

WITH HOPE IN GOD, THE PRIME MINISTER AND THE POET: LESSONS FROM THE 1999 REFERENDUM ON THE PREAMBLE

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I INTRODUCTION

Throughout the 1990s, the republic debate in Australia focused on issues of national and legal identity. It is not surprising then that proposals to replace the current Preamble to the *Australian Constitution* ('Constitution') emerged as a by-product of that debate. What was surprising was the manner in which the final proposal for a new preamble emerged not from republicans or from the 1998 Constitutional Convention ('Convention') but from the desk of a constitutional monarchist, Prime Minister John Howard. That preamble was put to the people by the Howard Government in a national referendum held on 6 November 1999. The proposal was rejected overwhelmingly by the Australian people, receiving fewer votes than the republic proposal.

The history of the preamble debate of the 1990s holds important lessons for the future of constitutional reform in Australia. This article tells that story and analyses the politics of the debate. Its main focus is on events that occurred between the time of the Constitutional Convention in February 1998 and the 1999 referendum. Our companion article, 'First Words: The Preamble to the *Australian Constitution*'¹ examines the legal issues relating to the current Preamble to the Constitution, as well as related questions that have arisen in discussing proposals for a new preamble.

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II THE 1998 CONSTITUTIONAL CONVENTION

From 1991 to 1998, a new preamble was not claimed by the republican movement as a key element of their vision for the future. Apart from the interest shown by the various statutory authorities representing the interests of Indigenous Australians, the question of a preamble was an emerging issue in search of a prominent advocate.² The Convention in February 1998 initiated the perception that the preamble issue was an integral part of the republic debate. The Convention saw a significant shift in the debate and achieved a broad consensus on the need for a new preamble to the Constitution.

On the first day of the Convention, Australian Republican Movement ('ARM') Chairperson, Malcolm Turnbull, asserted:

We believe that the preamble should be amended. If it is to remain a statement of history, then it should pay appropriate regard and respect to Aboriginal history ... The preamble should also affirm our commitment to those core political values which define our nation.³

In the days that followed, this sentiment received almost unanimous support from the members of the Convention.

There was broad agreement that God's blessing should be included in any new preamble. Like the Crown one hundred years earlier, God provided a unifying bond. Abstract enough to be multicultural and non-denominational, God was an uplifting and visionary symbol. Delegates seemed to agree that the acknowledgment of a higher power in the Constitution lent the document gravity, humility and some sense of spirituality. Including God was one means of imagining the Constitution as more than a legal document and was seen as removing an obstacle to the success of the preamble question at a referendum. The fact that the preamble managed to stimulate considerable debate at the Convention was also an indication that Australians were beginning to view their Constitution in a different light. Many delegates expressed the belief that a new preamble could help to create greater popular identification with the Constitution.⁴

The Convention set up four working subgroups on the preamble, which laid the foundation for the Convention Communiqué. The most important contribution was arguably that of Working Group III, which included Gatjil Djerrkura (then ATSIC Chairperson) and Lowitja O'Donoghue (a former ATSIC Chairperson). This group resolved that a separate referendum question should be put on a new preamble at the same time as any referendum on the republic, and that such a preamble should recognise 'Aboriginal peoples and Torres Strait

2 Ibid 393.

3 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-3 February 1998* (1998) vol 3, 10.

4 Ibid.

Islanders as the original inhabitants of Australia who enjoy with all other Australians fundamental human rights'.⁵

Given the comments of the Constitutional Commission 10 years earlier,⁶ the Convention's Communiqué on the preamble was achieved with a remarkable spirit of unanimity. It was framed as follows:

Constitutional Convention 1998 Communiqué

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

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

The Preamble to the Constitution should contain the following elements:

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

Reference to 'Almighty God';

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

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

Affirmation of the rule of law;

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

Recognition of Australia's cultural diversity;

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

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

The following matters be considered for inclusion in the Preamble:

Affirmation of the equality of all people before the law;

Recognition of gender equality; and

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

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

Chapter Three of the Constitution should state that the Preamble not be used to interpret other provisions of the Constitution.⁷

In the final moments of the Convention, Prime Minister Howard committed his Government to holding a referendum on the republic but made no commitment on the preamble. In terms of the federal political agenda, the Convention's final resolution on the preamble was the last word until February 1999, when the preamble suddenly took centre stage.

