Joint Select Committee on Aboriginal Constitutional Recognition

Towards a True and Lasting Reconciliation

Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia

Report No. 1
March 2015

Parliament of Western Australia

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Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia

Report No. 1

Presented by

Ms Josie Farrer, MLA

Laid on the Table of the Legislative Assembly on 26 March 2015

and

Hon Michael Mischin, MLC

Laid on the Table of the Legislative Council on 26 March 2015

Chair's Foreword

The issue of recognising the Aboriginal people of Western Australia in the State's Constitution has gained increasing momentum over the past few years. In many respects it has been overshadowed by the campaigns to achieve recognition of Aboriginal and Torres Strait Islander peoples in the Commonwealth Constitution.

This cross-Party Committee was created in the wake of a Private Member's Bill, the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, introduced by Ms Josie Farrer, MLA. It was apparent from the debate consequent upon that Bill's introduction that there was an appetite in Parliament to effect such a recognition.

The Committee was established to consider and report to Parliament on the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia. It was assigned by Parliament a relatively short time frame in which to discharge that responsibility, but the Committee was aided by the considerable literature in existence concerning the issue, and work that had been done by others generally and in respect to the Commonwealth Constitution, the Constitutions of other States of the Federation, and international jurisdictions. The Committee's ability to fulfil its remit was assisted by its relatively narrow terms of reference, which did not require consideration of the merits of *whether* recognition ought to be made, but *how* it ought to be done.

The Committee recognised that such an issue raises many competing considerations. On the one hand it is viewed as a desirable—if not a necessary—step towards 'reconciliation' between the non-Aboriginal and Aboriginal peoples of the State; on the other, there are concerns that recognition may give greater acknowledgement to one segment of the community over others, and so work to aggravate, rather than to heal, relationships between the descendants of our State's pre-colonial inhabitants and their fellow citizens. Further, there is the legitimate concern that recognition, if not addressed with care in the statutes which found our body politic and define our sovereignty, may give rise to unintended and presently unforeseen consequences.

The Committee's report, to which I am proud to have contributed, seeks to examine and weigh each of those issues and determine a means by which recognition can be achieved with due regard to those considerations.

The Committee had the benefit of a range of submissions from many sources: government, academic and legal, as well as from interest and advocacy groups. The experiences of other jurisdictions were also invaluable in informing the Committee's deliberations, findings and conclusions.

The Report has also noted and made comment on provisions of the *Constitution Act 1889* (WA) that can be seen to be inconsistent with current attitudes, notably section 42. Consideration of what ought to be done with that section raises the broader issue of reviewing the State's constitutional legislation to repeal obsolete and spent provisions, but that is a task for another day.

I would like to express my appreciation for the work done by my fellow Committee Members, and to acknowledge with thanks the dedication and efforts of the Principal Research Officer, Mr Tim Hughes, for his professionalism and efficiency and seemingly tireless capacity for work; and of the Committee's Legal Advisor Mr Adam Sharpe of Counsel and our Legal Counsel Mr Peter Quinlan SC, for their prompt and comprehensive advice on the constitutional and legal issues the Committee had to address. I should also mention the contribution of the Government's legal advisers, Solicitor-General Mr Grant Donaldson SC and State Solicitor's Office Legal Officer Dr Jim Thomson SC.

I commend the Report to the Parliament and trust that it will assist both members and the people of Western Australia to gain a better understanding of this important issue.

HON MICHAEL MISCHIN, MLC
(ATTORNEY GENERAL; MINISTER FOR COMMERCE)
COMMITTEE CHAIR

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Executive Summary

> *Reconciliation involves building mutually respectful relationships between Indigenous and other Australians that allow us to work together to solve problems and generate success that is in everyone's best interests.*
>
> *Achieving reconciliation involves raising awareness and knowledge of Indigenous history and culture, changing attitudes that are often based on myths and misunderstandings, and encouraging action where everyone plays their part in building a better relationship between us as fellow Australians.*[1]

The Joint Select Committee on Aboriginal Constitutional Recognition was established on 2 December 2014 to consider and report on the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia.

The Constitution of Western Australia is made up of several statutes, but it is commonly accepted that the principal constitutional document in this state is the *Constitution Act 1889* (WA).

While the act of constitutional recognition is primarily symbolic, it is nonetheless seen as an important component in the process of reconciliation between Aboriginal and non-Aboriginal Australians.

To date, four Australian state parliaments have amended their constitutions to include a statement recognising their Aboriginal peoples. Western Australia is now the only Australian mainland state not to have done so.

While Western Australian parliamentarians have contemplated constitutional recognition previously, including as far back as 1991, none of these previous initiatives has come to fruition. The latest proposal seeking to incorporate a statement of recognition has come via the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, introduced by the Member for Kimberley, Ms Josie Farrer MLA, on 11 June 2014.

In the debate that followed the introduction of Ms Farrer's Bill, there was broad support for the principle of constitutional recognition and a general acknowledgement that such recognition is long overdue.

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1 Reconciliation Australia, *What is reconciliation?*, 6 April 2011. Available at: https://web.archive.org/web/20110406093843/http://www.reconciliation.org.au/home/reconciliation-resources/what-is-reconciliation-. Accessed on 20 March 2015.

However, it was also clear from the debate that unanimous Parliamentary support is contingent upon all members being confident that constitutional recognition—whatever the form of words—does not produce any unintended legal consequences.

It is in this context that a motion establishing this Committee was ultimately agreed to by both Houses and this report represents the final findings of the Committee's three-month inquiry into the matter.

Chapter One briefly outlines the constitutional framework in Western Australia and the place of the *Constitution Act 1889* (WA) as the principal constitutional document before Chapter Two provides greater detail as to the background to the Inquiry.

In Chapter Three the Committee considers various approaches whereby overseas and Australian polities have amended their constitutions to include statements recognising their indigenous peoples. Some of these forms of recognition are quite expansive and include commitments to the preservation of cultures, the granting of limited sovereignty, the guarantee of parliamentary and economic participation, and the affirmation of land rights.

By comparison, the proposal within the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 is modest, simply framed, and unlikely to prove overly contentious. Furthermore, it has been subject to significant consultation and appears to have the greatest level of current support among advocates of constitutional recognition. As such, the Committee saw it as a suitable starting point for considering an appropriate form of words for the Western Australian jurisdiction.

In Chapter Four, the Committee examines a range of legal and legislative issues that need to be considered when contemplating any Bill proposing constitutional recognition of Aboriginal peoples. Where applicable, the Committee considered these issues in the context of the Bill introduced by Ms Farrer. From this analysis, the Committee found that this particular Bill offers Parliament one option whereby the risks of unintended legal consequences appear to be negligible.

Were Parliament indeed to contemplate that option, the Committee in Chapter Five briefly discusses the merit of a minor alteration to the text that it believes would improve the readability of that particular statement of recognition.

The Committee goes on to recommend this amended text as an appropriate form words to insert into the current preamble of the *Constitution Act 1889* (WA).

The Committee has found that both the timing and the timeframe within which the Parliament asked it to report has proven problematic for numerous stakeholders who may otherwise have contributed to the Inquiry. Nonetheless, the Committee extends

its sincere thanks to the individuals and entities that did provide submissions (as listed in Appendix Two).

Equally, the Committee wishes to express its gratitude to barrister Mr Adam Sharpe for his research support throughout the course of its Inquiry, Mr Peter Quinlan SC for the legal opinions he provided (both of which are included in the report at Appendix Eight), and to both the Solicitor General, Mr Grant Donaldson SC, and the State Solicitor's Office Legal Officer, Dr Jim Thomson SC, for the advice they provided at various stages of the Committee's work. The input of these individuals has been of great assistance when considering the legal and legislative issues throughout Chapter Four.

Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Select Committee on Aboriginal Constitutional Recognition directs that the Premier report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1 **Page 29**

Having examined numerous statements of recognition from international and domestic jurisdictions, the Committee sees the statement proposed in Clause 4(2) of the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 as a suitable starting point for considering an appropriate form of words for constitutional recognition in Western Australia.

The statement is simply framed, comparatively modest in its scope, and among the least contentious in terms of its content.

Finding 2 **Page 30**

The Committee has been limited in the amount of consultation it has been able to undertake. Nonetheless, it understands that the statement proposed in Clause 4(2) of the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 has been subject to significant consultation. It also appears to have the greatest level of current support among advocates of constitutional recognition.

Finding 3 **Page 33**

Section 73 of the *Constitution Act 1889* (WA) outlines the circumstances in which a Bill proposing a constitutional amendment must be enacted via special procedures, including a referendum.

Based on the advice available to it, the Committee finds that the constitutional recognition of Aboriginal peoples in the form proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would not trigger the provisions of section 73 and thus could be enacted by the ordinary legislative procedure.

Finding 4 **Page 35**

It is the view of the Committee that any future amendments to words of recognition in the *Constitution Act 1889* (WA) should be able to be enacted by the ordinary legislative procedure.

Finding 5 **Page 37**

Based on the advice available to it, the Committee finds that any likelihood of the constitutional amendment proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 limiting the legislative power of the state can be discounted.

Further, the Committee is satisfied that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, if passed by ordinary legislative procedures, will not limit the legislative power of the state.

Finding 6 **Page 39**

If words of recognition are included in the preamble to the *Constitution Act 1889* (WA), the legislation most likely to have its interpretation affected by a statement of constitutional recognition is the *Constitution Act 1889* (WA) itself.

Finding 7 **Page 39**

Based on the advice available to it, the Committee finds that the constitutional amendment proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would not result in any different interpretation of the *Constitution Act 1889* (WA).

Finding 8 **Page 41**

Based on the advice available to it, the Committee finds that the risk of constitutional recognition of Aboriginal peoples, in the form proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, having any impact on the interpretation of other Western Australian legislation is exceedingly low. The risk of it having a decisive impact on the interpretation of other Western Australian legislation or on state executive and administrative power appears to be negligible.

Finding 9 **Page 43**

Based on the advice available to it, the Committee finds that the form of constitutional recognition proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 will not have any substantive effect on native title law or pastoral leases in Western Australia.

Finding 10 **Page 46**

Having considered a range of matters relating to legal policy and legal implications, the Committee is satisfied that the preamble is the appropriate place within the *Constitution Act 1889* (WA) to incorporate a statement of recognition.

Finding 11 **Page 48**

The Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to offer an appropriate order for its proposed amendments to the preamble in the *Constitution Act 1889* (WA).

Finding 12 **Page 51**

The Committee finds that a non-effects clause should not be incorporated into any statement of recognition similar in form to that proposed in the Constitution

Amendment (Recognition of Aboriginal People) Bill 2014, as such a clause would either be superfluous or ineffective.

Finding 13 **Page 51**

The incorporation of a non-effects clause into any statement of recognition similar in form to that in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would undermine the spirit in which the statement of recognition is made.

Finding 14 **Page 53**

The Committee considers that section 42 of the *Constitution Act 1889* (WA) ought to be deleted.

The Committee considers that the definition of 'Aborigines Protection Board' as it currently appears in section 75 of the *Constitution Act 1889* (WA) should also be deleted.

The continued presence of these spent provisions within the *Constitution Act 1889* (WA) would be inappropriate and inconsistent with the spirit of reconciliation inherent in a statement of recognition by the Parliament.

Finding 15 **Page 56**

The Committee has examined a range of legal and legislative issues that need to be considered when contemplating a Bill that proposes recognising Aboriginal peoples in the state's Constitution. It notes that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to be one such option available to Parliament where the risks of unintended legal consequences are negligible.

Finding 16 **Page 56**

Were Parliament to contemplate the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 as its preferred option, the Committee believes the following minor alteration is worthy of consideration:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

Recommendation 1 **Page 57**

The Committee recommends the following as an appropriate form of words for insertion at the end of the preamble of the *Constitution Act 1889* (WA) after the word 'contained':

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

Recommendation 2 **Page 57**

The Committee recommends that Parliament use the findings of this report in considering any bill proposing to recognise Aboriginal peoples in the *Constitution Act 1889* (WA), noting that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to be an option available to the Parliament.

Chapter 1

The Constitution of Western Australia

1.1 The Joint Select Committee on Aboriginal Constitutional Recognition has been established to consider and report on the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia.

1.2 At the outset of this report, it is important to determine what is meant by the term "Constitution of Western Australia". In order to do this, a brief examination of the state's constitutional arrangements is warranted.

What is the Purpose of a Constitution?

1.3 Generally speaking, constitutions establish the fundamental institutions of government for a polity, allocate powers to and impose restrictions upon those institutions, and set out the relationship between those institutions and the people.

1.4 It is rarely the case that a single legal document will encompass all of the legal principles and conventions which are fundamental to the government of such polities. Most polities do, however, have a foundational constitutional document.

What is the Constitution of Western Australia?

1.5 In Western Australia, the foundational constitutional document is the *Constitution Act 1889* (WA).

1.6 The *Constitution Act 1889* (WA) came into force in 1890. It was given legal effect by an Act of the UK Parliament, the *Western Australia Constitution Act 1890* (Imp). The coming into force of the *Constitution Act 1889* (WA) marked the beginning of self-government for the Colony of Western Australia.

1.7 In 1899, the *Constitution Acts Amendment Act 1899* (WA) was enacted by the Western Australian Parliament. Although it made substantial changes to the *Constitution Act 1889* (WA), it was enacted as a separate Act. The two Acts have not been consolidated and, as a result, Western Australia has two Constitution Acts.

1.8 On 1 January 1901, the Constitution of the Commonwealth of Australia (the Commonwealth Constitution) came into force. The Commonwealth Constitution was also given legal effect by an Act of the UK Parliament, namely the *Commonwealth of Australia Constitution Act 1900* (Imp). That Act federated the Australian colonies into the Commonwealth of Australia and provided that the former colonies became the Australian States.

1.9 Section 106 of the Commonwealth Constitution provides that the Constitution of each state continued as at the establishment of the Commonwealth, subject to the Commonwealth Constitution itself. The Commonwealth Constitution did alter the state constitutions, for example, by transferring the power to impose an excise from the states to the Commonwealth, establishing free trade within the Commonwealth, and providing that state laws would be invalid to the extent that they were inconsistent with federal laws.[2]

1.10 In 1986, the UK Parliament and the Australian Commonwealth Parliament both enacted Acts in nearly identical terms which are referred to as the *Australia Acts 1986*. The *Australia Act 1986* (UK) and the *Australia Act 1986* (Cth) were enacted to confirm Australia's status as a sovereign nation. The Australia Acts are also a part of Western Australia's constitutional framework.[3] Among other things, the *Australia Acts* confirm the power of state parliaments to make laws that operate outside the state's territory.[4]

1.11 It follows that the "Constitution of Western Australia", in one sense, comprises at least the *Constitution Act 1889* (WA), the *Constitution Acts Amendments Act 1899* (WA), the Commonwealth Constitution, and the *Australia Acts*.

1.12 Nevertheless, the *Constitution Act 1889* (WA) is the foundational constitutional document for Western Australia, as it was the legal document by which Western Australia was granted self-government. It has continued to operate from its enactment, through Federation and to the present day. The *Constitution Act 1889* (WA) has been described by the High Court of Australia as 'the keystone of the present constitution of Western Australia'.[5] Thus, unless otherwise specified, any references by the Committee in this report to the Constitution of Western Australia, should be taken as references to the *Constitution Act 1889* (WA).

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2 Sections 90, 92, and 109 Commonwealth Constitution.

3 The High Court has indicated that it is the *Australia Act 1986* (Cth) alone that has continuing constitutional significance for Western Australia. See *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, [66]-[67]. See also Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence*, 2010, The Federation Press, Sydney, pp. 412-413.

4 See section 2(1) *Australia Act 1986* (Cth); Section 2(1) *Australia Act 1986* (UK).

5 *Western Australia v Wilsmore* (1982) 149 CLR 79, 93; *Yougarla v Western Australia* (2001). 207 CLR 344, [2]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, [15].

Chapter 2

Background to Inquiry – Constitutional Recognition of Aboriginal Peoples

2.1 Constitutions are common at the national and provincial level of government. As noted at 1.3 above, they often explain how the local legislature is formed and establish some of the basic rules by which the legislative, executive, and judicial branches of government will operate. Typically, constitutions also contain what Professor George Williams refers to as:

> *…symbolic and aspirational text that sets out not only where a [s]tate is headed, but how its community is constituted, and where it has come from*.[6]

2.2 Where historical narratives have been included in the constitutions of post-European colonial settlements, they have generally not included any due acknowledgement of the original inhabitants of the land. While these documents have endured, some of the attitudes that prevailed at the time of their drafting have increasingly come to be seen as out-dated.

2.3 In Australia over the past ten years, the parliaments of four Australian states (Victoria, Queensland, New South Wales, and South Australia) have amended their constitutions to formally recognise the status of Aboriginal peoples as original occupants.[7] At the national level, where such an amendment requires approval via a referendum, significant work has been undertaken to ensure widespread support for a vote on the matter within the next two years.[8]

2.4 Constitutional recognition is seen as an important step in the ongoing process of reconciliation between Aboriginal and non-Aboriginal Australians.[9] Speaking in the context of what such recognition would mean for Western Australia,

6 Submission No. 1 from Professor George Williams AO, 18 December 2014, p. 2.
7 In the case of Queensland, this recognition extends to Torres Strait Islander peoples.
8 The path to recognition in other Australian jurisdictions will be examined in greater detail in Chapter Three.
9 See, for example, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 16 January 2012, p. 11; Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 June 2014, p. 3699.

which is yet to follow the trend of the other mainland states, the Goldfields Land and Sea Council argues:

> *The Western Australian Constitution ('Constitution') sets the tone for this [s]tate's relationship with its Aboriginal population. Constitutional recognition of Aboriginal Australians would go a long way towards righting the wrongs of the past, by forging a new pathway and changing attitudes and behaviours between Aboriginal and non-Aboriginal Western Australians.*[10]

2.5 As it stands, there are two references to Aboriginal people in the *Constitution Act 1889* (WA), but neither represents a positive recognition of their status. The first occurs at section 42, a provision now redundant, whereby 'aboriginal natives' were excluded from the head count of the colony for the purposes of determining when Part III of the Act was to come into effect. The second reference occurs in section 75, where a definition of the *Aborigines Protection Board*—a body established under section 70 of the original 1889 Act, but abolished eight years later[11]—is provided.

2.6 Notably, recognition of Aboriginal peoples as the state's first inhabitants has been previously acknowledged in other key documents and statutes. These include the 2001 Statement of Commitment between the then-Gallop Government and the Western Australian Aboriginal and Torres Strait Islander Commission State Council, and the 2004 WA Charter of Multiculturalism.[12] More recently, the preamble of the *Western Australia Day (Renaming Act) 2012*, noted that the state holiday formerly called Foundation Day 'acknowledges our indigenous people as the original inhabitants and traditional custodians of the land…'.[13]

2.7 While steps to afford similar forms of recognition in the state's Constitution have previously been put forward, none have come to fruition. In 1991, a Joint Select Committee was established to consider reforms of the law, practice and statutes that made up the constitutional framework in the state. That Committee recommended a draft 'Consolidated Constitution of Western Australia' comprising a substantial set of amendments be brought before the Parliament—and the people—for approval. The preamble to the recommended draft document included an acknowledgement that 'Western

10 Submission No. 2 from Goldfields Land and Sea Council, 18 December 2014, p. 1.

11 Brian De Garis, 'The History of Western Australia's Constitution and attempts at its reform', *University of Western Australia Law Review*, vol. 31, no. 2, 22 March 2003, p. 145.

12 Department of Aboriginal Affairs, 'Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians', October 2001; Office of Multicultural Interests, *WA Charter of Multiculturalism*, November 2004, p. 5.

13 Background *Western Australia Day (Renaming Act) 2012*, (WA).

Australia has been inhabited by Aboriginal people and occupied and proclaimed as a British Colony'.[14]

2.8 In 2004, the President of the Legislative Council, Hon John Cowdell MLC, commissioned the drafting of a bill to amend the preamble of the *Constitution Act 1889* (WA) to include an acknowledgement from both Houses of Parliament of Aboriginal peoples as the state's 'First Peoples' and 'traditional custodians of the land'. Mr Cowdell sought an opinion from the Solicitor General regarding the proposed wording. Despite the subsequent opinion not expressing any concern over the wording, the matter did not proceed any further.[15]

2.9 In 2006, the Law Reform Commission of Western Australia tabled the final report of its six-year inquiry into Aboriginal customary laws that was commissioned by then-Attorney General in the Court Government, Hon Peter Foss MLC QC. Of its 131 recommendations, the report stressed the importance of Recommendation 6, which called for constitutional recognition of Aboriginal people, using a similar form of words to those adopted in amendments made in 2004 to the *Constitution Act 1975* (Vic).[16]

2.10 The most recent attempt at constitutional recognition has been initiated by Ms Josie Farrer MLA, a Gidja woman from the East Kimberley, and the current member for the seat of Kimberley. On 11 June 2014, Ms Farrer introduced the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (the Farrer Bill) into the Legislative Assembly. This Private Members' Bill sought to 'officially recognise Western Australia's Aboriginal people as the first people of this land.'[17]

2.11 Using the same wording as that prepared for the Hon Mr Cowdell in 2004, the Farrer Bill sought specifically to alter the preamble to the *Constitution Act 1889* (WA) by inserting the following text after the current first paragraph:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the

14 Joint Select Committee of the Legislative Assembly and the Legislative Council on the Constitution, *Final Report Vol. 2*, State Government Bookshop, Perth, 24 October 1991, p. 3.

15 Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 June 2014, p. 3700; Hon Mark McGowan, Leader of the Opposition, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2014, pp. 8048-8049.

16 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture – Final Report*, Project 94, September 2006, p. vii. See also Recommendation 6 at p. 74.

