

# AN AUSTRALIAN DECLARATION OF RECOGNITION: THE CASE FOR SEMI-ENTRENCHED SYMBOLISM

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*This article investigates the Referendum Council's second, rarely discussed and under-explored, extra-constitutional recommendation: a symbolic and inspiring Declaration of Recognition ('Declaration'), enacted concurrently by all Australian Parliaments, alongside a referendum on a First Nations constitutional voice. The article explores the legal possibilities and potential symbolic power that could be enlivened using variations of Australia's federal unanimity procedure to enact such a Declaration. It argues that, under Australia's constitutional arrangements, federal unanimity procedures may enable 'semi-entrenched' legislation — legislation subject to an effective manner and form requirement rendering it more stable and enduring than ordinary Commonwealth legislation but more flexible than clauses entrenched in the Constitution via s 128. It explores three ways of using federal unanimity to create a sense of moral and political entrenchment — one of which, through inserting the Declaration into the covering clauses of the Commonwealth of Australia Constitution Act 1900 (UK), also arguably enables legally effective semi-entrenchment. If Indigenous assent was added to the concurrence of all Australian Parliaments, such a Declaration (depending on its agreed content) could be a historic reconciliatory agreement of enduring significance.*

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## I INTRODUCTION

In June 2017, the Referendum Council tasked with advising on Indigenous constitutional recognition endorsed the historic *Uluru Statement from the Heart* (*‘Uluru Statement’*) and recommended a singular constitutional reform: a constitutionally guaranteed First Nations voice.<sup>1</sup> Since then, the proposal for a First Nations voice in the *Constitution* has garnered the vast majority of public, political and scholarly attention.<sup>2</sup> However, the Referendum Council also made a second, extra-constitutional recommendation which has engendered little attention. It proposed that a symbolic, inspiring and unifying Declaration of Recognition (*‘Declaration’*) should accompany the recommended

<sup>1</sup> *Final Report of the Referendum Council* (Report, 30 June 2017) 2 (*‘Referendum Council Final Report’*).

<sup>2</sup> I have written about this proposal elsewhere: Shireen Morris, “‘The Torment of Our Powerlessness’: Addressing Indigenous Constitutional Vulnerability and the Uluru Statement’s Call for a First Nations Voice in ‘Their Affairs’ (2018) 41(3) *University of New South Wales Law Journal* 629 (‘The Torment of Our Powerlessness’); Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs’ (2015) 26(3) *Public Law Review* 166 (‘Constitutional Procedure’); Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020); Shireen Morris, ‘Parliamentary Scrutiny and Insights for a First Nations Voice to Parliament’ in Laura Grenfell and Julie Debeljak (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) 703.

constitutional change. The Referendum Council also recommended that the Declaration should be enacted concurrently by all Australian Parliaments.<sup>3</sup>

This innovative extra-constitutional recommendation raises intriguing legal and political questions. What are the possibilities for a Declaration of this kind? Would a Declaration enacted by federal concurrence carry elevated and enduring moral and political importance in Australian life? Might it also be enacted to be semi-entrenched? This article explores the legal possibilities and potential symbolic power that could be enlivened utilising variations of Australia's federal unanimity procedure, as alluded to by the Referendum Council. Cooperative federal action in 1986 enabled Australia to update its relationship with the United Kingdom ('UK') through the *Australia Act 1986* (Cth) ('*Australia Act*') and *Australia Act 1986* (UK) (collectively, '*Australia Acts*').<sup>4</sup> It could also be used to update Australia's relationship with the First Nations, alongside substantive reform of the *Constitution* through a First Nations voice. Given its reconciliatory purpose, however, I suggest a Declaration should be endorsed not only by all Australian Parliaments, but also by Indigenous assent arising from genuine negotiation, perhaps through the First Nations voice (if the institution were already in operation). The resulting Declaration, born by co-operation between Australian Parliaments and the First Nations of Australia, might then come to represent a historic reconciliatory agreement of enduring significance.

The article proceeds in five Parts. Part II explores the longstanding debate about inserting symbolic values into the *Constitution* and explains why ideas for extra-constitutional articulations of symbolic statements have arisen in the Indigenous constitutional recognition debate. I examine past use of 'no legal effect' clauses that attempt to limit the constitutional consequences of symbolic insertions, as well as responses to the Expert Panel's proposed symbolic amendments in 2012, to show that an extra-constitutional Declaration provides a way forward that addresses concerns about unintended legal consequences, as well as resulting concerns about insincerity of sentiment.

Drawing inspiration from the United States' ('US') *Declaration of Independence* and New Zealand's *Treaty of Waitangi*, I suggest that a symbolic document of this kind could be enacted to carry enduring political, moral and cultural authority, even where it does not entail legally enforceable rights or obligations. The relationship between symbolism and practical reform is complex, but it is wrong to assume that symbolic statements must be in the *Constitution* to have

<sup>3</sup> *Referendum Council Final Report* (n 1) 2.

<sup>4</sup> See Christopher D Gilbert, 'Section 15 of the Australia Acts: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Review* 55, 55–6 ('Section 15 of the Australia Acts').

meaning and that articulations of values must be justiciable to have power.<sup>5</sup> In Australia, while poetic articulations of values and aspirations may be important for nation-building and reconciliation, they need not be captured and constrained in the *Constitution*, nor must the ultimate meanings of symbols declared be controlled by the courts. Rather, symbolic words can live and flourish outside the *Constitution*, in the domain of politics, philosophy and culture. They can be owned and argued by the Australian people and their representatives. The power of such a Declaration would thus be moral, cultural and political, rather than legal. This article explores the possible content of an extra-constitutional Declaration of this kind including its potential in bringing together the three parts of the Australian national story: the Indigenous, the British and the multicultural.

Part III turns to the possibility of semi-entrenchment, prompted by the Referendum Council's suggestion that the Declaration be concurrently legislated by all Australian Parliaments. I define semi-entrenchment as legislation subject to a legally valid special amendment and repeal requirement that is more onerous than ordinary legislation but less onerous than a double majority referendum under s 128. Where the special amendment procedure is legally ineffective, but nonetheless reiterated in the legislation and generally respected, this is better described as political and moral entrenchment. There may be benefits to both. Apart from increased longevity, the heightened public engagement and deliberation usually required by special enactment and amendment procedures can help generate political consensus and widespread national ownership of the outcome.<sup>6</sup> If an extra-constitutional Declaration were endorsed co-operatively by Australian Parliaments and the First Nations, it could in time be seen as a document of enduring status. I then consider whether a semi-entrenched Declaration of this kind may be considered quasi-constitutional. I suggest its symbolic content and purpose means it could be understood as quasi-constitutional only in a political, moral and cultural sense, but not in a legal supremacy sense. I therefore distinguish the legal quasi-constitutionality of substantive rights-protecting legislation that has emerged in Canada and the UK<sup>7</sup> from the potential quasi-constitutionality of a symbolic Declaration of political, moral and

<sup>5</sup> See generally Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999).

<sup>6</sup> See below Part III(A).

<sup>7</sup> See generally Richard Albert, 'Quasi-Constitutional Amendments' (2017) 65(4) *Buffalo Law Review* 739; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461; Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73(3) *Cambridge Law Journal* 514.

cultural authority. This, however, raises questions about why the Declaration needs to be in legislation at all, which I address later in the article.

In Part IV, I explore possibilities for semi-entrenchment under Australia's constitutional arrangements. After recapping the constitutional conditions that would seem to prevent the Commonwealth Parliament from legislating to bind itself, I note the one exception to this general rule: the federal unanimity procedure provided in s 15 of the *Australia Act*. Australia's constitutional arrangements confer on Australian Parliaments the cooperative power to enact semi-entrenched legislation of special and enduring significance through unanimous federal action. I outline three possibilities for utilising this procedure in relation to a Declaration, each entailing different legal and political implications in relation to semi-entrenchment.

The first possibility, along the lines suggested by the Referendum Council, is for all Australian Parliaments to concurrently legislate a Declaration. I suggest this could occur pursuant to an inter-governmental agreement. To this procedure I would add Indigenous assent. This would not result in legal semi-entrenchment, but it would likely create a sense of moral and political entrenchment. The Declaration would reflect a historic reconciliatory agreement of symbolic power.

The second possibility is to use the federal unanimity procedure to insert the Declaration into the *Australia Act*. Again, to this procedure I would add Indigenous assent. This too may not result in legal semi-entrenchment, though it would likely imbue the Declaration with a sense of political and moral entrenchment. The *Australia Act* updated Australia's relationship with the UK; it could also update Australia's relationship with the First Nations and may be a suitable place for the nation to symbolically bring together the three parts of our national story. However, the *Australia Act* is also highly technical and legalistic, which should also be considered.

The third possibility in my view presents the only way to achieve legally effective semi-entrenchment of a Declaration. Australian Parliaments could cooperatively insert a Declaration into the covering clauses (perhaps into a new covering cl 10) of the *Commonwealth of Australia Constitution Act 1900* (UK) ('*Constitution Act*'). Section 15 of the *Australia Act* empowers the Commonwealth, with the concurrence of the States, to alter s 8 of the *Statute of Westminster 1931* (Imp) ('*Statute of Westminster*'), to thereby implement an appropriate procedural mechanism for amendment of the *Constitution Act*. This procedure could then be followed to amend the covering clauses and insert the Declaration. Again, a requirement of Indigenous assent should be added with respect to a Declaration. This procedure, I suggest, would result in the Declaration being legally semi-entrenched, as well as morally and politically entrenched.

Placement in covering cl 10, after the *Constitution* itself, would increase the Declaration's stature. Whether such placement re-enlivens concerns about constitutional interpretation which this proposal seeks to avoid, however, needs to be further considered.

I then briefly discuss whether popular endorsement should be added to federal unanimity in the enactment procedure, as some have suggested, before considering a fourth, non-legislative option for unanimous federal enactment of a Declaration.

I conclude that a historic reconciliatory agreement of this kind would be a morally worthy project. Whether articulated in legislation or not, and whether popular endorsement was incorporated or not, each of these options for enactment of a Declaration with federal unanimity and Indigenous assent could create an important moment of national unity in reconciliation. Options for enactment of a Declaration should now be further explored, not as a substitute, but as an important companion to substantive constitutional recognition through a First Nations voice.

## II THE REFERENDUM COUNCIL'S PROPOSAL FOR AN EXTRA-CONSTITUTIONAL DECLARATION

In 2017, alongside its proposal for a constitutionally guaranteed First Nations voice following the *Uluru Statement*, the Referendum Council recommended 'an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians'.<sup>8</sup> The Referendum Council explained that

[a] Declaration of Recognition should be developed, containing inspiring and unifying words articulating Australia's shared history, heritage and aspirations. The Declaration should bring together the three parts of our Australian story: our ancient First Peoples' heritage and culture, our British institutions, and our multicultural unity. It should be legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament, as an expression of national unity and reconciliation.<sup>9</sup>

The recommendation for a symbolic Declaration outside the *Constitution*, alongside substantive constitutional reform through a First Nations voice, is an

<sup>8</sup> *Referendum Council Final Report* (n 1) 2.

<sup>9</sup> *Ibid.*

innovative shift away from past approaches to symbolic recognition. It is distinctly different from the 1999 approach which proposed a symbolic new preamble to the *Constitution*, accompanied by a ‘no legal effect’ clause<sup>10</sup> — this failed at referendum. It is also different to the 2012 Expert Panel approach, which called for the insertion of symbolic statements into the body of the *Constitution*, as well as substantive constitutional reform.<sup>11</sup> What prompted the shift in thinking about the appropriate placement of symbolic statements in the debate about Indigenous constitutional recognition? What legal, political and strategic benefits might be offered by symbolic recognition *outside* the *Constitution*, alongside substantive constitutional reform through a First Nations voice? The following Parts discuss recurring controversies with respect to insertion of constitutional poetry and explain the genesis of the idea of an extra-constitutional Declaration as a solution to some of those controversies.

### A Background: Controversial Constitutional Poetry

#### 1 *The Debate about Inserting Symbolic Values into the Australian Constitution*

The debate about Indigenous constitutional recognition has been characterised by fundamental disagreement on purpose: there has been divergence as to whether constitutional recognition should be merely symbolic, or whether it should involve substantive and practical constitutional reform.<sup>12</sup> Indigenous advocates have for decades argued for substantive constitutional reform to empower them in their relationship with the state.<sup>13</sup> They have sought a constitutional guarantee to ensure they are treated more fairly than in the past.<sup>14</sup> By contrast, Australian governments thus far have not implemented Indigenous calls for substantive constitutional reform, instead tending to prefer a merely symbolic constitutional mention that entails no structural or operational

<sup>10</sup> Constitution Alteration (Preamble) Bill 1999 (Cth) cl 4 (‘Preamble Bill’).

<sup>11</sup> *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012) xviii, 133 (‘Expert Panel Report’).

<sup>12</sup> Megan Davis, ‘Australia’s Reconciliation Process in its International Context: Recognition and the Health & Wellbeing of Australia’s Aboriginal & Torres Strait Islander Peoples’ (2015) 18(2) *Australian Indigenous Law Review* 56, 62.

<sup>13</sup> See generally Morris, ‘Constitutional Procedure’ (n 2) 170–3.

<sup>14</sup> See, eg, Galarrwuy Yunupingu, ‘We Know These Things to be True: The Third Vincent Lingiari Memorial Lecture’ (1998) 11(4) *Journal of Australian Indigenous Issues* 4, 14; Patrick Dodson, ‘1999 Vincent Lingiari Memorial Lecture: “Until the Chains are Broken”’ (2000) 5(2) *Australian Indigenous Law Reporter* 73, 80.

reform.<sup>15</sup> In 1999, Prime Minister John Howard put to the Australian people a symbolic preamble including some statements of Indigenous recognition as part of a broader statement of Australian values,<sup>16</sup> alongside the Republic referendum. Many Indigenous leaders opposed the change<sup>17</sup> and Australians voted ‘no’ to both reforms — only 39.34% of Australians voted ‘yes’ to the new preamble.<sup>18</sup> Troublingly, some seem to want to re-run the 1999 failure by pursuing purely symbolic recognition.<sup>19</sup>

Similarly, there is disagreement about whether the *Constitution* is the appropriate place for symbolic statements at all. Just as Indigenous people continue to call for substantive constitutional reform rather than a mere symbolic mention,<sup>20</sup> so too have some constitutional experts raised concerns about the incorporation of ambiguous symbolic words into what is essentially a structural rule-book.<sup>21</sup> In the context of debate about a new preamble in the 1990s, Stephen Gageler and Mark Leeming urged caution regarding the insertion of values statements, noting that uncertain judicial use of the preamble in constitutional interpretation was increasing.<sup>22</sup> George Winterton warned of unintended

<sup>15</sup> See Megan Davis, ‘“Political Timetables Trump Workable Timetables”: Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance’ in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 70, 88 (‘Political Timetables’).

