

Historical facts and constitutional adjudication: the case of the Australian constitutional preamble

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Introduction

Judges in the High Court of Australia often refer to constitutional history in the course of their judgments interpreting the Australian Constitution. The judges' use of history invites discussion in terms of originalism. This article addresses a different aspect of history and constitutional adjudication – the acceptance of particular constitutional text by courts as a reference to historical fact and the consequences of such acceptance.

In this article I argue that the High Court of Australia has treated the references to “the people” in the Australian constitutional preamble and covering clause 3 as references to historical fact – the fact of “the people” in the Australian colonies voting to approve the draft Constitution Bill. The Court's use of that history illuminates the constitutional identity of the Australian people – as constitutive and with a new identity under the Constitution. However, the preamble also contains a redundant

reference to history – the identity of the monarch to whom allegiance is owed by Australians.

This article is thus a contribution to the developing international scholarship regarding constitutional identity. Constitutional identity can be understood in many ways. In this article I focus on the constitutional identity of “the people” under the Australian Constitution. The Australian Constitution lacks any reference to Australian “citizenship” and I avoid that term because it is merely a statutory category in Australia, rather than a constitutional one. Instead, I focus on the phrase “the people” as it is the best term to capture the constitutional community of Australia. That community is the group of people recognised as members under the Australian Constitution. I focus on the judicial references to the colonial peoples who came together to form the Australian Commonwealth to ascertain what that case law reveals as to the identity of the Australian “people”.

I interpret the identity of “the people” by drawing on case law across the history of the High Court. Scholars have distinguished various ‘eras’ of the Court in relation to its constitutional jurisprudence. Despite the changes in approach of the Court over time, members of the Court have given consistent indications regarding the identity of the colonial peoples. I follow those references in this article.

1. *The Australian context*

The Constitution came into force on 1st January 1901. It is in the form of a statute, passed by the Imperial Parliament in the United Kingdom, but it was drafted by Australians and approved by Australians at referenda¹. The Australian Constitution draws inspiration from the United Kingdom, the United States of America and other federal systems. It establishes a federal system of States and the Commonwealth, with legislative power given to both. The States were formerly British colonies, and in general terms they retain their identity and powers as existed prior to the Constitution.

There are also a number of Australian Territories. Some of them were former British colonies, while others have been created since the enactment of the Constitution. The Commonwealth of Australia is a new entity created by the Constitution, which is given superiority in that its valid legislation overrides that of the States. The Commonwealth is also superior to the States because it has the financial advantage by being in control of the bulk of public revenue from income taxation since 1942.

The Constitution identifies legislative, executive and judicial power at the national level. The Parliament is created with two Houses – the House of Representatives and the Senate, and is to operate in a system of representative government. The Constitution imposes some limits on the powers of the States and the Commonwealth and includes a method for changing the text of the Constitution. The words can only be changed by a process involving both the Federal Parliament and the electors, whereby the Parliament must pass a Bill with the proposed changes and then a majority of electors plus a majority of electors in a majority of the six States must approve the proposed changes through referendum. This has been done on only 8 occasions since 1901, despite 44 attempts to change the text.

The meaning of the words, whether original or inserted or amended by referendum, is determined by the High Court of Australia: an institution created by the Constitution. That Court is the ultimate court of appeal in the Australian judicial hierarchy. The Court has the power of judicial review, which necessarily involves constitutional interpretation.

The Constitution is silent as to the method of interpretation to be adopted by the Court. A diversity of approaches in theory and practice has been considered in the Australian literature on this topic. The Court itself has eschewed the adoption of one «all-embracing theory of constitutional interpretation»². Instead, the Court adopts a «traditional common law constitutional method»³ which includes, amongst other things, consideration of the text and structure of the Constitution, previous authorities and history.

For many decades, the High Court's position was to not allow direct reference to the drafting debates of the Constitution in the course of interpreting the Constitution, despite referring to other historical materials. In 1988, the Court changed its approach and confirmed that the drafting history could be used to determine «the public meaning of the Constitution's provisions»⁴.

The Court has used this rule in relation to the drafting debates, as well as to legislative detail or common law principles existing at federation, to assist the Court in its task of constitutional interpretation. The Court also uses historical developments in law and politics post-federation to determine the meaning of the Constitution's words. In this article, I address how the preamble to the Australian Constitution, together with covering clause 3, provides a study into the use of constitutional text as a reference to historical fact and the consequences that follow.

2. *The relevant text*

The Commonwealth of Australian Constitution Act begins with a preamble which states:

Whereas the people of New South Wales, Victoria, South Australia, Queensland; and Tasmania, humbly relying on the blessing of the Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows [...]

Eight covering clauses follow after the preamble. The third states that the Queen may declare (emphasis added):

by proclamation that [...] the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania *and also, if Her Majesty is satisfied that the people of Western Australia had agreed thereto, of Western Australia*, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

The Constitution itself is contained in s 9 of the Act. The location of the references to the colonial peoples, outside the body of the Constitution, affects how Justices use those references in the course of their reasoning. Rather than being the source of doctrinal rules, or controlling the meaning of sections of the Constitution, that text has a role to play through its use as amongst the contextual considerations in a line of reasoning. The Court has accepted that text as referring to historical fact, in keeping with orthodox statutory interpretation approaches to preambles and with the use of constitutional preambles in other countries⁵. The way in which Justices refer to that fact in their reasoning provides some guidance as to the identity of the colonial peoples. The identity of "the people" evident in the case law emerges as that of the historically constitutive people who became people of the States and of the new federal Commonwealth.

My focus in this article is to address the existing case law regarding the references to "the people" in covering clause 3 and in the original constitutional preamble which,

for now, remains the only preamble to the Constitution. Therefore, I do not address the proposals to change the preamble in the course of Australia becoming a republic or recognising Aboriginal and Torres Strait Islander peoples in the Constitution.

