
57. Anne Twomey, *An Indigenous Advisory Body – Addressing the Concerns about Justiciability and Parliamentary Sovereignty*, 2015 <https://sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/CRU-Conf-Indigenous-Recognition-Twomey.pdf>

<https://www.theaustralian.com.au/nation/indigenous-treaties-just-playing-games-with-words/news-story/434a6b8491935cf4e87c8677e93fb686>

Geoff Gallop, *Where to for an Australian republic,* August 20 2018, the Mandarin <https://www.themandarin.com.au/97406-where-to-for-an-australian-republic/> [↑](#endnote-ref-57)
58. The Principle of indissolubility arises from the preamble to the Constitution in the (British) Constitution Act (1900):

*‘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’*……

This is discussed in more detail in Appendix 4. [↑](#endnote-ref-58)
59. Sharia law versions: <https://www.sbs.com.au/news/explainer-what-is-sharia-law>

Seal of the Catholic confessional: <https://www.catholiceducation.org/en/religion-and-philosophy/catholic-faith/the-seal-of-the-confessional.html>; <https://www.abc.net.au/news/2018-06-17/what-is-confession-and-is-the-change-important/9874752> [↑](#endnote-ref-59)
60. Brennan, Sean; Gunn, Brenda; Williams, George *Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments* [2004] SydLawRw 15; (2004) 26(3) Sydney Law Review 307 <http://classic.austlii.edu.au/au/journals/SydLawRw/2004/15.html> [↑](#endnote-ref-60)
61. For example: [https://www.abc.net.au/radionational/programs/soul-search/sovereignty-is-a-spiritual-notion:-naidoc-special/11277780](https://www.abc.net.au/radionational/programs/soul-search/sovereignty-is-a-spiritual-notion%3A-naidoc-special/11277780) [↑](#endnote-ref-61)
62. Brennan, Sean; Gunn, Brenda; Williams, George *Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments* [2004] SydLawRw 15; (2004) 26(3) Sydney Law Review 307 <http://classic.austlii.edu.au/au/journals/SydLawRw/2004/15.html> [↑](#endnote-ref-62)
63. The Joint Committee cited an example of Mr Gooda:

‘*Although the settlement was not negotiated as part of a specific treaty process, Mr Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner, asserted that it is an example of agreement making:*

*…. the Noongar Agreement …. When people ask about agreement making in any other country that would be called a treaty. When people ask me about treaty, I say, ‘We’ve already got treaties,’… All of the elements you’d think of when you think about a treaty are in there. They’d given up the right to claim Native Title in that area. They came to the conclusion that 98 per cent had been extinguished anyway. They got land and money back from the government. The government passed a piece of legislation that recognised them as the traditional owners of that country. It was state legislation… so I think we’ve already got treaties in this country.’*

*Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples,* November 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2freportjnt%2f024213%2f26813>

And see: Harry Hobbs, George Williams, *Australia’s first treaty*, April 2018 at <https://auspublaw.org/2018/04/australias-first-treaty/>. The authors claim the following matters constitute a (Indigenous) treaty:

*‘There are many examples of agreements between Indigenous peoples and governments, both in Australia and around the world. However, a treaty is a specific type of agreement….*

*First, it must recognise Indigenous peoples as a distinct political community….*

*Second, a treaty is a political agreement, reached by way of negotiation……*

*Finally, both sides must accept a series of responsibilities so that the agreement can bind the parties in an ongoing relationship. This means each party must accept that, in the words of Lamer CJ of the Supreme Court of Canada, ‘we are all here to stay’’*

This uses the word ‘treaty’ in its Indigenous rather than international sense. The treaty in this case was between the Noongar people and the Western Australian (State) Government rather than the national, Commonwealth, Government. [↑](#endnote-ref-63)
64. <https://www.sbs.com.au/nitv/article/2015/07/24/comment-anointing-indigenous-leaders-uses-logic-its-own>