<sup>16</sup> Preamble Bill (n 10) sch 1.

<sup>17</sup> See generally Mark McKenna, ‘First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99’ (Research Paper No 16, Department of the Parliamentary Library, Information and Research Services, Parliament of Australia, 4 April 2000).

<sup>18</sup> Australian Electoral Commission, *1999 Referendum Report* (Web Page, 24 October 2012) <[https://www.aec.gov.au/elections/referendums/1999\\_referendum\\_reports\\_statistics/index.htm](https://www.aec.gov.au/elections/referendums/1999_referendum_reports_statistics/index.htm)>, archived at <<https://perma.cc/K88H-SBHA>>. See also Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 122 (‘Constitutional Recognition’).

<sup>19</sup> For an argument on why this minimalist approach will fail, see Shireen Morris and Noel Pearson, ‘Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success’ (2017) 91(5) *Australian Law Journal* 350.

<sup>20</sup> See, eg, Jill Gallagher and Jeremy Clarke, ‘Why Indigenous Australians Will Reject a Minimalist Referendum Question’, *Sydney Morning Herald* (online, 20 March 2017) <<https://www.smh.com.au/politics/federal/why-indigenous-australia-will-reject-a-minimalist-referendum-question-20170319-gv1iso.html>>, archived at <<https://perma.cc/X8CL-XQHZ>>.

<sup>21</sup> For this kind of description of the *Constitution*, see Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7.

<sup>22</sup> Stephen Gageler and Mark Leeming, ‘An Australian Republic: Is a Referendum Enough?’ (1996) 7(3) *Public Law Review* 143, 145–7. See also Jeffrey Goldsworthy, ‘The Preamble, Judicial Independence and Judicial Integrity’ (2000) 11(2) *Constitutional Forum* 60, 62; Dan



consequences that may result from Indigenous recognition in a preamble, including unforeseen legal implications potentially 'deleterious to Aboriginal rights'.<sup>23</sup> Howard's inclusion of a 'no legal effect' clause<sup>24</sup> in the 1999 preamble proposal was, as Julian Leaser points out, an implicit admission that the preamble would have legal effect and that the clause was an attempt to circumvent this possibility.<sup>25</sup> However, a 'no legal effect' clause does not conclusively answer concerns about legal uncertainty. Leslie Zines suggested such a clause may be legally ineffective,<sup>26</sup> while others argue it would render the recognition statements disingenuous.<sup>27</sup>

Concerns about legal uncertainty on one hand and resulting insincerity of sentiment on the other raise serious strategic questions about the wisdom and efficacy of inserting symbolic statements into the *Constitution*. The common resort to 'no legal effect' clauses as an attempted way around the difficulty reflects the paradoxical logic of purely symbolic approaches to constitutional recognition,<sup>28</sup> which Indigenous people have been clear that they do not want.<sup>29</sup> Apart from the 1999 referendum, 'no legal effect' clauses have also been adopted in most State constitutions to confirm that the recognition statements

Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2(1) *Seton Hall Constitutional Law Journal* 127, 203.

<sup>23</sup> George Winterton, 'A New Constitutional Preamble' (1997) 8(3) *Public Law Review* 186, 187–8.

<sup>24</sup> The proposal included a new s 125A, which provided that '[t]he Preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law interpreting the Commonwealth or any part of the Commonwealth': Preamble Bill (n 10) cl 4.

<sup>25</sup> Julian Leaser, 'Uphold and Recognise' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) 78, 83–4.

<sup>26</sup> Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10(1) *Public Law Review* 67, 68. See also Jeremy Webber, 'Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21(2) *Sydney Law Review* 260, 269–70.

<sup>27</sup> See, eg, Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) 33(2) *University of New South Wales Law Journal* 239, 261; Leaser (n 25) 84; Alex Reilly, 'Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21(3) *University of New South Wales Law Journal* 903, 904; Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24(2) *University of New South Wales Law Journal* 382, 396.

<sup>28</sup> Dylan Lino, 'Written Constitutions and the Politics of Recognition: Symbolism and Substance' (Conference Paper, World Congress of Constitutional Law, 19 June 2014) 9–10 ('Written Constitutions').

<sup>29</sup> See, eg, *Referendum Council Final Report* (n 1) 23; McKenna (n 17) 19.

are not intended to have operational impact.<sup>30</sup> This seems a contradictory and tokenistic way to approach Indigenous constitutional recognition: why put something in a constitution — a practical, working document — if it is not intended to have practical effect?

## 2 *The Expert Panel's Hybrid Approach*

The Expert Panel in 2012 established that a 'no legal effect' clause would not be supported by Indigenous people and did not recommend such a clause.<sup>31</sup> The Expert Panel instead proposed a hybrid approach that included substantive constitutional reform — a judicially-adjudicated racial non-discrimination guarantee was the key proposed means for protecting Indigenous rights<sup>32</sup> — as well as symbolic amendments. Rather than a new preamble, it proposed a new s 51A — an Indigenous head of power to replace the race power, with symbolic recognition statements incorporated as an introduction to the new power.<sup>33</sup> It also proposed a languages recognition provision<sup>34</sup> and removal of references to

<sup>30</sup> See, eg, *Constitution Act 1975* (Vic), which recognises Indigenous peoples in s 1A. Section 1A(3) provides: 'The Parliament does not intend by this section — (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.' The *Constitution Act 1902* (NSW) recognises Indigenous peoples in s 2, and s 2(3) provides: '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.' The *Constitution of Queensland 2001* (Qld) recognises Indigenous peoples in its preamble, and provides a 'no legal effect' clause in relation to the preamble in s 3A. The *Constitution Act 1934* (SA) recognises Indigenous peoples in s 2, and s 2(3) provides a 'no legal effect' clause. Western Australia and Tasmania are the only States to have recognised Indigenous peoples in the preambles to their Constitutions without a 'no legal effect' clause: *Constitution Act 1889* (WA); *Constitution Act 1934* (Tas). See also Lino, *Constitutional Recognition* (n 18) 250.

<sup>31</sup> *Expert Panel Report* (n 11) 113–15.

<sup>32</sup> *Ibid* xviii.

<sup>33</sup> This was an attempt to contain the interpretational reach of the symbolic words: see *ibid* 117–18, 153. The proposed section provided as follows:

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: 153.

<sup>34</sup> *Ibid* 133. A new s 127A of the *Constitution* would provide:

‘race’<sup>35</sup> — both symbolic rather than operative changes. These recommendations re-enlivened concerns about unintended legal consequences and whether the *Constitution* is the appropriate place for symbolic statements.<sup>36</sup>

Associate Professor Luke Beck argues the Expert Panel adopted a living originalist attitude to the *Constitution*,<sup>37</sup> by undertaking a project of what Professor Jack Balkin termed ‘constitutional redemption.’<sup>38</sup> The Expert Panel’s symbolic recommendations arguably sought to reposition Australia’s *Constitution* as a ‘higher law’:<sup>39</sup> a site of ‘inspiration and aspiration’ and ‘a repository of values and principles.’<sup>40</sup> It also sought to revitalise the *Constitution* as ‘our law’, making it a document of increased popular ownership by incorporating a ‘constitutive narrative through which people imagine themselves as a people.’<sup>41</sup>

Beck’s observations are persuasive.<sup>42</sup> The Expert Panel proposed removing references to ‘race’ because ‘race’ was an outdated and distasteful concept,<sup>43</sup> rather than for operational effect (given s 25 is now dead-letter,<sup>44</sup> the race power would be replaced with an Indigenous head of power fulfilling the same function, and other powers apart from the race power can be used to racially discriminate)<sup>45</sup> — demonstrating an understanding of the *Constitution* as carrying

The national language of the Commonwealth of Australia is English.

The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

<sup>35</sup> Through removal of ss 25 and 51(xxvi) of the *Constitution*: see *Expert Panel Report* (n 11) 137–8, 144–56.

<sup>36</sup> Anne Twomey, ‘The Preamble and Indigenous Recognition’ (2011) 15(2) *Australian Indigenous Law Review* 4, 14. See generally Freeman and Morris (n 25).

<sup>37</sup> Luke Beck, ‘Jack Balkin’s Constitutionalism and the Expert Panel on Constitutional Recognition of Indigenous Australians’ (2014) 37(2) *University of New South Wales Law Journal* 407. See also Jack M Balkin, *Living Originalism* (Harvard University Press, 2011).

<sup>38</sup> See Jack M Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011) 6.

<sup>39</sup> Beck (n 37) 408.

<sup>40</sup> Balkin, *Living Originalism* (n 37) 60.

<sup>41</sup> *Ibid* 61, quoted in Beck (n 37) 412.

<sup>42</sup> Though a constitutive narrative is currently not entirely missing from Australia’s constitutional arrangements given the existing preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) (*‘Constitution Act’*). However, this preamble is part of the UK Act which contains the *Constitution* in covering cl 9 — it sits outside the *Constitution*.

<sup>43</sup> *Expert Panel Report* (n 11) 139–53.

<sup>44</sup> *Ibid* 143. See also Anne Twomey, ‘An Obituary for s 25 of the Constitution’ (2012) 23(2) *Public Law Review* 125.

<sup>45</sup> While the insertion of a new s 116A racial non-discrimination guarantee in the *Constitution* would provide protection against discrimination, changing the race power to an Indigenous power does not provide protection and can be considered a symbolic change.

symbolic and moral significance,<sup>46</sup> rather than it being a purely practical document. A similar characterisation applies to the s 127A languages provision, which was intended to be declaratory rather than operative,<sup>47</sup> and the recognition statements in s 51A.<sup>48</sup> These clauses sought to reposition the *Constitution* as a document with increased symbolic content.<sup>49</sup>

### 3 *Objections to the Expert Panel's Approach*

The Expert Panel's proposals attracted criticism reminiscent of concerns raised in 1999. I have written elsewhere about objections to the proposed racial non-discrimination clause,<sup>50</sup> but various commentators also expressed concerns that inserting symbolic language would enliven uncertain judicial interpretation.<sup>51</sup> The languages recognition provision was described as involving unpredictable legal implications<sup>52</sup> and being better suited to legislation.<sup>53</sup> Others

<sup>46</sup> Beck (n 37) 415.

<sup>47</sup> The Expert Panel noted this provision 'would not give rise to implied rights or obligations': *Expert Panel Report* (n 11) 132.

<sup>48</sup> Beck (n 37) 415–16.

<sup>49</sup> *Ibid* 417–18. Beck's observations would equally apply to the 1999 preamble proposal, which was intended to be wholly symbolic.

<sup>50</sup> Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40(2) *Monash University Law Review* 488 ('Undemocratic, Uncertain and Politically Unviable?').

<sup>51</sup> See, eg, Leaser (n 25); James Allan, 'The Three "Rs" of Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743, 780.

<sup>52</sup> Anne Twomey, 'A Revised Proposal for Indigenous Recognition' (2014) 36(3) *Sydney Law Review* 381, 409–10. Among the critics of the proposal to recognise English, as well as recognising First Nations languages, Alexander Reilly warned against amending the *Constitution* to fill 'a silence with symbolic text': Alexander Reilly, 'Confusion of Tongues: Constitutional Recognition of Languages and Language Rights in Australia' (2013) 41(2) *Federal Law Review* 333, 343. Though Reilly accepts that 'recognition of English language is potentially a powerful symbol of unity in the Australian nation', he warns against the 'reinforcement of a national monoculturalism' — even though the Expert Panel proposed recognition of Indigenous languages as well: at 434. See also Jessica Kitch, 'Constitutional Recognition: Recognising the Flaws in Indigenous Affairs?' (2014) 8(15) *Indigenous Law Bulletin* 18, 18. However, 77% of the public supported a clause recognising Indigenous languages alongside English: *Expert Panel Report* (n 11) 81.

<sup>53</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (Report, October 2014) 3; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (Report, July 2014) 27–9.

warned that the poetic statements in s 51A could be interpreted in unintended ways by the High Court.<sup>54</sup>

Indeed, the ‘living originalist’ approach to constitutional understanding may be an uneasy fit for the practical and structural nature of the Australian *Constitution*. Emeritus Professor Jeffrey Goldsworthy observes that Balkin’s theory may be better suited to the American constitutional context, rather than Australia, because ‘[t]he whole idea of the Constitution as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians.’<sup>55</sup> Goldsworthy argues that unlike the *United States Constitution*, the Australian *Constitution*, properly understood, serves as a basic law, not a ‘higher law’ or the ‘people’s law.’<sup>56</sup> The Australian *Constitution* sets up the structures in which moral debates are argued out in the political realm, but it enumerates few morals or values itself. Sir Anthony Mason describes it as a dull, ‘prosaic document expressed in lawyer’s language,’<sup>57</sup> while Justice Keane contrasts Australia’s ‘small brown bird’ of a *Constitution* with America’s more inspirational ‘eagle.’<sup>58</sup> Damien Freeman and Julian Leaser similarly characterise Australia’s *Constitution* as a ‘practical and pragmatic charter of government,’ ill-suited to articulations of aspirations.<sup>59</sup> Making their argument for symbolic statements to be pursued outside the *Constitution* instead of within it, they quote the conservative US Justice, Antonin Scalia:

If you want aspirations, you can read the Declaration of Independence, with its pronouncements that ‘all men are created equal’ with ‘unalienable Rights’ that include ‘Life, Liberty, and the Pursuit of Happiness.’ ... There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence

<sup>54</sup> Twomey, ‘The Preamble and Indigenous Recognition’ (n 36) 16–17; Gary Johns, ‘History Yes, Culture No’, *The Australian* (Canberra, 8 October 2013) 12; James Allan, ‘Constitutional Fiddling Brings Inherent Danger’, *The Australian* (Canberra, 9 December 2011) 14.

<sup>55</sup> Jeffrey Goldsworthy, ‘Constitutional Cultures, Democracy, and Unwritten Principles’ [2012] (3) *University of Illinois Law Review* 683, 687 (‘Constitutional Cultures’). See also Elisa Arcioni and Adrienne Stone, ‘The Small Brown Bird: Values and Aspirations in the Australian Constitution’ (2016) 14(1) *International Journal of Constitutional Law* 60.

<sup>56</sup> Goldsworthy, ‘Constitutional Cultures’ (n 55) 685.

<sup>57</sup> Mason (n 21) 7–8. See also Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 9–10; Jeffrey Goldsworthy, ‘Against a Constitutional Bill of Rights in Australia’ in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 393, 393–4.