5 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-3 February 1998* (1998) vol 2, 165-9. See generally the reports on the Convention in *The Weekend Australian* (Sydney), 6-7 February 1999; Frank Brennan, 'The Prospects for National Reconciliation Following the Post-Wik Standoff of Government and Indigenous Leaders' (1999) 22 *University of New South Wales Law Journal* 618, 622.

6 McKenna, Simpson and Williams, above n 1, 393.

7 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-3 February 1998* (1998) vol 1, 46-7.

III THE DRAFTING OF A NEW PREAMBLE

Prime Minister Howard spoke of the need to recognise Australia's Indigenous people in a new preamble shortly after his re-election in October 1998. In his victory speech on election night, he stated that reconciliation with Indigenous Australians would be one of his Government's major priorities in the coming term.⁸ Shortly afterwards, he came to see a new preamble as a vehicle for reconciliation. He was aware of the debate concerning the preamble at the Convention, and knew that the issue was capable of dividing republicans in a referendum. On 8 February 1999, he told the House of Representatives:

I think that as we approach the Centenary of Federation there are [sic] a growing number of Australians – Liberal and Labor, republican and anti-republican alike – who would like to see embedded in the basic document of this country some recognition of the prior occupation of the landmass of Australia by the indigenous people. That is my view. As I go round Australia, I find a greater unanimity of support for that than I do on the issue of a republic.⁹

It was significant that Howard explained the need for a new preamble in the context of the politics of the republic debate and the centenary of federation. One group missing from the Prime Minister's list of Australians who apparently wanted to see a new preamble 'embedded' in the Constitution was Indigenous Australians. They were being talked about rather than being talked to.

The Prime Minister's support for a new preamble followed only days after a national convention of republicans in Canberra had expressed conflicting views on the matter. At that time, in early February 1999, there were republicans who believed the preamble should be left to a later date, while others believed a republic which failed to address the issue of reconciliation through a new preamble would be a shallow enterprise.¹⁰ Indigenous leaders such as ATSIC chairman Gatjil Djerrkura called for a new preamble which recognised 'Indigenous custodianship of Australia' to be put to the Australian people at the same time as the referendum on the republic.¹¹ In this context, Howard saw the opportunity to detach the most important moral and symbolic issue in Australian politics from the republican cause.

On 16 February 1999, Howard received the support of the Coalition Joint Party Room ('Party Room') to draw up two separate constitutional amendment questions: one on the matter of Australia becoming a republic and the other on the insertion of a new preamble. The Party Room also asked for the inclusion in the proposed preamble of references to God, democracy, the prior occupation of Aborigines, and the equality of men and women before the law, so long as it

8 John Howard, Transcript of Election Night Speech, Sydney, 3 October 1998, *Prime Minister's Website*, <<http://www.prm.gov.au/news/speeches/1998/election.htm>> at 17 October 2001.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 8 February 1999, 2061 (John Howard, Prime Minister).

10 See, eg, 'Letters', *The Australian* (Sydney), 12 February 1999, 14; Mark McKenna, 'A new preamble just might save the republic', *The Age* (Melbourne), 8 February 1999, 13; and Mark McKenna, 'Referendum only as good as its words', *The Sydney Morning Herald* (Sydney), 8 February 1999, 17.

11 'Djerrkura plea for republic', *The Koori Mail* (Lismore), 24 February 1999, 5.

would not be justiciable.¹² The following day, Howard announced that he would write the new preamble 'in consultation with others'.¹³ From this moment forward, the preamble became the plaything of party politics.