17 Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 June 2014, p. 3699.

members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:[18]

2.12 The Bill also sought to delete the current section 42 (referred to at 2.5 above).[19]

2.13 In introducing the Bill, Ms Farrer emphasised its importance, arguing that:

Recognition, acknowledgement and acceptance are necessary steps to true and lasting reconciliation and this bill is just one of those steps. In a way it is more than a step; it is a confident stride forward.[20]

2.14 The subsequent debate on the Farrer Bill took place in November 2014. While all parties in the Assembly expressed their support for the principle of constitutional recognition of Aboriginal people, some reservations were noted regarding the content and drafting of the Bill. The Premier, Hon Colin Barnett MLA gave 'in-principle' support to the Bill, but was concerned that it might contain flaws. Mr Barnett wanted further consultation undertaken on the matter of constitutional recognition, in particular to ensure any proposed amendment would not have inadvertent legal implications in areas such as native title and the operation of pastoral leases.[21]

2.15 The National Party Leader, Hon Terry Redman MLA indicated that his party was 'ill-equipped' to determine whether the Bill contained 'fatal flaws', but held the overarching view that 'they did not want this bill to trip up'.[22] During his speech, Mr Redman indicated that he had been canvassing the idea of having Parliament agree to the establishment of a committee 'to prepare the wording required for the legislation.' [23]

18 Clause 4(2) Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (WA).
19 ibid., Clause 5.
20 Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 June 2014, p. 3699.
21 Hon Colin Barnett, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2014, pp. 8048-8055.
22 Hon Terry Redman, Leader of the National Party, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 November 2014, pp. 8410-8430.
23 ibid.

2.16 The following week, Ms Farrer moved that her Bill 'be immediately referred to a select committee of six members for consideration and report by 26 March 2015.'[24] In response, the Government proposed an amendment, which altered the composition of the Committee and broadened its investigative remit beyond the Farrer Bill, requiring:

That:

1. *A joint select committee of the Legislative Assembly and Legislative Council be established to consider and report on the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia.*
2. *That the joint select committee consist of seven members —*
    a. *three will be members of the Council; and*
    b. *four will be members of the Assembly;*

    and of those seven members —
    a. *two will be members of the Liberal Party;*
    b. *two will be members of the National Party; and*
    c. *three will be members of the Australian Labor Party.*

2.17 The reporting date of 26 March 2015 was retained and a further provision confirmed that Ms Farrer would be appointed to the Committee.[25]

2.18 In explaining its amendment, the Government argued that both Houses of Parliament should be involved in deliberations regarding important constitutional changes. It added that the Attorney General, Hon Michael Mischin MLC would be available to join the Committee. The Government's preference was for the Hon Mr Mischin to Chair the Committee, as his presence would expedite access to important legal and constitutional advice from the Government's legal advisers (the Attorney General's Office and the Office of the Solicitor General). It also expressed its support for Ms Farrer being appointed Deputy Chair 'so that she can work with the Attorney General to make sure we get the appropriate words to go in there.'[26]

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24 Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014, p. 8870.

25 For the full terms of reference, which include other administrative matters, see Appendix One.

26 Hon Dr Kim Hames, Minister for Health; Training and Workforce Development, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014, pp. 8877-8879. See also same debate, Hon Colin Barnett, Premier, pp. 8873-8874.

2.19 The Government's amended motion was agreed to and on 2 December 2014 the Council concurred with the Assembly's proposal with members from the Liberal, National, Labor, and Greens parties all speaking strongly in support of constitutional recognition of Aboriginal people.[27] As a consequence, the Joint Select Committee on Aboriginal Recognition (the Committee) came into operation.

2.20 What is clear from the debates that led to the establishment of the Committee is the sense among parliamentarians that proper acknowledgement of Aboriginal people within the Constitution is long overdue.[28]

2.21 The Committee shares this view and has conducted this Inquiry with a view to informing Parliament of the kinds of words that might give effect to this acknowledgement while alleviating doubts regarding unintended consequences. As importantly, we have sought to identify words that are easily understandable and capable of uniting all Western Australians in the spirit of ongoing reconciliation with our "First Peoples".

27 Hon Peter Collier, Minister for Aboriginal Affairs; Electoral Affairs; Education; Hon Sue Ellery; Hon Colin Holt; Hon Robin Chapple, WA, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 2014, pp. 9085-9088.

28 Ms Josie Farrer, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 June 2014, p. 3699; Ms Margaret Quirk, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 November 2014, p. 8414; Hon Colin Barnett, Premier, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014, p. 8871; Hon Peter Collier, Minister for Aboriginal Affairs; Electoral Affairs; Education, WA, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 2014, p. 9086.

Chapter 3

Constitutional Recognition in Other Jurisdictions

3.1 In order to determine an appropriate form of words for recognising Aboriginal peoples in the Constitution, the Committee examined some of the approaches already implemented in other jurisdictions, both international and domestic. The Committee was interested in looking at the various forms recognition has taken, the legal questions or implications that have emerged, and the arguments put forward by opponents. In respect of the latter two issues, recent developments at Commonwealth and state level are relevant in the Western Australian context, given the similarities between the jurisdictions' legal and political systems and settlement histories.

Constitutional Recognition in International Jurisdictions

3.2 Constitutional recognition of indigenous peoples has manifested in various forms in other countries.[29] Some of these forms are quite expansive and include the commitment to the preservation of cultures, the granting of limited sovereignty, the guarantee of parliamentary and economic participation, and the affirmation of land rights.

3.3 Statements committing to the recognition, protection, and/or promotion of indigenous languages, customs or cultural practices are evident in the constitutions of Brazil, Bolivia, Ecuador, Singapore, and The Philippines.[30]

3.4 Norway and Finland similarly include statements aimed at preserving the language and culture of their indigenous Sami populations, with the Finnish Constitution extending this to 'the Roma and other groups'.[31] The Finnish Constitution also confirms the rights of the Sami to use their own language in their dealings with public authorities.[32] In Sweden, the Constitution explicitly

29 For detailed summary, refer to Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, Chapter 2.

30 Article 231 *Constitution of the Federative Republic of Brazil*, 1996; Article 30 II (2 and 9) *Bolivia (Plurinational State of)'s Constitution of 2009*; Articles 2 and 57 *Republic of Ecuador Constitution of 2008*; Section 152(2) *Constitution of the Republic of Singapore* (1965); Article II Section 22 *The 1987 Constitution of the Republic of The Philippines*.

31 Article 108 *Norwegian Constitution* (including amendments up to May 2014); Section 17 *The Constitution of Finland* (Unofficial translation), 11 June 1999.

32 Section 17 *The Constitution of Finland* (Unofficial translation), 11 June 1999.

guarantees the rights of its Sami to continue certain cultural practices (reindeer husbandry), while promoting the opportunities of the Sami and other minorities 'to preserve and develop a cultural and social life of their own.'[33]

3.5 Sections providing for limited self-government are evident in the Norwegian and Finnish constitutions,[34] although it is noted that Sami Parliaments were established in these jurisdictions via other legislation that preceded constitutional recognition.[35]

3.6 In the Americas, the constitutions of Columbia, Ecuador, and the United Mexican States allow for varying degrees of sovereignty with the qualification that such powers are not exercised in a manner contrary to the Constitution and other national laws.[36]

3.7 In some jurisdictions recognition has taken the additional form of confirming rights of participation in the economic affairs of the state. In Columbia, 'indigenous (Indian) reservations' are recognised as municipalities for the purpose of sharing in the distribution of 'the current revenues of the nation'.[37] The Bolivian Constitution confirms the rights of rural indigenous native groups '[t]o participate in the benefits of the exploitation of natural resources in their territory' and provides for mandatory consultation, 'each time legislative or administrative measures may be foreseen to affect them'.[38]

3.8 The constitutions of Brazil and the United Mexican States confirm varying degrees of rights to traditional or ancestral lands,[39] while in Ecuador and Bolivia, a range of indigenous groups are given explicit recognition as citizens of the nation.[40]

3.9 Among the constitutions of countries that emanated from British colonial settlements, Canada is among the more notable. The *Constitution Act 1982* (Canada) includes the "Canadian Charter of Rights and Freedoms" (the Charter) at Part I. Section 25 makes clear that any guarantee of rights contained within

33 Chapter 2 Article 17 and Chapter 1 Article 2 *Constitution of the Kingdom of Sweden 1974* (2012).
34 Article 108 *Norwegian Constitution* (including amendments up to May 2014); Section 121 *The Constitution of Finland* (Unofficial translation), 11 June 1999.
35 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, pp. 54-55.
36 Articles 246 and 330 *Columbia's Constitution of 1991* (with Amendments through 2005); Article 171, *Republic of Ecuador Constitution of* 2008; Article 2 *Political Constitution of the United Mexican States*.
37 Article 357 *Columbia's Constitution of 1991* (with Amendments through 2005).
38 Article 30 (II) 15-16 *Bolivia (Plurinational State of)'s Constitution of 2009.*
39 Article 231 *Constitution of the Federative Republic of Brazil*, 1996; Article 2 A (v)-(vi) *Political Constitution of the United Mexican States*.
40 Article 56 *Republic of Ecuador Constitution of* 2008; Articles 3 and 5 *Bolivia (Plurinational State of)'s Constitution of 2009*.

the Charter 'shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples'.[41]

3.10 Part II of the Constitution, "Rights of the Aboriginal Peoples of Canada" broadly defines the groups that comprise the 'aboriginal peoples of Canada'[42] and recognises and affirms all 'existing aboriginal and treaty rights' applicable to them.[43] Canadian courts have subsequently interpreted Part II of the *Constitution Act 1982* (Canada) to uphold this principle where traditional aboriginal rights have contravened Federal Law.[44]

3.11 Part II also mandates the participation of representatives of the aboriginal peoples in any constitutional conference where amendments to section 25 or Part II of the Constitution are proposed.[45]

3.12 The legal implications of these sections are significant in that they have effectively ensured that aboriginal and treaty rights 'can only be altered or terminated by consent or constitutional amendment.'[46]

3.13 Looking at other former British settler colonies, the United States Constitution limits recognition to an implicit acknowledgement of the existence of 'the Indian Tribes', as parties with whom Congress is empowered to regulate trade.[47]

3.14 Finally, New Zealand's constitutional principles are not defined in a single entrenched document. Instead, they emanate from: numerous statutes; the powers of the head of state; underlying constitutional conventions; and the Treaty of Waitangi.[48] Within this framework, the Treaty of Waitangi has formed the basis for the subsequent recognition of Maori rights in a range of

41 Section 25 *Constitution Act, 1982* (Canada).
42 Defined only as including Indian, Inuit and Metis peoples.
43 Section 35 (1)-(2) *Constitution Act, 1982* (Canada).
44 See references to *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 in Michael Asch and Patrick Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*', *Alberta Law Review*, vol. XXIX, no. 2, 1991, pp. 499-500.
45 Section 35.1 (a)-(b) *Constitution Act, 1982* (Canada).
46 Law Council of Australia, 'Constitutional Recognition of Indigenous Australians – A Discussion Paper', 19 March 2011, p. 27.
47 The original version included a reference to 'Indians not taxed' as part of a group, along with slaves, who were not counted as part of the population for the purpose of apportioning taxes and determining membership of the House of Congress. This reference was later dropped from the Constitution. See, United States Senate, 'Constitution of the United States', 1994.
48 Constitution Advisory Panel, 'New Zealand's constitution: The conversation so far', September 2012, pp. 7-8.

areas[49] while provision for Maori participation in the parliamentary process via the inclusion of four Maori seats in the New Zealand Parliament dates back to the enactment of the *Maori Representation Act 1867* (NZ).

Constitutional Recognition at the National Level (Australia)

3.15 Constitutional recognition is a relatively recent development in Australia with four states so far leading in the passage of relevant amendments. At the federal level, it can be argued that the comparative complexity of the process of constitutional amendment has resulted in a slower path to reform in this area.

3.16 Section 128 of the Commonwealth Constitution confirms that any proposed constitutional reforms must be put to a national referendum. To succeed at any such referendum, the proposal must win the support of the majority of all voters nationally, in addition to a majority of voters in a majority of states. Australians have proven reluctant to embrace constitutional change with only 8 of 44 referendum proposals succeeding.

3.17 Despite the inherent difficulty in this process, arguments calling for the Commonwealth Constitution to be amended to include a statement recognising Aboriginal and Torres Strait Islander peoples date back to at least the late-1980s.

3.18 In 1988, a commission was established to conduct a comprehensive review of the Commonwealth Constitution. Part of this review considered the question of including a statement of recognition. Ultimately, the commission opted against such an amendment believing it would be too difficult to reach widespread agreement on an appropriate form of words.[50]

3.19 The question of constitutional change was raised again in the 1990s following the High Court's ruling on the ten-year *Mabo v Queensland (No 2)* case in 1992, and the subsequent passage of the *Native Title Act 1993* (Cth). The 1993 Act included an extensive preamble confirming the prior inhabitancy of Australia by Aboriginal and Torres Strait Islanders and acknowledging that these peoples

49 These rights are not definitively captured in the Treaty, which has variations in translation between the original English and Maori versions. Instead, the rights have been encapsulated in "Treaty principles", which continue to be developed by the courts. For further details, see Janine Hayward. 'Principles of the Treaty of Waitangi – ngā mātāpono o te tiriti - What are the treaty principles?', Te Ara - the Encyclopedia of New Zealand, 13 July 2012.

50 Gareth Griffith, 'Constitutional Recognition of Aboriginal People', July 2010, NSW Parliamentary Library Research Services – e-brief 11/2010, p. 3.

were 'progressively dispossessed of their lands …. largely without compensation'.[51]

3.20 Following this, in 1999, Prime Minister John Howard initiated a referendum question on whether to insert a multi-faceted preamble into the Commonwealth Constitution, part of which would include a statement:

> *… 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*.[52]

3.21 Proponents argued that the statement was a 'small but significant contribution to national reconciliation'.[53] However, the referendum failed to win the required level of support and moves towards constitutional recognition were shelved until 2007 when Prime Minister Howard indicated that if re-elected he would commit to revisiting the idea of a statement of recognition as a stand-alone referendum question.[54]

3.22 By 2010, both major political parties had committed to seeking constitutional recognition of Aboriginal and Torres Strait Islander peoples as part of their election policy platforms. Following Labor's 2010 victory, Prime Minister Julia Gillard signed agreements with the Greens and Independent MPs Andrew Wilkie and Rob Oakeshott, promising to hold a referendum on the issue by the 2013 election.[55]

3.23 In the period since, various bodies have been established, and initiatives taken, all aimed in some way at building community awareness about the issue of constitutional recognition and determining a form of words likely to succeed at a referendum. Foremost among these are:

- The Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel) - established by the Gillard Government in 2012.
- "Recognise" - a national campaign body established in 2012 through Commonwealth Government funding.[56]

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51 Preamble *Native Title Act 1993* (CTH).

52 Australian Electoral Commission, 'Yes/No – Referendum '99 – Your official Referendum pamphlet', no date, p. 32.

53 ibid., p. 36.

54 Hon John Howard OM, A.C., 'A New Reconciliation ', *The Sydney Papers*, vol. 19, no. 4, Spring 2007, pp. 108-109.

55 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, p. 2.

56 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, 20 October 2014, p. 34. For more information on Recognise, go to: http://www.recognise.org.au/.

- The Commonwealth Parliament Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Joint Select Committee) - established in November 2012 by the Gillard Government. Re-established in December 2013 by the Abbott Government.[57]

- The *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) (2013 Recognition Act) – which provides for an interim act of recognition by Parliament, 'on behalf of the people', while efforts at putting together a proposal to amend the Commonwealth Constitution continue.[58]

- The Aboriginal and Torres Strait Islander Act of Recognition Review Panel (Review Panel) – established in 2014 by the Abbott Government as per the requirements of section 4 of the 2013 Recognition Act.

3.24 On 16 January 2012 the Expert Panel presented its Final Report and recommended a set of words be inserted in the body of the Commonwealth Constitution as a new section 51A, rather than as a preamble. The full text of this recommended clause is included at Appendix Three. In summary, it:

1. recognises prior occupation of the continent and islands now known as Australia;

2. acknowledges the continuing relationship that Aboriginal and Torres Strait Islander peoples have with Australia's lands and waters;

3. respects the 'continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples'; and

4. acknowledges the 'need to secure …[their] advancement.'[59]

3.25 The Expert Panel Report went on to recommend the deletion of several other sections of the Commonwealth Constitution that it argued were discriminatory, while calling for the introduction of a section explicitly prohibiting racial discrimination and another acknowledging Aboriginal and Torres Strait Islander languages as 'part of our national heritage.'[60]

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57 For more information on role of the Joint Select Committee, visit: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Role_of_the_Committee. Accessed 12 February 2015.

58 Section 3 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

59 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, p. xviii.

60 ibid., p. xviii.

3.26 The Expert Panel Report is significant in that it has formed the basis of the public debate that has ensued. The 2013 Recognition Act adopted the first three clauses recommended by the Expert Panel, while the Joint Select Committee has included the same three clauses in two of the three 'structural options' it has recommended Parliament consider. Notably, the Joint Select Committee reported 'a lack of public support' for the fourth clause of the Expert Panel's proposal.[61]

3.27 The push for constitutional amendments of this nature has drawn a body of critics, some of whom argue that such change is inconsistent with the Constitution's purpose of 'establishing the organs of machinery for a federal system of government'.[62]

3.28 Others express concern that such amendments provide scope for judicial activism by the Courts and create uncertainty around how judges will interpret any form of amended wording in the future.[63] One commentator expresses concern that moves to recognise continuing cultures or ongoing connection to land might be 'at least partly motivated by a desire to achieve more favourable native title outcomes'.[64] Another cites the approach of Canadian courts towards constitutional interpretation[65] to caution against enabling a 'transfer of power from the parliamentary to the judicial arena'.[66]

3.29 A further line of argument suggests that amendments of this kind are potentially divisive in that they can be seen as giving greater acknowledgement to one group of citizens over others.[67] There is also concern that blanket recognition of culture may lead to implicit endorsement of practices that are not supported by the majority of the community or may not be consistent with Australia's general and statutory laws.[68] In a similar vein, one opponent argues that 'separate provisions for Aboriginal cultural rights in the Constitution may lead to inequality before law' in criminal, civil, and administrative matters.[69]

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61 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, paragraph 1.25. See also paragraphs 1.19-1.32.

62 Bryan Pape, ' Cosmetic preamble an irrelevant adornment ', in Gary Johns (ed.), *Recognise what?*, Conor Court Publishing, Ballarat, 2014, p. 44.

63 James Allan, 'Recognition hands power to judges', in Johns (ed.), op. cit, p. 24; Greg Sheridan, 'Preamble will divide, not unite, the nation', *Weekend Australian*, 20 September 2014, p. 20.

64 Ron Brunton, "Myths of Aboriginal cultural continuity", in Johns (ed.), op. cit, p. 7.

65 One example of which is cited at paragraph 3.10.

66 Tom Flanagan, 'Constitutionalising Canadian Aboriginal rights', in Johns (ed.), op. cit, p. 91.

67 Greg Sheridan, 'Preamble will divide, not unite, the nation', *Weekend Australian*, 20 September 2014, p. 20; Anthony Dillon, 'Recognition may mean never closing the gap', in Johns (ed.), op. cit, pp. 56, 61; Frank Salter, 'Six recognition traps', in Johns (ed.), op. cit, p. 72.

68 Alistair Crooks, 'An Aboriginal Constitution', Johns (ed.), op. cit, pp. 14-16; Anthony Dillon, 'Recognition may mean never closing the gap', in Johns (ed.), op. cit, p. 55.

69 Kerryn Pholi, 'Upsetting the intermarriage applecart', in Johns (ed.), op. cit, p. 65.

3.30 These critics often argue that if recognition goes ahead, it should be limited to a simple historical acknowledgement of Aboriginal and Torres Strait Islander peoples as the nation's first inhabitants.[70]

3.31 While the public debate continues, the question of the timing and exact wording of a proposal to go to a national referendum remains uncertain. The Joint Select Committee is due to table its Final Report by 30 June this year. It has already recommended that Parliament dedicate a day of business to considering the options the Committee put forward in its Progress Report. It has also recommended a referendum take place 'at or shortly after the next federal election in 2016'.[71] In the interim, the Review Panel has tabled its report, which calls for a 'circuit-breaker' to 'cut through the debates on the model and settle a final proposition.'[72] The Review panel has recommended that a 'Referendum Council' comprising 'a small group of Indigenous and non-Indigenous national guardians', be established for this purpose and for the Council to draw on the work of the Joint Select Committee.[73]

3.32 Prime Minister Abbott has recently indicated a preference to hold the referendum in May 2017, to coincide with the 50th anniversary of the 1967 referendum.[74] However, he is not prepared to lock in any date until he is confident the wording will be embraced by voters, arguing '[i]t is more important to get this right than to try and rush it through.'[75]

Recognition at the State Level

3.33 Constitutional change at the state level in Australia is comparatively simpler, requiring only the passage of an ordinary Bill proposing the amendment. Currently, four state parliaments have amended their constitutions to include a statement recognising their Aboriginal peoples.[76] While similarities are

70 Gary Johns and Kerryn Pholi, 'Great constitution, shame about the nation', in Johns (ed.), op. cit, p. 112; Anthony Dillon, 'Recognition may mean never closing the gap', in Johns (ed.), op. cit, p. 57.

71 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014, paragraph 1.41.

72 Hon John Anderson AO, Ms Tanya Hosch, and Mr Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, 19 September 2014, p. 21.

73 ibid.

74 The 1967 Referendum produced the most successful "Yes" vote recorded to date. The subsequent amendments allowed Indigenous Australians to be counted in the National Census and removed section 51(xxvi), which had hitherto precluded the Commonwealth from making laws with respect to the 'people of the aboriginal race in any State'. See Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, p. 32.