<sup>58</sup> PA Keane, ‘In Celebration of the Constitution’ (Speech, National Archives Commission, 12 June 2008) 1. See also Webber (n 26) 260–1.

<sup>59</sup> Damien Freeman and Julian Leaser, *The Australian Declaration of Recognition: Capturing the Nation’s Aspirations by Recognising Indigenous Australians* (Uphold and Recognise, 2014) 4.

and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.<sup>60</sup>

Freeman and Leaser argue the same is true of Australia's *Constitution*, which is even more 'practical and pragmatic' than the *United States Constitution*, because it contains no aspirational language.<sup>61</sup> Agreeing with such characterisations, Professor Greg Craven in 1999 commended the fittingly 'unemotional' approach of what he calls the 'old constitutionalism' that is 'uninterested in the magic of constitutional symbols'.<sup>62</sup> In 2012, Craven criticised the Expert Panel as suffering a 'fatal attack of enthusiasm' for seeking to constitutionalise 'abstract, legally binding value statements' which may yield uncertain High Court interpretations.<sup>63</sup> Indeed, when the *Constitution* is characterised in such terms — as basic, modest, unemotional, practical and pragmatic — the Expert Panel's attempted injection of symbolism seems incongruous with Australian constitutional culture and design.

However, this may downplay the inherent symbolic power of constitutions. For Professor Joseph Weiler, constitutions 'encapsulate fundamental values of the polity', and therefore reflect 'collective identity'.<sup>64</sup> Accepting that this is also true, constitutions arguably perform dual functions: a more legalistic, practical and institutional function to do with the distribution of power, but also a

<sup>60</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 134. Though there is scholarly debate about whether the *Declaration of Independence* should be considered part of the *United States Constitution*, the formal position is that it is not. The *Declaration of Independence* does not give rise to constitutional rights, but can inform constitutional interpretation as a secondary source of values: see Lee J Strang, 'Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution' (2016) 89(3) *Southern California Law Review* 637; Frederick Schauer, 'Why the Declaration of Independence Is Not Law — And Why It Could Be' (2016) 89(3) *Southern California Law Review* 619; Alexander Tsesis, 'The Declaration of Independence as Introduction to the Constitution' (2016) 89(3) *Southern California Law Review* 359, 360; Mark Graber, 'The Declaration of Independence and Contemporary Constitutional Pedagogy' (2016) 89(3) *Southern California Law Review* 509.

<sup>61</sup> Freeman and Leaser (n 59) 4. See also Lael K Weis, 'Constituting "the People": The Paradoxical Place of the Formal Amendment Procedure in Australian Constitutionalism' in Richard Albert, Xenophon Contiades and Alkmene Fontiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 256.

<sup>62</sup> Greg Craven, 'Australian Constitutional Battlegrounds of the Twenty-First Century' (1999) 20(2) *University of Queensland Law Journal* 250, 251. For further discussion, see generally Arcioni and Stone (n 55).

<sup>63</sup> Greg Craven, 'Keep the Constitutional Change Simple', *The Australian Financial Review* (online, 6 February 2012) <<https://www.afr.com/politics/federal/keep-the-constitutional-change-simple-20120206-i3ocf>>, archived at <<https://perma.cc/KWZ3-N5Y7>>.

<sup>64</sup> JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3(2-3) *International Journal of Constitutional Law* 173, 184, quoted in Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010) 11.

symbolic, emotional and nation-building function.<sup>65</sup> Understood in this way, even constitutions devoid of symbolic words can nonetheless convey symbolic meanings. For Dylan Lino, however, the non-operational, ‘expressive dimension of written constitutions’ is *non-constitutional*, because it is ‘not concerned with the basic distribution and exercise of public power within the state.’<sup>66</sup> The symbolic function of constitutions may therefore be better understood as a side-effect or corollary of the *Constitution*’s main function, which is the ordering of public power and processes.<sup>67</sup> Through such processes, citizens and their representatives engage in ongoing political dialogue not only about policy questions but also ultimately about national and constitutional identity.<sup>68</sup> As Associate Professor Elisa Arcioni and Professor Adrienne Stone point out, even though the *Constitution* lacks a statement of values, it nonetheless indirectly shapes (and is shaped by) cultural, political and moral values.<sup>69</sup>

Yet if the symbolic power of constitutions, properly understood, is non-constitutional, and inoperative constitutional poetry is non-constitutional, why must symbolic words be articulated in the *Constitution* to have the desired impact? It may be because insertion in the *Constitution* gives the words special status and prominence — but there may be other ways to achieve this. Another reason might be the high levels of deliberation usually required for constitutional amendments which help build community consensus and endorsement of the ideas expressed — and there are other ways of achieving this too.

#### 4 *The Shift to Extra-Constitutional Articulation of Symbolic Statements*

In light of arguments about legal uncertainty,<sup>70</sup> some advocates realised that any symbolic insertion would likely be whittled down to pointlessness in constitutional drafting discussions. Former Prime Minister Paul Keating succinctly captured the resulting difficulty: ‘If my forebears had been here 60,000 years, there is no way I would be fobbed off with some weasel words in this country’s

<sup>65</sup> Martin Loughlin, ‘What Is Constitutionalisation?’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 47, 52.

<sup>66</sup> Lino, ‘Written Constitutions’ (n 28) 5. See also Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 67, 82.

<sup>67</sup> See Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (Working Paper No 10–87, Public Law and Legal Theory Research Paper Series, New York University School of Law, May 2012).

<sup>68</sup> Jacobsohn (n 64) 7, 11–13.

<sup>69</sup> Arcioni and Stone (n 55) 60–1. See also Sean Brennan and Megan Davis, ‘First Peoples’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 46–53.

<sup>70</sup> See *Referendum Council Final Report* (n 1) 11–12.

horse-and-buggy utilitarian Constitution.<sup>71</sup> Aboriginal leader Noel Pearson in his 2018 Lowitja O'Donoghue Oration agreed with Keating's characterisation, noting:

The Keating aversion to the constitution as an appropriate instrument for symbolic recognition coincides with the objection of constitutional conservatives, who abjure symbolic words lest they give rise to unintended consequences in constitutional interpretation.

The constitution is the place for substantive rules, the establishment of institutions and the distribution of power. Which is why establishing the institution of an Indigenous Voice is rightly done in the constitution.<sup>72</sup>

On inserting symbolic language into the *Constitution*, Pearson's view had shifted from his days as a member of the Expert Panel in 2011.<sup>73</sup> 'I agree the Australian Constitution is not the place for symbolic words,' he concluded, as '[i]t would be like putting some poetic flourish in the front of the Rules of Cricket.'<sup>74</sup>

The idea of an extra-constitutional Declaration arose as a response to objections regarding unintended legal interpretations, but also in response to Indigenous concerns that such legalistic worries would ultimately render symbolic insertions tepid and uninspiring. In the face of political resistance to the Expert Panel's proposals,<sup>75</sup> Indigenous leaders and constitutional experts worked together to find alternative solutions to the challenge of Indigenous constitutional recognition.<sup>76</sup> Where the proposal for a First Nations constitutional voice arose

<sup>71</sup> Paul Keating quoted in Troy Bramston, 'Indigenous Treaty More Meaningful, Says Paul Keating', *The Australian* (Canberra, 14 November 2016) 4. Keating therefore preferred a treaty outside the *Constitution* as a way of achieving more fulsome recognition.

<sup>72</sup> Noel Pearson, 'The Uluru Statement from the Heart' (Speech, Lowitja O'Donoghue Oration, Don Dunstan Foundation, 29 May 2018) 4 ('Lowitja O'Donoghue Oration').

<sup>73</sup> The Cape York Institute argued for a new preamble: Cape York Institute, Submission to the Expert Panel on Constitutional Recognition of Indigenous Australians (September 2011) 7, 50 <<https://www.capeyorkpartnership.org.au/wp-content/uploads/2018/09/Constitutional-Reform-Proposal-2011.pdf>>, archived at <<https://perma.cc/3YYV-FJSS>>. For a portrayal of Pearson's views as a member of the Expert Panel in 2011, see Shireen Morris, *Radical Heart: Three Stories Make Us One* (Melbourne University Press, 2018) ch 3 ('*Radical Heart*').

<sup>74</sup> Pearson, 'Lowitja O'Donoghue Oration' (n 72) 4.

<sup>75</sup> In particular, there was resistance to the one substantive recommended reform, a racial non-discrimination guarantee: see generally Morris, 'Undemocratic, Uncertain and Politically Unviable?' (n 50).

<sup>76</sup> For more on this engagement, see generally Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' [2014] (55) *Quarterly Essay* 65–6 ('A Rightful Place'); Noel Pearson, 'Foreword' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) ix; Morris, *Radical Heart* (n 73).



as an empowering, political and procedural alternative to a judicially-adjudicated racial non-discrimination clause,<sup>77</sup> the proposal for a Declaration arose as an extra-constitutional alternative to symbolic recognition within the *Constitution*,<sup>78</sup> thus addressing the argument that the *Constitution* is not the appropriate place for poetry and freeing symbolic articulations from legalistic constraints.<sup>79</sup> Pearson called for an extra-constitutional Declaration alongside a constitutional voice.<sup>80</sup> Professor Megan Davis suggested that Indigenous recognition could incorporate legislative recognition, perhaps enacted through the unanimous action of all Australian Parliaments.<sup>81</sup> Craven (also a supporter of an Indigenous body in the *Constitution*) suggested a symbolic Declaration in the form of an Act unanimously passed by federal and state Parliaments,<sup>82</sup> while Freeman and Leaser (similarly supporters of a First Nations constitutional voice) proposed a non-legal Declaration to effect the symbolic aspects of Indigenous recognition,<sup>83</sup> to accompany the substantive constitutional change. As formulated by its proponents, an extra-constitutional Declaration would not entail justiciable rights or obligations,<sup>84</sup> but would have enduring moral, cultural and political power. Further, by making the lateral shift to *extra-constitutional* articulations of symbolism, a Declaration might more freely express the sentiments desired without constraining concerns about constitutional consequences. The revised logic had a neatness: a substantive constitutional guarantee within the *Constitution* through a First Nations constitutional voice; poetic symbolism outside the *Constitution* through an extra-constitutional Declaration.

<sup>77</sup> See generally Morris, 'The Torment of Our Powerlessness' (n 2) 632; Morris, 'Constitutional Procedure' (n 2); Morris, *A First Nations Voice in the Australian Constitution* (n 2).

<sup>78</sup> See generally Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016).

<sup>79</sup> Noel Pearson, 'Symbolic Indigenous Recognition for All of Us', *The Australian* (online, 2 June 2018) <<https://www.theaustralian.com.au/nation/inquirer/symbolic-indigenous-recognition-for-all-of-us/news-story/fe5c9d282082396c0ce8a7dabd22ce6b>>.

<sup>80</sup> Pearson, 'A Rightful Place' (n 76) 65–7.

<sup>81</sup> Megan Davis, 'Political Timetables' (n 15) 8–9. See also Davis, 'Indigenous Constitutional Recognition' (n 15) 79.

<sup>82</sup> Greg Craven, 'Throw Off the Right Number of Sandbags and This Might Fly', *The Australian* (Canberra, 23 August 2014) 21; Greg Craven, 'We Need to Work Out How Indigenous Voices Can Be Heard', *The Australian* (Canberra, 13 September 2014) 19.

<sup>83</sup> Freeman and Leaser (n 59) 2–4.

<sup>84</sup> See *ibid* 5; Pearson, 'Lowitja O'Donoghue Oration' (n 72) 7. However, note that while the Referendum Council report describes the Declaration as 'symbolic', its non-legal status is not specifically mentioned: *Referendum Council Final Report* (n 1) 2.

### B *The Uluru Statement and the Referendum Council Approach*

The Indigenous delegates at the First Nations regional dialogues were alive to concerns about the insertion of poetic language into the *Constitution* and the restrictions this may entail. In 2017, the *Uluru Statement* moved decisively away from the Expert Panel's approach and instead called for substantive and practical constitutional recognition through a constitutionally guaranteed First Nations voice instead of a racial non-discrimination guarantee.<sup>85</sup> The First Nations dialogues considered, but ultimately rejected the insertion of symbolic statements into the *Constitution*<sup>86</sup> because of concerns about 'the likelihood of government lawyers whittling down an acknowledgement into a bland statement incompatible with truth telling'.<sup>87</sup> An extra-constitutional symbolic statement was not rejected, however. As the Referendum Council notes, 'a Declaration outside the *Constitution* was endorsed by most Dialogues because it was considered that such a Declaration could be a more fulsome account of Aboriginal and Torres Strait Islander culture and history in Australia'.<sup>88</sup> Though this recommendation was not included in the *Uluru Statement*, the comments indicate potential Indigenous support for the concept which should be further explored.

In proposing an extra-constitutional Declaration to accompany substantive constitutional recognition through a First Nations voice, the Referendum Council — made up of Indigenous and non-Indigenous members — acknowledged the potential value in symbolic, aspirational statements.<sup>89</sup> However, Indigenous advocates have consistently made it clear that symbolic recognition *alone* would be insufficient,<sup>90</sup> which means a Declaration on its own would likely not garner Indigenous support. Alongside an empowering and substantive First Nations constitutional voice, however, an extra-constitutional

<sup>85</sup> Note that the *Uluru Statement* also called for a Makarrata Commission to oversee agreement-making, which would be set up in legislation: *Referendum Council Final Report* (n 1) i. This is an important proposal which may complement both a Declaration and a First Nations voice; however, this reform is not the focus of this article.

<sup>86</sup> *Ibid* 11.

<sup>87</sup> *Ibid* 12.

<sup>88</sup> Note that the insertion of symbolic statements into the *Constitution* was also rejected because of concerns about Indigenous sovereignty: *ibid*.

<sup>89</sup> *Ibid* 2.

<sup>90</sup> Indigenous advocates have consistently made it clear that mere symbolism or minimalism will not be acceptable, and that substantive constitutional change is sought: see, eg, Statement, 'Statement Presented by Aboriginal and Torres Strait Islander Attendees at a Meeting Held with the Prime Minister and Opposition Leader on Constitutional Recognition' (2015) 8(19) *Indigenous Law Bulletin* 26; Natasha Robinson, 'Indigenous Recognition "Must Be Real": Aboriginal Leaders', *The Australian* (Canberra, 6 July 2015) 1.

Declaration may be worthwhile, and may win Indigenous support as an important emotional ‘hook’ that could help engender wider popular support for the cause of reconciliation and ultimately a ‘yes’ vote in a referendum on a First Nations voice. Depending on timing, the process for formulating the Declaration could run alongside the process for designing, implementing and building popular support for a First Nations constitutional voice. Alternatively, a Declaration could be the emotional and symbolic celebration of the successful constitutional reform. Yet a symbolic Declaration would not be worth pursuing without substantive constitutional reform as called for by the *Uluru Statement*, as symbolism alone would not be acceptable to Indigenous people.