Even at this early stage, the drafting of the preamble proceeded without bipartisan support. The Opposition pre-empted the Prime Minister by releasing on 13 March its own preamble, penned largely by Labor front-bencher (and former academic lawyer), Gareth Evans. This preamble was concise and recognised Indigenous Australians as 'the original occupants and custodians of our land'. A draft of this preamble was released on 28 April 1999 by Gareth Evans, Natasha Stott-Despoja and Bob Brown:

Non-Government Parties Preamble

Having come together in 1901, relying on God, as a Federation under the Crown
And the Commonwealth of Australia being now a sovereign democracy, our people
drawn from many nations
We the people of Australia
Proud of our diversity
Celebrating our unity
Loving our unique and ancient land
Recognising Indigenous Australians as the original occupants and custodians of our
land
Believing in freedom and equality, and
Embracing democracy and the rule of law
Commit ourselves to this our Constitution.¹⁴

Different perspectives on a new preamble were also contained in a report commissioned by the Constitutional Centenary Foundation presented at the National Press Club on 24 February 1999. The Foundation received more than 400 public submissions, which included draft preambles from schoolchildren, professionals, tradespeople and academics. The report found that there was widespread support for an acknowledgment of Aborigines that went beyond historical fact.¹⁵ Public interest in the preamble was also stimulated by various newspaper competitions encouraging readers and celebrities to submit drafts. The Prime Minister paid no attention to the draft preamble endorsed by the opposition parties or those found in the Constitutional Centenary Foundation's report. If he did read any of the draft preambles published in the report or those that appeared in the press during this period, his initial draft displayed no evidence of being influenced by anyone other than himself and his poet co-author.¹⁶

12 Richard McGregor, 'PM gets his way on black preamble', *The Australian* (Sydney), 17 February 1999, 1.

13 Gervase Green, 'I will write the preamble, says PM', *The Age* (Melbourne), 18 February 1999, 3.

14 As cited in John Uhr (ed), *The Australian Republic: The Case for Yes* (1999) 203.

15 Constitutional Centenary Foundation, 'We the people of Australia...' *Ideas for a new Preamble to the Australian Constitution* (1999), and Gervase Green, 'PM under pressure on preamble', *The Age* (Melbourne), 25 February 1999, 10. Also see Stefanie Balogh, 'Students rewrite history with an eye on the future', *The Australian* (Sydney), 25 February 1999, 4, on school children and Norman Abjorensen, 'Keep it simple: preamble message', *The Canberra Times* (Canberra), 25 February 1999, 2.

16 Norman Abjorensen, 'It's the vision thing', *The Canberra Times* (Canberra), 27 February 1999, 3; *The Sunday Age* (Melbourne), 7 March 1999, C3.

At the same time as popular interest in the preamble was growing, Howard announced in early March that he would 'have a chat' to poet Les Murray and that he would seek Murray's assistance in drafting a preamble. The combined literary talents of Howard and Murray produced a preamble of which Ern Malley would have been proud.

The Howard-Murray Preamble

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

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

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

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

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

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

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

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

In this spirit we, the Australian people, commit ourselves to this Constitution.¹⁷

At a press conference on 23 March 1999, in the Prime Minister's courtyard at Parliament House, Howard described this draft as one produced 'in cooperation with a great wordsmith ... and one or two other people'. It was an attempt, said Howard, to embrace in 'ageless language', 'a sense of who we are, a sense of what we believe in, and a sense of what we aspire to achieve in the future'. One of the 'other' people consulted by Howard was conservative historian Professor Geoffrey Blainey. The Prime Minister also consulted two of his staff, Catherine Murphy and Michael L'Estrange.¹⁸ Howard also announced that the Coalition Joint Party Room had endorsed a proposal to submit the draft to the people at the same time as the republic referendum.

The Howard-Murray preamble, which was to be inserted into the Constitution proper and was intended to be non-justiciable, was immediately opposed by the non-Government parties.¹⁹ It also attracted widespread public and media criticism that could be summarised under the following categories:

17 Constitution Alteration (Preamble) 1999 (Cth) Exposure Draft, released 25 March 1999. Reproduced in Luke Slattery, 'Poet Les happy to preamble on', *The Australian* (Sydney), 4 March 1999, 3, and Stephanie Peatling, 'PM knows poet's prose apt for preamble', *The Sydney Morning Herald* (Sydney), 4 March 1999, 8. Murray's own recollections on the experience can be found in Les Murray, *The Quality of Sprawl* (1999), 213-35. See also Mark McKenna, 'The Tyranny of Fashion: John Howard's Preamble to the Australian Constitution' (1999) 10 *Public Law Review* 163.