75 Michael Gordon, 'Tony Abbott vows to "sweat blood" for Indigenous referendum', theage.com.au, 12 December 2014.

76 In the case of Queensland, this recognition extends to the state's Torres Strait Islander peoples.

evident across these jurisdictions, there are nonetheless variations in the nature of consultation undertaken, the final form of words chosen, and the location of these words within the constitutional document.

Victoria

3.34 In November 2004, Victoria became the first state to incorporate a statement of recognition in its constitution. The statement was proposed in the Constitution (Recognition of Aboriginal People) Bill, which was developed on the recommendation of the Premier's Aboriginal Advisory Council following 'extensive consultation' with the Aboriginal community.[77]

3.35 Following the passage of the Bill, the statement was included as a stand-alone section (section 1A) within the main body of the *Constitution Act 1975* (Vic). The preamble to this Act, which describes several historical events that led to the establishment of the Victorian Constitution, was left unchanged.

3.36 In the new section 1A, the full text of which is included in Appendix Four, 'Parliament acknowledges' that the events described in the preamble occurred 'without proper consultation, recognition or involvement of the Aboriginal people of Victoria'.[78]

3.37 Section 1A then goes on to recognise that 'Victoria's Aboriginal people' have a 'unique status as the descendants of Australia's first people'.[79] In terms of affiliation with the land, they are recognised as the 'original custodians' who have a 'spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria.'[80]

3.38 While no reference is made to heritage, customary laws, or languages, recognition is given to the 'unique and irreplaceable' contribution that Aboriginal people have made to Victoria's 'identity and well-being'.[81]

3.39 The amendments were not intended to 'confer any legal rights'[82] with a caveat (also known as a "non-effects clause") stating, '[t]he Parliament does not intend by this section' to create such rights or to 'affect in any way' the interpretation of the Constitution or any other laws in place in Victoria.[83]

77 Hon Richard Wynne, VIC, Assembly, *Parliamentary Debates* (Hansard), 16 September 2004, p. 543.
78 Section 1A (1) *Constitution Act 1975* (VIC).
79 ibid., Section 1A (2)(a).
80 ibid., Section 1A (2) and 1A (2)(b).
81 ibid., Section 1A (2)(c).
82 Hon Steve Bracks, VIC, Assembly, *Parliamentary Debates* (Hansard), 26 August 2004, p. 187.
83 Section 1A (3) *Constitution Act 1975* (VIC).

3.40 The amendments in Victoria were entrenched via a provision that precludes repeal, alteration, or variation of section 1A without the support of a three-fifths majority of both Houses of Parliament.[84]

3.41 While the 2004 Bill containing these amendments was passed unopposed, Opposition parties and an independent member of the Legislative Assembly expressed concern about some of the terminology of the Bill and the process by which it was brought to the Parliament.

3.42 Opposition parties were concerned that the use of the word 'intend' in the non-effects clause (see 3.39 above) was ambiguous and 'create[d] an avenue for someone to take it through the court process'.[85] The preferred option for those expressing such concerns was to remove the word intend from this clause to make it more definitive.[86]

3.43 Another concern around the drafting included the question of how terms such as 'economic relationship' (see 3.37 above) might be interpreted by future courts.[87]

3.44 It was also argued that the term 'Aboriginal people of Victoria' in section 1A(1) should have been pluralised to reflect the diversity of the different clans and language groups that existed within the boundaries of the colonial territory when the Constitution was drafted.[88]

3.45 Arguably, the major concern related to what was argued to be a lack of adequate public consultation about the Bill given the proposal sought to amend the Constitution.[89] In this regard, Independent member of the Legislative Assembly, Mr Russell Savage, moved a reasoned amendment requesting the Assembly to refuse to read the Bill a second time:

> *until consultation takes place with the people of Victoria concerning the principles of the bill and the impact it will have on the community.*[90]

84 Section 18 (2)(aa) *Constitution Act 1975* (VIC).
85 Mr Hugh Delahunty, VIC, Assembly, *Parliamentary Debates* (Hansard), 16 September 2004, p. 524.
86 ibid. See also Mr Robert Doyle from the same debate at p. 522.
87 Hon Philip Davis, VIC, Council, *Parliamentary Debates* (Hansard), 4 November 2004, p. 1108.
88 Mr Murray Thompson, VIC, Assembly, *Parliamentary Debates* (Hansard), 16 September 2004, p. 541.
89 Hon Philip Davis and Hon Damian Drum, VIC, *Parliamentary Debates* (Hansard), 4 November 2004, pp. 1106-1110; Mr Ted Baillieu, VIC, *Parliamentary Debates* (Hansard), 16 September 2004, pp. 544-545.
90 Mr Russell Savage, VIC, *Parliamentary Debates* (Hansard), 16 September 2004, p. 530.

3.46 Mr Savage went on to argue that the issue of constitutional recognition was potentially divisive and should be put to referendum at the next state election.[91] Mr Savage's amendment motion was supported by the Opposition parties, but was voted down by the Government. Following this, the Bill passed through both Houses unopposed and received Royal Assent on 9 November 2004.

Queensland

3.47 In February 2010, Queensland became the second Australian state to incorporate a statement of recognition in its Constitution, although the proposal did not enjoy the full support of the Parliament.

3.48 On 6 June 2002, the various statutes comprising the state's constitutional laws were revised and consolidated into the *Constitution of Queensland 2001*.[92] For over a decade, parliamentary committees and other bodies subsequently considered the inclusion of a wide-ranging preamble as part of this new consolidated document.[93]

3.49 On 4 December 2008, the Parliament's Legal, Constitutional and Administrative Review Committee received terms of reference requiring it to develop a draft preamble for the Constitution to commemorate the 150th anniversary of the establishment of Queensland (scheduled for 2010). Part of the preamble was to include a 'statement of due recognition to Queensland Aboriginal and Torres Strait Islander people.'[94] Notably, regard was to be given to 'ensure that the text to the preamble [did] not purport to include information to be used as an aid to statutory interpretation.'[95] Parliament also called for a stakeholder consultation process to be undertaken, specifically requiring the input of the Queensland Aboriginal and Torres Strait Islander Advisory Council.

3.50 On 23 April 2009, following the March State Election, the Parliament provided a 'fresh referral' with similar terms to the newly named Law, Justice, and Safety Committee.[96] On 3 September 2009, that Committee reported back to Parliament with a recommended set of words, most of which were subsequently incorporated into the Constitution (Preamble) Amendment Bill 2009 (the 2009 Amendment Bill). The statement of recognition adopted by the

91 Mr Russell Savage, VIC, *Parliamentary Debates* (Hansard), 16 September 2004, p. 530.
92 Submission No. 5 from Professor Anne Twomey, 7 January 2015, p. 2.
93 Gareth Griffith, 'Constitutional Recognition of Aboriginal People', July 2010, NSW Parliamentary Library Research Services – e-brief 11/2010, p. 6.
94 Legal, Constitutional and Administrative Review Committee (Qld), *A Preamble for the Queensland Constitution – Issues Paper*, February 2009, p. 1.
95 ibid.
96 Law, Justice and Safety Committee (QLD), *A preamble for the Constitution of Queensland 2001*, 3 September 2009, Chair's Foreword.

Committee in its proposed preamble was taken from a recommendation of the Advisory Council.[97]

3.51 The full text of the preamble that was incorporated into the *Constitution of Queensland 2001* is included in Appendix Five. The preamble refers to six commitments made by '[t]he people of Queensland, free and equal citizens of Australia'.[98]

3.52 The statement of recognition is one of these commitments. It acknowledges the historical status of the various tribal groups, and their affiliation with the land by honouring the state's Aboriginal and Torres Strait Islander 'peoples' as the 'First Australians, whose lands, winds, and waters we all now share'.[99]

3.53 In contrast to Victoria, the statement of recognition in the preamble makes no explicit reference to any spiritual, social, cultural, or economic relationship with the lands. However, it does adopt the Victorian approach of acknowledging the positive contribution of (Aboriginal and Torres Strait Islander) values and ancient cultures to the fabric of the wider community.[100]

3.54 There is no reference to a lack of consultation regarding historical events, nor is an entrenchment clause included. As a result of the latter, any text within the preamble can be amended or repealed by a vote of a simple majority in the Parliament.

3.55 Like Victoria, Queensland adopted an accompanying non-effects clause. The terminology is almost identical to section 1A(3) of the Victorian Constitution and is also incorporated in the main body of the legislation.[101] Notably, the 2009 Amendment Bill had originally proposed to preface its non-effects clause with the term used in Victoria, '[t]he Parliament does not intend [by this preamble]'.[102] However, the Government agreed to an amendment put forward by an Independent member, Mr Peter Wellington, to remove the word 'intend' during what was a contentious debate on the passage of the Bill.[103]

97 Law, Justice and Safety Committee (QLD), *A preamble for the Constitution of Queensland 2001*, 3 September 2009, Chair's Foreword.
98 Preamble *Constitution of Queensland 2001* (QLD).
99 ibid., Preamble (Clause (c)).
100 ibid.
101 ibid., Section 3A.
102 Clause 5 Constitution (Preamble) Amendment Bill 2009 (QLD).
103 Hon Anna Bligh, Premier, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, p. 412.

3.56 As noted at 3.47 above, the 2009 Amendment Bill did not receive the unanimous support of the Queensland Parliament, with the Opposition and Mr Wellington voting against it advancing beyond the second reading stage.[104]

3.57 The Opposition leader, and the three Opposition members of the Law, Justice and Safety Committee, argued there was a lack of public support for the adoption of the entire preamble and an inadequate level of public consultation on the issue. As such, they felt the issue should have been put to a referendum.[105]

3.58 Similar concerns were expressed by Mr Wellington who, while not opposed to most of the words used, was unable to support the proposal due to the fact that it was purported to represent the views of the people of Queensland. Mr Wellington unsuccessfully sought to move another amendment, which would have instead adopted the introductory phrase, 'The Parliament of Queensland, as representatives, of the people of Queensland.'[106]

3.59 Despite Government assurances to the contrary[107], Opposition members also remained unconvinced that the non-effects clause would serve to prevent the courts from using the content of the preamble to interpret the Constitution and other statutes.[108]

3.60 Referring specifically to his party's position against the statement of recognition, the Opposition leader further argued that the term "First Australians" is divisive, as is the concept of elevating the recognition of one ethnic group of the Queensland community over all others.[109]

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104 Constitution (Preamble) Amendment Bill, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, p. 410.

105 Hon John-Paul Langbroek, Leader of the Opposition, and Mr Andrew Cripps, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, pp. 361 and 368. See also the Statement of Reservation signed by the three Opposition Committee members in, Law, Justice and Safety Committee (QLD), *A preamble for the Constitution of Queensland 2001*, 3 September 2009, pp. 15-17.

106 Mr Peter Wellington, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, p. 379.

107 Government response to the Law, Justice and Safety Committee's report no. 70, *A preamble for the Constitution of Queensland 2001*, 24 November 2009, p. 2.

108 Hon John-Paul Langbroek, Leader of the Opposition, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, p. 366; Law, Justice and Safety Committee (QLD), *A preamble for the Constitution of Queensland 2001*, 3 September 2009, Statement of Reservation pp. 15-17.

109 Hon John-Paul Langbroek, Leader of the Opposition, QLD, Assembly, *Parliamentary Debates* (Hansard), 23 February 2010, p. 365.

New South Wales

3.61 New South Wales became the third state to include a statement of recognition when amendments to the *Constitution Act 1902* (NSW) took effect on 25 October 2010. The amendments were put forward in the Constitution Amendment (Recognition of Aboriginal People) Bill 2010, which was compiled by the Minister for Aboriginal Affairs following a two-month public submission period and consultation with the New South Wales Aboriginal Land Council.[110] The amendments, as printed in the Bill, are included at Appendix Six.

3.62 New South Wales has no preamble in its Constitution. Rather than follow the Queensland approach of drafting a preamble, NSW legislators opted instead to insert a stand-alone statement of recognition within the preliminary provisions of the *Constitution Act 1902* (NSW).

3.63 The statement itself adopts similar themes to the Victorian and Queensland models, albeit with subtle differences in the wording. For example, recognition is provided by 'Parliament, on behalf of the people of New South Wales'[111] using a phrase that combines the Victorian and Queensland approaches.

3.64 New South Wales also honours and acknowledges the historical status of its Aboriginal people, but uses the term 'State's first people and nations [emphasis added].'[112] The principle of recognising the diversity of Aboriginal groups within its jurisdiction is more consistent with wording adopted in Queensland.

3.65 New South Wales and Queensland are also similar in that there is recognition of an ongoing contribution made by Aboriginal people to the fabric of the state, whereas the Victorian terminology in this area can be read as referring exclusively to a past contribution.[113]

3.66 Notably, New South Wales and Victoria both acknowledge a spiritual, social, cultural, and economic relationship with the land. Yet, while Victoria attributes this relationship to the status of its Aboriginal people as 'original custodians of

110 Mr Paul Lynch, Minister for Aboriginal Affairs, NSW, Assembly, *Parliamentary Debates* (Hansard), 23 September 2010, pp. 25782-25786; Hon Helen Westwood, NSW, Council, *Parliamentary Debates* (Hansard), 19 October 2010, p. 26124.

111 Section 2(1) *Constitution Act 1902* (NSW).

112 ibid.

113 ibid., Section 2(2)(b); Preamble (Clause (c)) *Constitution of Queensland 2001* (QLD); Section 1A (2)(c) *Constitution Act 1975* (VIC).

the land', New South Wales uses the term 'traditional custodians and occupants of the land'.[114]

3.67 Like both its counterparts, New South Wales opted for a non-effects clause. While the terms are very similar, the New South Wales clause is broadened to explicitly preclude any right to 'review an administrative action.'[115] As was the case in Queensland, New South Wales sought to remove the potential ambiguity associated with the Victorian terminology, '[t]he Parliament does not intend by this section…' (see 3.42 above) by adopting the more definitive phrase, '[n]othing in this section … [creates any rights or liabilities].'[116]

3.68 While the New South Wales Parliament made the statement 'on behalf of the people' there was no legal requirement to take the issue to the people by way of a referendum. As with the other jurisdictions, a simple majority in both houses was all that was required. This was achieved easily. While the Greens in the Upper House moved an amendment motion seeking to remove the non-effects clause, this motion was quickly negatived and the amendment Bill was ultimately passed unamended with the support of all parties.[117]

South Australia

3.69 South Australia followed the lead of the other states by amending the *Constitution Act 1934* (SA) to include a statement of recognition, which took effect from 28 March 2013. This wording emanated from the recommendations of an Advisory Panel, which was appointed by Premier Jay Weatherill in May 2012 to report on the appropriate wording and location for a statement of recognition.[118] Over a four-month period, the panel engaged with Aboriginal and non-Aboriginal South Australians, receiving 49 submissions and holding over 20 consultation meetings across the state.

3.70 The statement of recognition subsequently put forward by the government in the Constitution (Recognition of Aboriginal Peoples) Amendment Bill 2013 (SA)

114 Section 2(2)(a) *Constitution Act 1902* (NSW); Section 1A (2) and 1A(2)(c) *Constitution Act 1975* (VIC).

115 Section 2(3) *Constitution Act 1902* (NSW).

116 ibid.

117 Hon Ian Cohen, NSW, Council, *Parliamentary Debates* (Hansard), 19 October 2010, pp. 26157-26158. For confirmation of the support of all parties in the Assembly, see: Ms Kristina Keneally, Premier; Mr Barry O'Farrell, Leader of the Opposition; and Mr Andrew Stoner, Leader of the Nationals, NSW, Assembly, *Parliamentary Debates* (Hansard), 8 September 2010, pp. 25441-25447.

118 The Advisory Panel included: a senior Aboriginal academic; an Aboriginal Elder with substantial experience working with government; the state's Commissioner for Aboriginal Engagement; and two former judges (Supreme Court of South Australia and Federal Court of Australia). For a full profile of the Advisory Panel members, see: Department of Premier and Cabinet (SA), 'Constitutional Recognition – Time for Respect', no date.

is similar in format to the other Australian jurisdictions, but is arguably more expansive (see Appendix Seven for the full text).

3.71 As another jurisdiction without a constitutional preamble, South Australia replicated the New South Wales format by including its statement within the body of its constitution among the preliminary provisions.[119] South Australia also followed the New South Wales approach of attributing its statement to '[t]he Parliament on behalf of the people' of the state.

3.72 A further similarity with New South Wales (and Queensland in this instance) is the clear acknowledgement of the diversity of Aboriginal groups within the state. South Australia frequently refers to the term 'Aboriginal peoples' and uses the term 'first peoples and nations' to confirm their prior inhabitancy of the land.[120]

3.73 In other aspects, the adopted text is more reflective of the Victorian model. For instance, South Australia includes a summary of historical events leading to the establishment of the colonial government with an acknowledgement that these events occurred without 'proper and effective recognition, consultation or authorisation of the Aboriginal peoples of South Australia.'[121] Likewise, the terms 'unique and irreplaceable' are used to describe the contribution Aboriginal peoples make to the state, although South Australia makes clear the ongoing nature of that contribution.[122] South Australia, as with the other jurisdictions, covers the entirety of its statement with a non-effects clause. However, it adopts the Victorian phrase, '[t]he Parliament does not intend', when prefacing this clause.[123]

3.74 In other aspects the South Australian text is more expansive when compared with the other Australian jurisdictions. Firstly, South Australia recognises the ongoing importance of its Aboriginal peoples' 'cultural and heritage beliefs, languages and laws'.[124] South Australia is also the only jurisdiction to use the term 'traditional owners' (and 'occupants') to describe Aboriginal affiliation with the land.[125] Victoria and New South Wales, which made similar acknowledgements, referred to custodianship rather than ownership. Most significantly, South Australia acknowledges 'that the Aboriginal peoples have

119 Section 2 *Constitution Act 1934* (SA).
120 ibid., Section 2 (1)(b) and 2 (2)(a)-(c).
121 ibid., Section 2 (1)(b).
122 ibid., Section 2 (2)(b)(iii).
123 ibid., Section 2 (3).
124 ibid., Section 2(2)(b)(ii).
125 ibid., Section 2(2)(b).

endured past injustice and dispossession of their traditional lands and waters.'[126]

3.75 The 2013 amendment Bill proposing these changes was passed with the unanimous support of both Houses of Parliament.[127] The consultation process and the eminence of the Advisory Panel were both roundly endorsed during the debates on the Bill[128], although one member expressed concern about the breadth of consultation and a lack of awareness about the issue among the wider community. This member believed those who participated in the consultation were probably 'the people who were already alive to the issue and wanting it to move along.'[129]

Observations

3.76 Professor of Constitutional Law at the University of Sydney, Anne Twomey, has cogently summarised the four main questions that have arisen in the context of the constitutional recognition debates in Victoria, Queensland, New South Wales, and South Australia. These questions are also applicable in the current debate around recognition at a national level.

3.77 In short, legislators have had to consider:

1. whether statements of recognition should be included within a preamble or the main body of the Constitution;

2. whether the content of such statements should be limited to historical, aspirational, and explanatory commentary or whether 'substantive changes' should be made;

3. 'whether there should be an express provision that denies any legal consequences [a non-effects clause] that might otherwise arise from what were intended to be non-substantive provisions'; and

4. whether such statements should be enacted via the ordinary legislative process or via referendum and what consideration is given to 'the consequences for community involvement and understanding.'[130]

126 Section 2(2)(c) *Constitution Act 1934* (SA).
127 Hon T J Stephens, SA, Council, *Parliamentary Debates* (Hansard), 21 March 2013.
128 See Second Reading Debate, SA, Assembly, *Parliamentary Debates* (Hansard), 19 February 2013.
129 Ms Isobel Redmond, SA, Assembly, *Parliamentary Debates* (Hansard), 19 February 2013, p. 4402.
130 Submission No. 5 from Professor Anne Twomey, 7 January 2015, p. 1.

3.78 The Committee has found these questions to be equally valid when considering an appropriate form of words to recognise our state's Aboriginal peoples in the *Constitution Act* 1889 (WA). This matter is addressed in the following chapter.

Chapter 4

Proposed Wording for Western Australia – Legal and Legislative Issues Considered

Proposals Submitted to the Committee

4.1 As part of its call for submissions, the Committee asked interested parties to provide comment on the most appropriate form of words to recognise Aboriginal people in the Constitution of Western Australia. The Committee also sought input on the most appropriate location for such words.

4.2 The Committee received 13 submissions in total. All submissions endorsed the principle of constitutional recognition, with eight recommending a particular form of words. Of these eight, the submissions from the Yamatji Marlpa Aboriginal Corporation, Reconciliation WA, and The Law Society of Western Australia all supported adopting the text as proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (the Farrer Bill) (quoted in full at 2.11 above).[131]

4.3 Three other submitters: the Goldfields Land and Sea Council, the International Commission of Jurists (WA Branch); and Professor George Williams opted for wording very similar to that now contained in the *Constitution Act 1975* (VIC).[132]

4.4 The Western Australian Department of Aboriginal Affairs supported the inclusion of a statement of recognition in the preamble, and suggested ways in which the wording currently recommended by the Commonwealth Joint Select Committee (see 3.24 through 3.26 above) could be applied in the Western Australian context.[133]

4.5 Finally, the proposal from Curtin University's Centre for Aboriginal Studies (CAS) was the most expansive. It called for a 'substantive transfer of decision-

131 Submission No. 7 from Yamatji Marlpa Aboriginal Corporation, 16 January 2015, p. 1; Submission No. 11 from Reconciliation WA, 5 February 2015, p. 2; Submission No. 9 from The Law Society of Western Australia, 29 January 2015, p. 2.

132 Submission No. 2 from the Goldfields Land and Sea Council, 18 December 2014, p. 2; Submission No. 6 from the International Commission of Jurists (WA Branch), 16 January 2015, p. 7; Submission No. 1 from Professor George Williams AO, 18 December 2014, p. 2.