 [↑](#endnote-ref-64)
65. Brennan, Sean; Gunn, Brenda; Williams, George *Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments* [2004] SydLawRw 15; (2004) 26(3) Sydney Law Review 307 <http://classic.austlii.edu.au/au/journals/SydLawRw/2004/15.html> [↑](#endnote-ref-65)
66. The academic, Megan Davis, *Seeking Settlement, how does the reinvigorated treaty movement fit with recognition?* July 2016, The Monthly:

‘*This is not a post-Mabo “Aborigines will take your backyard” situation. A treaty is not intended to create two nations or violate formal notions of equality. Globally it is common practice for states with indigenous populations to enter into such agreements on a variety of matters, from land use to management of national parks to service delivery. These modern-day instruments are internationally referred to as “treaties, agreements and other constructive arrangements”. Most liberal democracies with indigenous populations do it because it increases the democratic participation of indigenous peoples and improves democratic governance. Such an agreement or constructive arrangement can be as simple as mapping a path forwards based on agreed principles of engagement and mutual respect. Such an agreement could agree to disagree on some things and settle on others.*’

<https://www.themonthly.com.au/issue/2016/july/1467295200/megan-davis/seeking-settlement>

The commentator: Keith Windschuttle, *There’s more to the Voice than Gleeson says*, 21 July 2019, Quadrant:

*‘So, rather than one “black state” as envisaged in 2001 by the disastrous former representative body, ATSIC, the latest proposal is for each individual clan to be recognised as a First Nation and for the Australian government to make a treaty with each one, as if it was a separate state.’*

<https://quadrant.org.au/opinion/bennelong-papers/2019/07/theres-more-to-the-voice-than-gleeson-says/>. [↑](#endnote-ref-66)
67. Justice Gibbs (and Justice Aicken):

*‘it is not possible to say, as was said by Marshall CJ, at p. 16, of the Cherokee Nation, that the aboriginal people of Australia are organised as a "distinct political society separated from others", or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain*

COE v. THE COMMONWEALTH OF AUSTRALIA and THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (1979) 24 ALR 118 at <https://jade.io/article/188346> [↑](#endnote-ref-67)
68. Yorta Yorta (2002) 214 CLR in FRANCESCA DOMINELLO, *BEYOND SYMBOLISM: ABORIGINAL SOVEREIGNTY AND NATIVE TITLE FRANCESCA DOMINELLO* 2008 at <http://classic.austlii.edu.au/au/journals/JlALawTA/2008/13.pdf> [↑](#endnote-ref-68)
69. Definition of Aboriginality see note xvi (above). [↑](#endnote-ref-69)
70. *Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples,* November 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2freportjnt%2f024213%2f26813> [↑](#endnote-ref-70)
71. See Senator Stoker at note (xli) above. [↑](#endnote-ref-71)
72. <https://www.thejadebeagle.com/submission-to-aps-review-2019.html> [↑](#endnote-ref-72)
73. <https://www.themandarin.com.au/110008-young-australians-champion-democracy-and-freedom-in-designing-constitutional-change/>

Their preamble is:

*‘We the Australian people, united as an indissoluble Commonwealth, commit ourselves to the principles of equality, democracy and freedom for all and pledge to uphold the following values that define our nation.*

*We stand alongside the traditional custodians of the land and recognise the significance of Aboriginal and Torres Strait Islander cultures in shaping the Australian identity, their sovereignty was never ceded.*

*As a nation and indeed community, we are united under the common goal to create a society catered to all, regardless of heritage or identity.*

*We pledge to champion individual freedom and honour those who have served and continue to serve our nation.*