18 John Howard, Transcript of Prime Minister's press conference, Canberra, 23 March 1999, *Prime Minister's Website*, <<http://www.pm.gov.au/news/interviews/1999/PressConf2303.htm>> at 17 October 2001.

19 Louise Dodson, 'Preamble beneath us: Beazley', *The Australian Financial Review* (Sydney), 24 March 1999, 3; Margo Kingston, 'Custody battle may kill November vote', *The Sydney Morning Herald* (Sydney), 25 March 1999, 4.

- (1) There were objections to the Indigenous reference, in particular its failure to go beyond the recognition of prior occupation and include reference to Aboriginal 'custodianship'. Indigenous leaders roundly criticised the draft. They had not been consulted.²⁰
- (2) There were objections to the word 'mateship', especially from women's groups, on the grounds that it was an exclusively male term. As another poet, the late Judith Wright, observed, 'we are all men from Snowy River it seems. I hope women stamp on this'. She was not to be disappointed.²¹
- (3) There were objections to Howard's attempt to insert what he called 'a gentle rebuke to political correctness', by including the phrases, 'never be infringed by prejudice or fashion or ideology', and 'free to be proud of their country and heritage'. Critics maintained that these phrases would mean that the preamble would not be 'ageless', but would be located in the politics of the 1980s and 1990s. They also claimed that the meaning of such phrases was ambiguous and any meaning which could be discerned was patently absurd. To suggest, for example, that Australians should be 'free to be proud of their country' was akin to suggesting that they should be free to smile and wave the Australian flag.²²
- (4) There were objections to style, grammar or length. For example, frequent attention was drawn to the tautology 'woven together', or the coffee table language of phrases such as 'time immemorial'.²³
- (5) There were objections to the preamble being presented as 'republic neutral', the intended legal impotence of the preamble and the Government's intention to leave the current Preamble and covering clauses unamended, while inserting a second preamble in the Constitution.²⁴

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- 20 See, eg, Michael Mansell, Letter to the Editor, *The Sydney Morning Herald* (Sydney), 12 February 1999, 16; Peter Yu, Letter to the Editor, *The Australian* (Sydney), 19 February 1999, 12; Lowitja O'Donoghue in Tony Stephens, 'Preamble pathetic: O'Donoghue', *The Sydney Morning Herald* (Sydney), 16 April 1999, 7; Gatjil Djerrkura in Michelle Grattan and Margo Kingston, 'PM sparks war of words', *The Sydney Morning Herald*, 24 March 1999, 1. See also Editorial, *The Age* (Melbourne), 24 March 1999, 14; and Bain Attwood, 'Reprise of the dishonourable silence', *The Australian* (Sydney), 25 March 1999, 15.
 - 21 Stephanie Peatling, 'Mateship an insult say angry feminists', *The Sydney Morning Herald* (Sydney), 24 March 1999, 10. See also Judith Wright, as quoted in Stuart Rintoul *et al*, 'Blokey concept no mate to women,' *The Australian* (Sydney), 24 March 1999, 5.
 - 22 Wojciech Sadurski, 'Sorry but your draft is daft', *The Sydney Morning Herald* (Sydney), 25 March 1999, 21. See also Editorial, *The Age* (Melbourne), 30 April 1999, 16, which provides a summary of the major criticisms of the Howard-Murray Preamble.
 - 23 Gervase Green, 'Howard admits threat to Preamble', *The Age* (Melbourne), 30 April 1999, 2; Editorial, *The Age* (Melbourne), 30 April 1999, 16; see especially Wojciech Sadurski, above n 22. See generally *The Australian* (Sydney), 24 March 1999 for a variety of perspectives.
 - 24 Paul Kelly, 'A Preamble too bad to be true', *The Australian* (Sydney), 24 March 1999, 13; George Winterton and Mark McKenna, 'Two Preambles is Stretching the Mateship', *The Australian* (Sydney), 22 April 1999, 13.