### 1 *The Potential Value of an Extra-Constitutional Declaration*

For constitutional scholars, an extra-constitutional, symbolic Declaration may not generate much enthusiasm. As Lino notes, there is ‘nothing particularly constitutional’ about symbolic statements that involve no reform to power relationships.<sup>91</sup> Yet the *Constitution* is not the only source of important national values.<sup>92</sup> To understand the potential merit in an extra-constitutional Declaration, it is useful to recall Professor Mark Tushnet’s distinction between the ‘thick’ and ‘thin’ constitution in the US. Tushnet contrasts the written *United States Constitution* as a thick document full of legal rights and rules, requiring judicial interpretation.<sup>93</sup> However, such thick constitutions, Tushnet argues, ‘do not thrill the heart’ or ‘generate impassioned declarations’ — except perhaps for constitutional lawyers.<sup>94</sup> They do not engage the people. While the legal rules in such thick constitutions are mostly argued and interpreted by lawyers and judges, the thin constitution (which for Tushnet is encapsulated by the poetic words and values of the *Declaration of Independence* and the preamble to the *United States Constitution*)<sup>95</sup> is for the people to invoke, interpret and argue through politics.<sup>96</sup> The thin constitution constitutes the people. This is a morally worthy task<sup>97</sup> because the people and politicians should feel empowered to

<sup>91</sup> Lino, ‘Written Constitutions’ (n 28) 1–2. See also Davis, ‘Indigenous Constitutional Recognition’ (n 15) 79.

<sup>92</sup> See Arcioni and Stone (n 55) 75–6; Chief Justice Robert French, ‘Law Making in a Representative Democracy: The Durability of Enduring Values’ (Catherine Branson Lecture Series, Flinders University, 14 October 2016) 4 <<https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj14Oct2016.pdf>>, archived at <<https://perma.cc/5YMT-FZEL>>.

<sup>93</sup> Tushnet, *Taking the Constitution Away from the Courts* (n 5) 9–11.

<sup>94</sup> *Ibid* 10–11.

<sup>95</sup> *Ibid* 12.

<sup>96</sup> See *ibid* 31.

<sup>97</sup> *Ibid* 12.

argue in defence of national values — such engagement and deliberation should not just be the domain of the courts.<sup>98</sup>

There are important insights here for Australian advocates of constitutional recognition that is both practically worthwhile and symbolically inspiring. While poetic articulations of values and aspirations may be important for nation-building and reconciliation, they need not be captured and constrained in the *Constitution*; nor must the ultimate meanings of symbols declared be controlled by the courts. Rather, such words can live and flourish outside the *Constitution*, in the domain of politics, philosophy and culture. They can be owned and argued by the Australian people and their representatives. The power of such a Declaration would thus be moral, cultural and political, rather than legal. Here, an analogy with the *Declaration of Independence* may again be useful. As Professor Mark Graber observes, the *Declaration of Independence* ‘occupies a central role in the political constitution, which differs from the legal constitution.’<sup>99</sup> While it is ‘not the source of any important legal right’, it is ‘the central text of the political constitution, the major source of constitutional rules and rights when constitutional claims are made outside of the courtroom.’<sup>100</sup> Outside the courtroom, as Tushnet suggests, such declarations give citizens ‘the opportunity to construct an attractive narrative of American aspiration ... [which] is an important constituent of the human good.’<sup>101</sup> For Australia, an extra-constitutional Declaration could be the stuff of speeches and political rhetoric, moving poetry and inclusive patriotic sentiment — and of course inevitable, productive disagreement and debate about the meaning of the symbolic words.<sup>102</sup> This could be valuable, for Australia has never declared our nation in a way that attempts to reconcile and unite all Australians.

In considering the potential benefits of the Referendum Council’s dual recommendations, the hazy line between symbolism and practical reform must also be acknowledged.<sup>103</sup> It is not the case that a First Nations voice, as a substantive and practical form of constitutional recognition, would be devoid of symbolic power. Nor is it necessarily the case that a symbolic extra-constitutional Declaration would have no tangible, practical impact over time. As noted above, symbolic constitutional language misguidedly intended to have no practical effect (like in 1999) may end up having practical legal consequences

<sup>98</sup> See *ibid* 31.

<sup>99</sup> Graber (n 60) 512.

<sup>100</sup> *Ibid*.

<sup>101</sup> Tushnet, *Taking the Constitution Away from the Courts* (n 5) 12.

<sup>102</sup> With respect to the *Declaration of Independence*, see generally *ibid* 14.

<sup>103</sup> For a nuanced discussion on the complex interplay between symbolism and substance, see Lino, *Constitutional Recognition* (n 18) 101–6, 116–23.

through unintended judicial interpretation.<sup>104</sup> Conversely, an institutional constitutional reform, designed to be non-justiciable<sup>105</sup> but nonetheless intended to have real practical operation — like a constitutional amendment requiring Parliament to establish a First Nations voice as proposed by the Referendum Council — would also carry symbolic power through the historic impact of a successful referendum guaranteeing Indigenous peoples a voice and the Indigenous–state dialogue thereby created. As Professor Jeremy Webber argues, all ‘constitutional reform is shot through with symbolic implications’ and symbolic aims are ‘often interwoven with functional arguments.’<sup>106</sup> The *Uluru Statement* itself is written in symbolic and poetic language that calls for practical and substantive reforms.<sup>107</sup> The constitutional voice, if implemented, would carry symbolic power as well as practical usefulness.<sup>108</sup>

Extra-constitutional, and even non-legal, recognition may also carry symbolic power as well as propelling practical impact over time.<sup>109</sup> An extra-constitutional treaty, for example, as advocated by countless Indigenous Australians, depending on its negotiated content would likely be symbolic and practical:<sup>110</sup> it may contain symbolic statements and have symbolic meaning as a reconciliatory agreement, and its substantive promises could have enduring practical impact.<sup>111</sup> Given the right political conditions, practical impact can eventually flow from morally and politically authoritative forms of recognition, even absent direct legal enforceability. For example, the *Treaty of Waitangi* was signed in 1840 and is considered New Zealand’s founding document, but its promises and principles are not legally binding unless incorporated into legislation,<sup>112</sup> which is dependent on political will. It does not provide an

<sup>104</sup> See above Part II(A).

<sup>105</sup> *Referendum Council Final Report* (n 1) 38.

<sup>106</sup> Webber (n 26) 262.

<sup>107</sup> *Referendum Council Final Report* (n 1) i.

<sup>108</sup> As Pearson explains: ‘The Voice is a modest institutional proposal that would nevertheless sit within our Commonwealth’s most important law. It would therefore be highly symbolic and play an important function in our system of government. And so it should. Voice is power. Voice is recognition. Voice is empowerment’: Pearson, ‘Lowitja O’Donoghue Oration’ (n 72) 5.

<sup>109</sup> For discussion of small ‘c’ constitutional recognition, see Dylan Lino, ‘Indigenous Recognition’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 243, 253.

<sup>110</sup> Lino, *Written Constitutions* (n 28) 5, 11–12.

<sup>111</sup> For example, the *Treaty of Waitangi* contains a preamble, as well as substantive clauses with respect to property rights, equality before the law and sovereignty: see *Treaty of Waitangi Act 1975* (NZ) sch 1 (*‘Treaty of Waitangi Act’*).

<sup>112</sup> *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

independent legal source of Māori rights.<sup>113</sup> However, though the *Treaty of Waitangi* lacks legal teeth,<sup>114</sup> it has come to carry significant moral, cultural and political authority.<sup>115</sup> As Matthew Palmer explains:

[F]rom a symbolic and moral perspective the *Treaty* has power. It symbolized and still symbolizes a mutual agreement between two peoples that gave the Crown legitimacy to exercise a governance role in New Zealand and accorded some level of protection to Maori. Despite the uncertainty and argument over its terms the *Treaty* remains a potent symbol of nation-building.<sup>116</sup>

Aligning with Tushnet's arguments, the *Treaty of Waitangi's* symbolic, moral and political power is perhaps even *enhanced* by being outside the formal law. Palmer notes that some Māori felt that incorporating the *Treaty of Waitangi* into legislation would 'diminish its status', transforming it from 'a powerful normative symbol with moral legitimacy into a mere legal instrument'<sup>117</sup> that can be amended: 'If the *Treaty* is outside the law its moral and normative power can continue untouched, as a reference point for political agitation. Inside the law, it becomes an instrument of the legal system and a plaything for lawyers and judges.'<sup>118</sup> Despite its lack of direct legal power, the *Treaty of Waitangi's* principles, though contested,<sup>119</sup> over time have propelled legislation, processes and institutional arrangements further recognising Māori rights, including the Māori Language Commission and recognition of Māori as an official language

<sup>113</sup> See Sir Robin Cooke, 'The Challenge of Treaty of Waitangi Jurisprudence' (Harkness Henry Lecture, 1994).

<sup>114</sup> Constitutional Advisory Panel, *New Zealand's Constitution: A Report on a Conversation* (Report, November 2013) 13.

<sup>115</sup> See Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2014) 18(2) *Australian Indigenous Law Review* 67, 70.

<sup>116</sup> Matthew SR Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution' (2006) 29(1) *Dalhousie Law Journal* 1, 29.

<sup>117</sup> *Ibid* 31 (emphasis omitted).

<sup>118</sup> *Ibid*. The argument that being outside the law has enhanced the *Treaty of Waitangi's* moral and political power is one that needs to be seriously considered.

<sup>119</sup> There has been continuing debate about whether the *Treaty of Waitangi* ceded Māori sovereignty to the Crown. Māori often argue it did not. In 1989, anthropologist Hugh Kawharu developed an English translation of the Māori version of the *Treaty of Waitangi*, to more accurately reflect the understanding of the signing chiefs. Translated meanings continue to be debated: Ministry for Culture and Heritage (NZ) and Hugh Kawharu, 'The Treaty of Waitangi' (Translation Document, 1994) <<https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf>>. See also Constitutional Advisory Panel (n 114) 29.

of New Zealand,<sup>120</sup> the Waitangi Tribunal and related settlement processes,<sup>121</sup> and the Māori Council.<sup>122</sup> The *Treaty of Waitangi* demonstrates how non-legal, political forms of recognition can carry symbolic, moral, cultural and political power which, given political will and public support, may in time translate into important practical reform.<sup>123</sup>

A similar positive potential might lie in an extra-constitutional Declaration in Australia, depending on its formulation, enactment and content — and of course depending on the political environment. Given the right conditions, a Declaration could come to carry enduring symbolic, cultural and political power that over time may help engender the productive discussions and commonality of purpose that can lead to useful practical action. This symbolic and practical potential would be increased if the Declaration contained high level mutual promises and principles of reconciliation. If the Declaration was also endorsed by Indigenous assent (perhaps by the First Nations voice, if the institution was already in operation) following a period of genuine negotiation on its content, it could become a powerfully symbolic reconciliatory agreement. The assent of all Australian Parliaments and the First Nations to a fulsome Declaration, accompanying the insertion of a First Nations voice in the *Constitution* via referendum, could thus present an important moment of national reconciliation.

Australia's Declaration would necessarily be different from the *Declaration of Independence*: it would not be borne from historic revolution. Obviously, it would be new rather than historic (at least in the beginning). Likewise, it would be different from the *Treaty of Waitangi*: it would not be the nation's founding Declaration, though as I suggest, it may one day become influential in Australian politics and culture. An Australian Declaration, due to its belated timing, would not be a founding document — at least not in a birth-of-the-nation sense. That reconciliatory moment should have happened in 1788 or 1901. A contemporary Declaration's symbolic power would therefore be determined by the quality of its content and the sense of national ownership generated through the procedure by which it is enacted.

<sup>120</sup> *Māori Language Act 2016* (NZ).

<sup>121</sup> *Treaty of Waitangi Act* (n 11) ss 5–8.

<sup>122</sup> *Maori Community Development Act 1962* (NZ) ss 17–18.

<sup>123</sup> See generally Morris, *A First Nations Voice in the Australian Constitution* (n 2) ch 4; Damien Freeman and Nolan Hunter, 'When Two Rivers Become One' in Shireen Morris (ed), *A Rightful Place: A Roadmap to Recognition* (Black Inc, 2017) 86; Lino, 'Constitutional Recognition' (n 18) 112–16.

## 2 Possible Content of an Extra-Constitutional Declaration

Let us now consider possible content, before turning to procedures. As identified by the First Nations dialogues and acknowledged by the Referendum Council, situating symbolic statements of recognition outside the *Constitution* comes with several benefits.<sup>124</sup> As Webber suggests, ‘the complex problems of symbolic calculation may be more easily resolved if one can deal with them in a document that is set apart from and therefore unconstrained by functional objectives.’<sup>125</sup> An extra-constitutional Declaration answers the objection that inserting poetry into the *Constitution* would lead to unpredictable judicial interpretation. Unconstrained by constitutional consequences, the Declaration can be drafted more poetically and expansively.

Various advocates have penned draft examples of the kinds of poetic statements a Declaration of Recognition could contain.<sup>126</sup> Pearson explains that the Declaration could ‘deal with the events at Sydney Cove in 1788 from two perspectives, from the perspective of invasion and from the perspective of settlement.’<sup>127</sup> Thus, it could ‘afford mutual recognition of all Australians.’<sup>128</sup> Pearson’s draft ‘Declaration of Australia’ lyrically recites the three historical stories that make the nation — the Indigenous, the British and the multicultural — and incorporates the poetic language of the *Uluru Statement*.<sup>129</sup> It includes a pledge to ‘make good’ on the *Uluru Statement*, extols the importance of both English and First Nations languages, and articulates shared values. An extract is as follows:

*Our history is replete with shame and pride, failure and achievement, fear and love, cruelty and kindness, conflict and comity, mistake and brilliance, folly and glory. We will not shy from its truth. Our storylines entwine further each generation. We will ever strive to leave our country better for our children.*

*We will honour the Uluru Statement from the Heart and make good upon it. Whilst English is the shared language of our Commonwealth, mother tongues*

<sup>124</sup> *Referendum Council Final Report* (n 1) 12, 37.

<sup>125</sup> Webber (n 26) 271.