3. *The historical agreement of 'the people'*

The references to "the people" in the preamble and covering clause 3 were identified by commentators, as early as 1901, as being recitals of historical fact⁶. The High Court has also treated those references to the agreement of "the people" as references to history. In 1904, in addressing the appropriate method of constitutional interpretation, O'Connor J stated that the Constitution «embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble union»⁷. In 1906, Griffith CJ stated that the circumstances of the making of the Constitution were relevant in interpreting the text. Amongst those circumstances was that «the Constitution as framed was to be, and was, submitted to the votes of the electors of the States (sic)»⁸. The next year, the Court referred to the preamble as indicating that the Constitution was «an international agreement made between the people of the several self-governing Australian Colonies, and also between the people of those Colonies collectively and the United Kingdom»⁹. That agreement was seen in the text of the Constitution, which «expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned»¹⁰.

The approach of the Court, treating references to the people's agreement as being references of historical fact, has continued since these early cases. In 1920 the Court stated:

The Constitution was established by the Imperial Act [...]. The Act recited the agreement of the people of the various colonies, as they then were, "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established"¹¹.

Justices since that time have done the same¹². As recently as 1998, Hayne J referred to the history of Australia and its emergence as an independent nation, with one event of particular importance being: «the people of the colonies agreeing "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution"»¹³.

I now turn to outline the constitution-making process in order to provide the necessary contextual detail to explore those judicial references to the colonial peoples. As we will see, the role of "the people" was significant.

4. *The Constitution-making process*

From the time of the establishment of the separate Australian colonies in the early 1800s, there was discussion of bringing them together in some federal form. By the 1880s, federation had become a serious proposition. The final push for federation depended on the formal involvement of "the people". A Constitution Bill had been



Invitation to the opening of the first Parliament of the Australian Commonwealth, 1901

drafted in 1891, but it failed to gain sufficient political support in the colonies. The second, successful, attempt occurred after each colony had agreed to give “the people” a say in the constitution-making process. I focus on that second attempt here.

After the colonies did not proceed with the 1891 draft Constitution, and following a series of popular gatherings to reinvigorate the federation process, “the people” were given formal involvement in the constitution-making process. Each of the colonies passed legislation to enshrine a requirement that “the people” of the colonies would vote on any Constitution Bill drafted by a later Convention.

The drafting proceeded by a number of steps. Delegates were elected from New South Wales, Victoria, Tasmania and South Australia. Western Australian delegates were elected by the West Australian Parliament, not directly by “the people”. Queensland was not represented. The delegates met as the Australasian Federal Con-

vention. The Convention first met in Adelaide in 1897, where a draft Constitution was prepared. As required by the Enabling Acts passed in the colonies, the draft was then sent to the colonial Parliaments for consideration. The Convention then reconvened in Sydney, to continue discussion and address amendments proposed by the colonial Parliaments¹⁴. A third session was held in Melbourne in 1898, which ended with a draft Constitution Bill.

The preamble of the first draft presented to the 1897-98 Convention replaced the 1891 reference to colonies with a reference to the people of those colonies. Covering clause 3 was similarly amended. The references to “the people” in the preamble and covering clause 3 were matched by “the people” exercising greater political power in the text of the Constitution. Unlike the earlier draft Constitution, “the people” were to directly choose senators, and have a direct involvement in constitutional referenda¹⁵. The provisions with respect to

the choosing of the members of the House of Representatives always included direct election by "the people". Commentators and scholars, at the time of federation and later, have emphasised the significance of the changes in the text between the 1891 and 1897 draft constitutions, as being: «a notable intrusion of provisions for more democratic participation in the electoral and political processes of the federation»¹⁶.

Once the draft Bill was adopted in Melbourne, it was then put to "the people" for acceptance or rejection through referenda in five of the colonies. Despite majorities being recorded in favour of acceptance of the Bill in each of those colonies, the majority in NSW was not sufficient to satisfy the super-majority in the NSW Enabling legislation, of a minimum of 80,000 votes. The Premiers of the colonies met in 1899 to discuss amendments which would make the Constitution Bill more acceptable to NSW¹⁷. The amended Bill was then put to further referenda.

The Bill was passed by the United Kingdom Parliament and the Queen gave her assent on 9 July 1900. Western Australia had still not held a referendum to adopt the Bill, so "the people" of Western Australia were absent from the preamble. Western Australia finally held a successful referendum on 31 July 1900¹⁸. The Bill had therefore been agreed to by "the people" of all the Australian colonies. On 17 September 1900, the Queen proclaimed that 1st January 1901 would be the date of the establishment of the Commonwealth¹⁹.

The long process of federation ended with a document which, in its preamble and covering clause 3, recorded the historical agreement of the colonial peoples to unite to form an indissoluble federal

Commonwealth. The people's agreement was recorded by the choice of the electors in each colony voting in referenda to adopt the Constitution Bill. The extensive involvement of "the people" and the long, protracted process through which the people's agreement was finally obtained, have been noted both in the High Court and in the Privy Council²⁰.

As noted above, the Court has treated the preamble and covering clause 3 as references to historical fact – the fact of the people's agreement to the Constitution in the process outlined above. The judicial discussion relevant to the peoples of the colonies illuminates both the pre-federation identity of those peoples, as well as their post-federation identity. I begin with the former, which can be summarised as "the people" being the historically constitutive peoples.

5. *The constitutive peoples*

Justices of the High Court have emphasised the popular process of constitution-making, whereby the colonial communities acted through their electors to approve the draft Constitution and thereby agreed to unite in the federal Commonwealth. These references to the participatory role of the peoples of the colonies can be read as indicating the historically constitutive identity of the peoples of the colonies.

The peoples of the colonies are understood by the Court as distinct, separate and self-governing communities, who are represented by electors in the constitution-making process. Members of the Court have referred to the colonies and

the peoples of the colonies as self-governing communities. Self-government in this context refers to the fact that each colony had a Parliament with power to establish a judiciary, to administer the relevant colony and had power over its own constitution, powers and procedures²¹. Those powers were limited by Imperial legislation, as each colony was a colony within the British Empire²².

Within the limits of Empire, each colony had their own Parliament, elected by "the people", acting through electors. The peoples of the colonies were therefore separate bodies politic prior to federation. The collective identity and independence of the people of each colony from one another has been accepted by the Court²³.