- (6) There were objections to the process of drafting the preamble, mainly on the grounds that the preamble, if it were to be representative of a people's aspirations, would need to be drafted by more than two people.²⁵
- (7) There were objections to the Prime Minister's dismissal of the Constitutional Convention's recommendations on the preamble. Items mentioned by the Convention as worthy of consideration, which were not included in Howard's draft, included Aboriginal custodianship, a reference to the republic, reference to the environment and explicit mention of cultural diversity and gender equality. The Prime Minister's preamble bore little relation to the Convention's Communiqué.²⁶
- (8) Finally, there were objections from quite unexpected quarters. For example, Tasmanian Labor Premier, Jim Bacon, took issue with the reference to 'our island continent', because it seemed to exclude Tasmania.²⁷

With such a volume of criticism, the Howard-Murray preamble required substantial revision, or perhaps even incineration, if the preamble debate were to move forward to a vote at a referendum. The Government had received almost 700 submissions on the draft by the time submissions closed on 30 April 1999. When the non-Government parties endorsed their alternative draft preamble, Howard threatened to abandon the plan to put any preamble to the people.

It appeared that the Prime Minister had dropped the idea for a new preamble when the Bills for an Australian republic were introduced into Parliament without any Bill for a new preamble. In fact, it was not until the parliamentary committee examining the republic had completed its work that Howard introduced the new preamble Bill. The pessimism which, during April-July 1999, had surrounded the prospects of any preamble draft reaching the referendum stage had been broken by the new configuration in the Senate. From 1 July the balance of power was held by the Australian Democrats. The new Democrat spokesperson on reconciliation was Aden Ridgeway, an Indigenous Australian who quickly became immersed in the negotiations over the preamble Bill.²⁸ Once in the Federal Parliament, Senator Ridgeway soon found himself representing Indigenous Australians as much as the Australian Democrats. While Ridgeway's presence may have suited the Prime Minister by offering Howard the opportunity to be seen to be negotiating with Indigenous people, Aboriginal leaders were far from happy with Ridgeway's negotiations with the Government. Angered by a lack of broader consultation, Indigenous leaders, after a national telephone

25 See, eg, editorial calling for wider consultation: Editorial, *The Australian* (Sydney), 24 March 1999, 12; and a range of criticisms in Dennis Shanahan, 'Premiers doom PM's Preamble', *The Australian* (Sydney), 13 April 1999, 1.

26 Marian Sawer, 'Visible at Last? Women and the Preamble' in Uhr, above n 14, 143.

27 Shanahan, above n 25. For other criticisms, eg, from conservative Andrew Robb, see Aban Contractor, 'Preamble uninspiring and insignificant: Robb', *The Canberra Times* (Canberra), 30 March 1999, 3.

28 Dennis Shanahan, 'Democrat, PM in preamble deal', *The Weekend Australian* (Sydney), 7-8 August 1999, 8; Richard McGregor, 'New boy walking halls like a veteran', *The Weekend Australian* (Sydney), 7-8 August 1999, 8.

conference held in August, called for the proposed question on the draft preamble to be dropped from the referendum.²⁹

During the first two weeks of August 1999, the ARM and the Australian Labor Party ('ALP') lobbied for the preamble to be dropped entirely, while the Government and the Australian Democrats worked on achieving agreement on a revised version of the Howard–Murray preamble. Leading republicans such as Opposition leader Kim Beazley and Malcolm Turnbull wanted one referendum question only, believing that any additional question on a preamble would increase the likelihood of defeat on the republic question. On 11 August, one day before the republic legislation was due to be passed by Parliament in time for the November referendum, the final version of the revised preamble was released with the introduction in the House of Representatives of the Constitution Alteration (Preamble) 1999 (Cth). With the support of the Democrats, its passage through the Senate was now certain.