*As Australians, we stand for the pursuit of a democratic state that upholds the fundamental principles of human values as set out by this Constitution.’* [↑](#endnote-ref-73)
74. John Warhurst, *Closed minds on Constitutional reform*, Sydney Morning Herald, March 23, 2018 <https://www.smh.com.au/national/closed-minds-on-constitutional-reforms-20180522-p4zgsl.html> [↑](#endnote-ref-74)
75. Mark McKenna, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights,* [Research Paper 12 1996-97](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12> [↑](#endnote-ref-75)
76. Anne Twomey, *Constitutional Recognition of Indigenous Australians in a Preamble*, September 2011, Constitutional Reform Unit, Sydney Law School, Report No.2 2011. <https://sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/Report-2-2011-constitutional-recognition-of-indigenous-australians.pdf> [↑](#endnote-ref-76)
77. <https://www.usconstitution.net/xconst_preamble.html> <https://constitutionus.com/> [↑](#endnote-ref-77)
78. <https://www.constituteproject.org/constitution/France_2008.pdf?lang=en> [↑](#endnote-ref-78)
79. Sir Harry Gibbs, *A Preamble: The Issues’ Upholding the Constitution,* Samuel Griffith Society (1999, Vol 11). [↑](#endnote-ref-79)
80. John Pyke, Reasons not to be scared of a new constitutional preamble, AUSPUBLAW (18 May 2016) [*https://auspublaw.org/2016/05/reasons-not-to-be-scared/*](https://auspublaw.org/2016/05/reasons-not-to-be-scared/) [↑](#endnote-ref-80)
81. E.g. *Kruger v Commonwealth* [1997] HCA 27, per Justice Dawson. [↑](#endnote-ref-81)
82. Danny Jovica, *The Preamble to the Constitution*, December 2015.  <http://para-legal.org.au/the-preamble-to-the-constitution/> [↑](#endnote-ref-82)
83. Sir Robert Garran, *Commentaries on the Constitution of the Commonwealth of Australia*, 1901 (From *The Annotated Constitution of the Commonwealth of Australia* (Quick and Garran) <http://adc.library.usyd.edu.au/data-2/fed0014.pdf> [↑](#endnote-ref-83)
84. Mark McKenna, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights,* [Research Paper 12 1996-97](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697).

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12> [↑](#endnote-ref-84)
85. Cited by: Anne Twomey, *Constitutional Recognition of Indigenous Australians in a Preamble*, September 2011, Constitutional Reform Unit, Sydney Law School, Report No.2 2011. <https://sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/Report-2-2011-constitutional-recognition-of-indigenous-australians.pdf>

Garran further commented regarding the four preamble matters not found in the operating provisions:

*‘why are four at least of these momentous declarations to be found only in the preamble, and why have they no corresponding counterparts in the corpus of the Act? The answer is obvious. First as to the agreement of the people; that is the recital of a historical fact, and it could not therefore be reduced to the form in which a section of an Act of Parliament is generally cast, viz., that of a command coupled with a sanction. Then, again, their reliance on the Divine blessing is another recital of fact, incidental to the primary affirmation, and introduced in a participial sentence for the purpose of avoiding the suspicion of ostentation and irreverence; there would, indeed, have been not only a technical difficulty, but an absolute impropriety in attempting to frame a clause designed to give legislative recognition of the Deity. The indissolubility of the Federal Commonwealth is affirmed as a principle: the effect of that affirmation will be discussed at a later stage. The declaration that the Union is under the Crown is appropriate and fundamental; this also will be discussed at a later stage’*

One motivation for indissolubility was the experience of the United States:

*‘The omission from the Constitution of the United States of an express declaration of the permanence and indestructibility of the Union led to the promulgation of the disastrous doctrines of nullification and secession, which were not finally exploded until the Civil War of 1862–4 forever terminated the controversy.’*

Garran noted germination of the United States secession ‘heresy’ started more than sixty years earlier in Kentucky and Virginia. He also considered Canada whose Constitution similarly lacks a relevant operative provision. He considered it legally impossible for that union to be terminated because neither the originating Parliament (Britain) nor the people (via referendum) were afforded such powers. For Canada, indissolubility was implied.