The Court has referred to the compact or agreement of those peoples or their colonies in forming the federal Commonwealth. One example of note is when the Court emphasised the Constitution as a «political compact of the whole of the people of Australia»²⁴ in the course of setting out the «duty» of the Court to give effect to the Constitution «according to its own terms, finding the interpretation from the words of the compact, and upholding it throughout precisely as framed»²⁵. Individual Justices have also noted the compact²⁶.

Those self-governing peoples are recognised by individual Justices as the constitutive people through their participation in the constitution-making process, primarily through the electors voting to adopt the draft Constitution. For example, in 1983 Deane J stated: «The Constitution of Australia was established not pursuant to any compact between the Australian Colonies but, as the preamble of the Constitution emphatically declares, pursuant to the agreement of "the

people" of those Colonies»²⁷. Much earlier comments by members of the Court have emphasised the involvement of the electors in the making of the Constitution²⁸.

The representation of the colonial peoples by electors in the colonies provides an indication of the demotic character of "the people". The preamble and covering clause 3 refer to the agreement of "the people". However, Justices have recognised that the people's agreement was recorded by a vote of the electors in each colony: «the Constitution as framed was to be, and was, submitted to the votes of the electors»²⁹.

While many judicial references to the colonial peoples have emphasised those peoples' involvement in making the Constitution and therefore their constitutive character, the same Justices have also accepted the legal authority of the Imperial Parliament in passing the Constitution Act. The dual character of the Constitution – as an Act of Parliament and an agreement of "the people" – is recognised in early High Court cases³⁰, consistent with federation-era commentators³¹.

The colonial peoples exercised political constitutive power through electors, by being involved in the constitution-making process, but 'the people' were not the only relevant political actors. That is, their political constitutive power was shared with the Imperial Parliament who exercised formal legal authority. This is seen in 1920 where the Court noted that the Constitution «was established by the Imperial Act», but that the Act «recited the agreement of the people of the various colonies, as they then were»³², and the Constitution was a «compact» of the Australian people³³.

Some Justices, mostly in recent decades, emphasise "the people" as the central po-

litical agent over the Imperial Parliament as the pure source of legal authority. For example, McHugh J in 1996 used the fact that «the people have agreed to be governed by a constitution enacted by a British statute» to justify his adoption of «the ordinary techniques of statutory interpretation» to determine the meaning of the Constitution³⁴. By contrast, Dawson J has emphasised the authority of the Imperial Parliament³⁵. Justice Dawson's approach can be seen as a reaction to the suggestion of popular sovereignty, raised in the reasoning of Mason J in the same case³⁶. The debate between Dawson J and Mason J leads to a consideration of whether "the people" became the source of legal authority for the Constitution following Australian independence from the UK and the cessation of any ongoing legal authority of the Imperial Parliament.

6. *Later independence, expanding the authority of "the people"?*

The newly formed Commonwealth of Australia was not legally independent of the United Kingdom. The Constitution was created by the Imperial Parliament, exercising paramount force over the Australian colonies³⁷. Through federation, the Imperial Parliament retained legislative power over both the Commonwealth and the States. Judicial power could be exercised over the new nation through the jurisdiction of the Privy Council in some cases³⁸, and the executive power of the States was exercised on the advice of British Ministers. Some of the legal ties between the United Kingdom and Australia were broken with the passage of the *Statute of Westminster Adoption Act*

1942 (Cth), but it was not until the *Australia Acts* in 1986 that the final ties were severed. Australia at that date became legally and politically independent and the United Kingdom became a "foreign power"³⁹.

Following the cessation of any British power over Australia, some Justices observed a re-alignment of sovereignty away from Britain and towards the Australian constitutional people. That is, as a consequence of independence, some discussed whether sovereignty now rests with the Australian people. This shift in identifying the source of sovereignty has been attributed to Mason CJ. In 1992 Mason CJ stated «[T]he *Australia Act* 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people»⁴⁰.

Since that time, members of the Court have noted the historical authority of the Imperial Parliament⁴¹. However, the case law leaves open the question of whether "the people" have filled any lacuna in authority given the cessation of that Parliament's authority over any part of the Commonwealth. To the extent that the reasoning of the Justices indicates that "the people" may provide an alternative source of authority, there is lack of clarity over which people are the relevant people – the historically constitutive colonial peoples, the subject of this article, or the ongoing demotic people – the federal electors under the Constitution whose choose their members of federal Parliament and vote in constitutional referenda⁴².

Overall, there is relatively little emphasis in the case law on issues of sovereignty and no clear majority position clarifying whether *legal* sovereignty has now passed

to “the people”. References to sovereignty go no further than to direct attention to the *political* roles played by “the people” as electors, supporting an argument that “the people” today, as in the past, exercise some political constitutive authority.

The High Court Justices, through their many and varied references to the peoples of the colonies, have indicated that those peoples are the historically constitutive peoples. The colonial peoples agreed to the draft Constitution through electors in each colony voting in referenda. In the next section I consider how the judicial references to the colonial peoples in the preamble and covering clause 3 provide guidance as to the post-federation identity of “the people”.

7. *Transformation and continuity*

Once the Commonwealth was created, “the people” then took on a series of identities. The judicial references to the colonial peoples and their agreement indicate both transformation and continuity of identity.

The Constitution created a federal Commonwealth and in doing so, “the people” under the Constitution became the “people of the Commonwealth”. That “people” is made up of a series of overlapping and intersecting categories of persons⁴³. Here I argue that the peoples of the colonies were transformed into a new, national, people, although the Justices do not always cite covering clause 3 to ensure explicit inclusion of the people of Western Australia. As I discuss below, the new national identity coexisted with a continuity of identity as distinct communities within the federation.

In an early case concerning the extent of the Commonwealth’s legislative power, O’Connor J in 1908 noted that «in respect of the exercise of Commonwealth powers all State boundaries disappear and there is but one community, the people of the Commonwealth»⁴⁴. The new national identity of “the people” has also been referred to in much more recent cases. Justice Brennan, in 1988 provided the clearest exposition of the national identity of the peoples of the colonies:

The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite ‘in one indissoluble Federal Commonwealth’, melding their history, embracing their cultures, synthesizing their aspirations and their destinies⁴⁵.