133 Submission No. 12 from Department of Aboriginal Affairs, 16 February 2015, p. 3.

making power from the government to Indigenous peoples'[134] calling on '[t]he People and Parliament of Western Australia' to acknowledge Aboriginal peoples 'as the first people and self-determined nations of the State'.[135] The CAS proposal included a further clause stating:

It is accepted that as a result of past Government decisions the amount of land set aside for Aboriginal people has been progressively reduced without compensation.[136]

4.6 Similar to the Victorian, New South Wales, and South Australian statements, the CAS proposal also included an acknowledgement of the contribution of aboriginal peoples to the identity and well-being of the state and of their social, cultural and economic relationship with the land.[137]

4.7 While some submissions noted non-effects clauses as something for the Committee to consider, none argued for the inclusion of such a clause.

An Appropriate Form of Words – Starting Point for Considerations

4.8 Having considered these proposals, and the various statements adopted in other jurisdictions, the Committee was drawn to the text contained in the Farrer Bill as a suitable starting point for considering an appropriate form of words for constitutional recognition in Western Australia. In this respect, the Committee offers two pertinent observations.

4.9 Firstly, the core statement of recognition in paragraph 2, Clause 4(2) of the Farrer Bill is comparatively modest and uncontroversial. It reads:

And whereas the Houses of Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia.

4.10 This paragraph is the least contentious statement of recognition observed by the Committee. It is limited to a broadly accepted historical declaration coupled with an aspirational statement articulating Parliament's rationale for making what is a simple, yet symbolically significant acknowledgement. The Committee believes the relative simplicity of this proposal is such that it is likely to prove uncontroversial to most Western Australians.

134 Submission No. 8 from Curtin University Centre for Aboriginal Studies, 21 January 2015, p. 6.
135 ibid., p. 1.
136 ibid.
137 ibid.

4.11 Secondly, it appears the text of the Farrer Bill has been subject to the broadest level of consultation among interested stakeholders. Hon Fred Chaney AO advised the Committee that:

> *a genuine effort to hear Aboriginal views would be an act of good faith and could make the recognition an important step in a new and better relationship between our first nations and the rest of us*.[138]

4.12 The Committee acknowledges the importance of this issue and has attempted to undertake a broad consultation throughout its Inquiry. However, it has found that the Inquiry timeframe—itself limited—has coincided with the period in which Aboriginal communities and stakeholders are limited in their availability due to other obligations, including the South West native title settlement negotiations, school holidays, law business, and weather.[139]

4.13 Given these limitations, the Committee was influenced by Reconciliation WA's submission,[140] which endorsed the text in the Farrer Bill and confirmed that there had been 'significant public consultation and wide scale public support for the Bill' before it was originally introduced in June 2014.[141] The Committee acknowledges there is never likely to be consensus among all advocates of constitutional recognition, but believes the text of the Farrer Bill has been subject to significant consultation and has the greatest level of current support among these groups.

Finding 1

Having examined numerous statements of recognition from international and domestic jurisdictions, the Committee sees the statement proposed in Clause 4(2) of the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 as a suitable starting point for considering an appropriate form of words for constitutional recognition in Western Australia.

The statement is simply framed, comparatively modest in its scope, and among the least contentious in terms of its content.

138 Submission No. 4 from Hon Fred Chaney AO, 26 December 2014, p. 2.
139 Submission No. 3 from Central Desert Native Title Services, 18 December 2014, p. 1.
140 The Reconciliation WA submission was made on behalf of Reconciliation WA and several other signatory organisations: Aboriginal Family Law Services; NAIDOC Perth; "Recognise This"; the Western Australian Council of Social Services (WACOSS); and Mr Jim Morrison, Co-convenor of the Bringing Them Home Committee.
141 Submission No. 11 from Reconciliation WA, 5 February 2015, p. 5.

Finding 2

The Committee has been limited in the amount of consultation it has been able to undertake. Nonetheless, it understands that the statement proposed in Clause 4(2) of the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 has been subject to significant consultation. It also appears to have the greatest level of current support among advocates of constitutional recognition.

Legal and Legislative Issues for Consideration

4.14 The purpose of constitutional recognition is as a symbol which has the aim of advancing reconciliation in Western Australia. There is no intention to make substantive changes to the law of Western Australia.

4.15 The Committee realises that unanimous Parliamentary support for any words proposing constitutional recognition of Aboriginal peoples is contingent upon all members being convinced that such wording does not produce any unintended legal consequences. This was readily apparent in the debate that led to the establishment of the Committee.[142]

4.16 The Committee notes that the form of words in paragraph 2 of Clause 4(2) of the Farrer Bill is taken from an earlier proposal contemplated in 2004[143] for which legal advice was sought from the then-State Solicitor General. The Solicitor General at that time, Mr Robert Meadows QC, advised that he 'did not believe that an amendment in these terms would have any significant legal consequences.'[144] Despite these assurances, the Committee decided it was nonetheless prudent to seek updated advice on this matter, both to take into account the other text in the Farrer Bill (which does not appear have been included in the request for advice in 2004) and in light of the developments in constitutional recognition that have occurred in other Australian jurisdictions in the ensuing period.

4.17 The Committee also wanted to consider a range of other legal and legislative questions. Some of these questions are similar to those that have arisen in other Australian jurisdictions (see 3.77 above), while other matters are more specific to Western Australia. In the rest of this chapter, the Committee examines eight issues, some of which are considered in the context of the Farrer Bill:

142 See paragraphs 2.14 and 2.15 above.
143 See paragraphs 2.8 to 2.11 above
144 Mr Robert Meadows QC, Solicitor General, Letter to Attorney General (Copy), 2 April 2004, Att A.

1. Can a Bill providing for constitutional recognition of Aboriginal peoples be enacted by the ordinary procedure for the passage of legislation or is any special procedure (e.g. a referendum) required?

2. Which legislative procedure should be required to amend the constitutional recognition of Aboriginal peoples once it has been included in the Constitution (i.e. should the recognition be entrenched in the Constitution)?

3. Will constitutional recognition of Aboriginal peoples limit the Western Australian Parliament's power to legislate?

4. Will constitutional recognition of Aboriginal peoples affect the interpretation of Western Australian legislation and the exercise of executive power?

5. Will constitutional recognition of Aboriginal peoples affect the operation of native title law or pastoral leases?

6. Will the potential for unintended legal consequences differ depending upon whether the recognition is located in the preamble to the *Constitution Act 1889* (WA) as opposed to being in an operative provision of the Act or a schedule to the Act?

7. What is the legal efficacy of clauses which provide that constitutional recognition of Aboriginal peoples shall not have legal effect (i.e. a "non-effects" clause)?

8. Should section 42 of the *Constitution Act 1889* (WA) be deleted?

4.18 These questions are dealt with in the sections immediately below.

Which legislative procedure is required to enact constitutional recognition?

4.19 Constitutional recognition of Aboriginal peoples raises a critical first issue: Is there a special legislative procedure that must be followed to amend the *Constitution Act 1889* (WA)?

4.20 The ordinary procedure for the enactment of legislation is that a Bill is passed by each House of Parliament by a simple majority and the Bill is then presented to the Governor for Royal Assent.[145]

4.21 It is well established that the constitutions of the various Australian states can be amended by legislation that is enacted following the ordinary procedure

145 See section 2(3) *Constitution Act 1889* (WA).

unless there is a special procedure specified by the constitution of that state.[146]

4.22 The only provision in the *Constitution Act 1889* (WA) that provides for special procedures is section 73. Section 73(1) provides that a Bill which makes 'any change in the Constitution of the Legislative Council or the Legislative Assembly' must be passed by an absolute majority in each House of Parliament. Section 73(2) specifies five categories of Bill which must be passed by absolute majority and then obtain the support of a majority of electors at a referendum to be lawfully enacted.

4.23 The issues of why and when the Parliament must comply with those special procedures are complicated issues of constitutional law. However, the special procedures in section 73 are binding in at least some circumstances. The High Court has held that by virtue of section 6 of the *Australia Act 1986* (Cth), the Western Australian Parliament will have to comply with those special procedures if the law it is enacting respects 'the constitution, powers or procedure of the Parliament'.[147]

4.24 The Committee is satisfied that the constitutional recognition of Aboriginal peoples does not change the constitution[148] of the Houses of Parliament and so section 73(1) is not engaged by the constitutional recognition of Aboriginal peoples.

4.25 Similarly, paragraphs (a), (b), (c) and (d) of section 73(2) are clearly not engaged. These paragraphs concern a bill that 'expressly or impliedly' provides for: the abolition or alteration of the office of Governor; the abolition of the Legislative Council or the Legislative Assembly; any change to the current process of direct election of members of the Legislative Council and the Legislative Assembly by the people of Western Australia; or reducing the number of members of the Legislative Council or Legislative Assembly.

4.26 The only other category of Bill for which section 73 stipulates special procedures is a Bill to affect sections 2, 3, 4, 50, 51 and 73 of the *Constitution Act 1889* (WA).[149] Sections 3 and 4 concern the sessions of Parliament and are not relevant. Sections 50 and 51 concern the Office of Governor and so also clearly would not be affected. The reference to section 73 is to prevent a

146 *McCawley v R* [1920] AC 691.

147 See *Attorney General (Western Australia) v Marquet* (2003) 217 CLR 545, [68] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

148 The High Court has held that the constitution of the Western Australian Parliament includes the nature and composition of the Parliament as a bicameral and representative Parliament: *Attorney General (Western Australia) v Marquet* (2003) 217 CLR 545, [75]-[76].

149 Section 73(2)(e) *Constitution Act 1889* (WA).

Parliament from avoiding the special procedures in section 73 by simply repealing section 73. Section 73 therefore need not be considered further.

4.27 This leaves section 2 of the *Constitution Act 1889* (WA) which confers power upon the State Parliament to legislate. One of the key concerns for the Committee is that the recognition of Aboriginal peoples in the Constitution should not limit the state's legislative power.

4.28 The Committee has obtained legal advice from Senior Counsel which confirms that the words of recognition proposed by the Farrer Bill do not reveal any intention to affect, change or limit the legislative powers of Parliament and therefore do not fall within the scope of section 73(2)(e).[150]

4.29 The Committee therefore notes that a Bill providing for constitutional recognition of Aboriginal people, in the form proposed by the Farrer Bill, is able to be enacted by the ordinary procedure for the passage of legislation and that no special procedure is required.

Finding 3

Section 73 of the *Constitution Act 1889* (WA) outlines the circumstances in which a Bill proposing a constitutional amendment must be enacted via special procedures, including a referendum.

Based on the advice available to it, the Committee finds that the constitutional recognition of Aboriginal peoples in the form proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would not trigger the provisions of section 73 and thus could be enacted by the ordinary legislative procedure.

Should constitutional recognition be entrenched?

4.30 An important and related issue which then arises is whether the Parliament should seek to require that any future amendment of the constitutional recognition of Aboriginal peoples can only be effected by a special legislative procedure.

4.31 As noted at paragraph 3.40 above, the amendments in Victoria to recognise the Aboriginal people of that state included a provision requiring that any Bill to repeal, alter or vary the recognition provision in the Victorian Constitution must be passed by a three-fifths majority in each House of Parliament. This is known as an 'entrenching' provision.

150 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraph 17.

4.32 The Committee concluded that any future amendment of a statement of recognition in the Constitution should be able to be made by a Bill enacted by the ordinary legislative procedure for the following reasons.

4.33 First, it is not for the current Parliament to make it more difficult for future Parliaments to ensure that the wording which recognises Aboriginal peoples in the Constitution is appropriate. If a Parliament in 50 years' time sees fit to change any such words to make them more suitable to that future time, then it is not for the current Parliament to make it more difficult for those words to be changed than it has been for this Parliament to include them in the Constitution.

4.34 Secondly, entrenchment provisions tend to transfer power away from democratically-elected Parliaments to the courts. Once a provision is entrenched, then it is significantly more difficult for the Parliament to respond to an interpretation of that provision by the courts which was not intended by the Parliament. If there are unintended consequences which arise as a result of the constitutional recognition of Aboriginal peoples in Western Australia, then those unintended consequences will be more difficult to remedy if the recognition is entrenched.[151]

4.35 Thirdly, an entrenchment provision which sought to prevent a future Parliament from changing the words of recognition may well not be binding in any event. Although there is debate among constitutional lawyers as to when entrenchment provisions are binding, the High Court's decision in *Attorney General (Western Australia) v Marquet* suggests that an entrenchment provision might only be effective if given binding force by section 6 of the *Australia Act 1986* (Cth).[152] For section 6 of that Act to be engaged, the amending law must be a law that respects 'the constitution, powers or procedure of the Parliament'. A law which sought to amend the words of recognition would not be a law respecting the constitution, powers or procedures of the Parliament. As a consequence, the entrenchment provision would not be given binding effect by section 6 of the *Australia Act 1986* (Cth) and therefore may well not be binding at all.

151 Later in this section (at paragraphs 4.46 to 4.62) the Committee finds that the statement of recognition as proposed in the Farrer Bill would not result in any different interpretation of the *Constitution Act 1889* (WA) and is highly unlikely to have a decisive impact on the interpretation of other Western Australian legislation. Even so, it still believes that it is prudent not to include an entrenchment clause for the collection of reasons stated in this section.

152 See *Attorney General (Western Australia) v Marquet* (2003) 217 CLR 545, [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

Finding 4

It is the view of the Committee that any future amendments to words of recognition in the *Constitution Act 1889* (WA) should be able to be enacted by the ordinary legislative procedure.

Will constitutional recognition limit Parliament's power to legislate?

4.36 The legislative power of the state of Western Australia is identified in section 2(1) of the *Constitution Act 1889* (WA) as the power 'to make laws for the peace, order and good Government' of Western Australia.[153] The High Court has made it clear that this phrase is intended to convey the notion that a state's legislative power is 'ample and plenary' and that the words used 'are not words of limitation'.[154]

4.37 In the case of the Farrer Bill, the Committee notes that the Bill does not refer to section 2 of the *Constitution Act 1889* (WA) and does not expressly provide for any alteration of the state's legislative power. However, a potential concern is that the constitutional recognition of Aboriginal peoples might be interpreted by a court as the source of an implied limitation on state legislative power.

4.38 It has been suggested that there is a remote risk of a court in future interpreting aspirational words of recognition as limiting the power of Parliament, so that Parliament could not enact legislation that was inconsistent with those aspirations.

4.39 However, this same advice acknowledges that such a scenario would be contrary to the law as presently understood.[155]

4.40 As noted already, the Committee has obtained the opinion of Senior Counsel that the words contained in the Farrer Bill would not be interpreted as limiting the state's legislative power (see 4.28 above).

153 Section 2 of the *Constitution Act 1889* (WA) refers to the power to 'make laws for the peace, order, and good Government of the Colony of Western Australia'. Section 107 of the Commonwealth Constitution provides that the legislative power of the Parliament of a colony which became a state was continued as the legislative power of the Parliament of the state at Federation except to the extent that the Commonwealth Constitution withdrew legislative power from the state. Section 2(2) of the *Australia Acts* confirms the legislative power of the Australian states.

154 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

155 Mr Grant Donaldson SC, Solicitor General, Letter to Attorney General (Copy), 17 March 2015, (Closed Evidence).

4.41 Senior Counsel observed further that the passage of the Farrer Bill by simple majority would, by itself, reinforce an interpretation of the amendments such that they are to be taken not to affect the legislative power of Parliament.[156]

4.42 A general presumption applied by the courts when interpreting legislation is that Parliament intends to pass legislation that is valid.[157] If legislation can be interpreted in two ways and the first interpretation will mean that the legislation is valid and the second interpretation will mean that the legislation is invalid, then a court will presume that the Parliament intended the legislation to have the first interpretation. In other words, legislation is interpreted in a manner which will result in the legislation being within the legislative power of the Parliament.

4.43 A Bill intended by Parliament to alter the legislative power of the Parliament would need to be enacted in accordance with the special procedure set out in section 73(2).[158] It follows that if a Bill proposing the constitutional recognition of Aboriginal peoples were enacted in accordance with ordinary procedures, then this would lead a court to presume that the Bill was not intended to affect legislative power because it was not enacted in accordance with the section 73(2) procedure. Further, if a party to a court case did seek to argue that an Act for the constitutional recognition of Aboriginal peoples had impliedly limited the state's legislative power, this argument could be met by the response that the Act could not have that effect because it had not complied with the section 73(2) procedure.

4.44 In one of the submissions to the Committee, it was suggested that any Bill for constitutional recognition should be put to a referendum to augment the political significance of the recognition.[159] The Committee does not share this view. The Committee considers that constitutional recognition can carry great meaning even without a referendum. More pertinently, were a Bill such as the Farrer Bill put to a referendum this would increase the risk that the Bill would be later interpreted by a court as limiting the state's legislative power. The fact that a referendum had been carried out would be likely to mean that the requirements for a special procedure in section 73(2) had been satisfied. As a

156 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraph 28.
157 Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources*, 2013, Thomson Reuters, Sydney, [25.1.2000].
158 This procedure was explained in paragraph 4.22 above.
159 Submission No. 5 from Professor Anne Twomey, 7 January 2015, p. 4.

result, the arguments made in the previous paragraph would no longer stand in the way of the implication of a limit on legislative power.[160]

4.45 The Committee is confident that the passage of any Bill similar in content to that of the Farrer Bill via the ordinary legislative process would reinforce Parliament's intention that constitutional recognition of Aboriginal peoples will not limit the legislative power of the state.

Finding 5

Based on the advice available to it, the Committee finds that any likelihood of the constitutional amendment proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 limiting the legislative power of the state can be discounted.

Further, the Committee is satisfied that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, if passed by ordinary legislative procedures, will not limit the legislative power of the state.

Will constitutional recognition affect the interpretation of Western Australian legislation and the exercise of executive power?

4.46 The Committee noted that the issue of unintended impact on statutory interpretation emanating from constitutional recognition has featured in debates at the Commonwealth level, in Victoria, and in Queensland.[161] Accordingly, the Committee felt that this question required examination in the Western Australian context.

Constitution Act 1889 (WA)

4.47 If words of recognition are included in the preamble to the *Constitution Act 1889* (WA), then the legislation most likely to have its interpretation affected is the *Constitution Act 1889* (WA) itself.

4.48 Section 31 of the *Interpretation Act 1984* (WA) provides that a preamble to a written law forms part of the written law and shall be construed as being 'intended to assist in explaining its purport and object'. As an example, the amendment to the preamble proposed by the Farrer Bill will introduce a widely accepted statement of historical fact and an aspiration by the Parliament into the preamble. The question is whether those amendments may assist a court

160 There may still be a further argument that the purported restriction on legislative power was inconsistent with section 2(2) of the *Australia Act 1986* (Cth) but this need not be explored further.

161 See paragraphs 3.28, 3.43, and 3.59 respectively.

in explaining the purport and object of the *Constitution Act 1889* (WA) in a manner which would alter the interpretation of the provisions in that Act.

4.49 When enacted, the *Constitution Act 1889* (WA) had 78 sections which dealt with the machinery of government for the Colony of Western Australia. Many of those original sections have been deleted and the subject matter with which they dealt is now governed by other Western Australian legislation, principally the *Constitution Acts Amendment Act 1899* (WA) and the *Electoral Act 1907* (WA). Of the 45 sections which are now found in the *Constitution Act 1889* (WA), a significant number are spent or have no potential operation given Western Australia's present constitutional arrangements.[162]

4.50 Section 2 of the *Constitution Act 1889* (WA), which concerns the legislative power of the state, has been considered above. The other provisions of the *Constitution Act 1889* (WA) which continue to operate concern such matters as the sessions of Parliament,[163] the functioning of the Houses of Parliament,[164] the office of Governor,[165] local government,[166] the tenure and removal of Supreme Court Judges,[167] financial matters,[168] special procedures to amend the Constitution,[169] and appointments to public office.[170] It is very difficult to see how the introduction of a statement of historical fact concerning the Aboriginal peoples of Western Australia and an aspiration to seek to effect a reconciliation could affect the interpretation of these provisions.

4.51 The Committee has taken the advice of Senior Counsel on this issue and Senior Counsel is of the opinion that the amendments to the preamble proposed by the Farrer Bill would not result in any different interpretation of the *Constitution Act 1889* (WA).[171]

162 The 1991 report of the Joint Select Committee on the Constitution (WA) identified the following provisions which currently remain in the *Constitution Act 1889* (WA) as being obsolete: sections 5, 6, 7, 8, 9, 38, 41, 42, 43, 46, 49, 59, 60, 61, 62, 63, 76 and 77. See Joint Select Committee of the Legislative Assembly and the Legislative Council on the Constitution, *Final Report Vol.* 2, State Government Bookshop, Perth, 24 October 1991, pp. 39-44.

163 Sections 3 and 4 *Constitution Act 1889* (WA).

164 ibid., Sections 12, 13, 15, 22, 34 and 36.

165 ibid., Sections 50 and 51.

166 ibid., Sections 52 and 53.

167 ibid., Sections 54 and 55.

168 ibid., Sections 64, 65, 68 and 72.

169 ibid., Section 73.

170 ibid., Section 74.

171 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraph 44.

Finding 6

If words of recognition are included in the preamble to the *Constitution Act 1889* (WA), the legislation most likely to have its interpretation affected by a statement of constitutional recognition is the *Constitution Act 1889* (WA) itself.

Finding 7

Based on the advice available to it, the Committee finds that the constitutional amendment proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would not result in any different interpretation of the *Constitution Act 1889* (WA).

Other Legislation and Executive Power

4.52 The Committee also considered whether amendments to the preamble in the form proposed in the Farrer Bill would affect the interpretation of other Western Australian legislation.