Regarding the preamble’s reference to the Crown, he said that was added from an ‘abundance of caution’ but implied it was necessary to achieve public support for the Federation:

*‘Some years ago, a few ardent but irresponsible advocates of Australian federation indulged in predictions that the time would inevitably come when Australia would separate from the mother country and become an independent Republic. Those ill-considered utterances caused, at the time, strong expressions of disapproval throughout the colonies……’*

He went on to say the reference to the Crown did not prevent any amendment to the Constitution, such as to break ties with the British Crown – the only restraint on the power to amend the Constitution being approval of the people of a State whose representation or boundary would be affected (s.128):

*‘That is the only thing like an exception to, or a restriction on, the general power of amendment specified in the Constitution’*

Sir Robert Garran, *Commentaries on the Constitution of the Commonwealth of Australia*, 1901 (From *The Annotated Constitution of the Commonwealth of Australia* (Quick and Garran) <http://adc.library.usyd.edu.au/data-2/fed0014.pdf> [↑](#endnote-ref-85)
86. John Pyke, Reasons not to be scared of a new constitutional preamble, AUSPUBLAW (18 May 2016) [*https://auspublaw.org/2016/05/reasons-not-to-be-scared/*](https://auspublaw.org/2016/05/reasons-not-to-be-scared/)

His example was:

***‘Whereas****the six British colonies which federated in 1901 to form the Commonwealth of Australia were established on lands that had been occupied by indigenous Australian people for tens of thousands of years,*

***We the People of Australia***

***Express our pride in****our fundamental principles of government, including parliamentary democracy, the rule of law, and the independence of the judiciary, which have their origins in the legal and political system brought to Australia by the British colonisers,*

***But acknowledge****that the process of colonisation occurred in total disregard of the rights of the people already indigenous to Australia, and that for many years their descendants’ rights to equal citizenship and title to their land were not recognised,*

***And therefore now –***

***Declare****that we acknowledge and honour the indigenous people as the descendants of Australia’s first people, acknowledge their continuing relationship with their traditional lands and waters, and celebrate their contributions to national life and culture, as we also celebrate the contributions made by successive waves of migrants, from the early colonists to those most recently arrived,*

***Commit ourselves****to living under a democratic system in which all citizens have equal political rights, regardless of their ancestry, and all our differences are resolved peacefully, fairly, and with mutual respect, and*

***Affirm****that this Constitution continues to have force as the supreme law of the land simply because its original text and all subsequent amendments have been approved by majorities of the people, and that it is therefore binding on all legislatures, executive governments, courts, judges and people within Australia and in all places where Australian law applies.’* [↑](#endnote-ref-86)
87. Gregory Melleuish, *Australia’s Constitution works because it doesn’t define national identity*, July 2015 <https://theconversation.com/australias-constitution-works-because-it-doesnt-define-national-identity-43253> [↑](#endnote-ref-87)
88. Mark McKenna, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights,* [Research Paper 12 1996-97](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697).

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12> [↑](#endnote-ref-88)
89. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-89)
90. Mark McKenna *First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99*, [Research Paper 16 1999-2000](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16> [↑](#endnote-ref-90)
91. The Constitutional Convention preamble:

*‘resolved that the Constitution include a Preamble, noting that the existing Preamble before the Covering Clauses of the Imperial Act which enacted the Australian Constitution 'and which is not itself part of our Constitution' would remain intact.*

*Any provisions of the Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed.*

*The Preamble to the Constitution should contain the following elements:*

*Introductory language in the form 'We the people of Australia';*

*Reference to 'Almighty God';*

*Reference to the origins of the Constitution, and acknowledgment that the Commonwealth has evolved into an independent, democratic and sovereign nation under the Crown;*

*Recognition of our federal system of representative democracy and responsible government;*

*Affirmation of the rule of law;*

*Acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders;*

*Recognition of Australia's cultural diversity;*

*Reference to the people of Australia having agreed to reconstitute our system of government as a republic;*

*Concluding language to the effect that '[ We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution'.*

*The following matters be considered for inclusion in the Preamble:*

*Affirmation of the equality of all people before the law;*

*Recognition of gender equality; and*

*Recognition that Aboriginal people and Torres Strait islanders have continuing rights by virtue of their status as Australia's indigenous peoples.*

*Care should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution.*

*Chapter three of the Constitution should state that the Preamble not be used to interpret other provisions of the Constitution.’*