Several Justices have affirmed that the peoples of the colonies took on a new identity as the people of the Commonwealth. Justice McHugh, in his last case on the Court, stated: «Throughout the Constitution, there is frequent reference to “the people” of the Commonwealth»⁴⁶. He cited the peoples of the colonies in the preamble. Other Justices have referred to the peoples of the colonies as «the people of Australia»⁴⁷ or of «the Commonwealth»⁴⁸. Justice Kirby stated that the «new nation was brought into existence by the will of the *people* in the several colonies»⁴⁹. Justice Deane referred to the historical agreement as «the compact made between the people of this country»⁵⁰.

While it is only post-1986 that Australia has been formally and fully independent of the UK, the Court as early as 1907 has recognised that the colonial peoples in the preamble were the “people of the Commonwealth” who formed a federal nation from the time of federation, separate from the United Kingdom⁵¹.

The peoples of the colonies were constitutive of the new nation. Their part in agreeing to the Constitution meant that, for the Court, the interpretation of the Constitution was not confined to simply looking at the Imperial Act. The history of the making of the Constitution was relevant:

If it is suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if relevant, is negated by the preamble to the Act itself, which has been already quoted. That is to say, the Imperial legislature expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned, who [...] had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to have been present to the minds of the parties to the agreement be left out of consideration?⁵²

The preamble and covering clause 3 have been used by some Justices to explain "the people" as the constituent people, who form the new Commonwealth and therefore are the Commonwealth and its component parts⁵³. The separate colonial peoples were united in the federal Commonwealth to become both peoples of States and the "people of the Commonwealth". In 1945, McTiernan J understood "the people" of the preamble as a united people⁵⁴. Similarly, over the following decades, the preambular reference to "the people" was referred to by members of the Court in asserting the unity of the people⁵⁵.

These judicial references suggest that the peoples of the colonies, through their agreement to unite in a federal Commonwealth, became a new, national and federal people of the Commonwealth, although the Justices do not always accurately cite cover-

ing clause 3 to ensure the people of Western Australia were expressly included.

The colonies were "continued" as States. The Constitution explicitly maintains the institutions of the colonies as institutions of the States⁵⁶. The "continuation" of the colonies as States has been noted by members of the Court. Justice Menzies specifically stated that «[t]he Constitution [...] continues the constitution of the federating colonies as States of the Commonwealth»⁵⁷, referring to s 106 of the Constitution. Chief Justice French has recently affirmed this view, stating that: «[t]he Constitution assumes the continuing existence of the States, their co-existence as independent entities within the Commonwealth, and the functioning of their governments»⁵⁸, referring to the preamble, covering clauses 3, 5, 6 of the Constitution Act and Chapter V of the Constitution. While these references are not directly to "the people", they reinforce that the State "entities" (to use French CJ's term) are the same as the colonial "entities". Upon enactment of the Constitution, the colonial boundaries remained but were redefined as State boundaries; thus the colonies became the States⁵⁹.

The continuation of the colonies as States is consistent with Aroney's analysis of the "federative logic" of the Constitution. Aroney argues that:

A central presupposition of Australian federation was that the several constituent colonies would continue to exist as autonomous states [...] although the several colonies were in a sense transformed into states under the Constitution, they are not said to have been 'constituted' or 'established' thereunder, but rather the Constitution refers to them as 'continuing'⁶⁰.

Members of the Court have gone beyond asserting the continuation of the States and

their institutions, and have conflated “the people” of the colonies with “the people” of the States. The conflation occurs when Justices describe the history of the making of the Constitution⁶¹, and when they directly cite the preamble or covering clause 3 as a reference to the people of the *States*. I interpret such conflation to mean that the peoples of the colonies continued in their pre-federation identity but with a new name.

Justices of the Court have specifically conflated the textual references to the peoples of the colonies in the preamble and covering clause 3 with the peoples of the States. Justice Mc Tiernan has conflated the peoples of the colonies with the peoples of the States when he notes that «the preamble to the Imperial Act [...] declares that “the people” of the States agreed “to unite”»⁶². Chief Justice Barwick has done the same, noting that «[i]n the preamble in covering cl. 5 and in s 24 [the Constitution] speaks of “the people of the States”»⁶³. The reference in the preamble is to the people of the colonies yet these Justices conflated those people with the people of the States within the Commonwealth, albeit overlooking the absence of Western Australia from the list in the preamble. Justice Kirby has similarly noted that «It is the people of the several States who “agreed to unite in one indissoluble Federal Commonwealth”», with a footnote to the preamble⁶⁴. Covering clause 3, with its reference to the people of the colony of Western Australia agreeing to unite with the other colonies, has been used in the same way. That is, Justices have used covering clause 3 as a reference to the people of the *State* of Western Australia⁶⁵.

The “continuation” of the colonies as States, together with the conflation of the

peoples of the colonies with the peoples of the States, suggests that the historical category of the peoples of the colonies has ongoing significance. Specifically, the colonial peoples continued as the peoples of the States, rather than there being a fundamental break in identity at the point of federation.

The six Australian colonies whose people voted to adopt the Constitution Bill were transformed into Original States. However, parts of the territory of New South Wales and a large part of South Australia were then surrendered to the Commonwealth to form federal Territories. A number of other Territories were either acquired by, or granted to, the Commonwealth in accordance with s 122 of the Constitution. Relevant to this article, the case law indicates that the historical category of peoples of the colonies may have an impact on the post-federation status of people in some Territories.

The Court has suggested that the people in the Territories formed from the Original States, which were colonies whose peoples agreed to unite at federation, may be more secure in their membership of the constitutional “people” than people in Territories that were not territorially part of an Original State. The protection arises because of a connection to the historical peoples of the colonies.