4.53 For the reasons that have been discussed already[172], and those that follow, the Committee has concluded that these proposed amendments would not affect the interpretation of other legislation or the approach to the interpretation of legislation which is currently taken by the courts and required by the *Interpretation Act 1984* (WA).

4.54 The High Court has observed that when a court interprets legislation, it is the duty of the Court 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.'[173] A court will seek to identify the purpose of the legislation and interpret the legislation in a manner which is consistent with the purpose of the legislation.[174] Section 18 of the *Interpretation Act 1984* provides that an interpretation which would promote the 'purpose or object' underlying a written law is to be preferred to a construction which would not promote that purpose.

4.55 In interpreting a particular provision of an Act, the courts have emphasised the need to read the provision in its context. In the first instance, this means that the particular provision must be interpreted so that it is consistent with the other provisions of the Act.[175] More broadly, the need to read the provision in context means that the provision must be interpreted in light of materials which supply a context to the enactment of the provision. Section 19 of the

172 Starting at paragraph 4.36 above.
173 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78].
174 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.
175 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].

Interpretation Act 1984 (WA) permits consideration to be given to any material not forming part of the written law which is capable of assisting the in the ascertainment of the meaning of the provision. The materials which section 19 identifies include reports of Parliamentary committees, the explanatory memorandum and the Second Reading Speech.[176]

4.56 If an argument were made that legislation enacted prior to the insertion of the words recognising Aboriginal peoples into the *Constitution Act 1889* (WA) should be interpreted in light of those words, then the orthodox response from the courts would be that a subsequent Act of Parliament would not be part of the context of the enactment of the earlier legislation and therefore irrelevant to its interpretation.

4.57 If an argument were made that legislation enacted after the constitutional recognition of Aboriginal peoples should be interpreted in light of that recognition, then whoever made that argument would need to explain why the recognition should be taken into account as part of the context. Given that a provision of an Act needs to be interpreted according to the meaning the Parliament intended it to have, in the context of the other provisions in the Act and in light of its legislative history, it seems that the scope for words in the preamble of the *Constitution Act 1889* (WA) to have an influence on the interpretation of those words is minimal at best.

4.58 The Committee sought the opinion of Senior Counsel on this issue and Senior Counsel was of the opinion that it is quite unlikely that the broad statement of principle in the proposed amendments would ever be likely to be considered, let alone be a decisive consideration, in the interpretation of future legislation.[177]

4.59 Senior Counsel did observe that Kirby J in *Northern Territory v Arnhem Land Trust*[178] stated that it was appropriate for the High Court of Australia to take judicial notice of the National Apology provided to the Indigenous Peoples of the Commonwealth in the Commonwealth House of Representatives on 13 February 2008.[179] Justice Kirby considered that the National Apology was 'not legally irrelevant' to the task of interpreting the Northern Territory legislation in issue in that appeal because it 'constitutes part of the factual matrix or background against which the legislation … should now be considered and interpreted.'

176 Section 19(1) and (2) *Interpretation Act 1984* (WA).
177 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraph 48.
178 (2008) 236 CLR 24, [70]-[72].
179 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraph 46.

4.60 Justice Kirby's approach, if widely adopted by the courts, may give a basis for courts in the future to have regard to the constitutional recognition of Aboriginal peoples in the *Constitution Act 1889* (WA) when interpreting other Western Australian legislation. However, this approach does not reflect the current orthodoxy in statutory interpretation and was not adopted by the other Justices of the High Court in that case or any subsequent case.

4.61 As a result, the Committee considers that the risk of constitutional recognition of Aboriginal peoples in the form proposed in the Farrer Bill having any impact on the interpretation of other Western Australian legislation is exceedingly low. The risk of it having a decisive impact on the interpretation of other Western Australian legislation appears to be negligible.

4.62 The Committee is also aware of a suggestion that the aspirational elements of a preamble could require state executive and administrative power to be exercised in a manner consistent with those aspirational elements.[180] For the reasons mentioned, the Committee takes the view that such a possibility is equally remote.

Finding 8

Based on the advice available to it, the Committee finds that the risk of constitutional recognition of Aboriginal peoples, in the form proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, having any impact on the interpretation of other Western Australian legislation is exceedingly low. The risk of it having a decisive impact on the interpretation of other Western Australian legislation or on state executive and administrative power appears to be negligible.

Will constitutional recognition impact the operation of native title or pastoral leases?

4.63 A third concern identified by the Committee was whether the enactment of words of recognition in the *Constitution Act 1889* (WA) could lead to an impact upon the operation of native title law in Western Australia, including the interaction of native title law and pastoral leases.

4.64 The operation of native title law in Western Australia, as in the rest of Australia, is ultimately governed by Commonwealth legislation, namely the *Native Title Act 1993* (Cth).[181] While Western Australia has legislated in respect of native title in the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) and the *Native Title (State Provisions) Act 1999* (WA),

180 Mr Grant Donaldson SC, Solicitor General, Letter to Attorney General (Copy), 17 March 2015, (Closed Evidence).

181 See *Western Australia v Commonwealth* ('The Native Title Act Case') (1995) 183 CLR 373.

those Acts operate within the framework established by the Commonwealth Act.

4.65 The *Native Title Act 1993* (Cth) itself has a lengthy preamble which goes into significantly more detail than the Farrer Bill in its description of the history of Australia's Aboriginal peoples and Torres Strait Islanders. While using different terminology, the preamble to the *Native Title Act 1993* (Cth) nonetheless contains the two principal elements of recognition proposed in the Farrer Bill. Firstly, it states that '[t]he people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australian before European settlement.' It then goes on to explain that the *Native Title Act 1993* (Cth) 'is intended to further advance the process of reconciliation among all Australians.' In light of this, the words of recognition in the preamble to the *Constitution Act 1889* (WA) proposed by the Farrer Bill will not add to those matters which might be taken into account in interpreting the *Native Title Act 1993* (Cth).

4.66 In any event, as a Commonwealth law, the *Native Title Act 1993* (Cth) prevails over state legislation to the extent of any inconsistency between the respective statutes.[182] Any argument that the operation of native title law was altered by the recognition of Aboriginal peoples in the Constitution of Western Australia would be met by the response that the *Native Title Act 1993* (Cth) will operate according to its terms regardless of the recognition of Aboriginal peoples in the *Constitution Act 1889* (WA).

4.67 The Committee notes that some commentators have suggested that proposals for the recognition in the Commonwealth Constitution of continuing Aboriginal culture or Aboriginal peoples' continuing connection to land may have an impact on native title claims.[183] In order to establish native title, native title claimants are required to prove rights and interests possessed under traditional laws and the observance of traditional customs by which the claimants have a continuing connection with the land or waters claimed.[184] The suggestion is that proof of these matters will be facilitated by constitutional recognition. The Farrer Bill does not include recognition of continuing Aboriginal culture or Aboriginal peoples' continuing connection to land. The concern identified by these commentators therefore does not arise in respect of the Farrer Bill.

182 This is a result of the operation of section 109 of the Commonwealth Constitution.

183 Ron Brunton, "Myths of Aboriginal cultural continuity", in Gary Johns (ed.), *Recognise what?*, Conor Court Publishing, Ballarat, 2014, p. 7; Frank Salter, "Six Recognition Traps", in Johns (ed.), op. cit, p. 75.

184 See section 223(1) of the *Native Title Act 1993* (Cth).

4.68 The Committee also sought the opinion of Senior Counsel on whether the proposed amendments to the preamble contained in the Farrer Bill would have any substantive effect on native title law and pastoral leases. Senior Counsel's view was that the proposed amendments would not do so.[185]

4.69 For these reasons, the Committee is confident that the proposed recognition of Aboriginal peoples in the *Constitution Act 1889* (WA) would not impact upon the operation of native title law or pastoral leases in Western Australia.

Finding 9

Based on the advice available to it, the Committee finds that the form of constitutional recognition proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 will not have any substantive effect on native title law or pastoral leases in Western Australia.

Where in the Act to place the words of recognition?

4.70 The Farrer Bill proposes that the words of recognition be included in the preamble to the *Constitution Act 1889* (WA). Using the example of the Farrer Bill, the Committee considered whether the preamble was an appropriate place for the words of recognition or whether they should be included in a section or schedule. The Committee notes that, of the other Australian States to have included statements of recognition, Queensland is the only jurisdiction to have chosen the preamble as the preferred location. Victoria, New South Wales and South Australia all included their statements in operative provisions.

Inclusion in the preamble

4.71 The preamble to an Act is located prior to the sections of the Act. A preamble can be included for different purposes. Particularly in old Acts, a preamble was included to explain the reason for the enactment of an Act.[186] A preamble can also be used to set out history that is relevant to enactment of the Act or to include symbolic or aspirational statements. For example, the preamble to the Constitution of the United States of America commences with the phrase "We the People", which emphasises the democratic and republican underpinnings of the United States' Constitution.

4.72 As noted at 4.48 above, section 31 of the *Interpretation Act 1984* (WA) provides that the preamble to a written law forms part of the written law 'and shall be construed as a part thereof intended to assist in explaining its purport

185 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraphs 54-56.

186 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia*, 8th Ed, 2014, LexisNexis Butterworths, Sydney, [1.32].

and object'. A preamble is generally understood as having the potential to impact upon the interpretation of the Act but not to have a substantive legal operation of its own.

4.73 Despite the general understanding that a preamble is not intended to have a substantive legal operation, there have been instances where courts have been willing to identify or imply substantive rights from the preamble to a national Constitution. For example, three Justices of the High Court of Australia in *Leeth v Commonwealth*[187] held that the preamble to the Commonwealth Constitution supported the implication of a right to equal treatment by the law. There have also been examples where apex courts overseas have held that a preamble has a substantive legal operation.[188]

Inclusion in a section of the Act

4.74 The sections of an Act are generally intended to have a substantive legal operation, for example, by conferring rights, imposing duties or modifying existing legal obligations. Section 29 of the *Interpretation Act 1984* (WA) states that 'Every section of an Act takes effect as a substantive enactment without introductory words.' This section of the *Interpretation Act 1984* (WA) means that it is not necessary for the Parliament to include a statement that the following section is enacted before every section as was the historical practice.[189] It also confirms the general expectation that sections of an Act have a substantive legal effect.

4.75 The inclusion of words of recognition in a new section in the *Constitution Act 1889* (WA) would give one ground to support to an argument that the words are intended to have a substantive legal effect. However, the task of interpreting the meaning of the words ultimately requires a court to ascertain the Parliament's intention in including the words in the Act. Even if the words of recognition were included in a section of the *Constitution Act 1889* (WA), it would still be unlikely that the words of recognition would be interpreted as having a substantive legal operation given Parliament's clear intention that the words should not alter the substantive law.

187 (1992) 174 CLR 455, 475 (Brennan J), 486 (Deane and Toohey JJ).

188 See Anne Twomey, "The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians", *International and Comparative Law Quarterly*, vol. 62, no. 2, 2013, pp. 317, 336-340.

189 See *Smalley v Motor Accident Authority of New South Wales* (2013) 85 NSWLR 580, [43] considering the equivalent section in the *Interpretation Act 1987* (NSW). See also Pearce and Geddes, op. cit, [1.36].

Inclusion in a schedule to the Act

4.76 A schedule generally follows the final section of the Act. Schedules were traditionally used for dealing with material that can conveniently be set out in a table or to include items which follow from the matters dealt with by the sections of the Act.[190] However, it is increasingly common for schedules to contain operative provisions. Section 31 of the *Interpretation Act 1984* (WA) provides that a schedule to an Act forms part of the written law. Therefore, the inclusion of the words of recognition in a schedule to the *Constitution Act 1889* (WA) would give one argument in support of an intention that the words of recognition were intended to have legal effect. However, as with the inclusion of a statement of recognition in a section of the Act, it would still be unlikely that the words would be given substantive legal effect.

Conclusion on legal analysis

4.77 It appears that the risk of unintended consequences is very low no matter where the statement of recognition is included in the *Constitution Act 1889* (WA). Based upon the above analysis, however, the Committee concludes that the risk of unintended consequences is reduced further if words of recognition are included in the preamble. While the interpretation of a preamble as having a substantive legal operation is not unprecedented, it is unusual. The Committee is satisfied that the inclusion of a statement of recognition in the preamble will reinforce the Parliament's intention that the words in that statement are not intended to have a substantive legal effect.

Legal policy considerations

4.78 The Committee took account of policy considerations when considering where a statement of recognition should be located. The submissions of The Law Society of Western Australia and the Department of Aboriginal Affairs both supported the approach of including a statement recognition in the preamble to the *Constitution Act 1889* (WA) rather than as an amendment to the operative text of the Act.[191]

4.79 The fact that the New South Wales and South Australian constitutions did not have preambles helps explain their decision to place statements of recognition within the body of their respective statutes.[192] In Victoria, it was decided not

190 See Pearce and Geddes, op. cit, [1.38].

191 Submission No. 9 from the Law Society of Western Australia, 29 January 2015; Submission No. 12 from the Department of Aboriginal Affairs, 16 February 2015, p. 2.

192 Professor Twomey observes in her submission that in New South Wales, the lack of an existing preamble meant that broader issues would have arisen about what should be included in a

to amend the preamble because the existing preamble accurately stated the history which led to the enactment of the Victorian Constitution.[193]

4.80 In the case of the Farrer Bill, the proposed amendment to the preamble of the *Constitution Act 1889* (WA) would not detract from the accuracy of the history of the enactment of the Constitution as currently depicted. Moreover, the Farrer Bill has been drafted to include a paragraph which updates the constitutional history set out in the preamble by referring to Western Australia's accession as an 'Original State of the Commonwealth of Australia'.[194]

4.81 On the basis of the above consideration of legal implications and legal policy, the Committee is satisfied that the appropriate place for the inclusion of a statement of recognition is in the preamble.

Finding 10

Having considered a range of matters relating to legal policy and legal implications, the Committee is satisfied that the preamble is the appropriate place within the *Constitution Act 1889* (WA) to incorporate a statement of recognition.

Where within the preamble?

4.82 Professor Kent Roach has drawn a distinction between preambles that are "narrative" and those that are "aspirational". A narrative preamble gives 'a narrative about why particular legislation has been enacted and can even be used to reflect the process of deliberation that preceded the enactment of the legislation.'[195] An aspirational preamble sets out the hopes and aspirations of the Parliament for an Act or more generally.[196]

4.83 The current preamble sets out a part of the constitutional history of Western Australia by explaining that the *Constitution Act 1889* (WA) was enacted because it was considered the appropriate time to substitute the then existing Legislative Council with a Legislative Council and a Legislative Assembly. The preamble therefore records the establishment of a bicameral Parliament in Western Australia. Applying Professor Roach's distinction, the current preamble of the *Constitution Act 1889* (WA) can therefore be classified as a narrative preamble.

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preamble if a new preamble, which included a statement of recognition, was to be inserted in the Constitution: Submission No. 5 from Professor Anne Twomey, 7 January 2015, p. 2.

193 Submission No. 5 from Professor Anne Twomey, 7 January 2015, p. 1.

194 See paragraph 2.11 above.

195 Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill Law Journal 129, p. 144.

196 ibid p. 151.

4.84 In the case of the Farrer Bill, it is apparent that the two paragraphs it proposes inserting into the preamble (see 2.11 above) have both narrative and aspirational aspects.

4.85 The first paragraph which the Farrer Bill proposes to insert is narrative in that it recounts Western Australia's accession as an Original State of the Commonwealth. The second paragraph can be read as essentially aspirational in that it acknowledges the Aboriginal peoples of Western Australia and confirms that the Parliament seeks to effect a reconciliation. The second paragraph can also be read as partly narrative in that it implicitly recognises that the Aboriginal peoples of Western Australia inhabited the land which is now known as Western Australia prior to the establishment of the Colony.

4.86 A narrative preamble generally records the events it narrates in chronological order.[197] In this respect, the first paragraph which the Farrer Bill proposes to insert into the preamble could follow the existing preamble as is currently proposed. However, the question could then be asked as to whether the second paragraph is better suited at the start of the preamble.

4.87 After considering this question, the Committee concluded that the second paragraph could be inserted as the Farrer Bill proposes. Although the second paragraph can be read as narrative, it is essentially an aspirational statement in that it is being included to recognise the Aboriginal peoples of Western Australia and to further reconciliation. As an aspirational statement, it is more appropriate that it should follow the narrative.[198] Further, the inclusion of the second paragraph as the Farrer Bill proposes reflects the fact that recognition of Aboriginal peoples occurred after Western Australia became a state.

4.88 In addition, the inclusion of the 'acknowledgement' clause of the second paragraph at the start of the preamble would lead to difficulties about where to place the 'reconciliation' clause. One option would be to include both clauses at the start of the preamble. However, this would result in the 'reconciliation' clause being inserted prior to the current preamble, which would interrupt the narrative. The alternative would be to decouple the 'acknowledgement' and 'reconciliation' clauses and place the acknowledgement clause at the start of the preamble and locate the 'reconciliation' clause at the end of the preamble. This is undesirable because the two clauses are clearly linked, with the constitutional recognition of Aboriginal people being designed to contribute towards and further reconciliation.

197 Mr Peter Quinlan SC, Letter, 25 February 2015, paragraph 13.
198 ibid., paragraph 23(b).

4.89 Therefore, the Committee considers that the Farrer Bill provides an appropriate order for its proposed amendments to the preamble in the *Constitution Act 1889* (WA).

Finding 11

The Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to offer an appropriate order for its proposed amendments to the preamble in the *Constitution Act 1889* (WA).

Should a non-effects clause be included?

4.90 The next issue considered by the Committee was whether to include a non-effects clause. A non-effects clause is a provision which expressly states that the words of recognition do not have any legal effect. As noted in Chapter Three, non-effects clauses have been included in the constitutions of the other Australian states where statements of recognition have been incorporated.

4.91 In Victoria, the non-effects clause provides that Parliament, in its statement of recognition, does not intend to create in any person any legal right or give rise to any cause of action, or to affect the interpretation of the Constitution or any other law of the state.[199] The Queensland provision has similar scope.[200] The New South Wales provision goes further by adding that the statement of recognition does not give any right to review of administrative action.[201] The South Australian provision simply provides that the statement of recognition is not intended to have any legal force or effect.

4.92 The inclusion of non-effects clauses have been criticised for diminishing the significance of the words of recognition. The consultations of the Department of Aboriginal Affairs have revealed that such disclaimers may detract from the symbolic nature of recognition.[202] Professor George Williams states in his submission that such clauses have 'undermined Indigenous support, in part because of a perception that this constrained form of recognition is insincere'.[203] The question for the Committee is whether a non-effects clause should be included because such a clause will prevent the statement of recognition from having a legal operation it is not intended to have. This required the Committee to consider:

199 Section 1A *Constitution Act 1975* (Vic).
200 Section 3A *Constitution of Queensland 2001* (Qld).
201 Section 2(3) *Constitution Act 1902* (NSW)
202 Submission No. 12 from the Department of Aboriginal Affairs, 16 February 2015, p. 5.
203 Submission No. 1 from Professor George Williams AO, 18 December 2014, p. 2.

1. whether a non-effects clause is required to achieve the intended result that the words of recognition will not have substantive legal effect; and

2. whether a non-effects clause would have efficacy in practice.

Is a non-effects clause required?

4.93 In the case of the Farrer Bill, the Committee considers that a non-effects clause would be unnecessary, given the modest wording proposed. From a legal perspective, the key terms used in the Farrer Bill are 'First Peoples', 'traditional custodians' and 'reconciliation'. The Committee is satisfied that these are not terms that would ordinarily give rise to legal rights. However, the Committee notes that the Department of Aboriginal Affairs has cautioned that words such as 'custodians' and 'reconciliation' could be open to interpretation.[204]

4.94 When a court came to interpreting the meaning of these key terms, it would no doubt attribute significance to the fact they appear in a preamble. For this reason, a court would presume that the words were not intended to create any substantive legal effect. Further, if the court identified any ambiguity regarding whether the Parliament intended to create legal effects by including those words, the court would be able to consider those extrinsic materials identified by section 19(2) of the *Interpretation Act 1984* (WA).

4.95 The materials identified by section 19(2) of the *Interpretation Act 1984* (WA) include the Explanatory Memorandum to the Bill and any relevant report of a committee of Parliament. In resolving any ambiguity as to whether the statement of recognition in the Farrer Bill was intended to have substantive legal effect, the court would have regard to the Explanatory Memorandum to the Farrer Bill and to this report of the Committee.

4.96 The Explanatory Memorandum to the Farrer Bill identifies that the advice of the Solicitor General was sought in 2004 as to whether any legal consequences flowed from inserting the same statement of recognition now included in the Farrer Bill. The advice of the then Solicitor General, Mr Robert Meadows QC, which is set out in the Explanatory Memorandum, was as follows:

> *I do not believe that an amendment to the preamble in these terms would have any significant legal consequences. I would see it as principally a statement of historical fact.*[205]

204 Submission No. 12 from the Department of Aboriginal Affairs, 16 February 2015, p. 4.

205 Explanatory Memorandum, Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (WA).

4.97 The Explanatory Memorandum records that the advice from the Solicitor General also stated:

> *In terms of its constitutional significance, it could only be relevant to the extent that it might be the foundation for some implied limitation on the legislative power of the Parliament. However, I find it difficult to see how any limitation of substance could be constructed from such a provision.*[206]

4.98 The Explanatory Memorandum therefore makes it plain that the intention of the Farrer Bill was that the proposed statement of recognition was not to have substantive legal effect. The Committee is also of the view that the proposed statement of recognition is not intended to have any legal effect and the analysis in this report demonstrates that it was a critical concern of the Committee that any statement of recognition should not have substantive legal effects. The extrinsic materials make it amply clear that the proposed statement of recognition is not intended to have any substantive legal effects.

Would a non-effects clause have efficacy in practice?