<sup>126</sup> See, eg. Noel Pearson, ‘In the Spirit of Getting the Ball Rolling, Noel Pearson Offers this “Declaration of Australia and the Australian People”’, *The Australian* (Canberra, 2 June 2018) 16; Stan Grant, ‘A Makarrata Declaration: A Declaration of Our Country’ in Shireen Morris (ed), *A Rightful Place: A Roadmap to Recognition* (Black Inc, 2017) 117; Tim Wilson, ‘Declaring Our National Unity’ in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) 105.

<sup>127</sup> Pearson, ‘Lowitja O’Donoghue Oration’ (n 72) 8.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*; *Referendum Council Final Report* (n 1) i.



name the country and sing its song-lines — and we do not want for them to pass from this land. They are part of the cultural and natural wonder of our country that is the campfire of our national soul, and the pledge of care and custody we owe our ancestral dead and unborn descendants.

*After the battles* of our frontier wars fell silent, diggers from the First Nations joined their Settler and New Australian comrades in the crucibles of Gallipoli, the Western Front and Kokoda, and there distilled the essence of our values:

- That our mateship is and will always be our enduring bond.
- That freedom and the fair go are our abiding ethic.
- That our virtues of equality and irreverence give us courage to have a go.
- That we know we can and always will count on each other.

Three stories make us one: Australians.<sup>130</sup>

Pearson's draft reflects an articulation of different histories brought together and different identities, perspectives and memories of history mutually acknowledged. Though unity is the goal, diversity and difference are embraced and incorporated into a shared national story. This idea has been enthusiastically propounded by Labor Member of Parliament, Tim Watts, who calls for a more inclusive patriotism that is reflective of Australia's contemporary diversity.<sup>131</sup> The draft also articulates shared values and makes a commitment to implement the *Uluru Statement*. This gives the text the sense of mutual promises.

Indigenous journalist Stan Grant suggested possible content for what he calls a 'Makarrata Declaration',<sup>132</sup> usefully melding the concepts of a high-level agreement and a Declaration. Grant's draft preamble to the Declaration articulates shared history and shared values such as democracy and the rule of law, equal dignity and opportunity, the value of hard work over privilege and the importance of caring for those without.<sup>133</sup> It also articulates a commitment to national unity: 'Here, together, we form a new people bound not by the chains of history but committed to a future forged together.'<sup>134</sup> Liberal Member of Parliament, Tim Wilson, penned a 'Declaration of Unity' that embraces Indigenous culture and heritage, acknowledges the importance of Australia's British

<sup>130</sup> Pearson, 'Lowitja O'Donoghue Oration' (n 72) 9 (emphasis in original).

<sup>131</sup> Tim Watts, *The Golden Country: Australia's Changing Identity* (Text Publishing, 2019) 201–3.

<sup>132</sup> 'Makarrata' is a Yolngu word meaning 'coming together after a struggle': *Referendum Council Final Report* (n 1) i.

<sup>133</sup> Grant (n 126).

<sup>134</sup> *Ibid* 123–4.

institutional heritage, and celebrates the contribution of migrants.<sup>135</sup> It articulates values of equality, mutual respect and responsibility, and envisions a 'free, fair, just and united Australia for all'.<sup>136</sup> Graham Bradley suggested a 'Declaration of Recognition' to be enacted in legislation which focuses mainly on statements of Indigenous recognition.<sup>137</sup>

A Declaration could contain symbolic statements of recognition as well as an articulation of values and mutual promises of reconciliation. If the Declaration captures public and political imagination, absorption of its values and sentiments may over time help create the political impetus to implement its commitments. For example, the Declaration's articulation of the importance of Indigenous languages may in time help support political commitment for policies and legislation recognising and revitalising Indigenous languages and setting up a languages commission. If it contained promises in relation to the *Uluru Statement*, it may over time help drive the establishment of a Makarrata Commission to supervise agreement-making between Indigenous peoples and the state.<sup>138</sup> Indeed, the very process of forging agreement on the content of the Declaration would be a way of instigating national conversations about important values and commitments, thus helping to move the country towards greater mutual understanding and consensus on matters of reconciliation. At the very least, a Declaration enacted after such a process would give Indigenous advocates and Australians at large an agreed statement of values to appeal to and argue about. The Declaration could be an enduring moral and political reminder of mutual promises and principles to which the nation should aspire.

### III A SEMI-ENTRENCHED DECLARATION OF RECOGNITION

Apart from its content, the power of a Declaration will depend on the sense of national ownership generated by its enactment procedure. The Referendum Council recommended the Declaration be 'legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament'.<sup>139</sup> Federal unanimity would help imbue the Declaration with elevated status. If Indigenous

<sup>135</sup> Wilson (n 126).

<sup>136</sup> *Ibid* 113.

<sup>137</sup> Graham Bradley, 'Towards a Winning Referendum Proposal' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) 115, 123–5.

<sup>138</sup> This was the other call made by the *Uluru Statement*, presuming a First Nations voice was already in operation: *Referendum Council Final Report* (n 1) i, 2.

<sup>139</sup> *Ibid* 2.

assent were also incorporated, the authority and legitimacy of the Declaration would be further increased. But what if such an enactment procedure were echoed in a special amendment or repeal requirement within the legislation? Would this mean the Declaration would be legally semi-entrenched? I turn now to discuss possibilities of semi-entrenchment under Australia's constitutional arrangements, before exploring three possible options for utilising unanimous federal legislation.

### A What Is Semi-Entrenchment?

For the purposes of this discussion, semi-entrenchment is legislation subject to a legally valid manner and form requirement for amendment or repeal. I use the term 'semi-entrenched' to mean legislation that is more difficult to amend than an ordinary Act, but less onerous than a double majority referendum under s 128. Here I argue that an amendment procedure requiring the unanimity of all Australian Parliaments, if legally binding and effective, would be semi-entrenched. While obtaining the agreement of all Australian Parliaments may be difficult, it is not as difficult as achieving a majority of voters in a majority of States and a majority nationally.<sup>140</sup> A procedure requiring a majority popular vote, rather than a double majority referendum under s 128, if legally effective would also be semi-entrenched. Where the entrenchment is legally ineffective, but a special enactment procedure is nonetheless undertaken (and particularly if the special amendment requirement appears in the legislation as an authoritative directive that is generally followed), the legislation is better described as being politically or morally entrenched.<sup>141</sup> A government may find it politically difficult to amend the Act without following the special procedure, but it would be legally possible to do so.

Why is potential semi-entrenchment worth discussing in relation to a Declaration? Winterton argued that manner and form requirements enable 'a prudent balance to be struck between the rigidity of constitutional limitations on legislative power and complete legislative freedom of action; it represents a

<sup>140</sup> See Albert (n 7) 742.

<sup>141</sup> See generally Thomas F Burke, 'On the Resilience of Rights' in Martin A Levin, Marc K Landy and Martin Shapiro (eds), *Seeking the Centre: Politics and Policymaking at the New Century* (Georgetown University Press, 2001) 172, 176; Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (Oxford University Press, 6<sup>th</sup> ed, 2012) 638; John D Skrentny and Micah Gell-Redman, 'Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment' (2011) 120 *Yale Law Journal Online* 325; Thomas F Burke 'The Rights Revolution Continues: Why New Rights Are Born (and Old Rights Rarely Die)' (2001) 33(4) *Connecticut Law Review* 1259, 1262.

flexible compromise between the two.<sup>142</sup> This is one reason extra-constitutional yet semi-entrenched legislation is worth exploring: political pragmatism.<sup>143</sup> Such mechanisms can provide a middle way between constitutional entrenchment and total legislative flexibility which may prove useful for proponents of enduring structural reform, or as in this case, an enduringly authoritative symbolic statement. When a double majority referendum appears too politically difficult or the consequences of constitutional entrenchment too legally uncertain (as discussed above in relation to constitutional poetry),<sup>144</sup> less onerous options for semi-entrenchment have been considered as a way of giving legislation special, enduring significance and elevated status while stopping short of constitutional entrenchment. The higher levels of political consensus and public engagement often required contribute to this special weight.

While manner and form requirements in Australia are most common in the entrenchment of state constitutions, such procedures are used in general to protect legislation of elevated importance.<sup>145</sup> In Australia, semi-entrenchment has been raised in the context of rights debates for politically pragmatic reasons, as well as in the Indigenous recognition debate. Acknowledging the lack of bipartisanship regarding a racial non-discrimination clause in the *Constitution* in 2015, Indigenous Member of Parliament, Ken Wyatt, suggested strengthening the *Racial Discrimination Act 1975* (Cth) to require an absolute majority of both Houses of Parliament for any amendment, as an alternative to constitutional entrenchment.<sup>146</sup> Such an attempt to bind the Commonwealth Parliament

<sup>142</sup> George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11(2) *Federal Law Review* 167, 170.

<sup>143</sup> See also discussion of this political pragmatism in Albert (n 7) 742.

<sup>144</sup> See above Part II(A).

<sup>145</sup> Lord Wilberforce argues:

In a democratic country, with a true respect for the rule of law, entrenchment provisions, requiring special majorities, or special procedures, over which the Courts, or a Court, have control, can be an important restraint. Canada, has tried, in its Bill of Rights, a kind of demi-entrenchment and this cannot be said to have failed. No government is lightly going to over-ride these restraints, or if it does, it may suffer, as the case of India showed. So we should not give way to the theorists, and we should firmly entrench essential provisions.

Lord Wilberforce, 'The Need for a Constitution in the United Kingdom' (1979) 14(3) *Israel Law Review* 269, 275. See also Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17(2) *King's College Law Journal* 255, 279.

<sup>146</sup> Natasha Robinson, 'Spectre of Bill of Rights Kills Racism Clause: Ken Wyatt', *The Australian* (Canberra, 4 March, 2015) 7. See also Dylan Lino's suggestion of incorporating an 'express words' or 'notwithstanding clause' into the *Racial Discrimination Act 1975* (Cth): Dylan Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition: Entrenching the Racial Discrimination Act' (2017) 91(5) *Australian Law Journal* 381; Lino, *Constitutional Recognition* (n 18) 211.

would be legally ineffective as it would be inconsistent with the *Constitution* which sets out the procedures for lawmaking.<sup>147</sup> However, Wyatt's comment demonstrated the creative search for semi-entrenched alternatives to constitutional reform. Such middle way alternatives have also been raised in broader bill of rights discussions for similarly pragmatic reasons. During the 2009 National Consultation on Human Rights, Professor Anne Twomey suggested that a bill of rights could be 'effectively entrenched' without altering the *Constitution*, by inserting the rights clauses into the *Australia Act* using the federal unanimity procedure.<sup>148</sup> This is an idea I will explore below in relation to a Declaration.

Manner restraints have been attempted in Commonwealth legislation, in some cases resulting in effective semi-entrenchment.<sup>149</sup> Other attempts are legally ineffective because they are inconsistent with the *Constitution*, resulting in what is more accurately described as political and moral entrenchment. For example, the *Flags Act 1953* (Cth) ('*Flags Act*') provides that the national flag can only be altered (and therefore the *Flags Act* can only be altered) through a popular vote by a majority of electors.<sup>150</sup> While this may operate to politically restrain hasty flag changes, this procedural requirement is legally ineffective as the Commonwealth Parliament lacks power under the *Constitution* to bind itself in this manner.<sup>151</sup> Similarly, national Goods and Services Tax ('GST') legislation purports to prevent the Commonwealth from altering the GST rate 'unless each State agrees to the change'.<sup>152</sup> But the *Constitution* provides Parliament with the power to legislate with respect to taxation<sup>153</sup> and sets out the procedure for lawmaking. This special procedural requirement is also legally ineffective,<sup>154</sup> though it may carry political force, particularly because it reflects an intergovernmental agreement.<sup>155</sup>

<sup>147</sup> See *Constitution* ch I.

<sup>148</sup> Anne Twomey, Submission to the National Human Rights Consultation Committee, *National Human Rights Consultation Committee* (5 May 2009) 20. See also National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Report, September 2009) 302.

<sup>149</sup> See, eg, *Australia Act 1986* (Cth) s 15 ('*Australia Act*'). This will be discussed further below at Part IV.

<sup>150</sup> *Flags Act 1953* (Cth) s 3.

<sup>151</sup> See generally Anne Twomey, 'Manner and Form' (Speech, Gilbert + Tobin Constitutional Law Conference, The University of New South Wales, 18 February 2005) 2.

<sup>152</sup> *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) s 11 ('*A New Tax System Act*').

<sup>153</sup> *Constitution* s 51(ii).

<sup>154</sup> See generally Twomey, 'Manner and Form' (n 151) 2.

<sup>155</sup> The intergovernmental agreement is in *A New Tax System Act* (n 152) sch 2.

### B Engendering Enduring Political, Moral and Cultural Legitimacy

Part of the value in special enactment and amendment procedures that require increased political consensus is in generating longstanding public or national endorsement of an outcome. Accordingly, the endorsement procedures often found in manner and form requirements are sometimes used by governments, not to restrain future amendment or repeal, but to garner a public mandate or legitimacy for a proposed action. In such cases, the special procedure is not intended to result in a binding obligation on parliament, but to generate increased political authority for the outcome. Freeman and Leeser in 2014, proposed that a non-legal extra-constitutional Declaration should be subject to a popular vote to ensure political legitimacy and moral authority.<sup>156</sup> In 1977, this type of plebiscite was used to enable Australians to choose a national anthem.<sup>157</sup>

Similar devices to generate political legitimacy and authority for an action or outcome have been used to help resolve contentious policy questions domestically and internationally.<sup>158</sup> In 2017, the Australian government ran a postal survey to determine public views and secure a popular mandate for ordinary legislative reform addressing the question of same-sex marriage. Though some argued the resort to a plebiscite was a failure of parliamentary responsibility,<sup>159</sup> the public vote ultimately helped forge a path through parliamentary blockages by confirming public support (61% of Australians endorsed reform)<sup>160</sup> which created the political mandate for implementation of the same-sex marriage reform.<sup>161</sup> In South Africa, before pursuing negotiations to end Apartheid, the government held a referendum to secure a political mandate for the forthcoming negotiations.<sup>162</sup> These popular votes were legally unnecessary but politically

<sup>156</sup> Freeman and Leeser (n 59).

<sup>157</sup> Freeman and Leeser argue that a Declaration, popularly endorsed in this way, could have 'similar cultural status to the National Anthem': *ibid* 4. In my view, the aim should be for the Declaration to have much more powerful cultural status than the national anthem.

<sup>158</sup> Paul Kildea, 'The Constitutional and Regulatory Dimensions of Plebiscites in Australia' (2016) 27(4) *Public Law Review* 290.

<sup>159</sup> See, eg, Matt Collins, 'A Plebiscite on Same-Sex Marriage Would Be a Failure of Parliament's Responsibility', *The Conversation* (Web Page, 4 March 2016) <<https://theconversation.com/a-plebiscite-on-same-sex-marriage-would-be-a-failure-of-parliaments-responsibility-55289>>, archived at <<https://perma.cc/3V6E-MDH4>>.