In the case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, the Court heard a challenge to the deprivation of Australian citizenship from people in Papua, effective upon independence of Papua New Guinea. Papua and New Guinea had, until 1975, been Australian Territories, but neither had formed part of the federating colonies. The Court was unanimous in its

decision to reject the challenge in *Ame*. The judgments made a distinction between Papua as an external Territory on the one hand and the internal Territories of the Northern Territory and the Australian Capital Territory on the other. They did so in the context of determining that the Commonwealth could divest itself of Papua⁶⁶, an external Territory, while noting that the Commonwealth could not necessarily do the same to an internal Territory⁶⁷. The joint judgment stated:

The relations that may exist between Australia and the inhabitants of external territories are not necessarily identical with those that apply to the people united in a Federal Commonwealth pursuant to covering cl 3 of the Constitution, the people of the Commonwealth referred to in covering cl 5, or the people referred to in s 24⁶⁸.

Justice Kirby referred to the argument of the applicant that, if deprivation of citizenship were admitted, the Parliament may be able to «deprive all or some Australians born within internal territories of the Commonwealth of their Australian nationality (called citizenship) [... but that] ... the spectre of [this] potential misuse of [s 122] in relation to an internal Territory can be put aside»⁶⁹.

He identified a «clear textual distinction» between different types of Territories within the words of s 122. The difference existed because:

[T]erritories of the first kind [surrendered by a State] are, by definition, within the continental description of Australia as constituted by the former Australasian colonies of the Queen named in the covering clauses [covering clause 3]. It is the people of those colonies whose assent led to the creation of the united federal Commonwealth under the name of the Commonwealth of Australia. By contrast, other possessions of the Crown at the time of Australian federation [including Papua] [...] are to be treated as having a different status⁷⁰.

The approach of the Court in *Ame* is consistent with an earlier reference by Dixon CJ. In a key case regarding the incorporation of the Territories into the Commonwealth in 1958, Dixon CJ concluded that the Northern Territory is part of the Commonwealth because:

It formed part of a colony whose people agreed with the other colonies 'to unite in one indissoluble Commonwealth'. It formed part of the Commonwealth mentioned in the preamble and the subject of the Queen's proclamation by which pursuant to ss 3 and 4 of the covering clauses the Commonwealth was established⁷¹.

The status of the peoples of the Territories is complex and has changed over time⁷². For the purpose of this article, I emphasise that the category of the peoples of the colonies has had an impact upon judicial views regarding the post-federation identity of the constitutional people.

So far, I have argued that the High Court has treated the references to the agreement of 'the people' in the preamble and covering clause 3 as references to historical fact and that in doing so, the Court has illuminated the identity of the Australian constitutional people, albeit sometimes overlooking the detail regarding Western Australia. While the historical fact of a popular agreement can be seen in the judgments of the Court, the Court has also accepted that another part of the preamble is redundant – the reference to the Crown of the UK. The relevant monarch is now the Queen of Australia, with consequences for understanding membership of the constitutional people and the independence of the Australian nation, by reference to historical events which have occurred since the enactment of the Constitution.

8. *Redundant historical reference?*

As noted above, the peoples of the colonies were independent communities from each other. However, they shared a common allegiance to the monarch of the UK. That common allegiance was transformed to allegiance to the Queen of Australia, with consequential changes in the shared identity.

The status of subject of the Queen was a status shared with people throughout the British Empire. However, after federation, Australia became a Dominion and finally, by 1986, an independent nation with a different monarch. Along the way, legislated Australian citizenship was introduced and the status of British subject almost disappeared. These legal and political changes came to have constitutional significance and affect the meaning of subject of the Queen in the text of the Constitution, and therefore membership of the Australian constitutional people.

Allegiance is central to the category of subject of the Queen. This can be seen in the historical origin of that concept⁷³, its legal meaning at federation, and its ongoing meaning within High Court jurisprudence. The medieval history of allegiance was of personal allegiance, or allegiance to the person in whom power was vested – the person of the sovereign⁷⁴. Such personal connection was discarded by the 19th century, replaced with allegiance being owed to the monarch in their political capacity⁷⁵. Allegiance remained at the core of subject status, but to whom do Australians owe allegiance today?

The Constitution refers to “the Queen” in numerous sections⁷⁶. The preamble to the Constitution Act refers to «the Crown

of the United Kingdom of Great Britain and Ireland». Covering clause 2 states that «The provisions of this Act referring to the Queen shall extend to Her Majesty’s heirs and successors in the sovereignty of the United Kingdom». The Schedule to the Act refers to «allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law»⁷⁷, with a note that «The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being to be substituted from time to time.» These references appear to establish that the Queen to which the Constitution refers, and to whom allegiance is therefore owed by the Australian subjects, is the monarch of the United Kingdom. That was certainly the case at federation, but is not so today. The relevant monarch is now the Queen of Australia, although one natural person wears both the Australian and United Kingdom Crowns⁷⁸.

The change in identity of the Queen was mentioned by a number of the justices in the case of *Street v Queensland Bar Association* (1989) 168 CLR 461. The justices in *Street* noted the change of sovereign by reference to the decision of only the previous year in *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178. In *Nolan*, the plaintiff argued that the references to the “Crown of the United Kingdom” in the preamble, together with other parts of the Constitution, «were inconsistent with the notion that any subject of the Queen [...] could be an alien»⁷⁹. This argument was made because Therrence Nolan was a British citizen trying to avoid being deported as an alien. The Court rejected Nolan’s argument, stating:

[T]hose references cannot alter, or avoid the consequences of, the emergence of Australia as

an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship. Those developments necessarily produced different reference points for the application of the word "alien". Inevitably, the practical designation of the word altered so that, while its abstract meaning remained constant, it encompassed persons who were not citizens of this country even though they might be British subjects or subjects of the Queen by reason of their citizenship of some other nation. We would add that, to the extent that there would otherwise be inconsistency in the use of the words "subject of the Queen" in the Constitution, it should be resolved by treating those words as referring, in a modern context, to a subject of the Queen in right of Australia (cfr., Royal Style and Titles Act 1973 (Cth))⁸⁰.