4.99 In the case of the Farrer Bill, the process of interpretation set out in the *Interpretation Act 1984* (WA) should lead a court to be amply satisfied that there are no substantive legal effects from the words of recognition proposed. A non-effects clause would thus be superfluous where a court is following the orthodox approach to statutory interpretation. The only case in which a non-effects clause might become relevant is if a judge was determined to ignore the clear intention of Parliament as confirmed by the extrinsic materials and find some substantive legal effect in the words of the preamble.

4.100 While on an orthodox approach to statutory interpretation a non-effects clause should operate according to its terms,[207] if a judge were determined to ignore the clear intention of Parliament as evident from the extrinsic materials one would expect that the judge would also impose a strained interpretation upon the non-effects clause so as to avoid its operation. For example, the Victorian and South Australian non-effects clauses state that the Parliament 'does not intend' that the words of recognition give rise to legal consequences. A judge might conclude that the words of recognition did give rise to legal consequences even though the Parliament did not intend them to do so.

206 Explanatory Memorandum, Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (WA).

207 Mr Peter Quinlan SC, Letter, 11 February 2015, paragraphs 66-69.

4.101 No matter how careful the wording of a non-effects clause, a judge who is prepared to ignore the clear intention of Parliament would find a way around it. The only ways to effectively remedy the approach of a judge is for the judge's decision to be overturned on appeal or for the Parliament to legislate to clarify the legal position in response to the judge's decision. It follows that the Committee considers that a non-effects clause would not be efficacious.

4.102 On this basis, the Committee considers that a non-effects clause would be either superfluous or ineffective and, given its detrimental effect on the spirit of the process, should not be incorporated into a statement of recognition such as that proposed in the Farrer Bill.

Finding 12

The Committee finds that a non-effects clause should not be incorporated into any statement of recognition similar in form to that proposed in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, as such a clause would either be superfluous or ineffective.

Finding 13

The incorporation of a non-effects clause into any statement of recognition similar in form to that in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 would undermine the spirit in which the statement of recognition is made.

Should section 42 of the *Constitution Act 1889* (WA) be deleted?

4.103 The Committee notes that the Farrer Bill proposes that section 42 of the *Constitution Act 1889* (WA) should be deleted.

4.104 While arguably outside its terms of reference, the proposed repeal of section 42 has nonetheless been the subject of Committee deliberations and the following observations are offered for Parliament's consideration.

4.105 The sole purpose of section 42 of the *Constitution Act 1889* (WA) is to specify the date when Part III of the Act comes into operation. Part III in fact commenced operation on 18 October 1893.[208] Section 42 is therefore wholly spent. The repeal of section 42 would not undo the operation of section 42 in specifying the date when Part III commenced due to section 37(1)(b) of the *Interpretation Act 1984* (WA). Section 37(1)(b) provides that the repeal of an enactment does not affect the previous operation of the enactment.[209] The

208 *Government Gazette*, 18 July 1893 p. 727.

209 'Enactment' is defined in section 5 of the *Interpretation Act* to mean "a written law or any portion of a written law".

Committee cannot identify any legal consequence which flows from the repeal of section 42. It would now appear to be only of historical interest.

4.106 The reason why it is seen as desirable to repeal section 42 in the context of providing for Aboriginal constitutional recognition is that section 42 provided that in calculating the population of the Colony of Western Australia, the 'aboriginal natives' of Western Australia were to be excluded. The Parliamentary debates surrounding the introduction of what became section 42 make no reference as to why this approach to the population's head count was adopted.[210] Whatever the reason, it is seems no longer appropriate for such an exclusionary provision to remain on the statute books.

4.107 The removal of section 42 from the *Constitution Act 1889* (WA) has the explicit support of the Department of Aboriginal Affairs and the Yamatji Marlpa Aboriginal Corporation.[211] Support for the removal of section 42 was also implicit in the submissions from Reconciliation WA and The Law Society of Western Australia, both of which endorsed the Farrer Bill.[212] There were no submissions which recommended the retention of section 42. The Committee also sees merit in the removal of section 42 from the *Constitution Act 1889* (WA) noting that such a provision is not consistent with the spirit of reconciliation inherent in a statement of recognition by the Parliament. The deletion of section 42 may make desirable some consequential amendments (for example, the deletion of section 43, which is also spent).

4.108 The submission of the Yamatji Marlpa Aboriginal Corporation suggested that the definition of 'Aborigines Protection Board' in section 75 of the *Constitution Act 1889* (WA) should also be deleted.[213] The note in the current version of the Act to the definition of the 'Aborigines Protection Board' records that the reference to that term was used only in section 70 of the Act. Section 70 of the *Constitution Act 1889* (WA) was repealed in 1905. The note also records that the *Aborigines Protection Act 1886* (WA) was repealed by the *Statute Law Revision Act 1964* (WA). The definition of 'Aborigines Protection Board' in section 75 is therefore now entirely redundant. Again, the Committee sees merit in the removal of the definition of the 'Aborigines Protection Board' from section 75.

210 Legislative Council, Colony of Western Australia, *Parliamentary Debates* (Hansard), 27 March 1889, pp. 156-158.

211 Submission No. 12 from the Department of Aboriginal Affairs, 16 February 2015, p. 2; Submission No. 7 from Yamatji Marlpa Aboriginal Corporation, 16 January 2015, p. 2.

212 Submission No. 11 from Reconciliation WA, 5 February 2015, p. 2; Submission No. 9 from the Law Society of Western Australia, 29 January 2015, p. 2.

213 Submission No. 7 from the Yamatji Marlpa Aboriginal Corporation, 16 January 2015, p. 2.

4.109 While the Committee sees merit in the deletion of section 42 and the definition of the 'Aborigines Protection Board' from the defined terms in section 75, it acknowledges that recommendations to this end may be beyond the remit of its terms of reference. Accordingly, it has opted to articulate its position in a finding so that Parliament may still consider the matter when it debates any proposal seeking constitutional recognition of Aboriginal peoples.

Finding 14

The Committee considers that section 42 of the *Constitution Act 1889* (WA) ought to be deleted.

The Committee considers that the definition of 'Aborigines Protection Board' as it currently appears in section 75 of the *Constitution Act 1889* (WA) should also be deleted.

The continued presence of these spent provisions within the *Constitution Act 1889* (WA) would be inappropriate and inconsistent with the spirit of reconciliation inherent in a statement of recognition by the Parliament.

Chapter 5

Committee Conclusions

5.1 This Committee has been formed in order to consider and report on the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia.

5.2 The Committee has established that references to the Constitution of Western Australia in this context are taken to mean the *Constitution Act 1889* (WA).

5.3 The Committee has considered a variety of approaches whereby overseas and Australian polities have amended their constitutions to include statements of recognition of their indigenous peoples. From this examination, as noted at 4.8 above, the Committee selected as a suitable starting point and point of reference for its considerations the text contained in the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (the Farrer Bill).

5.4 The Farrer Bill proposes inserting the following words immediately after the first sentence in the *Constitution Act 1889* (WA):

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

5.5 Relative to other proposals, this is a modest, uncomplicated, but nonetheless symbolically significant statement. It is unlikely to generate substantial controversy and is arguably, the most widely consulted and supported proposal for constitutional recognition undertaken in Western Australia to date.

5.6 Through a detailed analysis in Chapter Four, the Committee has examined a range of legal and legislative issues that need to be considered when contemplating a Bill that

proposes the recognition of Aboriginal peoples in the state's Constitution. It notes that the Farrer Bill appears to be one such option available to Parliament where the risks of unintended consequences are negligible.

5.7 Were Parliament to contemplate the Farrer Bill as its preferred option, the Committee would encourage the adoption of a minor alteration. In the second paragraph of the statement, the Committee would suggest that the term, 'And whereas the Houses of the Parliament resolve', be replaced with, 'And whereas the Parliament resolves'. In the Committee's view, this slight change reads better with the term 'the said Parliament' which follows later in the same sentence.

Finding 15

The Committee has examined a range of legal and legislative issues that need to be considered when contemplating a Bill that proposes recognising Aboriginal peoples in the state's Constitution. It notes that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to be one such option available to Parliament where the risks of unintended legal consequences are negligible.

Finding 16

Were Parliament to contemplate the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 as its preferred option, the Committee believes the following minor alteration is worthy of consideration:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

Recommendation 1

The Committee recommends the following as an appropriate form of words for insertion at the end of the preamble of the *Constitution Act 1889* (WA) after the word 'contained':

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

Recommendation 2

The Committee recommends that Parliament use the findings of this report in considering any bill proposing to recognise Aboriginal peoples in the *Constitution Act 1889* (WA), noting that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 appears to be an option available to the Parliament.

5.8 The Committee members are honoured to have had the opportunity to participate in this Inquiry and commend this report to the Parliament.

HON MICHAEL MISCHIN, MLC
(ATTORNEY GENERAL; MINISTER FOR COMMERCE)
COMMITTEE CHAIR

Appendix One

Inquiry Terms of Reference

The Committee's terms of reference, composition, functions and powers were confirmed in Message No. 70 dated 2 December 2014 from the Legislative Council in the following terms:

That in response to Legislative Assembly Message No. 89, the Legislative Council agrees to the following resolution —

> *(1) That a Joint Select Committee of the Legislative Council and Legislative Assembly be established to consider and report on the appropriate wording to recognise Aboriginal people in the constitution of Western Australia.*
>
> *(2) That the Joint Select Committee consist of seven members —*
>
> *(a) three will be members of the Council; and*
>
> *(b) four will be members of the Assembly.*
>
> *and of those seven members —*
>
> *(a) two will be members of the Liberal Party;*
>
> *(b) two will be members of the National Party;*
>
> *(c) three will be members of the Australian Labor Party.*
>
> *(3) The Standing Orders of the Legislative Assembly relating to Standing and Select Committees will be followed as far as they can be applied.*
>
> *(4) That the Joint Select Committee report to both Houses by 26 March 2015.*
>
> (5)*That the following Members are appointed to the Joint Select Committee on Aboriginal Constitutional Recognition —*
>
> - *Hon Attorney General;*
> - *Hon Jacqui Boydell; and*
> - *Hon Sally Talbot.*
>
> *and that the Legislative Assembly be acquainted accordingly.*

Appendix Two

Submissions Received

Name	Position	Organisation
Professor George Williams AO	Anthony Mason Professor	University of NSW Faculty of Law
Mr Lawrence Thomas	Chairperson	Goldfields Land and Sea Council
Mr Terry Grose	Chairperson	Central Desert Native Title Services
Hon Fred Chaney AO		
Professor Anne Twomey	Professor of Constitutional Law	University of Sydney
Mr Greg McIntyre SC	President	International Commission of Jurists (WA Branch)
Mr Simon Hawkins	Chief Executive Officer	Yamatji Marlpa Aboriginal Corporation
Professor Marion Kickett	Director	Curtin University Centre for Aboriginal Studies
Mr Matthew Keogh	President	The Law Society of Western Australia
Mr Matthew Howard SC	Vice President	Western Australian Bar Association
Mr James Back	Executive Officer	Reconciliation WA
Mr Cliff Weeks	Director General	Department of Aboriginal Affairs (WA)

Appendix Three

Expert Panel on Constitutional Recognition of Indigenous Australians – Recommended Statement of Recognition

Recommendation No. 3 of the Expert Panel in its Final Report[214]**:**

That a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

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

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

214 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 16 January 2012, p. xviii.

Appendix Four

Constitution Act 1975 (Victoria) – Relevant Amendments

Amendments incorporated following passage of Constitution (Recognition of Aboriginal People) Bill 2004 on 9 November 2004:

New Section 1A inserted:

1A. Recognition of Aboriginal people

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

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

a. have a unique status as the descendants of Australia's first people; and

b. have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

c. have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section –

a. to create in any person any legal right or give rise to any civil cause of action; or

b. to affect in any way the interpretation of this Act or of any other law in force in Victoria.

Note: Section 18(2) was also amended to entrench the new Section 1A so that it could not be repealed, altered, or varied without the support of a three-fifths majority of both the Legislative Assembly and Legislative Council at the third reading stage of any proposed amendment bill.

Appendix Five

Constitution of Queensland 2001 (Queensland) – Relevant Amendments

Amendments incorporated following passage of Constitution (Preamble) Amendment Bill 2009 on 25 February 2010:

Preamble inserted after long title:

Preamble –
The people of Queensland, free and equal citizens of Australia –

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

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

c) *honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community; and*

d) *determine to protect our unique environment; and*

e) *acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and*

f) *resolve, in this the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.*

New Section 3A inserted:

3A Effect of preamble
The Parliament does not in the preamble –

a) *create in any person any legal right or give rise to any civil cause of action; or*

b) *affect in any way the interpretation of this Act or of any other law in force in Queensland.*

Appendix Six

Constitution Act 1902 (NSW) – Relevant Amendments

Amendments incorporated following passage of Constitution Amendment Bill (Recognition of Aboriginal people) Bill 2010 on 25 October 2010:

Former Section 2 repealed and replaced with:

2 Recognition of Aboriginal people

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

(2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:

a. have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and

b. have made and continue to make a unique and lasting contribution to the identity of the State

(3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

Appendix Seven

Constitution Act 1934 (SA) – Relevant Amendments

Amendments incorporated following passage of Constitution (Recognition of Aboriginal peoples) Amendment Bill 2013 on 28 March 2013:

Section 2 inserted:
2 Recognition of Aboriginal peoples

(1) The Parliament on behalf of the people of South Australia acknowledges that—

a) the Parliament of the United Kingdom in 1834 passed a Bill called An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonisation and Government thereof and that by Letters Patent dated 19 February 1836 His Majesty established the Province of South Australia; and

b) the making of the above instruments and subsequent constitutional instruments providing for the governance of South Australia and for the making of laws for peace, order and good government occurred without proper and effective recognition, consultation or authorisation of Aboriginal peoples of South Australia.

(2) Following the Apology given on 28 May 1997, the Parliament, on behalf of the people of South Australia –

a) acknowledges and respects Aboriginal peoples as the State's first peoples and nations; and

b) recognises Aboriginal peoples as traditional owners and occupants of land and waters in South Australia and that

i. their spiritual, social, cultural and economic practices come from their traditional lands and waters; and
ii. they maintain their cultural and heritage beliefs, languages and laws which are of ongoing importance; and
iii. they have made and continue to make a unique and irreplaceable contribution to the State; and

c) acknowledges that the Aboriginal peoples have endured past injustice and dispossession of their traditional lands and waters.

(3) The Parliament does not intend this section to have any legal force or effect.

Appendix Eight

Legal Opinions Provided to the Committee (11 and 25 February 2015)

OPINION

JOINT SELECT COMMITTEE ON ABORIGINAL CONSTITUTIONAL RECOGNITION

Introduction

1. My opinion is sought in relation to a number of issues concerning the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2014 (WA), a Bill introduced into the Legislative Assembly of the Western Australian Parliament on 11 June 2014 ("the *Recognition Bill*").

2. Before identifying the issues the subject of my advice, it is convenient to set out the background.

Background

3. The *Recognition Bill*, the provisions of which are set out below, proposes certain amendments to the *Constitution Act* 1889 (WA) intended to acknowledge the Aboriginal peoples as the First Peoples of Western Australia. The *Recognition Bill* does this by amendment of the preamble to the *Constitution Act* 1889.

4. The *Recognition Bill*, in recognising Aboriginal peoples, follows similar recognition of Aboriginal peoples in the Constitutions of other Australian States including by the *Constitution (Recognition of Aboriginal People) Act* 2004 (Vic), the *Constitution (Preamble) Amendment Act* 2010 (Qld), the *Constitution Amendment (Recognition of Aboriginal People) Act* 2010 (NSW) and the *Constitution (Recognition of Aboriginal Peoples) Amendment Act* 2013 (SA). Similar proposals at a Commonwealth level are currently under consideration by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, appointed by the Commonwealth Parliament on 28 November 2012.

5. The operative provisions of the *Recognition Bill* are brief and may be set out in full. The *Recognition Bill* provides:

Constitution Amendment (Recognition of Aboriginal People) Bill 2014

A Bill for

An Act to amend the *Constitution Act 1889*.

The Parliament of Western Australia enacts as follows:

1. Short title

This is the *Constitution Amendment (Recognition of Aboriginal People) Act 2014*.

2. Commencement

This Act comes into operation on the day on which it receives the Royal Assent.

3. Act amended

This Act amends the *Constitution Act 1889*.

4. Preamble amended

(1) In the Preamble delete "contained:" and insert:

contained;

(2) At the end of the Preamble insert:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chose by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

5. Section 42 deleted

Delete section 42.

6. The questions posed for my consideration are:

1. Whether the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2014 can be enacted following the passage of the Bill by simple majority through both Houses of Parliament or whether any special procedure is required (for example, by s 73 of the *Constitution Act* 1889 read with section 6 of the *Australia Act* 1986 (Cth))?

2. What is the nature and extent of the legal implications, if any, of the proposed amendment to the preamble? In particular, please address the legal implications for any other Western Australia legislation, the operation of native title law (of Western Australia and the Commonwealth) and pastoral leases.

3. How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a stand-alone section in the *Constitution Act* 1889 (for example, as a new s 1)?

4. How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a schedule to the *Constitution Act* 1889?

5. What is the legal efficacy of 'non-effects' clauses such as section 1A(3) of the *Constitution Act* 1975 (Vic), both in respect of interpretation and the limitation of the creation of any legal rights? How would such a clause affect the legal implications that you have identified in answering questions 2, 3 and 4?

6. What would be the effect of the deletion of s 42 of the *Constitution Act* 1889? In particular, please address whether s 42 has any impact, substantive or interpretative, on any other parts of the *Constitution Act* 1889 or *Constitution Acts Amendment Act* 1899.

7. If s 42 of the *Constitution Act* 1889 were deleted, would it need to be replaced and, if so, by what? Would this replacement be able to be achieved by passage of a Bill by simple majority through both Houses of Parliament?

8. Are there any other matters within the Committee's terms of reference that are not addressed within these questions that you think should be pursued?

7. Before turning to these questions, it is necessary to say something, briefly, in relation to the *Constitution Act* 1889 generally.

***Constitution Act* 1889 (WA)**

8. The *Constitution Act* 1889 has been described, in the High Court of Australia, as the "keystone of the present constitution of Western Australia"[1].

9. The *Constitution Act* 1889, which initially appeared as the first schedule to an Imperial Statute, the *Western Australia Constitution Act* 1890 (Imp), provided for representative and responsible government of the Colony of Western Australia. Following the enactment of the Commonwealth *Constitution*, of course, the former colonies continued as new elements of the Federal polity, namely States, and the Constitution of each State continued as at the establishment of the Commonwealth, subject to the Commonwealth *Constitution* itself: see Commonwealth *Constitution*, s.106.

10. While the constitution of Western Australia is to be ascertained by reference to a number of instruments, including the overriding effect of the *Commonwealth Constitution* and the *Australia Act* 1986 (Cth), it remains true to say that the *Constitution Act* 1889 is the keystone of the constitution of Western Australia.

11. In that regard, and subject always to the terms of the *Commonwealth Constitution* and the *Australia Act* 1986 (Cth), the form of the *Constitution Act* 1889, remains a matter for the State of Western Australia and, in particular for the Parliament of Western Australia, subject to compliance with certain special procedures for its amendment.

12. The principal provision for the amendment of the *Constitution Act* 1889 is s.73. Section 73, relevantly, provides:

> ***73. Legislature as constituted by this Act empowered to alter any of its provisions***
>
> (1) Subject to the succeeding provisions of this section, the Legislature of the Colony shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act. Provided always, that it shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed

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1 *Western Australia v Wilsmore* (1982) 149 CLR 79 per Wilson J at 93; *Yougarla v Western Australia* (2001) 207 CLR 344 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at [2].

with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively. Provided also, that every Bill which shall be so passed for the election of a Legislative Council at any date earlier than by Part III provided, and every Bill which shall interfere with the operation of sections 69, 70, 71, or 72, or of Schedules B, C, or D, or of this section, shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon.

(2) A Bill that —

(a) expressly or impliedly provides for the abolition of or alteration in the office of Governor; or

(b) expressly or impliedly provides for the abolition of the Legislative Council or of the Legislative Assembly; or

(c) expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people; or

(d) expressly or impliedly provides for a reduction in the numbers of the members of the Legislative Council or of the Legislative Assembly; or

(e) expressly or impliedly in any way affects any of the following sections of this Act, namely —

sections 2, 3, 4, 50, 51 and 73,

shall not be presented for assent by or in the name of the Queen unless —

(f) the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively; and

(g) the Bill has also prior to such presentation been approved by the electors in accordance with this section,

and a Bill assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.

13. It should be noted that, by reason of s.9(2) of the *Australia Act* 1986 (Cth), the final sentence in s.73(1), requiring reservation by the Governor for signification of Her Majesty's Pleasure on certain Bills, is no longer of any force or effect.

14. The special procedures provided for in the second sentence of s.73(1), namely the requirement for absolute majorities in the case of Bills changing the Constitution of either House of Parliament, and the special procedures provided for in s.73(2),

however, continue to affect the power of the Parliament to repeal or alter any of the provisions of the *Constitution Act* 1889.

15. Various sources for the binding effect of the special procedures set out in s.73 of the *Constitution Act* 1889 have been identified[2]. For present purposes, however, it is sufficient to note that those procedures are, at least, given force by s.6 of the *Australia Act* 1986 (Cth), which was passed with the request and consent of each of the States. Section 6 of the *Australia Act* 1986 (Cth) provides:

> **Manner and form of making certain State laws**
>
> **6.** Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

16. In light of this background I now turn to the questions posed of me.

Whether the *Constitution Amendment (Recognition of Aboriginal People) Bill 2014* can be enacted following the passage of the Bill by simple majority through both Houses of Parliament or whether any special procedure is required (for example, by s 73 of the *Constitution Act 1889* read with section 6 of the *Australia Act 1986* (Cth))?