<sup>160</sup> Australian Bureau of Statistics, *National Results: Australian Marriage Law Postal Survey, 2017* (Catalogue No 1800.0, 15 November 2017).

<sup>161</sup> If a future parliament wished to amend the *Marriage Act 1961* (Cth) to reverse the change, no plebiscite would be legally required, but it would be interesting in such a case to see whether the public would clamour for their fair say on the issue now that the political precedent has been set.

<sup>162</sup> See generally Annette Strauss, 'The 1992 Referendum in South Africa' (1993) 31(2) *Journal of Modern African Studies* 339.

useful in engendering consensus, confirming public support and propelling popular legitimacy and momentum for proposed reform. They encouraged conversations conducive to change.

Part of the importance of exploring special mechanisms for semi-entrenchment, therefore, is not just in creating a unifying symbolic moment or enduring change that may be subject to more difficult amendment or repeal procedures, but in the elevated levels of public engagement, deliberation and consent often required by such procedures. A special enactment or amendment procedure that requires increased public engagement, like a plebiscite or referendum or increased negotiation and discussion between all Australian Parliaments, like a federal unanimity procedure, asks citizens and/or their representatives to give the particular issue special levels of consideration and deliberation. It challenges the country to have the conversations required to develop higher than ordinary levels of consensus. This intensified engagement process can give rise to increased rancour and division,<sup>163</sup> but it may also enliven increased productive debate, listening, learning and consensus-building:<sup>164</sup> good groundwork not only for reform, but for the building of social, political and cultural understanding, cohesion and reconciliation.

There are thus two reasons special amendment procedures have been discussed in relation to a Declaration. First, it is a way of ensuring the legislation has longevity and will not be lightly amended or repealed — this would be especially true if the enactment procedure is echoed in a special amendment procedure, and even more so if the procedure is legally binding. Second, it is a way of developing public buy-in for the ideas expressed and ensuring that the Declaration enjoys long-term political, cultural and moral authority.<sup>165</sup> It is a way

<sup>163</sup> Notably, the same-sex marriage postal survey was divisive and damaging for LGBTIQ Australians: see, eg, Lexi Metherell, 'Same-Sex Marriage Survey Damaging to LGBTI People's Mental Health, Research Finds', ABC News (Web Page, 24 January 2019) <<https://www.abc.net.au/news/2019-01-24/same-sex-marriage-survey-damaging-to-mental-health/10745800>>, archived at <<https://perma.cc/T48U-PCUF>>.

<sup>164</sup> See generally Shawn W Rosenberg (ed), *Deliberation, Participation and Democracy: Can the People Govern?* (Palgrave Macmillan, 2007).

<sup>165</sup> There is some resonance here with Professor Bruce Ackerman's notion of 'constitutional moments', which are moments of heightened political debate and deliberative activity, leading to transformative constitutional changes that can occur outside the written constitution: see generally Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991); Bruce Ackerman, *We the People: Transformations* (Belknap Press, 1998) vol 2. Rosalind Dixon describes this as 'informal constitutional change': Rosalind Dixon, 'Updating Constitutional Rules' [2009] (1) *Supreme Court Review* 319, 344; Rosalind Dixon and Guy Baldwin, 'Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate' [2017] *University of New South Wales Law Research Series* 74. However, unlike Ackerman, I do not suggest here that such 'constitutional moments' external to formal constitutional change need to be given judicial recognition.

of instigating a national conversation about reconciliation and empowering the whole country (at least through their political representatives) to have input into the principles, concepts and ideals that would be expressed in a Declaration, thus encouraging reconciliation through conversation. A Declaration agreed by all Australian Parliaments would carry more legitimacy, authority and symbolic power than a Declaration enacted unilaterally by the Commonwealth.

### C *Would a Semi-Entrenched Declaration Be Quasi-Constitutional?*

In contemplating options for semi-entrenchment, or political and moral entrenchment, one question that may be asked is whether such semi-entrenchment would make the Declaration quasi-constitutional.<sup>166</sup> Here I suggest that it would not — at least not in a legal supremacy sense. Given the Declaration would be symbolic in content and purpose rather than legally substantive, it could be considered quasi-constitutional only in a political and cultural sense and by virtue of the fact that the legislation may be more difficult to amend. As intended, its operation would be more like the politically, culturally and morally authoritative *Treaty of Waitangi*<sup>167</sup> or the *Declaration of Independence*,<sup>168</sup> which sit outside formal legal instruments, than a justiciable, legislated bill of rights. The distinction is crucial.

Professor Richard Albert describes ‘quasi-constitutional amendments’ as ‘a curious phenomenon resulting from the marriage of constitutional law and politics.’<sup>169</sup> In Canada, the term ‘quasi-constitutional’ has been used to describe

Critics of Ackerman’s approach have noted the problems with his theory: see, eg, William W Fisher III, ‘The Defects of Dualism’ (1992) 59(2) *University of Chicago Law Review* 955; Michael J Klarman, ‘Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments’ (1992) 44(3) *Stanford Law Review* 759; Michael W McConnell, ‘The Forgotten Constitutional Moment’ (1994) 11(1) *Constitutional Commentary* 115.

<sup>166</sup> For discussions of statutes of elevated, quasi-constitutional importance, see generally Albert (n 7); Vanessa MacDonnell, ‘A Theory of Quasi-Constitutional Legislation’ (2016) 53(2) *Osgoode Hall Law Journal* 508; David Feldman, ‘The Nature and Significance of “Constitutional” Legislation’ (2013) 129(3) *Law Quarterly Review* 343; Chief Justice James J Spigelman, ‘The Application of Quasi-Constitutional Laws’ (McPherson Lecture Series, The University of Queensland, 11 March 2008).

<sup>167</sup> Which is not legally enforceable unless incorporated into legislation, but which presumably could not be altered except by another agreement between the Māori people and the Crown: see Janet McLean, ‘Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand’ [2015] (2) *New Zealand Law Review* 187, 191.

<sup>168</sup> Which, as noted, does not give rise to justiciable rights: see above Part II(B)(i).

<sup>169</sup> A ‘quasi-constitutional amendment’, Albert explains,



ordinary statutes (usually with important rights-protecting subject matter) that are given elevated importance and operation by the courts through a restriction on implied repeal except by express words, either under the authority of a supremacy clause in the legislation<sup>170</sup> or by virtue of the statute's important content.<sup>171</sup> This is a creative variation on the principle of legality — a way of imbuing ordinary legislation with a status approaching constitutional law, while avoiding difficult constitutional reform requirements. Albert observes risks in quasi-constitutional entrenchments of this kind. These include the circumvention of formal constitutional reform procedures for politically convenient purposes to the detriment of constitutional authority and the weakening of demarcations between constitutional and non-constitutional law.<sup>172</sup> Similarly in the UK context, Professors Farrah Ahmed and Adam Perry critique the 'judicial innovation' of 'quasi-entrenchment' of 'constitutional statutes' as lacking a sound legal basis.<sup>173</sup>

Such observations are properly applied to statutes of substantive law and rights, which are generally the focus of discussions of this kind of quasi-constitutionality. An extra-constitutional Declaration of the kind envisioned here can be distinguished from quasi-constitutional statutes in Canada and the UK. The distinction between form and content is important. Even if legally semi-entrenched, a Declaration as understood here is intended to be symbolic, poetic and declaratory in function rather than giving rise to justiciable rights and obligations.<sup>174</sup> It is intended to inspire politics, culture and philosophy, not enliven litigation. If it leads to substantive action and reform, it will be through political action. No legal supremacy clause is contemplated and the Declaration would not legally trump other laws.

is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance-making it just as durable as a constitutional amendment: Albert (n 7) 740.

Albert cites the *Canadian Bill of Rights*, SC 1960, c 44 ('*Canadian Bill of Rights*') as an example of a quasi-constitutional amendment — it was an ordinary Act passed by ordinary procedures, but it was imbued with the moral and political authority of a constitutional law.

<sup>170</sup> See, eg, the *Canadian Bill of Rights* (n 169), which contains a supremacy clause: at s 2.

<sup>171</sup> See generally MacDonnell (n 166) 518. Similar approaches have also been employed by UK courts: see Ahmed and Perry, 'Constitutional Statutes' (n 7); Ahmed and Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (n 7).

<sup>172</sup> Albert (n 7) 742.

<sup>173</sup> Ahmed and Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (n 7) 515.

<sup>174</sup> Freeman and Leaser (n 59) 5; Pearson, 'Lowitja O'Donoghue Oration' (n 72) 7. However, that while the Referendum Council describes the Declaration as 'symbolic', its non-legal status is not specifically mentioned: *Referendum Council Final Report* (n 1) 2.

Mechanisms for semi-entrenchment, or political and moral entrenchment, on this understanding, are intended to ensure the Declaration enjoys longevity and national legitimacy. Such procedures seek to imbue the document with elevated and enduring political, moral and cultural authority. Amendment or repeal should be difficult, but the intent is not legal supremacy. If the Declaration as intended could be described as quasi-constitutional, it would thus be in a political, moral and cultural sense, not in a legal sense. Yet this raises the question: if the Declaration is wholly symbolic in content and purpose, why does it need to be in legislation? Arguably a Declaration agreed by all Australian governments and the First Nations would carry political, moral and cultural authority, even if it was not articulated in legislation. This is a possibility I will consider after my discussion of semi-entrenched legislation below.

#### IV EXPLORING OPTIONS FOR A SEMI-ENTRENCHED DECLARATION

The Referendum Council recommended a Declaration be ‘legislated by all Australian [p]arliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples’ Voice to Parliament’.<sup>175</sup> Here I argue that the federal unanimity procedure under Australia’s constitutional arrangements gives rise to the possibility of a semi-entrenched Declaration that is more entrenched than an ordinary Act, but less entrenched than an amendment to the *Constitution* under s 128. In this section I discuss semi-entrenchment in the Australian constitutional context, before considering three options for utilising unanimous federal legislation with respect to a Declaration.

##### A *Constitutional Context: Can the Commonwealth Parliament Bind Itself?*

Determining whether it is possible to create a semi-entrenched federal statute in Australia requires a quick refresher of some Australian constitutional basics. Courts in general characterise Australian Parliaments as legislatures bestowed with the same absolute and plenary power of the UK Parliament.<sup>176</sup> The words ‘for the peace, order and good government’ in s 51 of the *Constitution* ‘connote, in British constitutional language, the widest law-making powers appropriate

<sup>175</sup> *Referendum Council Final Report* (n 1) 2.

<sup>176</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 152–3.

to a Sovereign.<sup>177</sup> However, because the plenary power conferred on the Commonwealth is constrained by the *Constitution*,<sup>178</sup> the Commonwealth cannot bind itself in the same way as the states.<sup>179</sup> Taylor agrees that given the absence of an equivalent to s 6 of the *Australia Act* at the Commonwealth level,<sup>180</sup> the Commonwealth lacks power to bind successor Parliaments.<sup>181</sup> The *Constitution* dictates how Parliament must make laws and these rules cannot be varied by legislation.<sup>182</sup> This is why federal manner and form requirements like those mentioned in the *Flags Act* and the GST legislation are legally invalid. On a preliminary assessment, therefore, it appears that the Commonwealth can only

<sup>177</sup> *Ibralebbe v The Queen* [1964] AC 900, 923 (Viscount Radcliffe). This phrase is a conventional formula signifying conferral of unlimited sovereign power which has been held not to confer any judicially enforceable limitations on plenary power: see, eg, *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282; *Riel v The Queen*; *Ex parte Riel* (1885) 10 App Cas 675. See also Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24(3) *Melbourne University Law Review* 677, 681; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 25; Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 189. Cf Ian D Killely, 'Peace, Order and Good Government: A Limitation on Legislative Competence' (1989) 17(1) *Melbourne University Law Review* 24, 42–3.

<sup>178</sup> Goldsworthy accepts, therefore, that parliamentary sovereignty does not apply to the Commonwealth where the doctrine is displaced by binding constitutional provisions: Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed) *Australian Federation: Working Towards the Second Century* (Melbourne University Press, 1992) 152.

<sup>179</sup> The states in Australia have a limited power to enact manner and form provisions under s 6 of the *Australia Act* (n 149) which, if effective, can bind state Parliaments so that the state's constitution can only be altered following particular procedures: *A-G (NSW) v Trethowan* [1932] AC 526; *A-G (WA) v Marquet* (2003) 217 CLR 545 ('*Marquet*'). According to Kirby J: 'In this respect, the grant, or confirmation, of legislative power inherited by the State Parliaments ... is larger than that enjoyed by the Federal Parliament': at 596 [152]. See generally Jeffrey D Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403; Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69; Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 235–49 ('*The Australia Acts 1986*').

<sup>180</sup> *Australia Act* (n 149) s 6 provides:

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.

<sup>181</sup> Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57, 62.

<sup>182</sup> See, eg, *Constitution* ss 23, 40. See also Winterton, 'Can the Commonwealth Enact "Manner and Form" Legislation?' (n 142) 170, 191–2.

obtain the power to bind itself through constitutional reform authorised by referendum.<sup>183</sup>

The federal unanimity procedure under s 15 of the *Australia Act* appears to be the one exception to this general rule.<sup>184</sup> Importantly however, unanimous federal action is not the Commonwealth binding itself unilaterally; it is binding itself through federal co-operation, which is reciprocal and therefore crucially different. The *Australia Acts* in 1986 gave Australian Parliaments cooperative authority over Australian constitutional arrangements,<sup>185</sup> without conferring the power to alter the *Constitution* proper other than by referendum under s 128.<sup>186</sup> Accordingly, there are existing examples of effectively semi-entrenched legislation that cannot be amended except by the cooperative action of Australian Parliaments. The *Australia Act*<sup>187</sup> and the *Statute of Westminster* are semi-entrenched,<sup>188</sup> as they are subject to s 15 of the *Australia Act*, which requires State concurrence for amendment of those Acts.<sup>189</sup> Similarly, because s 15 provides the only way of amending the *Statute of Westminster* and thus the *Constitution Act* (via amendment of s 8 of the *Statute of Westminster*),<sup>190</sup> all three Acts are semi-entrenched.

<sup>183</sup> Carney (n 179) 95.

<sup>184</sup> This procedure is also echoed in s 51(xxxviii) of the *Constitution*.

<sup>185</sup> See generally Nicholas Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 20(2) *University of Queensland Law Journal* 262, 290; Anthony Dillon, 'A Turtle by Any Other Name: The Legal Basis of the Australian Constitution' (2001) 29(2) *Federal Law Review* 241, 242–53 ('A Turtle by Any Other Name').