This reasoning demonstrates that the preamble is a statement of historical fact, in this instance meaning that the peoples of the colonies had an allegiance to the Queen of the United Kingdom at federation. However, that statement in the preamble has been overtaken by later developments which impact on how current membership of the constitutional "people" is to be determined. Since *Nolan*, the High Court has confirmed that since at the latest 1986, Australians owe allegiance to the sovereign of Australia, distinct from that of the UK⁸¹.

In determining that the Crown's identity had changed, in title if not in person, the relevant factor for the Court was legal and political independence from Britain. That independence was determined by reference to political events and legislation. The legislation referred to in *Nolan* was either referred to as having crystallised the changes, or merely reflecting the earlier political and legal changes which had an impact on the identity of the sovereign. Either way, legislative expression of the changes was

a factor for all the judges who referred to the change in the Crown, regardless of the date they identified as the relevant turning-point⁸².

Since *Nolan*, the High Court has confirmed that Australians today owe allegiance to the Queen of Australia⁸³. That is, "the people" today owe allegiance to a different Crown from the Crown to whom the peoples of the colonies owed allegiance. Therefore, the peoples of the States and the "people of the Commonwealth" today are not legally and constitutionally exactly the same as the peoples of the colonies who united to form the federal Commonwealth. The preamble is a reference to history, but to some extent, a reference to history which has limited ongoing significance.

Conclusions

The use of history in constitutional adjudication is usually considered in terms of originalism. In this article I avoid that large topic. Instead, I consider the use of constitutional text as a reference to historical fact and what consequences flow from such use by the High Court of Australia. I focus on the preamble to the Australian Constitution, and the related text of covering clause 3 of the Constitution Act. Relatively little has been written regarding the High Court's references to the preamble and covering clauses, possibly because the nature of that text means it is assumed to have limited legal effect and is typically used as only one of a number of contextual considerations in a line of reasoning. However, my analysis of the Court's references to that text demonstrates that its meaning is not merely «of

historical interest», nor is it a «relatively inconsequential matter [...]»⁸⁴.

Constitutional preambles can go beyond statements of prosaic history to indicate elements of national identity, or be symbolic statements regarding the desires of the community under the Constitution. The Australian constitutional preamble lacks the inspirational or aspirational language of either the US preamble, or more modern ones such as the South African preamble. In this article I have indicated that the reference to the peoples of the colonies in the Australian preamble, together with covering clause 3, is a record of history which members of the Court have used in identifying elements of the constitutional identity of “the people” – the constitutive, demotic character of “the people”, their new identities as “people of the Commonwealth”, and a starting point for understanding their legal status derived from allegiance to the sovereign.

The Court has understood the references to the agreement of “the people” as historical fact. That fact has been used by the High Court to develop the identity of “the people” – both the historical constitutive people and the new people under the Constitution. The Court has accepted that the peoples of the colonies are the historically constitutive people due to their involvement in the constitution-making process, while noting that they were not the only actors in that process and are not the only ones recognised as a source of authority for the Constitution. The Court has used the history contained in the preamble and covering clause 3 to explain how ‘the people’ were transformed through that agreement into a new, federal and national people.

The Court has understood the reference to the monarch in the preamble as a historical fact, but a fact which has been overtaken by more recent history. At the time of the making of the Constitution, “the people” owed allegiance to the monarch identified in the preamble – the monarch of the United Kingdom. That monarch has, following legal and political events recognised by the Court, changed into the Queen of Australia. The consequences are significant. The United Kingdom is now a foreign power and the Australian constitutional people owe allegiance to their own monarch, with no legal or constitutional ties to the United Kingdom. Thus, the nature of the polity of which “the people” are members has changed, with consequences for how membership is determined under Australian constitutional law.

Use of history in constitutional interpretation is contested, due to potential lack of clarity of the history and lack of certainty in what reference to history may lead to. Despite that contestation, it is clear from the Australian High Court case law considered here that use of the preamble, together with covering clause 3, as a record of historical fact has played a role in determining the constitutional identity of “the people” of the Australian Constitution.