The Final Preamble Proposal

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

We the Australian people commit ourselves to this Constitution:

proud that our national unity has been forged by Australians from many ancestries; never forgetting the sacrifices of all who defended our country and our liberty in time of war;

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

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

recognising the nation building contribution of generations of immigrants;

mindful of our responsibility to protect our unique natural environment;

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

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Bland and innocuous, this preamble was a considerable improvement on the original Howard–Murray draft. Unlike the legislation on a republic, there was to be no parliamentary inquiry or committee process that would examine the proposed preamble and receive public submissions.³⁰ This was unfortunate given the anomalies that would have been brought about by the proposed preamble. The Constitution Alteration (Preamble) 1999 (Cth) sought to insert a new preamble, whilst retaining the current version, perhaps due to concerns that a referendum might not be capable of repealing the Preamble to the British Act

29 Gatjil Djerrkura, *Lack of Proper Consultation Sinks Referendum*, ATSIIC Media Release (8 November 1999).

30 A Joint Select Committee on the Republic Referendum was established on 10 June 1999 to enquire into the Constitution Alteration (Republic) 1999 (Cth) and the Presidential Nominations Committee Bill 1999 (Cth). The Committee received 122 original written submissions, exhibits and other correspondence, and held public hearings in major cities. It reported on 9 August 1999. The Committee's terms of reference did not enable it to consider proposed constitutional preambles. See Joint Select Committee on the Republic Referendum, *Advisory Report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999* (1999) 2.

that contains the Constitution.³¹ As a result, a successful referendum would have lead to two preambles prefacing the Constitution, the first and current Preamble at the head of the British Act and the second and new preamble at the head of the Constitution itself. Moreover, in the event of the passage of the republic referendum, the former, current Preamble would have continued to assert that Australia had 'agreed to unite in one indissoluble Federal Commonwealth under the Crown'.

In the second week of August 1999, Prime Minister Howard insisted that the proposed preamble could not be changed, stating that 'we need to pass the legislation this week'. When asked if he had spoken to other Indigenous leaders, the Prime Minister replied 'No'. When asked whether the preamble would advance reconciliation, Howard replied, 'Yes, [the proposed preamble includes] an appropriate, generous and very positive reference to Aborigines and Torres Strait Islanders'.³² 'Kinship', rather than 'custodianship', had been used to describe the relationship of Indigenous peoples to the land. Unfortunately, 'kinship' does not easily apply to the connection between a person and a place or thing. The argument from Howard and Ridgeway was that the proposed preamble at least made positive mention of Indigenous Australians, something that could only be an improvement on the existing situation. Since the removal of two negative references to Aboriginal people as a result of the 1967 referendum, the Constitution makes no reference to Indigenous peoples whatsoever.³³

Despite the ALP's opposition to the preamble in Parliament, it agreed at a subsequent Caucus meeting not to oppose the amendment during the referendum campaign, fearing that this would harm the more important republic question.³⁴ By withdrawing its political opposition, the ALP thereby escaped involvement in drafting the NO Case for the referendum question. Under s 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth), the negative case in a referendum can be authorised 'by a majority of those members of the Parliament who voted against the proposed law and desire to forward such an argument'.³⁵ The crucial word in this particular provision is 'desire'. The ALP's strategic withdrawal left only one Member of Parliament who still opposed the preamble, Peter Andren,

31 See Nicholas Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 20 *University of Queensland Law Journal* 262; Gregory Craven, 'The Constitutional Minefield of Australian Republicanism' (1992) 8(3) *Policy* 33, 34-5; Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 143, 147; George Winterton, 'The States and the Republic: A Constitutional Accord?' (1995) 6 *Public Law Review* 107, 120-1. Compare Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, 122.

32 John Howard, Transcript of Prime Minister's press conference, Canberra, 11 August 1999, *Prime Minister's Website*, <<http://www.pm.gov.au/news/interviews/1999/PressConf1108.htm>> at 17 October 2001.

33 See George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

34 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8436; Commonwealth, *Parliamentary Debates*, Senate, 12 August 1999, 7370.

35 *Referendum (Machinery Provisions) Act 1984* (Cth) s 11.