*Report of the Constitutional Convention, 1998* [↑](#endnote-ref-91)
92. Mark McKenna *First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99*, [Research Paper 16 1999-2000](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16> [↑](#endnote-ref-92)
93. The ‘Howard-Murray’ preamble:

*‘With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.*

*The Australian nation is woven together of people from many ancestries and arrivals.*

*Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.*

*Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.*

*In every generation immigrant have brought great enrichment to our nation's life.*

*Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals.*

*We value excellence as well as fairness, independence as dearly as mateship.*

*Australia's democratic and federal system of government exists under law to preserve and protect all Australians in equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.*

*In this spirit we, the Australian people, commit ourselves to this Constitution.’* [↑](#endnote-ref-93)
94. For some other attempts at a preamble see: Mark McKenna *First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99*, April 2000, [Research Paper 16 1999-2000](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16> appendix 2 [↑](#endnote-ref-94)
95. Mark McKenna *First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99*, April 2000, [Research Paper 16 1999-2000](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16> [↑](#endnote-ref-95)
96. Competing legal opinion: well prior to the referendum, statements by some High Court justices in *Leeth v Commonwealth [*1992] HCA 29 referred to the preamble to assist in interpretation. In that case, three justices held the Constitution did not create an implied right to substantive legal equality but recognised procedural equality. Justices Toohey and Deane went further and held there is an implied right to substantive equality because the Constitution is an agreement between people of the former colonies as stated in the preamble i.e. the preamble has an effect. Justice Brennan also referred to the preamble. In *Kruger v Commonwealth* [1997] HCA 27 (‘Stolen Generation Case’) the court rejected the implied substantive right.

The preamble referendum proposed a new operative provision for the Constitution – s.125A – which said the new preamble could not be used for judicial interpretation of the Constitution *or statutes*. However, this was doubted by Constitutional expert Zines and by former Chief Justice Gibbs:

*‘a preamble might be relied upon as evidence supporting, as a matter of fact, the statements made therein. According to Sir Harry Gibbs, this might prove particularly significant in the context of native title if a preamble contained recitals about the dispossession of Indigenous peoples or their relationship with the land.’*

Mark McKenna, Amelia Simpson, George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble*, (2001) 24 University of New South Wales Law Journal 382 [↑](#endnote-ref-96)
97. Gatjil Djerrkura was chair of the Aboriginal and Torres Strait Islander Commission.

Mark McKenna, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights,* [Research Paper 12 1996-97](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12> [↑](#endnote-ref-97)
98. MEGAN DAVIS AND ZRINKA LEMEZINA, *INDIGENOUS AUSTRALIANS AND THE PREAMBLE: TOWARDS A MORE INCLUSIVE CONSTITUTION OR ENTRENCHING MARGINALISATION?* UNSW Law Journal Vol 33 2:

 '*This version was criticised by Aboriginal leaders, especially on the basis that no other Aboriginal leaders were consulted ….*

*the word ‘kinship’ as simplistic and diminishing the significance of Aboriginal and Torres Strait Islander connection to land and the practice of their lore. On the contrary, Howard and Ridgeway argued that the preamble was better than the current text that makes no mention of Aboriginal and Torres Strait Islander peoples and was therefore an improvement.*

*The fact that the preamble was attached to the same referendum as the question of an Australian republic was argued by some commentators to be less a manifestation of reconciliation than a political red herring designed by the Howard Government to dilute the mounting strength of the republic debates.’*

The article also claims:

‘*The eventual vote saw the preamble rejected by every state and territory and nationally by 60.7 per cent. The rejection was especially pronounced in electorates with Aboriginal and Torres Strait Islander populations.’*

However, an inference of Indigenous voting patterns significantly affecting referendum results would be simplistic. Referendum criteria are voter majorities in States and nationwide rather than electorates. There are claims (elsewhere) Indigenes account for only 2% of the population. [↑](#endnote-ref-98)
99. Mark McKenna, Amelia Simpson, George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble,* (2001) 24 University of New South Wales Law Journal 382 [↑](#endnote-ref-99)
100. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010. [↑](#endnote-ref-100)
101. Ern Malley was the central fictitious figure in a literary hoax intended to prove ‘meaningless codswallop’ could be taken seriously: <https://www.abc.net.au/archives/80days/stories/2011/10/27/3367929.htm>