- ¹ J. Williams, *The Australian Constitution: A documentary history*, Melbourne, Melbourne University Press, 2005.
- ² *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [14] (French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ).
- ³ M. McHugh, *The Constitutional Jurisprudence of the High Court: 1989-2004*, in «Sydney Law Review», XXX, n. 5, 2008, p. 8.
- ⁴ H. Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, in «Federal Law Review», XLI, 2013, p. 109, referring to *Cole v Whitfield* (1988) 165 CLR 360.
- ⁵ This is also consistent with the comparative analysis of constitutional preambles conducted in J. Frosini, *Constitutional Preambles: At a Crossroads between Politics and Law*, Rimini, Maggioli Editore, 2012, pp. 37-39.
- ⁶ J. Quick, R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, LexisNexis Butterworths, 1901, pp. 286, 332 (and see p. 250).
- ⁷ *Tasmania v Commonwealth* (1904), 1 CLR 329, pp. 359-360.
- ⁸ *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906), 4 CLR 488, p. 534.
- ⁹ *Baxter v Commissioners of Taxation (NSW)* (1907), 4 CLR 1087, pp. 1104-1105.
- ¹⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920), 28 CLR 129, p. 1109.
- ¹¹ Ivi, p. 152 (Knox CJ, Isaacs, Rich and Starke JJ).
- ¹² *Commonwealth v Tasmania* (1983), 158 CLR 1, pp. 207-208 (Brennan J); *New South Wales v Commonwealth* (1990), 169 CLR 482, p. 504 (Deane J in dissent); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992), 177 CLR 248, p. 274 (Brennan, Deane and Toohey JJ); *Leeth v The Commonwealth* (1992), 174 CLR 455, p. 484 (Deane and Toohey JJ).
- ¹³ *Josse v Australian Securities and Investment Commission* (1998), 159 ALR 260, p. 264.
- ¹⁴ Williams, *The Australian Constitution*, cit., pp. 669-704.
- ¹⁵ See the final versions of ss 7, 24, 128 of the Constitution.
- ¹⁶ J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, 1972, p. 137. See also: Quick, Garran, *The Annotated Constitution of the Australian Commonwealth*, cit., p. 418; WH. Moore, *The Constitution of the Commonwealth of Australia*, Sydney, Legal Books, 1910², p. 67; J. Waugh, *Review Essay: New Federation History*, in «Melbourne University Law Review», XXIV, 2000, p. 1042.
- ¹⁷ See Williams, *The Australian Constitution*, cit., p. 1150; La Nauze, *The Making of the Australian Constitution*, cit., chapter 15.
- ¹⁸ Williams, *The Australian Constitution*, cit., p. 1169.
- ¹⁹ See Quick, Garran, *The Annotated Constitution of the Australian Commonwealth*, cit., p. 250.
- ²⁰ *Queensland v Commonwealth* (1977), 139 CLR 585, p. 592 (Barwick CJ, in dissent), *Attorney-General (Cth) v The Queen (Boilermakers' Case)* (1957), 95 CLR 529 [1957] AC 288.
- ²¹ *Colonial Laws Validity Act 1865 (Imp)*, s 5.
- ²² *Colonial Laws Validity Act 1865 (Imp)*, ss 2, 3.
- ²³ *Baxter v Commissioners of Taxation (NSW)* (1907), 4 CLR 1087, pp. 1104-1105 (emphasis added), see also pp. 1109-1110; *Henry v Boehm* (1973), 128 CLR 482, p. 487 (Barwick CJ).
- ²⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920), 28 CLR 129, pp. 141, 160.
- ²⁵ Ivi, p. 141.
- ²⁶ *Tasmania v Commonwealth* (1904), 1 CLR 329, pp. 359-360 (O'Connor J); *McGinty v Western Australia* (1996), 186 CLR 140, p. 230 (McHugh J); *Victoria v Commonwealth* (1971), 122 CLR 353, p. 394 (Menzies J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992), 177 CLR 248, p. 274 (Brennan, Deane and Toohey JJ); *Roach v Electoral Commissioner* (2007), 233 CLR 162, p. 172 (Gleeson CJ).
- ²⁷ *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983), 158 CLR 535, pp. 589-590; *New South Wales v Commonwealth* (1990), 169 CLR 482, pp. 503-504 (in dissent); *Hematite Petroleum Pty Ltd v Victoria* (1983), 151 CLR 599, p. 660.
- ²⁸ *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906), 4 CLR 488, p. 534 (Griffith CJ).
- ²⁹ *Federated Amalgamated Government Railway & Tramway Service Association*, cit.; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005), 222 CLR 439, p. 463 (Kirby J); *Australian Capital Television Pty Ltd v Commonwealth* (1992), 177 CLR 106, pp. 210-211 (Gaudron J); Frosini, *Constitutional Preambles: At a Crossroads between Politics and Law*, cit., pp. 34-35.
- ³⁰ *Tasmania v Commonwealth* (1904), 1 CLR 329, pp. 359-360 (O'Connor J); *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906), 4 CLR 488, p. 534 (Griffith CJ); *Baxter v Commissioners of Taxation (NSW)* (1907), 4 CLR 1087, pp. 1104-1105, 1109-1110; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920), 28 CLR 129, p. 152 (Knox CJ, Isaacs, Rich and Starke JJ).
- ³¹ Quick, Garran, *The Annotated Constitution of the Australian Commonwealth*, cit., p. 285; Moore, *The Constitution of the Commonwealth of Australia*, cit., pp. 64, 66-67, 290; A. Inglis Clark, *Studies in Australian Constitutional Law*, Sydney, Legal Books, 1901, pp. xxxii, 20-22.
- ³² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920),