<sup>186</sup> Under s 128 of the *Constitution*, 'this Constitution' cannot be altered except by a referendum. The distinction between the *Constitution* and the *Constitution Act* (n 42) will be discussed further below at Part IV(A)(3).

<sup>187</sup> *Sue v Hill* (1999) 199 CLR 462 confirmed the validity of the *Australia Act* (n 149) under section 51(xxxviii): at 490–1 [61]–[62] (Gleeson CJ, Gummow and Hayne JJ), 525 [164] (Gaudron J) ('*Sue v Hill*'). See also *Marquet* (n 179) 570–1 [67]–[68] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409 (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>188</sup> Zines, *The High Court and the Constitution* (n 177) 420; Twomey, *The Australia Acts 1986* (n 179) 322–41.

<sup>189</sup> While there is not space here to go into a detailed discussion of the complex history related to these Acts, for an in-depth discussion, see Twomey, *The Australia Acts 1986* (n 179) 322–405, 412; Zines, *The High Court and the Constitution* (n 177) 420–5; GJ Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, the Effect of Independence' (1986) 16(1) *Federal Law Review* 29; Dillon, 'A Turtle by Any Other Name' (n 185). For those that argue s 15 of the *Australia Act* (n 149) is not valid in its attempt to restrain amendment or repeal, see James A Thomson, 'The Australia Acts 1986: A State Constitutional Law Perspective' (1990) 20(2) *University of Western Australia Law Review* 409, 414–15.

<sup>190</sup> Twomey, *The Australia Acts 1986* (n 179) 361–3, 389; Anne Twomey, 'The Effect of the *Australia Acts* on the Western Australian Constitution' (2013) 36(2) *University of Western Australia Law Review* 273, 291–2 ('The Effect of the *Australia Acts*').

In my view, the federal unanimity procedure under s 15 presents the only way of achieving legally effective semi-entrenchment of a Declaration. It could also, however, be utilised to enable political and moral entrenchment, as suggested by the Referendum Council.<sup>191</sup> The following Parts briefly explore three possibilities for using concurrent federal legislation to enact a Declaration:

- 1 A standalone Declaration enacted by all Australian Parliaments (as recommended by the Referendum Council);
- 2 Amendment of the *Australia Act* with the concurrence of all the States to insert a Declaration;
- 3 Amendment of the covering clauses of the *Constitution Act* with the concurrence of all the states to insert a Declaration into a new covering cl 10.

#### 1 *Option One: A Standalone Declaration Enacted by Federal Concurrence*

The Referendum Council recommends a Declaration legislated by all Australian Parliaments.<sup>192</sup> As discussed above, a Declaration enacted in this way would arguably carry elevated and enduring status.<sup>193</sup> If Indigenous assent were added to the enactment procedure, as I suggest, this would add symbolic, moral and political weight. But if the enactment procedure were reiterated in an amendment requirement in the legislation, would the Declaration be semi-entrenched?

The Referendum Council's proposed procedure sounds something like an exercise of power under s 51(xxxviii) of the *Constitution*, which contains a federal concurrence requirement.<sup>194</sup> If s 51(xxxviii) were the only constitutional

<sup>191</sup> See *Referendum Council Final Report* (n 1) 38–9.

<sup>192</sup> *Ibid* 2.

<sup>193</sup> *Ibid* 38–9. See also above Part III.

<sup>194</sup> This power was used to enact the *Australia Act* (n 149): *Sue v Hill* (n 187) 490–1 [61]–[62] (Gleeson CJ, Gummow and Hayne JJ), 525 [164] (Gaudron J); *Marquet* (n 179) 570–1 [67]–[68] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Section 51(xxxviii) of the *Constitution* provides the Commonwealth the authority to make laws with respect to

the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

However, s 51(xxxviii) does not strictly implement the Referendum Council's recommendation. The power requires the concurrence of 'all the States directly concerned', not 'all Australian parliaments' as the Referendum Council recommends — the Northern Territory and Australian Capital Territory parliaments are not included under s 51(xxxviii). The extra assent of the territories would not matter, however.

power available to enact a Declaration,<sup>195</sup> then the legislation may be semi-entrenched, because the same procedure would need to be used for amendment or repeal. However, a Declaration recognising Indigenous peoples could be enacted under s 51(xxvi), the race power, which post-1967 includes Indigenous people within its operation.<sup>196</sup> Any federal unanimity amendment requirement with respect to amendment or repeal of the Declaration would therefore not be legally binding, because the race power confers plenary power that includes power to amend and repeal legislation.<sup>197</sup> A Declaration enacted in this way would not be semi-entrenched. The amendment requirement may, however, carry a sense of political and moral entrenchment.

To add to the authority of a special amendment requirement, despite legal invalidity, the unanimous federal action enacting the Declaration could occur following an intergovernmental agreement. The states and territories would thus not just be copying the legislation that the Commonwealth dictates; there would need to be negotiation and cooperation to agree on the content of the Declaration. The final words of the Declaration could be encapsulated in an intergovernmental agreement, whereby the Parliaments agree to pass the legislation on the same day at the same time. The agreement could also confirm that any future changes to the Declaration should be negotiated and agreed by all parties. This process should occur in negotiation with Indigenous peoples, perhaps through the structures of a First Nations voice, if already in operation.<sup>198</sup> If the First Nations were genuinely party to this agreement, the Declaration could be enduringly powerful.

<sup>195</sup> The Commonwealth could enact a standalone Declaration of Recognition with the concurrence of the States under s 51(xxxviii) of the *Constitution*. At the establishment of the *Constitution* (straight after federation), only the UK Parliament could have enacted a federal statute recognising the prior and continuing existence of Indigenous peoples in Australia (the race power was unavailable because prior to the 1967 referendum it excluded Indigenous people from its operation). The external affairs power would not have been appropriate, because Indigenous affairs was a domestic matter and the relevant international human rights treaties that might enliven the external affairs power domestically did not yet exist. On a broader reading of the power, the same is true. Just before federation, only the UK Parliament could have legislated to recognise Indigenous peoples at a national level — the colonial Parliaments would have lacked the authority. Arguably, therefore, a Declaration of Recognition could now be enacted under s 51(xxxviii).

<sup>196</sup> See generally George Williams, 'The Races Power and the 1967 Referendum' (2007) 11 (Special Edition) *Australian Indigenous Law Review* 8.

<sup>197</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 355–7 [12]–[15] (Brennan CJ and McHugh J).

<sup>198</sup> If a First Nations voice is not in operation, consultation and negotiation would nonetheless be needed, perhaps followed by a postal survey or other polling to ascertain Indigenous approval of the Declaration.

The resulting Declaration Acts could stipulate that any amendment or repeal require not only the consent of all Australian Parliaments, but the assent of Indigenous Australians as well via the First Nations voice. The Declaration would then be politically and morally difficult to amend without the same federal unanimity and Indigenous agreement, but this amendment requirement would not be legally binding. It may also not be necessary. A combination of federal cooperation and Indigenous agreement in the formulation and enactment of the Declaration could nonetheless over time create a document of enduring national, cultural and political significance. Indeed, a Declaration enacted in this way would signify an intergovernmental compact with the First Nations on the principles of reconciliation. This could be a powerful symbolic agreement of ongoing significance for the nation.

## 2 Option Two: Inserting a Declaration into the Australia Act

A second option is to insert the Declaration into the *Australia Act*. The *Australia Act* appears to be semi-entrenched under s 15 and can only be amended with federal concurrence.<sup>199</sup> Twomey has suggested that the *Australia Act* could be amended via ‘collective action’ to insert clauses which would be ‘effectively entrenched’.<sup>200</sup> Thus, inserting the Declaration into the *Australia Act* could mean it is semi-entrenched, because State concurrence would be required for amendment or repeal under s 15. As there is some contention about whether and how s 15 is legally valid and binding,<sup>201</sup> there may accordingly be uncertainties as to whether a Declaration inserted into the *Australia Act* would be legally semi-entrenched.<sup>202</sup> Complexities regarding legal validity aside, however, insertion

<sup>199</sup> It should be noted here that the Referendum Council proposes a more complete federal unanimity procedure than that required by s 15 of the *Australia Act* (n 149). Section 15 requires the concurrence of ‘all the Parliaments of all the States’, whereas the Referendum Council suggests action by all Australian Parliaments, which would include territory Parliaments: *Referendum Council Final Report* (n 1) 2. The procedures are substantially similar, however, as both require widespread federal consensus. For the purposes of this discussion of semi-entrenchment, however, it would not matter if the territories assented as well.

<sup>200</sup> Twomey, Submission to the National Human Rights Consultation Committee (n 148) 20 n 28. See also Zines, *The High Court and the Constitution* (n 177) 425; Justin Gleeson, ‘A Federal Human Rights Act: What Implications for the States and Territories?’ (2010) 33(1) *University of New South Wales Law Journal* 110, 111. Though Twomey also suggests it would be politically unlikely to get all the Parliaments required to agree to the change: Twomey, *The Effect of the Australia Acts* (n 190) 291–2.

<sup>201</sup> Justice Kirby seems to suggest that the whole Act is ineffective: *Marquet* (n 179) 614–15 [209]–[210]. Additionally, s 15 may be an invalid abdication of parliamentary power: see Twomey, *The Australia Acts 1986* (n 179) 402–6; Thomson (n 189) 414–15.

<sup>202</sup> Twomey argues that ‘[i]t is extremely doubtful that s 51(xxxviii) of the Commonwealth Constitution is a valid source of power for s 15’: Twomey, *The Australia Acts 1986* (n 179) 403. See

of the Declaration into the *Australia Act* following the federal unanimity procedure, together with Indigenous assent, would create a strong sense of political and moral entrenchment. Once the procedure was followed to insert the Declaration, it would be politically and morally difficult for the Declaration to be removed or amended without following the same procedure. Again, this would be bolstered if the Declaration followed an intergovernmental agreement. The First Nations should be party to this agreement.

The *Australia Act* modernised and clarified Australia's constitutional relationship with the UK. It could also help to modernise Australia's constitutional relationship with Indigenous peoples. The aptly titled *Australia Act* may be an appropriate place for this important national relationship to be re-articulated. On the other hand, the *Australia Act* is a highly technical piece of legislation, severing legal links with the UK. It contains clauses about merchant shipping,<sup>203</sup> manner and form,<sup>204</sup> and the powers of State Governors.<sup>205</sup> It is legalistic and technical, much like the *Australian Constitution*. Arguably, it is an Act for lawyers, not the Australian people. These competing considerations must be weighed up in assessing whether the *Australia Act* is the appropriate place for the Declaration.

### 3 Option Three: Inserting the Declaration into the Covering Clauses of the Constitution Act

I argue that the only way of achieving an effectively semi-entrenched Declaration is to insert it into the *Constitution Act* using the federal unanimity procedure under s 15 of the *Australia Act*. The Declaration could be inserted into a new covering cl 10, appearing after the *Constitution* in covering cl 9:<sup>206</sup>

generally at 402–6, 410. If s 15 is declaratory of s 51(xxxviii) and not binding of its own force or the force of the *Australia Act 1986* (UK), then once the Declaration is inserted, those clauses may become vulnerable to amendment or repeal without state concurrence. Laws amending the Declaration, as noted, would also be supported by the current race power, and so the manner and form requirement in s 51(xxxviii) could be avoided. Accordingly, the Declaration once inserted into the *Australia Act* (n 149) may not be effectively semi-entrenched. This is so even if the *Australia Act* (n 149) in its current form is effectively semi-entrenched through s 15 being declaratory of s 51(xxxviii), because no other powers can be used for its alteration. While inserting the Declaration into the *Australia Act* (n 149) may not result in effective semi-entrenchment, it may, however, be considered politically and morally entrenched and subject in this sense to s 15.

<sup>203</sup> *Australia Act* (n 149) s 4.

<sup>204</sup> *Ibid* s 6.

<sup>205</sup> *Ibid* s 7.

<sup>206</sup> Notably, this procedure can also be used to insert an effectively entrenched statement of Indigenous recognition into the preamble of the *Constitution Act* (n 42) if desired.



Clause 9: The Constitution of the Commonwealth shall be as follows: ...

Clause 10: The Declaration of Recognition shall be as follows: ...

The covering clauses and preamble of the *Constitution Act* cannot be changed via referendum: only the *Constitution* can be altered by referendum under s 128. This is because the *Constitution Act* and the *Constitution* are separate things, though the *Constitution Act* contains the *Constitution*<sup>207</sup> and s 128 does not include the *Constitution Act* within its scope.<sup>208</sup> The 'orthodox view', therefore, is that a referendum cannot alter the covering clauses or preamble in the *Constitution Act*.<sup>209</sup>

Twomey explains that s 15 of the *Australia Act* 'established the sole way of altering the *Statute of Westminster*, and hence the means of providing for the amendment or repeal of the ... *Constitution Act*, including its Preamble'.<sup>210</sup> The paramount force of s 8 of the *Statute of Westminster* prevents the Commonwealth from directly altering the *Constitution Act*.<sup>211</sup> However, s 15 of the *Australia Act* allows for amendment of s 8 of the *Statute of Westminster* and thus amendment of the covering clauses and preamble to the *Constitution Act*.<sup>212</sup>

<sup>207</sup> See *Australia Act* (n 149) s 16 (definition of 'the Commonwealth of Australia Constitution Act' and 'the Constitution of the Commonwealth'). See also Cheryl Saunders, 'Founding Blueprint Has Faded with Time', *The Australian* (Canberra, 5 July 2000) 12; Twomey, 'The Preamble and Indigenous Recognition' (n 36) 11.

<sup>208</sup> Twomey explains that s 128 expressly refers to the alteration of 'this Constitution', not the *Commonwealth of Australia Constitution Act*. The distinction between the two was maintained in the *Statute of Westminster 1931* (Imp) and the *Australia Act 1986* (Cth) ('*Australia Act*') and *Australia Act 1986* (UK). On its face, s 128 does not permit the amendment of the *Commonwealth of Australia Constitution Act*: Twomey, 'The Preamble and Indigenous Recognition' (n 36) 11.

<sup>209</sup> *Expert Panel Report* (n 11) 110. See also Gageler and Leeming (n 22) 148–9. I take the view that a referendum would not be legally effective in altering the *Constitution Act* (n 42), and that s 15 of the *Australia Act* (n 149) provides the sole means for amendment. However, Winterton argued that it is too pedantic to interpret s 128 as denying the people the power to alter the *Constitution Act* (n 42): see George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 124–7 ('*Monarchy to Republic*'). For other competing views, see Christopher D Gilbert, 'Extraterritorial State Laws and the Australia Acts' (1987) 17(1) *Federal Law Review* 25; Gilbert, 'Section 15 of the Australia Acts' (n 4).