Mark McKenna, Amelia Simpson, George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble,* (2001) 24 University of New South Wales Law Journal 382 [↑](#endnote-ref-101)
102. In at least two respects: the reference to ‘kinship’ was misplaced as it does not apply to connections between people and places; the inclusion of s.125A in the proposal. The latter would preclude the new preamble from assisting in the interpretation of the Constitution or other laws, but continue to allow the pre-existing British 1900 preamble to do so: Mark McKenna, Amelia Simpson, George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble,* (2001) 24 University of New South Wales Law Journal 382 [↑](#endnote-ref-102)
103. Anne Twomey, *Constitutional Recognition of Indigenous Australians in a Preamble*, September 2011, Constitutional Reform Unit, Sydney Law School, Report No.2 2011. <https://sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/Report-2-2011-constitutional-recognition-of-indigenous-australians.pdf> [↑](#endnote-ref-103)
104. John Pyke, Reasons not to be scared of a new constitutional preamble, AUSPUBLAW (18 May 2016) [*https://auspublaw.org/2016/05/reasons-not-to-be-scared/*](https://auspublaw.org/2016/05/reasons-not-to-be-scared/) [↑](#endnote-ref-104)
105. Mark McKenna, Amelia Simpson, George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble,* (2001) 24 University of New South Wales Law Journal 382 [↑](#endnote-ref-105)
106. See: The Hon. Stephen Gagelar, *The Section 92 Revolution*, in James Stelios (ed) *Encounters with Constitutional Interpretation and Legal Education* (2018) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/GagelerJ_Stellios_Coper_Ch_01.pdf>

 [↑](#endnote-ref-106)
107. See Appendix 3. [↑](#endnote-ref-107)
108. Such as the controversy regarding Mr Folau identifying candidates for hell:

<https://johnmenadue.com/paul-collins-give-me-a-break/>

<https://johnmenadue.com/ramesh-thakur-folau-saga-when-employers-and-sponsors-become-the-thought-police/>

and National Rugby League players being offended by words of the national anthem because it is ‘non-inclusive’:

<https://theconversation.com/our-national-anthem-is-non-inclusive-indigenous-australians-shouldnt-have-to-sing-it-118177>

<https://www.theaustralian.com.au/sport/israels-lesson-for-rugby-league-as-blues-teammates-boycott-anthem/news-story/4cfe9641e6659a9b911f33cb804a9b92> [↑](#endnote-ref-108)
109. George Williams David Hume, *People Power: The history and future of the referendum in Australia*, UNSW 2010.

<https://www.thejadebeagle.com/election-2019.html>

<https://johnmenadue.com/michael-keating-urban-and-regional-policy/>

<https://www.thejadebeagle.com/election-2019.html> [↑](#endnote-ref-109)
110. Anne Twomey, *Local Government Referendum*, Alternative Law Journal (2013) 38(3) AltLJ 142 at

<https://www.altlj.org/news-and-views/opinion/578-local-government-referendum>

<https://theconversation.com/explainer-why-are-we-having-a-referendum-on-local-government-14112>

<https://blogs.adelaide.edu.au/law/2014/06/12/the-referendum-that-australia-had-to-have-but-didnt/>
 [↑](#endnote-ref-110)
111. An example of ‘umbrella legislation’ is cited by Twomey regarding the Williams (No. 1) case:

*‘After the Williams case was handed down by the High Court, instead of negotiating s 96 grants with the States, the Commonwealth Parliament enacted (with virtually no parliamentary scrutiny19) the Financial Framework Legislation Amendment Act (No 3) 2012 (Cth). It inserted s 32B in the Financial Management and Accountability Act 1997 (Cth), 20 which not only validated executive spending on all programs, grants and arrangements that the public service could think of, including the chaplaincy scheme, but also gave the Executive carte-blanche to enter into and engage in spending upon any future programs or grants, without any parliamentary scrutiny at all, as long as the program or grant could be shoe-horned into one of the existing descriptions set out in the regulations. The regulations identified over 400 executive programs and grants by categories, many of which were extremely broad, such as expenditure for ‘Foreign Affairs and Trade Operations’, ‘Payments to International Organisations’, ‘Public Information Services’, ‘Regulatory Policy’, ‘Diversity and Social Cohesion’, ‘Domestic Policy’ and ‘Regional Development’.*

Twomey, Anne *"Post-Williams Expenditure-When Can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?"* [2014] UQLawJl 2; (2014) 33(1) University of Queensland Law Journal 9 at <http://classic.austlii.edu.au/au/journals/UQLawJl/2014/2.html>

In Williams (No. 2) the High Court held s.32B gives *‘power to the Commonwealth to make, vary or administer arrangements or grants only where it is within the power of the Parliament to authorise the making’* etc, meaning the umbrella did not expand Commonwealth power. [↑](#endnote-ref-111)
112. Professor Cheryl Saunders: <https://blogs.unimelb.edu.au/opinionsonhigh/2013/09/23/saunders-local-government-referendum/> [↑](#endnote-ref-112)
113. *Pape v. Federal Commissioner of Taxation* [2009] HCA 23. [↑](#endnote-ref-113)
114. Joint Select Committee on Constitutional Recognition of Local Government, *Final report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government: the case for financial recognition, the likelihood of success and lessons from the history of constitutional referenda,* March 2013. At <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsclg/localgovt/finalreport.htm> [↑](#endnote-ref-114)
115. See note xxi (above) and PAUL KILDEA AND A J BROWN, *THE REFERENDUM THAT WASN’T: CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT AND THE AUSTRALIAN FEDERAL REFORM DILEMMA* (2016) 44 Federal Law Review 143 [2016] UNSWLRS 67 at <http://www.austlii.edu.au/au/journals/UNSWLRS/2016/67.pdf> [↑](#endnote-ref-115)
116. <https://www.thejadebeagle.com/election-2019.html> [↑](#endnote-ref-116)
117. See for example: Senate Standing Committees on Legal and Constitutional Affairs, [*Trick or Treaty? Commonwealth Power to Make and Implement Treaties*](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/index) *Chapter 5 Interpretation of the external affairs power and reform proposals*, 1995

<https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/c05> [↑](#endnote-ref-117)
118. For example, Carrie Fellner, Alexandra Smith, *Fourth block of units abandoned*, Sydney Morning Herald 19 July 2019. [↑](#endnote-ref-118)
119. <https://www.thejadebeagle.com/submission-to-aps-review-2019.html> [↑](#endnote-ref-119)
120. Joint Select Committee on Constitutional Recognition of Local Government, *Final report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government: the case for financial recognition, the likelihood of success and lessons from the history of constitutional referenda,* March 2013. At <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsclg/localgovt/finalreport.htm> [↑](#endnote-ref-120)
121. Rienstra, Anna; Williams, George, *Redrawing the Federation: Creating New States from Australia's Existing States,* [2015] SydLawRw 17; (2015) 37(3) Sydney Law Review 357

<http://classic.austlii.edu.au/au/journals/SydLawRw/2015/17.html> [↑](#endnote-ref-121)
122. <https://www.thejadebeagle.com/no-deal.html> [↑](#endnote-ref-122)
123. Shoalhaven has a population of around 100,000 in an area of 4,600sqkm. Its length is around 120km. [↑](#endnote-ref-123)
124. See Appendix 5. [↑](#endnote-ref-124)
125. Benjamin Franklen Gussen, *AUSTRALIAN CONSTITUTIONALISM BETWEEN SUBSIDIARITY AND FEDERALISM,* Monash University Law Review (Vol 42, No 2) <https://www.monash.edu/__data/assets/pdf_file/0007/768490/05_Gussen.pdf> [↑](#endnote-ref-125)
126. Commonwealth legislative functions are set out in s.51 of the Constitution. A location power relates to the seat of government; s.125:

***‘Seat of Government***

*The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.*

*Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.*

*The Parliament shall sit at Melbourne until it meets at the seat of Government.’*

<http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/s125.html> [↑](#endnote-ref-126)
127. <https://www.thejadebeagle.com/williams-case.html> [↑](#endnote-ref-127)
128. Rienstra, Anna; Williams, George, *Redrawing the Federation: Creating New States from Australia's Existing States* [2015] SydLawRw 17; (2015) 37(3) Sydney Law Review 357 <http://classic.austlii.edu.au/au/journals/SydLawRw/2015/17.html> [↑](#endnote-ref-128)
129. [Dave Roos,](https://www.howstuffworks.com/about-dave-roos.htm)*"How do new states become part of the U.S.?* 3 December 2012.
HowStuffWorks.com. <https://people.howstuffworks.com/new-state-in-us.htm> 23 July 2019 [↑](#endnote-ref-129)
130. Chordia, Shipra, *Section 96 of the Constitution: Developments in Methodology and Interpretation* [2015] UTasLawRw 13; (2015) 34(2) University of Tasmania Law Review 54 <http://classic.austlii.edu.au/au/journals/UTasLawRw/2015/13.html> [↑](#endnote-ref-130)
131. <https://www.thejadebeagle.com/williams-case.html> [↑](#endnote-ref-131)
132. See: [https://en.wikipedia.org/wiki/1913\_Australian\_referendum\_(Trade\_and\_Commerce)](https://en.wikipedia.org/wiki/1913_Australian_referendum_%28Trade_and_Commerce%29) [↑](#endnote-ref-132)
133. Justice Dixon in R. v. Burgess; Ex parte Henry [[1936] HCA 52](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1936/52.html) [↑](#endnote-ref-133)
134. Sydney Morning Herald June 16, 1926 at <https://trove.nla.gov.au/newspaper/article/16299373> [↑](#endnote-ref-134)
135. [https://en.wikipedia.org/wiki/1937\_Australian\_referendum\_(Aviation)](https://en.wikipedia.org/wiki/1937_Australian_referendum_%28Aviation%29) [↑](#endnote-ref-135)
136. Attorney-General (WA) v Australian National Airlines Commission ("Western Australia Airlines case") [1976] HCA 66. The case considered the validity of Commonwealth legislation enabling a Commonwealth organisation to pick-up and set-down passengers at Port Hedland on flights between Perth and Darwin; which would make the service more economic. The Commonwealth relied on this being ‘incidental’ to the Territories power (s.122) and to the trade and commerce power (s.51.i). A 3:2 majority held it was not incidental to s.122. A 4:1 majority held it was not incidental to the trade and commerce power. Regarding the latter:

The majority held: the mere fact that intra-state activity would be conducive to the efficiency, competitiveness and profitability of the interstate activity does not make it incidental to the Commonwealth powers.

Justices Gibbs and Stephen (in the majority) noted with approval previous statements in the Court that the Commonwealth would have incidental powers over intra-state activities which physically interfere or endanger inter-state activities.

The two dissenters (Justices Mason and Murphy) by holding that efficiency (in this case) was so inextricably tied to intra-state matters it was incidental to Commonwealth power, impliedly also agreeing with the incidental nature of physical matters. At:

 <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1976/66.html> [↑](#endnote-ref-136)
137. Auslink is outlined in <https://www.thejadebeagle.com/austral-obscura-2.html> [↑](#endnote-ref-137)
138. <https://www.thejadebeagle.com/austral-obscura-2.html> [↑](#endnote-ref-138)
139. <https://www.thejadebeagle.com/commonwealth-urban-transport.html>

<https://www.thejadebeagle.com/glory-without-power.html>

<https://johnmenadue.com/john-austen-and-luke-fraser-urbane-transport-police-part-3-of-3/> [↑](#endnote-ref-139)