- 28 CLR 129, p. 152.
- ³³ *Amalgamated Society of Engineers*, cit., pp. 142, 160.
- ³⁴ *McGinty v Western Australia* (1996), 186 CLR 140, p. 230 (emphasis added) and see earlier: *Victoria v Commonwealth* (1971), 122 CLR 353, pp. 394–395 (Windeyer J) and later: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992), 177 CLR 248, p. 274 (Brennan, Deane, and Toohey JJ).
- ³⁵ See *Australian Capital Television Pty Ltd v Commonwealth* (1992), 177 CLR 106, pp. 180–181.
- ³⁶ Ivi, p. 138.
- ³⁷ See *Colonial Laws Validity Act 1865* (Imp).
- ³⁸ Constitution, s 74 allows for some appeals to be heard by the Queen in Council.
- ³⁹ *Sue v Hill* (1999), 199 CLR 462.
- ⁴⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992), 177 CLR 106, p. 138.
- ⁴¹ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005), 222 CLR 439, p. 463 (Kirby J); *Thomas v Mowbray* (2007), 233 CLR 307, pp. 362–363 (Gummow and Crennan JJ); *Sue v Hill* (1999), 199 CLR 462, p. 523 (Gaudron J); *McGinty v Western Australia* (1996), 186 CLR 140, p. 230 (McHugh J).
- ⁴² *Unions NSW v New South Wales* [2013], HCA 58, para. [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), para. [135] (Keane J); *Tajjour v New South Wales* [2014], HCA 35, para. [197] (Keane J).
- ⁴³ E. Arcioni, *Australian Constitutional Identity: complexity and fluidity*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467407> (October 2015), and see E. Arcioni, A. Stone, *Australian Constitutional Culture and The Social Role of the Constitution*, in «International Journal of Constitutional Law», 2015 (forthcoming).
- ⁴⁴ *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* (1908), 6 CLR 469, p. 552.
- ⁴⁵ *Davis v The Commonwealth* (1988), 166 CLR 79, p. 110.
- ⁴⁶ *Hwang v Commonwealth* (2005), 222 ALR 83, p. 88.
- ⁴⁷ *Stemp v Australian Glass Manufacturers Co Ltd* (1917), 23 CLR 226, p. 239 (Isaacs J); *R v Hughes* (2000), 202 CLR 535, pp. 560–561 (Kirby J).
- ⁴⁸ See *Nelan v Downes* (1917), 23 CLR 546, p. 568 (Isaacs J); *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945), 71 CLR 237, p. 273 (McTiernan J); *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975), 135 CLR 1, pp. 68–69 (Murphy J); *Youngarla v Western Australia* (2001), 207 CLR 344, p. 376 (Kirby J).
- ⁴⁹ *Australian Competition and Consumer Commission v Baxter Healthcare* (2007), 232 CLR 1, p. 46 (original emphasis); *Bistricic v Rokov* (1976), 135 CLR 552, p. 566 (Murphy J); *China Ocean Shipping Co v South Australia* (1979), 145 CLR 172, p. 236 (Murphy J, in dissent).
- ⁵⁰ *New South Wales v Commonwealth* (1990), 169 CLR 482, p. 504.
- ⁵¹ *Baxter v Commissioners of Taxation (NSW)* (1907), 4 CLR 1087, pp. 1104–1105, 1109–1110 (emphasis added).
- ⁵² Ivi, p. 1109.
- ⁵³ *Leeth v The Commonwealth* (1992), 174 CLR 455, p. 484 (Deane and Toohey JJ) (footnote omitted).
- ⁵⁴ *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945), 71 CLR 237, p. 273.
- ⁵⁵ *Hematite Petroleum Pty Ltd v Victoria* (1983), 151 CLR 599, p. 660 (Deane J); *Bistricic v Rokov* (1976), 135 CLR 552, p. 566 (Murphy J).
- ⁵⁶ Sections 106–108.
- ⁵⁷ *Victoria v Commonwealth* (1971), 122 CLR 353, p. 386.
- ⁵⁸ *Clarke v Federal Commissioner of Taxation* (2009), 240 CLR 272, p. 289.
- ⁵⁹ See covering clause 6 which defines «The States» to mean “such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia [...] as for the time being are parts of the Commonwealth”».
- ⁶⁰ N. Aroney, *The Constitution of a Federal Commonwealth: The making and meaning of the Australian Constitution*, Cambridge, Cambridge University Press, 2009, p. 255 (footnote omitted).
- ⁶¹ *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906), 4 CLR 488, p. 534 (Griffith CJ); *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* (1908), 6 CLR 469, p. 533 (O'Connor J). See also S. Gageler, *Beyond the Text: A Vision of the Structure and Function of the Constitution*, in «Australian Bar Review», XXXII, 2009, p. 148.
- ⁶² *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945), 71 CLR 237, p. 273; *Nelungaloo Pty Ltd v Commonwealth* (1950), 81 CLR 144, p. 154 (Lord Normand).
- ⁶³ *Henry v Boehm* (1973), 128 CLR 482, p. 487.
- ⁶⁴ *New South Wales v Commonwealth* (2006), 229 CLR 1, p. 226.
- ⁶⁵ *Newcrest Mining (WA) Ltd v Commonwealth* (1997), 190 CLR 513, p. 535 (Brennan CJ); *Attorney-General (NSW) ex rel McKellar v Commonwealth* (1977), 139 CLR 527, p. 533 (Barwick CJ); *Attorney-General of the Commonwealth; ex rel Mc Kinlay v The Commonwealth* (1975), 135 CLR 1, p. 69 (Murphy J).
- ⁶⁶ *Papua New Guinea Independence Act 1975* (Cth), s 4.
- ⁶⁷ *Kruger v The Commonwealth* (1997), 190 CLR 1, pp. 41–43 (Brennan J).
- ⁶⁸ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005), 222 CLR 439, p. 457 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).
- ⁶⁹ *Re Minister for Immigration and Multicultural and Indigenous Affairs*, cit., p. 478.
- ⁷⁰ *Ibidem*.
- ⁷¹ *Lamshed v Lake* (1958), 99 CLR 132, p. 140.

- ⁷² E. Arcioni, *Identity at the edge of the constitutional community*, in F. Jenkins, M. Nolan, K. Rubenstein (eds.), *Allegiance and Identity in a Globalised World*, Cambridge, Cambridge University Press, 2014, pp. 31 ff.
- ⁷³ See Quick, Garran, *The Annotated Constitution of the Australian Commonwealth*, cit., p. 955.
- ⁷⁴ *Calvin's Case* (1608) 7 Co Rep; 77 ER 377; 2 How St Trials 559.
- ⁷⁵ *Isaacson v Durant* (1886) 17 QBD 54.
- ⁷⁶ See ss. 1-4, 7, 34, 44, 57-61, 64, 66, 68, 73-74, 117, 122, 126, 128 of the Constitution.
- ⁷⁷ A. Twomey, *Changing the rules of succession to the Throne*, in «Public Law», 2011, p. 377.
- ⁷⁸ B. Selway, *The constitutional role of the Queen of Australia*, in «Common Law World Review», XXXII, n. 3, 2003, p. 248; G. Winterton, *The Evolution of a Separate Australian Crown*, in «Monash University Law Review», IXX, 1993, p. 1.
- ⁷⁹ *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988), 165 CLR 178, p. 185 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).
- ⁸⁰ *Nolan v Minister of State for Immigration and Ethnic Affairs*, cit., pp. 185-186.
- ⁸¹ *Shaw v Minister for Immigration and Multicultural Affairs* (2003), 218 CLR 28, p. 48 (McHugh J).
- ⁸² The impact of legislation in signifying membership and exclusion of the constitutional people is considered in E. Arcioni, *Democracy and the Constitution: The People Deciding the Identity of "the people"*, in G. Patmore, K. Rubenstein (eds.), *Law and Democracy: Contemporary Questions*, Canberra, Australian National University Press, 2014, p. 11.
- ⁸³ *Shaw v Minister for Immigration and Multicultural Affairs* (2003), 218 CLR 28, p. 48 (McHugh J); *Sue v Hill* (1999), 199 CLR 462, pp. 502-504 (Gleeson, Gummow and Hayne JJ), 523-528 (Gaudron J); *Singh v Commonwealth* (2004), 222 CLR 322, pp. 406, 411, 417 (Kirby J).
- ⁸⁴ Cfr.: M. McKenna, A. Simpson, G. Williams, *First Words: The Preamble to the Australian Constitution*, in «University of New South Wales Law Review», XXIV, n. 2, 2001, p. 392. See Aroney, *The Constitution of a Federal Commonwealth*, cit., pp. 182-184.