<sup>210</sup> Twomey, 'The Preamble and Indigenous Recognition' (n 36) 11.

<sup>211</sup> Section 8 of the *Statute of Westminster Adoption Act 1942* (Cth) ('*Statute of Westminster Adoption Act*') provides:

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

<sup>212</sup> Twomey, *The Australia Acts 1986* (n 179) 39; Twomey, 'The Preamble and Indigenous Recognition' (n 36) 11.

Under s 15, the federal unanimity procedure could be followed to alter s 8 of the *Statute of Westminster* to implement the appropriate manner and form procedure to enable alteration of the *Constitution Act*.

The inserted procedure (perhaps the federal unanimity procedure) could then be followed to insert a Declaration into the covering clauses.<sup>213</sup> Additionally, the concurrence of Indigenous peoples via the First Nations voice (if in operation) could be inserted into a s 8(2), as a requirement specific to amendment or repeal of the new covering cl 10 and the Declaration therein, if this was politically achievable.<sup>214</sup> Once inserted into the *Constitution Act* via the new procedure, the Declaration would in my view be legally semi-entrenched. Indeed, the method of amending the *Constitution Act* would itself be effectively semi-entrenched, as it would sit within s 8 of the *Statute of Westminster*, which is semi-entrenched because of s 15 of the *Australia Act*.

Alteration of the *Constitution Act* via s 15 to insert the Declaration into a new covering cl 10 would have several advantages. The Declaration would carry elevated and enduring status and could not be legally amended or repealed without federal consensus. It would be outside the *Constitution* and so would still address concerns about insertion of ambiguous symbolic language into the *Constitution* proper. As Twomey explains, one reason ‘why the High Court may have had such little regard for the existing Preamble is that it is not part of the *Constitution* itself, but rather the *Commonwealth of Australia Constitution Act*’.<sup>215</sup> Indeed, it can be persuasively argued that the *Constitution Act* is the appropriate place for symbolic declarations, given this is where the existing preamble is situated. In this sense, insertion of a Declaration into the *Constitution Act* appears an appropriate middle way alternative to constitutionalisation of symbolic words: it would not be inside the *Constitution* proper, but it would still carry political, moral and cultural status through its proximity to the *Constitution* in the unique and historic *Constitution Act*. The Declaration would be part of Australia’s constitutional arrangements and thus would carry elevated authority and historic significance.

<sup>213</sup> For example, a new s 8(1) of the *Statute of Westminster Adoption Act* (n 211), emulating but broadening s 15 of the *Australia Act* (n 149) in line with the Referendum Council’s suggestion could read:

The Constitution may only be altered in the manner required by section 128 of the Constitution.

This Act and the Constitution Act may only be altered or repealed by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of all the Parliaments of the States and Territories.

<sup>214</sup> Alternatively, this could occur simultaneously, with the legislation authorising the s 8 amendment also instituting the *Constitution Act* (n 42) amendment.

<sup>215</sup> Twomey, ‘The Preamble and Indigenous Recognition’ (n 36) 13.

On the other hand, the *Constitution Act* is a historic UK Act. Do Australians want to insert their Declaration into a UK Act? On one view this could be seen as updating and reclaiming the Act,<sup>216</sup> but others may feel this is symbolically inappropriate placement. A further downside of this approach is that insertion of a Declaration into the *Constitution Act* via the procedure outlined above might seem too legally complicated and theoretical to be realistic. It may also on some views re-enliven concerns about possible use of the Declaration in constitutional interpretation, thus potentially defeating the original purpose of exploring extra-constitutional options. Nonetheless, this option for achieving a semi-entrenched Declaration is legally available and should be further understood, debated and explored.

### B *What about Popular Assent?*

Is federal concurrence and Indigenous assent enough political consensus, or should popular, public endorsement be required? There are various arguments in relation to this question. While Twomey agrees that s 15 can be used to alter the covering clauses, she proposes it might be less ‘politically objectionable’ if the manner and form procedure incorporated into s 8 was a referendum, to engage a feeling of popular support for the *Constitution Act’s* alteration.<sup>217</sup> This would give effect to Winterton’s view that the *Constitution Act* should be able to be altered via referendum.<sup>218</sup> However, given that a referendum would be required for the constitutional amendment to guarantee a First Nations voice, a national vote for the Declaration may be justifiably avoided for pragmatic reasons. The failed 1999 symbolic preamble was rejected when subject to a popular vote and there can be unhelpful public division about symbolic words and aspirational statements.<sup>219</sup> If seeking to semi-entrench a Declaration, which would involve more complex ideas than a preamble, the concurrence of Australian Parliaments (and Indigenous peoples) may be considered a sufficient indication of political consensus — as it was with the *Australia Acts*.

There may also be strategic benefits to a focussed approach. In matters of reconciliation, focussing on the relationship between Indigenous peoples and the state can have advantages. As Professor Janet McClean suggests, in New

<sup>216</sup> One option is to change the name of the Act at the same time, to make it an Australian Act, rather than a UK Act, but this may be opposed as an inappropriate deletion of the Act’s history and original purpose.

<sup>217</sup> Twomey, ‘The Preamble and Indigenous Recognition’ (n 36) 11–12.

<sup>218</sup> Winterton, *Monarchy to Republic* (n 209) 124–6.

<sup>219</sup> See, eg, McKenna (n 17); Twomey, ‘The Preamble and Indigenous Recognition’ (n 36) 12–14; *Expert Panel Report* (n 11) 119–21.

Zealand a focus on ‘the Crown’ in Māori–state treaty relationships has enabled the government to pursue direct political negotiations with Māori in a way that usefully shields the public from moral culpability for past wrongs.<sup>220</sup> For Professor Janine Hayward, this contained conversation has ‘relieved the public of “guilt by association”’ such that ‘New Zealanders today are not held accountable for the sins of their colonial past.’<sup>221</sup> Indeed, the significance of the settlements process under the *Treaty of Waitangi* is that it created an enduring ‘political conversation sustained over several decades between the treaty partners.’<sup>222</sup> This demonstrates what can be achieved through focused and engaged political dialogue between Indigenous peoples and representatives of the state: it shows a commitment to Indigenous–state relationships that Australia lacks, arguably to the detriment of reconciliatory progress. The approach also demonstrates that important moments of reconciliation between Indigenous peoples and colonising states need not necessarily include endorsement from the general public — if a nation’s leaders have the political will to lead the way, sometimes public ownership over reconciliatory outcomes can grow over time. On such views, the endorsement of elected political representatives and the assent of the First Nations may be considered sufficient for an Australian Declaration, especially given we are not talking about constitutional amendment.

On the other hand, the Declaration is intended to be for all Australians. It is not just about Indigenous recognition: it is about mutual recognition. It should bring together the three parts of Australia’s national story: our ancient Indigenous heritage, our inherited British institutions and our multicultural achievement. An enactment process requiring agreement of Australian Parliaments and the First Nations arguably engages the first two elements of our national story: Indigenous peoples and our inherited parliamentary institutions, representing all Australians. Yet given the persisting whiteness of Australian Parliaments,<sup>223</sup> does this omit meaningful engagement with multicultural Australia? If popular endorsement were considered necessary to create a Declaration of enduring legitimacy and moral power as Freeman and Leaser suggest,<sup>224</sup> a plebiscite could be incorporated into the enactment procedure. One way to

<sup>220</sup> McLean (n 167).

<sup>221</sup> Janine Hayward, ‘Treaty of Waitangi Settlements: Successful Symbolic Reparation’ in Joannah Luetjens, Michael Mintrom and Paul ‘t Hart (eds), *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University Press, 2019) 399, 400.

<sup>222</sup> *Ibid* 401.

<sup>223</sup> See Gareth Evans, ‘The “Bamboo Ceiling” in Australia is Real’, *The Sydney Morning Herald* (online, 12 September 2019) <<https://www.smh.com.au/national/the-bamboo-ceiling-in-australia-is-real-20190912-p52qp8.html>>, archived at <<https://perma.cc/RJ2L-MT54>>.

<sup>224</sup> Freeman and Leaser (n 59) 3.

approach this would be to emulate the same-sex marriage approach and conduct a postal survey to ascertain public endorsement of the Declaration, once its words had been negotiated and agreed by Australian governments and Indigenous peoples (perhaps with the help of poets and writers). In my view, however, negotiation between Australian governments and the First Nations would be unprecedented and historic in itself. Whether or not the added element of public assent were incorporated, this would be a Declaration of special significance.

### C *Is Legislative Enactment Necessary?*

This raises a further, related question with respect to the Referendum Council's recommendation: what does *legislative* enactment of a Declaration that has been negotiated and agreed by all Australian governments and the First Nations (through an intergovernmental agreement) really add? If the Declaration is intended to be symbolic in content and purpose, does it need to be in legislation? The *Treaty of Waitangi* and the *Declaration of Independence* were not legislated documents.<sup>225</sup> Though the *Declaration of Independence* was debated, amended and ultimately approved (through signatures) by the Continental Congress on 4 July 1776, it is not a piece of legislation.<sup>226</sup> Similarly, as noted by Palmer, some Māori felt incorporating the *Treaty of Waitangi* into legislation would 'diminish its status,' transforming it from 'a powerful normative symbol with moral legitimacy into a mere legal instrument' that can be amended.<sup>227</sup> They therefore chose not to incorporate the *Treaty of Waitangi* into the *New Zealand Bill of Rights Act 1990* (NZ).<sup>228</sup> Outside legislation, as Palmer explains, some Māori felt the *Treaty of Waitangi* would better retain its 'moral and normative power'

<sup>225</sup> Though the *Treaty of Waitangi's* text was later reproduced (in both English and Māori) in the *Treaty of Waitangi Act 1975* (NZ) sch 1, which established the Waitangi Tribunal, and the *Declaration of Independence* was reproduced at the start of the United States Code: *Declaration of Independence*, USC (1958) xxvii.

<sup>226</sup> See generally Jack N Rakove (ed), *The Annotated US Constitution and Declaration of Independence* (Harvard University Press, 2009) 73–102.

<sup>227</sup> Palmer (n 116) 31 (emphasis omitted).

<sup>228</sup> Kirsty Gover, 'The Treaty and Human Rights in New Zealand Law: Can We Add the Declaration and Stir?' in Andrew Erueti (ed), *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, 2018) 49–50; KJ Keith 'The New Zealand Bill of Rights Act 1990: An Account of Its Preparation' (2013) 11(1) *New Zealand Journal of Public and International Law* 1, 12. McHugh argues that, 'Māori lost an important opportunity when their representatives rejected inclusion of a Treaty principles clause in the Bill of Rights Act 1990 (BORA). This would have given those principles a clear application throughout the public sector': PG McHugh, "'Treaty Principles': Constitutional Relations Inside a Conservative Jurisprudence' (2008) 39(1) *Victoria University of Wellington Law Review* 39, 67.

and could ‘continue untouched’.<sup>229</sup> Inside legislation, it would become an ‘instrument of the legal system and a plaything for lawyers and judges.’<sup>230</sup> With these considerations in mind, a non-legislative approach could also be considered: maybe a Declaration would actually be more entrenched if it is *outside* legislation.

As noted, the point of pursuing a Declaration outside the *Constitution* is that it does not become a plaything for lawyers and judges. Rather, the Declaration should be owned by the Australian people and their representatives. Contrary to the Referendum Council’s recommendation, if the aim is to create a Declaration of truly enduring and authoritative political, cultural and moral status like the *Treaty of Waitangi* or the *Declaration of Independence*, perhaps the Declaration is best situated external to legislative instruments. Outside legislation, it cannot be amended or repealed; presumably the agreed Declaration could not be altered except by further agreement with all signatories.

Arguably, an intergovernmental agreement with the First Nations enacting the Declaration need not be legislated to have power. It could still be signed by parliamentary representatives if desired, like the *Declaration of Independence*, and public endorsement could be added if deemed necessary. Keeping the Declaration outside legislation may be more in line with its symbolic, rather than legal, purpose. It may in fact render the Declaration more enduring and morally authoritative — for legislative instruments are usually mundane and technical. Non-legislative enactment of the Declaration could therefore also be considered.

## V CONCLUSION

Poetic articulations of values and aspirations may be important for nation-building and reconciliation, but they need not be captured and constrained in the *Constitution*, nor must the ultimate meanings of symbols declared be controlled by the courts. Rather, symbolic words can live and flourish outside the *Constitution*, in the domain of politics, philosophy and culture. They can be owned and argued by the Australian people and their representatives. The power of such a Declaration would thus be moral, cultural and political. An extra-constitutional Declaration would address concerns that ambiguous symbolic statements in the *Constitution* may give rise to unintended legal consequences, but it would also create space for a more fulsome and poetic

<sup>229</sup> Palmer (n 116) 31.

<sup>230</sup> *Ibid.* Contrary to the Referendum Council’s recommendation that it be concurrently legislated, advocates should weigh up the pros and cons of the non-legal option. See Freeman and Leaser: Freeman and Leaser (n 59).

Declaration that is unconstrained by legalistic concerns. Federal concurrence and Indigenous assent should be important facets of this Declaration.

Here I have presented three options for semi-entrenchment of a Declaration. I have argued that a Declaration would be morally and politically entrenched, but also legally entrenched, if it were inserted into a new covering cl 10 in the *Constitution Act* using the federal unanimity procedure. I have also argued that assent of the First Nations should be an important part of the Declaration's enactment procedure. The pros and cons of popular endorsement should also be discussed. Contrary to the Referendum Council's recommendation,<sup>231</sup> however, perhaps such a Declaration need not ultimately be articulated in legislation to have power. All these possibilities should be further explored.

An extra-constitutional Declaration would be a morally worthy project for Australia. It could set out mutual promises and principles of reconciliation, as well as recognising Australia's shared history and heritage, to contextualise and supplement constitutional reform establishing a First Nations voice. If genuine Indigenous negotiation and assent were also incorporated, as I have suggested, the possibilities for such a Declaration become even more exciting. The enactment process would instigate useful dialogue between Indigenous peoples and Australian governments, with a view to re-articulating and resetting the principles and promises that should guide fairer relationships for the future. Following genuine negotiation, the resulting Declaration could in time become seen as a historic reconciliatory agreement.

An extra-constitutional Declaration should not remain the Referendum Council's forgotten recommendation. The possibilities of this proposal should be explored and debated, not as a substitute, but as a worthwhile supplement to substantive constitutional reform through a First Nations voice.

<sup>231</sup> *Referendum Council Final Report* (n 1) 2.