17. In my view the answer to this question is clear. In its current form, the *Recognition Bill* can be enacted following its passage by simple majority through both Houses of Parliament. No special procedure is required for its enactment.

18. The reasons for this are as follows.

19. As is apparent from the opening words of s.73(1) of the *Constitution Act* 1889, the legislature has full power and authority from time to time, by any Act, to repeal to alter any of the provisions of the *Constitution Act* 1889. This general legislative competence is reflected in the principal lawmaking power in the *Constitution Act*

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2 See *Attorney General (Western Australia) v Marquet* (2003) 217 CLR 545 per Gleeson CJ, Gummow, Hayne and Heydon JJ at [80].

1889, namely the power, in s.2, for the Parliament to "make laws for the peace, order, and good government of the colony of Western Australia".

20. It is clearly established that the power to make laws for the "peace, order and good government" of the State are not words of limitation and are intended, subject to any other limitations of grant, to confer plenary power in the widest possible terms[3].

21. That plenary power, as stated above, is subject to special procedures in the case of certain amendments referred to in s.73 of the *Constitution Act* 1889. In my view, however, the amendments proposed by the *Recognition Bill* do not fall within any of the circumstances requiring a special procedure identified in either s.73(1) or s.73(2).

22. In particular, the amendment of the preamble to the *Constitution Act* 1889 proposed by the *Recognition Bill* and the repeal of s.42 of the *Constitution Act* 1889 would not effect any change to the Constitution of the Legislative Council or of the Legislative Assembly (as provided for in s.73(1)) or otherwise affect those chambers, or the office of Governor (as provided for in s.73(2)(a), (b), (c) or (d)).

23. The only subsection which might *potentially* be engaged by the *Recognition Bill* is s.73(2)(e), which applies to any Bill which expressly or impliedly in any way affects ss.2, 3, 4, 50, 51 and 73.

24. In that regard, ss.50 and 51 of the *Constitution Act* 1889 concern the office of the Governor are not relevant and may be put to one side.

25. The other sections referred to, ss.2, 3 and 4 of the *Constitution Act* 1889, concern the powers and sessions of the Houses of Parliament. Sections 3 and 4 of the *Constitution Act* 1889 concern the sessions of Parliament and may also be put to one side.

---

[3] See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 per the Court at 9. The breadth of the State's legislative power is further confirmed by s.2(2) of the *Australia Act* 1986 (Cth) which declares that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of that Act.

26. As noted above, it is s.2 of the *Constitution Act* 1889 that confers upon the Parliament its plenary legislative power. Accordingly, were it intended, by an amendment providing for Aboriginal recognition, to affect the legislative powers of the Parliament, for example, so as to limit those powers in some way, s.73(2) of the *Constitution Act* 1889 would require that the special procedure, including approval by the electors, be followed.

27. However, in my view it is not possible to discern such an intention in the *Recognition Bill*. That is, the *Recognition Bill* does not, in my view, reveal any intention to affect, change or limit the legislative powers of the Parliament. It, therefore, does not fall within the scope of s.73(2)(e).

28. Indeed passage of the *Recognition Bill* by simple majority would, itself, in my view, reinforce an interpretation of the amendments such that they are to be taken *not* to affect the legislative power of the Parliament. In that regard there is a general rule of statutory construction that presumes that Parliament does not intend to pass legislation beyond constitutional bounds, and that legislative should be interpreted so as to be consistent with this presumption (see *Federal Commissioner of Taxation for Munroe; British Imperial Oil Co Limited v Federal Commissioner of Taxation* (1926) 38 CLR 153 per Isaacs J at 180; Pearce & Geddes, Statutory Interpretation in Australia, 8th Ed, 2014 at [2.42], [5.8]).

29. Given that any Bill intended to affect the legislative powers of the Parliament would require passage via a special procedure, an amendment of the *Constitution Act* 1889 which did not follow that special procedure would be presumed not to have that intention. Such would be the case if the *Recognition Bill* were passed in accordance with ordinary legislative procedures. That is, in my view, any argument that the *Recognition Bill* did affect the State's legislative power would not succeed, including for the reason that the special procedure in s.73(2) was not followed.

30. Finally, it should be noted that s.73 itself is included within the sections requiring a special procedure for its amendment. This results in a "double entrenchment" whereby the special procedures in s.73 cannot be avoided by simply first amending

s.73 by ordinary procedures so as to remove those special procedures. What this, in turn, means is that legislation to "entrench" any further provisions of the *Constitution Act* 1889 (so as to require special procedures for their removal), would themselves have to comply with the special procedure in s.73(2) (insofar as the special procedure was binding by reason of, e.g., s.6 of the *Australia Act* 1986 (Cth)).

31. Accordingly, were it proposed to "entrench" any recognition of Aboriginal peoples in the *Constitution Act* 1889 (that is, so as to require a special procedure for its removal by a future Parliament), by an amendment of s.73, it would be necessary to follow the special procedure. Even in that case, issues may arise as to whether a future law seeking to further amend the preamble would, in any event, be a law respecting the "constitution, powers or procedure" of the Parliament of the State, so as to engage the binding force of the *Australia Act* 1986 (Cth).

32. This issue does not arise, however, as no such "entrenchment" is proposed by the *Recognition Bill*. That is, the preamble if amended by the *Recognition Bill* could in future be further amended by legislation passed by simple majority of each House of Parliament.

What is the nature and extent of the legal implications, if any, of the proposed amendment to the preamble? In particular, please address the legal implications for any other Western Australia legislation, the operation of native title law (of Western Australia and the Commonwealth) and pastoral leases.

33. The preamble to an Act, of course, forms part of the Act and "shall be construed as a part thereof intended to assist in explaining its purport and object" (*Interpretation Act* 1984, s.31(1)). This principle of interpretation applies to the *Constitution Act* 1889 (WA).

34. Nevertheless, for the reasons which follow, in my view, beyond the recognition and acknowledgement of Aboriginal Peoples expressed by the preamble, there would be few, if any, legal implications of the proposed amendment to the preamble. In this regard, it is difficult to envisage any substantive effect upon the powers of the

Parliament, other Western Australian legislation, the operation of native title law or pastoral leases.

35. Any potential legal implications of the proposed amendment may be broadly considered under two headings:

    (a) effects on the legislative power of the State; and

    (b) effects on the interpretation of legislation,

    I have considered each of these in turn.

Effect on Legislative Power

36. In relation to the legislative power of the State, in my view, the proposed amendment to the preamble would have no effect on the legislative power of the State. This is, essentially, for two reasons.

37. First, as stated above, any amendment to the *Constitution* Act 1889 which, expressly or impliedly, limited the legislative powers of the Parliament, would have to be passed in accordance with the special procedure prescribed by s.73(2) of the *Constitution Act* 1889. Accordingly, were the *Recognition Bill* passed by simple majorities, Parliament will have been presumed not to have limited it legislative powers.

38. Secondly, the proposed wording of the amendment to the preamble, in my view, could not in any event sensibly be construed so as to give rise to any implied limitation of legislative power.

39. In this regard, it is important to recognise that the proposed amendments would be to the preamble of a Constitution. As such, while the *Constitution Act* 1889 is to be interpreted according to its ordinary and natural meaning as with any other piece of legislation, certain broad principles of constitutional interpretation are applicable to it. For example in *Jumbunna Coal Mine NL v Victorian Coalminers Association* (1908) 6 CLR 309, O'Connor J articulated the following principle of constitutional interpretation, which has been frequently approved and applied by the High Court:

> "[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution is used in expression in a wider or in the narrower sense, the court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrow interpretation will best carry out its object and purpose."[4]

40. In addition, where a suggested implication is structural rather than textural, the terms sought to be implied in a Constitution must be logically or practically necessary for the preservation of the integrity of that structure: see *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 per Mason CJ at 135; *McGinty v Western Australia* (1996) 186 CLR 140 per Brennan CJ at 168-169.

41. In my view, no implication, limiting the power of the Parliament, can be discerned in the text or structure of the proposed amendment to the preamble (or the *Constitution Act* 1889 generally, if so amended). It is, on its face, simply a statement of historical and social fact in relation to Aboriginal peoples (as indeed, the proposed amendments include the historical fact of Western Australia's accession as a State of the Commonwealth) and an expression of aspiration to reconciliation on the part of the Parliament.

42. In the face of the clear, plain and accepted meaning of the grant of legislative power in s.2 of the *Constitution Act* 1889, these statements in the preamble would not operate so as to impliedly limit the legislative power of the State[5].

43. In this context, it may be noted that the potential effect on the scope of legislative power of the Parliament of Western Australia are markedly different to those which might arise in the context of the Commonwealth *Constitution*, where the legislative

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4 *Jumbunna Coal Mine NL v Victorian Coalminers Association* (1908) 6 CLR 309, O'Connor J at 367-368 (see also the *Tasmanian Dam Case* (1983) 158 CLR 1 at 128; *McGinty v Western Australia* (1996) 186 CLR 140 per McHugh J at 231.

5 See *Bowtell v Goldsbrough Mort & Co Ltd* (1906) 3 CLR 444 per Griffith CJ at 451; *Wacando v The Commonwealth* (1981) 148 CLR 1 per Gibbs CJ at 15-16, Mason J at 23.

power of the Commonwealth is conferred by reference to specific enumerated subject matters and legal persons (principally by s.51). In that context, changes to the *Constitution* as a whole might more easily affect the interpretation of the scope of those subject matters, than in the case of the *Constitution Act* 1889 where legislative power is not generally confined by reference to subject matters. In addition, at the Commonwealth level, the preamble to the *Constitution* may only be amended by referendum (in accordance with s.128), whereas the preamble to the *Constitution Act* 1889 may be amended by ordinary parliamentary procedures.

Effects On The Interpretation Of Legislation

44. In relation to potential "interpretive" effect of the proposed amendments to the preamble, it might be argued, consistently with s.31 of the *Interpretation Act* 1984, that the amendments to the preamble in *Constitution Act* 1889 could be called in aid "to assist in explaining its purport and object". However, given the nature of the *Constitution Act* 1889, for the reason given above, I do not consider that the amendments to the preamble would result in any different interpretation of the provisions of the *Constitution Act* 1889 itself.

45. It might, nevertheless, also be argued that the recognition of Aboriginal peoples in the preamble might in future become a broader "contextual" consideration to be taken into account in the interpretation of other Acts of Parliament and subsidiary legislation. Given that the recognition of Aboriginal peoples in the preamble to the *Constitution Act* 1889 would be intended to be a genuine act of recognition and reconciliation reflected in the State's keystone constitutional instrument, that recognition might be capable of being regarded as part of the legal matrix in which Western Australian legislation is intended to operate.

46. For example, Kirby J in *Northern Territory v Arnhem Land Trust* (2008) 236 CLR 24 at [70]-[72] held that it was appropriate for the High Court of Australia to take judicial notice of the National Apology provided to the Indigenous Peoples of the Commonwealth in the Commonwealth House of Representatives on 13 February 2008. In that case, which was concerned with the interpretation of certain

Northern Territory legislation, Kirby J stated that the National Apology was not legally irrelevant to the task in hand in that case and "constitutes part of the factual matrix or background against which the legislation in issue in this appeal should now be considered and interpreted". While Kirby J's approach, in this regard, did not enjoy majority support on the High Court, it does provide an indication of one possible future approach to statutory interpretation.

47. In like manner, it is possible that the courts might, in future, have regard to the proposed amendments to the preamble in interpreting legislation passed by the Parliament of Western Australia, in cases where there is some ambiguity which might be resolved by reference to the preamble.

48. Nevertheless, the potential for such an approach, from a legal point of view, should not be overstated. Indeed, for the reasons which follow, I consider it quite unlikely that the broad statement of principle reflected in the proposed amendments to the preamble would ever be likely to be considered, let alone be a decisive consideration, in the interpretation of future legislation.

49. Firstly, the words of legislation passed by the Western Australian Parliament are, ultimately, to be interpreted according to the meaning the legislature is taken to have intended them to have. The principles of statutory construction, for example, are those summarised in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at 384:

> "...the duty of the Court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical constructions, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

50. Ultimately, any future legislation passed by the Parliament of Western Australia will be interpreted in accordance with the language in fact used by the Parliament in that legislation. Given the broad statement of principle reflected in the proposed

amendments to the preamble, it is difficult to see that that statement of principle will have any greater effect upon the interpretation of any specific legislation than that which would be achieved in any event by reference to the particular enactment.

51. For example, the preamble might, theoretically, be called in aid of a principle of interpretation such that legislative provisions should be interpreted so that they are consistent with respect for Aboriginal heritage. However, insofar as such a principle arose, for example in an matter concerning the *Aboriginal Heritage Act* 1972, I would expect such approach to be adopted in any event having regard to the purposes of that legislation. The preamble to the *Constitution Act* 1889 is unlikely to result in any different approach.

52. In *Northern Territory v Arnhem Land Trust*, for example, Kirby J's reference to the National Apology (which in my view reflects the high watermark of the use of extra-legislative instruments in the interpretation of legislation) did not yield any different result to the approach of the other four judges in the majority in that case, (who did not make reference to the National Apology).

53. For these reasons, while the preamble might, theoretically, be called in aid of the interpretation of other legislation, I consider it unlikely to have any substantial effect on such interpretation.

54. The questions posed of me specifically refer to the operation of native title law (of Western Australia and the Commonwealth) and pastoral leases.

55. Ultimately, the operation of native title law, including in relation to pastoral leases, is a matter determined in accordance with the *Native Title Act* 1993 (Cth). Insofar as the State has validly legislated in relation to native title, for example, by the *Native Title (State Provisions) Act* 1999, that legislation will be interpreted in accordance with, and so as to be consistent with the *Native Title Act* 1993 (Cth) (see, e.g. *Native Title (State Provisions) Act* 1999, s.1.5). This is particularly so in light of the overriding effect of the *Native Title Act* 1993 (Cth), brought about by s.109 of the Commonwealth *Constitution* which provides that laws of the Commonwealth prevail

over laws of the States in the event of, and to the extent of, any inconsistency between them.

56. Accordingly, in my view, the proposed amendments to the preamble to the *Constitution Act* 1889 would not have any substantive effect on native title law. Indeed, the preamble to the *Native Title Act* 1993 (Cth) itself, which goes significantly further in its recognition of Aboriginal peoples interests than the amendments proposed by the *Recognition Bill*, would in my view leave no room in the native title context for any interpretive principle to be derived from the amendments proposed to the preamble to *Constitution Act* 1889.

How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a stand-alone section in the *Constitution Act 1889* (for example, as a new s 1)?

57. The nature and extent of any legal implications would not, in my view, be substantially different if the second paragraph that the *Recognition Bill* proposes to include was instead included as a stand-alone section in the *Constitution Act* 1889.

58. Of course, as the sections of Acts of Parliament generally (although not exclusively) are intended to alter the law and affect rights and interests, any argument that the recognition of Aboriginal persons in the *Constitution Act* 1889 affected the law would be strengthened were that recognition included within a section of the *Constitution Act* 1889. Nevertheless, for the reasons set out above, that is in my view a remote prospect and I do not consider that the words reflected in the second paragraph of the proposed amendments to the preamble are likely to have any substantive legal implications (wherever they appear in the *Constitution Act* 1889).

59. From a drafting perspective, as the recognition of Aboriginal peoples is intended be a statement of fact and aspiration, rather than an operative provision, that recognition would, in my view, more appropriately be contained in a preamble in any event.

How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a schedule to the *Constitution Act 1889*?

60. The nature and extent of any legal implications would not, in my view differ if the second paragraph that the *Recognition Bill* proposes to include in the preamble was instead inserted as a Schedule to the *Constitution Act* 1889.

61. A Schedule to an Act is part of the written law (*Interpretation Act* 1984 (WA), s.31(2)). Indeed, it is now commonplace for legislation to include operative provisions in schedules. Accordingly, the view I expressed in relation to the previous question applies equally were the recognition included in a Schedule; that is, it may provide more force to an argument that the recognition of Aboriginal persons affected the law, although ultimately, in my view, it would not do so.

What is the legal efficacy of 'non-effects' clauses such as section 1A(3) of the *Constitution Act 1975* (Vic), both in respect of interpretation and the limitation of the creation of any legal rights? How would such a clause affect the legal implications that you have identified in answering questions 2, 3 and 4?

62. This question raises the legal efficacy of "non-effects" clauses such as s.1A(3) of the *Constitution Act* 1975 (Vic). That subsection provides:

> **"1A Recognition of Aboriginal people**
>
> ...
>
> (3) The Parliament does not intend by this section –
>
> (a) to create in any person any legal right or give rise to any civil cause of action; or
>
> (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria."

63. Similar provisions appear in the Constitutions of the other States that have recognised Aboriginal persons, including where that recognition appears in the

preamble to the Constitution. For example, s.3A of the *Constitution of Queensland* 2001 provides:

> **"3A Effect of preamble**
>
> "The Parliament does not in the preamble –
>
> (a) create in any person any legal right or give rise to any civil cause of action; or
>
> (b) to affect in any way the interpretation of this Act or of any other law in force in Queensland."

64. Section 3A of the *Constitution of Queensland* 2001 is, of course in similar terms to s.1A(3) of the *Constitution Act* 1975 (Vic), the principal difference being that the "non-effect" clause in the *Constitution of Queensland* 2001 applies to *all* aspects of the preamble to *Constitution of Queensland* 2001. In that regard, as with the preamble to the *Constitution Act* 1889 (WA), the preamble to *Constitution of Queensland* 2001 is not limited to the recognition of Aboriginal peoples but deals with other matters such as the representative nature of the Parliament.

65. Given the conclusions I have reached as to any legal implications of the proposed amendments to the preamble and the *Recognition Bill*, "non-effects" clauses such as s.1A(3) of the *Constitution Act* 1975 (Vic) and s.3A of the *Constitution of Queensland* 2001 may well have been included out of an abundance of caution (or, in the case of the latter, in light of the variety of matters dealt with in the preamble). Aside from the legal issue of their effect, I also note that there are differing views as to the appropriateness of "non-effects" clauses, as a matter of policy[6].

66. That being said, those provisions would be legally efficacious and would, in my view, remove any potential for an argument that the proposed amendments to the preamble (or other form of recognition) would affect the interpretation of legislation or create any legal rights. Ultimately, a provision such as a "non-effects" clause, as with any other valid legislation, must be given effect by the courts.

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6 A number of these views are summarised in Anne Twomey (2003) "The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians", 62 *International and Comparative Law Quarterly* 317 at 322.

67. It is a clear rule of statutory construction that the court must strive to give meaning to every clause, sentence or word in a statutory provision (see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at [71]). In this regard a "non-effects" clause would operate according to its terms and, consistent with their constitutional duty, the courts would be bound to give effect to it.

68. In *Momcilovic v The Queen* (2011) 245 CLR 1, French CJ described that constitutional duty in the following terms:

> "[38] Interpretation of a law of the State … by the Supreme Court … is "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws". In that context "[a]scertainment of legislation intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters in the courts". In that way, the duty of the Court defined in *Project Blue Sky Inc v Australian Broadcasting Authority* is discharged "to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have."
>
> [39] There are different ways of undertaking the interpretative task and, in a particular case, they may yield different answers to the same questions. But if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear."

69. Consistent with these principles, in my view, "non-effects" clauses such as those found in s.1A(3) of the *Constitution Act* 1975 (Vic) and s.3A of the *Constitution of Queensland* 2001 are abundantly clear and would remove any potential for an argument that the proposed amendments to the preamble (or other form of recognition of Aboriginal peoples) would affect the interpretation of legislation or create any legal rights.

What would be the effect of the deletion of s 42 of the *Constitution Act 1889*? In particular, please address whether s 42 has any impact, substantive or interpretative, on any other parts of the *Constitution Act 1889* or *Constitution Acts Amendment Act 1899*.

70. Section 42 of the *Constitution Act* 1889 provides:

> "42. Operation
>
> When 6 years shall have elapsed from the date of the first summoning, under section 6, of persons to the Legislative Council, or when the Registrar General of the Colony shall have certified, by writing under his hand to be published in the *Government Gazette*, that the population of the Colony has, to the best of his knowledge and belief, exclusive of aboriginal natives, attained to 60 000 souls, whichever event shall first happen, this Part shall come into operation, provided that the Governor in Council shall have power, by proclamation in the *Government Gazette*, to further postpone the operation of this Part for any periods not exceeding 6 months."

71. Section 42 of the *Constitution Act* 1889, as can be seen, was a transitional provision, in that it identified the commencement date of Part III of the *Constitution Act* 1889. Section 42 ultimately took effect according to its terms and Part III of the *Constitution Act* 1889 commenced on 18 October 1893.

72. Upon the coming into effect of Part III of the *Constitution Act* 1889 certain provisions took effect. For example:

    (a) Provisions relating to the formal process for the appointment of members to the Legislative Council and their resignation ceased to have effect (see *Constitution Act* 1889, s.43(b));

    (b) provision was made for the general election of members to serve in the first elected Legislative Council (*Constitution Act* 1889, s.46; and

    (c) provision was made for the election of a President of the Legislative Council (*Constitution Act* 1889, s.49).

    This final provision has, of course, been overtaken by the effect of s.11 of the *Constitutions Acts Amendment Act* 1899.

73. The operative effect of s.42 of the *Constitution Act* 1889 has now been wholly spent and the section has no further work to do.

74. In my view, repealing s.42 of the *Constitution Act* 1889 would have no effect, substantive or interpretative, on any other parts of the *Constitution Act* 1889 or the *Constitutions Act Amendment Act* 1899. All the other operative provisions of those Acts would continue in operation, according to their terms. In particular, the repeal of s.42 would not, in any way undo the effect that it had, namely the commencement of Part III of the *Constitution Act* 1889. In this respect, were there any doubt about the matter, s.37(1)(b) of the *Interpretation Act* 1984 (WA) clearly provides that where a written law repeals an enactment, the repeal does not affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment[7].

If s 42 of the *Constitution Act* 1889 were deleted, would it need to be replaced and, if so, by what? Would this replacement be able to be achieved by passage of a Bill by simple majority through both Houses of Parliament?

75. If s.42 of the *Constitution Act* 1889 were repealed, it would not need replacement by any substitute provision. As set out above, the provision is now spent and its operative affect (which occurred on 18 October 1893) would not be undone by its repeal.

76. The repeal of s.42, having no substantive effect, could be achieved by passage of a Bill by simple majority through both Houses of Parliament.

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[7] In this context "repeal" and "delete" are synonymous (see *Interpretation Act* 1984, s.5) and include the repeal of a particular section: see *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1.

Conclusions

77. For the foregoing reasons, in my view, the answers to the questions posed of me are as follows:

Question 1: *Whether the Constitutional Amendment (Recognition of Aboriginal People) Bill 2014 can be enacted following the passage of the Bill by simple majority through both Houses of Parliament or whether any special procedure is required (for example, by s 73 of the Constitution Act 1889 read with section 6 of the Australia Act 1986 (Cth))?*

Answer 1: In its current form, the *Recognition Bill* can be enacted following its passage by simple majority through both Houses of Parliament. No special procedure is required for its enactment.

Question 2: *What is the nature and extent of the legal implications, if any, of the proposed amendment to the preamble? In particular, please address the legal implications for any other Western Australia legislation, the operation of native title law (of Western Australia and the Commonwealth) and pastoral leases.*

Answer 2: The proposed amendment to the preamble would have no effect on the legislative power of the State. The passage of the *Recognition Bill* by simple majority would, itself, reinforce an interpretation of the amendments such that they are to be taken *not* to affect the legislative power of the Parliament.

It is possible that the courts might, in future, have regard to the proposed amendments to the preamble in interpreting legislation passed by the Parliament of Western Australia, in cases where there is some ambiguity which might be resolved by reference to the preamble.

Nevertheless, it is quite unlikely that the broad statement of principle reflected in the proposed amendments to the preamble would ever be likely to be considered, let alone be a decisive consideration, in the interpretation of future legislation.

The proposed amendments to the preamble to the *Constitution Act* 1889 would not have any substantive effect on native title law.

Question 3: *How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a stand-alone section in the Constitution Act 1889 (for example, as a new s 1)?*

Answer 3: The nature and extent of any legal implications would not be substantially different if the second paragraph that the *Recognition Bill* proposes to include was instead included as a stand-alone section in the *Constitution Act* 1889.

Question 4: *How would the nature and extent of the legal implications, if any, differ if the second paragraph that the Bill proposes to include in the preamble was instead included as a schedule to the Constitution Act 1889?*

Answer 4: The nature and extent of any legal implications would not be substantially different if the second paragraph that the *Recognition Bill* proposes to include was instead inserted as a Schedule to the *Constitution Act* 1889.

Question 5: *What is the legal efficacy of 'non-effects' clauses such as section 1A(3) of the Constitution Act 1975 (Vic), both in respect of interpretation and the*

limitation of the creation of any legal rights? How would such a clause affect the legal implications that you have identified in answering questions 2, 3 and 4?

Answer 5: A "non-effects" clauses such as that found in s.1A(3) of the *Constitution Act* 1975 (Vic) would be legally efficacious and would remove any potential for an argument that the proposed amendments to the preamble (or other form of recognition) would affect the interpretation of legislation or create any legal rights.

Question 6: *What would be the effect of the deletion of s 42 of the Constitution Act 1889? In particular, please address whether s 42 has any impact, substantive or interpretative, on any other parts of the Constitution Act 1889 or Constitution Acts Amendment Act 1899.*

Answer 6: Repealing s.42 of the *Constitution Act* 1889 would have no effect, substantive or interpretative, on any other parts of the *Constitution Act* 1889 or the *Constitutions Act Amendment Act* 1899.

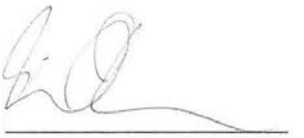
Question 7: *If s 42 of the Constitution Act 1889 were deleted, would it need to be replaced and, if so, by what? Would this replacement be able to be achieved by passage of a Bill by simple majority through both Houses of Parliament?*

Answer 7: If s.42 of the *Constitution Act* 1889 were repealed, it would not need replacement by any substitute provision.

The repeal of s.42, having no substantive effect, could be achieved by passage of a Bill by simple majority through both Houses of Parliament.

Question 8: *Are there any other matters within the Committee's terms of reference that are not addressed within these questions that you think should be pursued?*

Answer 8: No.



P D Quinlan SC
Francis Burt Chambers
11 February 2015

SUPPLEMENTARY OPINION

JOINT SELECT COMMITTEE ON ABORIGINAL CONSTITUTIONAL RECOGNITION

Introduction

1. By opinion dated 11 February 2015, I provided advice in relation to a number of issues concerning the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2014 (WA) ("the *Recognition Bill*"). In the course of that opinion I advised, in relation to the nature and extent of the legal implications, if any, of the proposed amendment to the preamble to the *Constitution Act* 1889 contained in the *Recognition Bill*:

> "The proposed amendment to the preamble would have no effect on the legislative power of the State. The passage of the *Recognition Bill* by simple majority would, itself, reinforce an interpretation of the amendments such that they are taken *not* to affect the legislative power of the Parliament.
>
> It is possible that the courts might, in future, have regard to the proposed amendments to the preamble in interpreting legislation passed by the Parliament of Western Australia, in cases where there is some ambiguity which might be resolved by reference to the preamble.
>
> Nevertheless, it is quite unlikely that the broad statement of principle reflected in the proposed amendments to the preamble would ever be likely to be considered, let alone be a decisive consideration, in the interpretation of future legislation.
>
> The proposed amendments to the preamble to the *Constitution Act* 1889 would not have any substantive effect on native title law."

2. My opinion is now sought in relation to the following additional questions. The questions relate to clause 4.2 of the *Recognition Bill*, which provides:

> At the end of the Preamble insert:
>
> And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the

> Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State; **[Paragraph 1, lines 16-23 of the *Recognition Bill* at page 2]**
>
> And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia: **[Paragraph 2, lines 24-28 of the *Recognition Bill* at page 2]**

3. The questions I am asked are:

> Question 1:
>
> Are there any drafting conventions that need to be considered if the above paragraphs are placed after the first sentence of the Preamble in the *Constitution Act* 1889 (WA) (as is currently proposed by the *Recognition Bill*)?
>
> Question 2:
>
> (a) Are there any drafting conventions that need to considered if, as an alternative, only Paragraph 2 of Clause 4.2 of the *Recognition Bill* is used and is placed at the beginning of the current Preamble in the *Constitution Act* 1889 (WA)?
>
> (b) Would the proposed alternative in 2(a) affect the answers you have provided in your previous opinion dated 11 February 2015?

4. As contemplated by question 2(b), this opinion should be read together with my opinion of 11 February 2015.

Summary

5. For the reasons set out below, the answer to each of these questions is, generally, "No". That is, so far as I am aware, there are no particular drafting conventions that would dictate the order in which the matters in the preamble to the *Constitution Act* 1889 should be recorded. That is, in my view, a matter of legislative choice.

Nor would those matters affect the answers to my previous opinion dated 11 February 2015.

6. Nevertheless, some guidance might be derived from an examination of the approach to preambles in legislation generally and in academic writing on the subject. These matters may help to provide some guidance as to the preferable approach to the drafting of a constitutional preamble.

The Role of a Preamble

7. As stated above, there are, so far as I am aware, no particular drafting conventions that would dictate the manner in which a preamble should be worded, and in particular the order in which various matters in a preamble should be recorded. The Drafting Manual issued by the Commonwealth Office of Parliamentary Counsel, for example, makes only passing reference to preambles, and in relation to drafting, simply provides that:

> "The preamble goes at the very start of the Bill before the enacting words and explains why the Bill is being enacted. It always ends with "The Parliament of Australia enacts:".[1]

8. Nevertheless, there has in recent years, including in the particular context of aboriginal recognition, been a good deal of academic literature in relation to the role of preambles in legislation[2]. An identification of those roles may assist in determining the preferred approach to the drafting of a preamble.

9. As the academic literature notes, a preamble, which (as the etymology of the word suggests) "walks in front" of a statute[3], may fulfil a variety of roles. These roles may be explanatory, persuasive, political or symbolic.

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1 OPC Drafting Manual, Edition 3.0, October 2012 at ¶271.

2 See for example Winterton, *A New Constitutional Preamble* (1997) 8 PLR 186, Roach, *The Uses and Audiences of Preambles in Legislation* (2001) 47 McGill Law Journal 129; Davis and Lemezina, *"Indigenous Australians in the Preamble: Towards a more inclusive Constitution or Entrenched Marginalisation?"* (2010) UNSWLJ 239; and *Constitutional Recognition of Australians in a Preamble*, (2011), Constitutional Reform Unit Report No. 2, Sydney Law School, University of Sydney.

3 See Winterton, *A New Constitutional Preamble* (1997) 8 PLR 186.

10. In this context, a useful distinction was drawn by Professor Kent Roach between those preambles that are "narrative" and those that are "aspirational". A "narrative" preamble is one which provides "a narrative about why particular legislation has been enacted and can even be used to reflect the process of deliberation that preceded the enactment of the legislation"[4]. In this context, Professor Roach refers to the expressive role of preambles in recognising past events. The alternative use of a preamble described by Professor Roach, namely "aspirational", occurs where the preamble is used to articulate and express the hopes and aspirations for particular legislation or of the legislature generally[5].

11. Of course, the preamble to a particular piece of legislation may fulfil both a narrative *and* an aspirational function. The preamble to the *Native Title Act* 1993, a copy of which is Annexure A to this opinion, is a useful example of a preamble that is both narrative and aspirational in its form.

12. By contrast, the current preamble to the *Constitution Act* 1889 (WA), a copy of which is Annexure B to this opinion, is largely a narrative of events leading to the *Constitution Act* 1889.

13. As appears from the narrative aspects of these preambles, and as accords with the logic of a narrative, a narrative preamble generally records the events preceding the enactment in chronological order.

14. For example, the preamble to the *Native Title Act* 1993 (Cth) begins with a narrative commencing with the period prior to European settlement, goes on to recount the effects of that settlement, moves to the 1967 Constitutional referendum and the 1992 decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, before moving finally to the present day and the intention of the Parliament in enacting the *Native Title Act* 1993. The preamble essentially moves from the chronological narrative to the aspirational.

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4 Roach, *The Uses and Audiences of Preambles in Legislation* (2001) 47 McGill Law Journal 129 at 144.

5 Roach, *The Uses and Audiences of Preambles in Legislation* (2001) 47 McGill Law Journal 129 at 151.

15. Similarly, the existing preamble to the *Constitution Act* 1889 (WA) begins with the *Australian Constitutions Act* 1850 (Imp) passed in the second decade of the Reign of Queen Victoria and moves on to the subsequent steps towards the establishment of representative and responsible government in Western Australia.

16. This pattern has been followed, to some degree, in the recognition of Aboriginal peoples in the Constitutions of other Australian States, such as in s 2 of the *Constitution Act* 1934 (SA) inserted by the *Constitution (Recognition of Aboriginal Peoples) Amendment Act* 2013 (SA). The practice is not, however, invariable, as can be seen in the preamble to the *Constitution of Queensland* 2001, which refers to the sovereignty of the people and the system of representative and responsible government *prior* to the reference to, and recognition of, Aboriginal peoples.

17. Section 1A of the *Constitution Act* 1975 (Vic) illustrates a further variation on the narrative theme by explicitly acknowledging "that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria", before then providing for recognition of Victoria's Aboriginal peoples as the original custodians of the land. In this way, by keeping the narrative somewhat out of chronological order, the *Constitution Act* 1975 (Vic) expressly acknowledges the failure to provide for recognition of Aboriginal people in the past.

18. With these observations, I turn to the particular questions posed of me.

Question 1: Are there any drafting conventions that need to be considered if the above paragraphs are placed after the first sentence of the Preamble in the *Constitution Act* 1889 (WA) (as is currently proposed by the *Recognition Bill*)?

19. The *Recognition Bill*, as currently drafted, proposes that two further paragraphs be added to the preamble after the first sentence of the existing preamble. That sentence, as stated above, is in the form of a narrative, which commences in 1850 and ends with the expediency of creating a new Constitution in 1889.

20. The proposed new paragraphs to the preamble record, in turn:

(a) The establishment of responsible and representative government (Paragraph 1, lines 16-20);

(b) The continuation of Western Australia as a State of the Commonwealth (Paragraph 1, lines 20-23);

(c) The acknowledgement of the Aboriginal peoples as First Peoples of Western Australia and traditional custodians of the land (Paragraph 2, lines 24-26); and

(d) The Parliament's intention to seek to effect a reconciliation with the Aboriginal peoples of Western Australia (Paragraph 2, lines 26-28).

21. As stated above, there are no particular drafting conventions that would dictate the order in which the matters in the preamble to the *Constitution Act* 1889 should be recorded. That is, in my view, a matter of legislative choice.

22. Nevertheless, in my view, the current draft of the *Recognition Bill* does reflect the usual pattern for the drafting of preambles. In particular, the references to representative and responsible government and Federation (in Paragraph 1) naturally follow from the first sentence in the existing preamble and are consistent with the chronological narrative presented.

23. In relation to paragraph 2, the reference to the Aboriginal peoples as the First Peoples of Western Australia might be thought not to follow the chronological narrative, given that the Aboriginal peoples' custodianship preceded *all* of the other events recounted in the narrative. Nevertheless, from a drafting perspective, there are at least two justifications for including Paragraph 2 in the place that it is currently drafted:

(a) First, insofar as the narrative is concerned, inclusion of the acknowledgement of Aboriginal peoples at this point in the preamble reflects the stage at which Western Australia's constitutional development included formal recognition of Aboriginal peoples. That is, while the fact of Aboriginal peoples' custodianship extends long into the past, the current draft reflects the reality that Parliament's acknowledgement of that fact is occurring now; and

(b) Secondly, Paragraph 2 of the current draft is not merely narrative but also aspirational, in that it seeks to effect a reconciliation with the Aboriginal peoples of Western Australia. From a drafting perspective, such aspirations more naturally appear at the close of a preamble, following the recitation of the relevant facts (as is the case, for example, with the *Native Title Act* 1993 (Cth)).

Question 2(a): Are there any drafting conventions that need to considered if, as an alternative, only Paragraph 2 of Clause 4.2 of the *Recognition Bill* is used and is placed at the beginning of the current Preamble in the *Constitution Act* 1889 (WA)?

24. Again, there are no particular drafting conventions that would affect that alternative proposal, which ultimately remains a matter of legislative choice.

25. As stated above, the inclusion of the reference to Aboriginal peoples as the First Peoples of Western Australia does tend to be more consistent with the chronological narrative of the first sentence of the existing preamble. Nevertheless, as noted above, the aspiration aspects of the proposed amendment, in my view, fit more naturally at the close of a preamble.

26. In addition, particularly if Paragraph 1 of the proposed amendments were deleted, the entire preamble, as amended, might appear somewhat confused. In that regard, the preamble (as amended) would open with a current aspiration (expressed in the present tense) but would close with words from 1889, which are also expressed in the present tense (i.e. "whereas it is expedient that the powers … should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council"). So constructed, the preamble as a whole would tend, in my view, to imply a historical relationship between the acknowledgement of Aboriginal peoples at the beginning of the preamble and the events of 1889 leading to the *Constitution Act* 1889 (WA), in circumstances in which such a historical relationship did not, in fact, exist.

27. I do not consider that this would affect the legality or the effect of the proposed amendments but it is a matter that might be considered in relation to the alternative proposal.

Question 2(b): Would the proposed alternative in 2(a) affect the answers you have provided in your previous opinion dated 11 February 2015?

28. I take this question to be directed particularly to my conclusions in relation to the effect of the proposed changes to the preamble summarised in paragraph 1 above.

29. The answer to this question is "No". Were the Parliament to enact only Paragraph 2 of Clause 4.2 of the *Recognition Bill* and place it at the beginning of the current preamble in the *Constitution Act* 1889 (WA), my views at to the legal effect of the amended preamble would not change.

30. In particular the placement of Paragraph 2 at the beginning of the preamble would not provide any stronger basis for concluding that the preamble was intended to substantively alter the law. The interpretative assistance, if any, that might be drawn from the preamble would remain the same.

Conclusion

31. For the foregoing reasons, in my view, the answers to the questions posed of me are as follows:

Question 1:

Are there any drafting conventions that need to be considered if the above paragraphs are placed after the first sentence of the Preamble in the Constitution Act 1889 (WA) (as is currently proposed by the Recognition Bill)?

Answer 1:

There are no particular drafting conventions that would dictate the order in which the matters in the preamble to the *Constitution Act* 1889 should be recorded. That is a matter of legislative choice.

Nevertheless, the current draft of the *Recognition Bill* does reflect the usual pattern for the drafting of preambles. In particular, the references to representative and responsible government and Federation (in Paragraph 1) naturally follow from the first sentence in the existing preamble and are consistent with the chronological narrative presented.

In relation to paragraph 2, the reference to the Aboriginal peoples as the First Peoples of Western Australia might be thought not to follow the chronological narrative, given that the Aboriginal peoples' custodianship preceded *all* of the other events recounted in the narrative. Nevertheless, from a drafting perspective, there are at least two justifications for including Paragraph 2 in the place that it is currently drafted:

(a) First, insofar as the narrative is concerned, inclusion of the acknowledgement of Aboriginal peoples at this point in the preamble reflects the stage at which Western Australia's constitutional development included formal recognition of Aboriginal peoples. That is, while the fact of Aboriginal peoples' custodianship extends long into the past, the current draft reflects the reality that Parliament's acknowledgement of that fact is occurring now; and

(b) Secondly, Paragraph 2 of the current draft is not merely narrative but also aspirational, in that it seeks to effect a reconciliation with the Aboriginal peoples of Western Australia. From a drafting perspective, such aspirations more naturally appear at the close of a preamble, following the recitation of the relevant facts (as is the case, for example, with the *Native Title Act* 1993 (Cth)).

Question 2(a):

Are there any drafting conventions that need to considered if, as an alternative, only Paragraph 2 of Clause 4.2 of the Recognition Bill is used and is placed at the beginning of the current Preamble in the Constitution Act 1889 (WA)?

Answer 2(a):

There are no particular drafting conventions that would affect that alternative proposal, which ultimately remains a matter of legislative choice.

As stated above, the inclusion of the reference to Aboriginal peoples as the First Peoples of Western Australia does tend to be more consistent with the chronological narrative of the first sentence of the existing preamble. Nevertheless, as noted above, the aspiration aspects of the proposed amendment, in my view, fit more naturally at the close of a preamble.

In addition, particularly if Paragraph 1 of the proposed amendments were deleted, the entire preamble, as amended, might appear somewhat confused. In that regard, the preamble (as amended) would open with a current aspiration (expressed in the present tense) but would close with words from 1889, which are also expressed in the present tense (i.e. "whereas it is expedient that the powers … should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council"). So constructed, the preamble as a whole would tend, in my view, to imply a historical relationship between the acknowledgement of Aboriginal peoples at the beginning of the preamble and the events of 1889 leading to the *Constitution Act* 1889 (WA), in circumstances in which such a historical relationship did not, in fact, exist.

I do not consider that this would affect the legality or the effect of the proposed amendments but it is a matter that might be considered in relation to the alternative proposal.

Question 2(b):

Would the proposed alternative in 2(a) affect the answers you have provided in your previous opinion dated 11 February 2015?

Answer 2(b):

"No". Were the Parliament to enact only Paragraph 2 of Clause 4.2 of the *Recognition Bill* and place it at the beginning of the current preamble in the *Constitution Act* 1889 (WA), my views at to the effect of the amended preamble would not change.

In particular the placement of Paragraph 2 at the beginning of the preamble would not provide any stronger basis for concluding that the preamble was intended to substantively alter the law. The interpretative assistance, if any, that might be drawn from the preamble would remain the same.

P D Quinlan SC
Francis Burt Chambers
25 February 2015

ANNEXURE A

Preamble to the *Native Title Act* 1993 (Cth)

Preamble

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

(a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and

(b) the acceptance of the Universal Declaration of Human Rights; and

(c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Australian Human Rights Commission Act 1986* .

The High Court has:

(a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on

by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and

(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

The Parliament of Australia therefore enacts:

ANNEXURE B

Preamble to the *Constitution Act* 1889 (WA)

Preamble

Whereas by the 32nd section of the Imperial Act passed in the session holden in the 13th and 14th years of the Reign of Her present Majesty, intituled "*An Act for the better Government of Her Majesty's Australian Colonies*", it was among other things enacted that, notwithstanding anything thereinbefore contained, it should be lawful for the Governor and Legislative Council of Western Australia, from time to time, by any Act or Acts, to alter the provisions or laws for the time being in force under the said Act or otherwise concerning the election of the elective members of such Legislative Council, and the qualification of electors and elective members, or to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of Representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted; and whereas it is expedient that the powers vested by the said Act in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter contained:

Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows: —

Appendix Nine

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Appendix Ten

Financial Statement

In accordance with Legislative Assembly Standing Order 276, the Committee's expenditure is detailed below:

Expenditure Item	Amount $AUD
Advertising	2,200
Consultants	17,500
Legal Fees	25,100
Miscellaneous	400
Postage	100
Printing	1,500
TOTAL	**46,800**

- Figures rounded to the nearest $100.
- Salaries of committee staff are not included.
- Costs of shared administrative expenses, including lease costs for committee accommodation, not included.