Independent MP for Calare. Andren therefore had sole responsibility for writing the formal NO Case.³⁶

In an attempt to ensure that the High Court could have no recourse to the new preamble, the final draft was presented to the people packaged together with an amendment to Chapter III of the Constitution that read:

125A Effect of preamble:

The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.³⁷

The anomalies created by having two preambles would have been increased by this section. Section 125A would not have applied to the current Preamble, with the result that judges could continue to take account of values in that Preamble but could not similarly use the newer version.

The 1998 Convention, and evidently the Government, had been confident that a constitutional amendment in the terms of s 125A would ensure that the new preamble, if accepted, would be non-justiciable. It was suggested that clauses of this type have operated as intended in other constitutions, including those of Ireland and India.³⁸ In fact, s 125A went considerably further than the Convention had recommended. The Convention recommendation was that recourse to the preamble be denied in the context of interpreting 'other provisions of the Constitution', whereas s 125A would have denied recourse to the preamble in the interpretation of 'the law in force in the Commonwealth or any part of the Commonwealth'. This seemed to remove the prospect of a new preamble being used in statutory interpretation and in the development of the common law. Ironically, those potential usages had been raised at the 1998 Convention by proponents of a s 125A-style clause to reassure those favouring a justiciable preamble that there remained ample scope for legal use of the preamble outside of the constitutional context.³⁹

Nevertheless, some commentators expressed doubts about whether s 125A would actually have precluded judicial recourse to the values and principles expressed in the new preamble. Several suggestions have been made as to ways in which those values and principles could be harnessed by courts, and especially the High Court, in spite of the sweeping s 125A directive. Leslie Zines has stated in regard to the more limited approach of the Convention, in an argument that applies equally to s 125A:

Whatever one thinks of the Convention's attempt to prevent judicial use of the preamble, I doubt whether it would be effective. It would, for example, be open to judges to find those very values or aspirations to be community values if they arrived at that conclusion from other sources, such as their own experience or intuition.⁴⁰

36 Peter Andren, 'Preamble Left in the Shade', *The Canberra Times* (Canberra), 5 November 1999, 5.

37 Constitution Alteration (Preamble) 1999 (Cth) s 4.

38 See George Winterton, 'The 1998 Convention: A Reprise of 1898?' (1998) 21 *University of New South Wales Law Journal* 856, 864.

39 See, eg, *ibid.*

40 Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10 *Public Law Review* 67, 68.

Sir Harry Gibbs, a former Chief Justice of the High Court, argued that even given s 125A, a preamble might be relied upon as evidence supporting, as a matter of fact, the statements made therein. According to Sir Harry Gibbs, this might prove particularly significant in the context of native title if a preamble contained recitals about the dispossession of Indigenous peoples or their relationship with the land.⁴¹

A more speculative suggestion, also raised by Sir Harry Gibbs, is that a preamble might be found to give rise to 'legitimate expectations' that would have ramifications for decision-makers under Commonwealth enactments.⁴² Sir Harry Gibbs suggested that the reasoning used by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* ('*Teoh*'),⁴³ in relation to the significance of international agreements, could apply by analogy in the context of a new preamble. However, this suggested analogy seems unlikely when one considers the terms of the proposed s 125A. The High Court in *Teoh* conceded that an express negation of the legal significance of an act of treaty ratification would undermine the scope for deriving any legitimate expectations. It would be difficult to deny that a s 125A-style clause would similarly undermine such potential in the preamble context.

Given the broad scope and unambiguous language of s 125A, it is unlikely that courts would nevertheless have invoked the preamble in ways that would give it legal effect. Not only is s 125A clear in its intent, the consequences of a judge seeking to bypass the section could be significant. A judge using the preamble as a legal tool could attract personal criticism and perhaps even cause a loss of public confidence in the courts. In such circumstances, it is likely that the proposed preamble would have had no more than a marginal or trivial impact upon legal development.

IV THE REFERENDUM CAMPAIGN

One of the most remarkable features of the 1999 referendum campaign on the preamble was how very limited the campaign was. At the time of the preamble's release, the Prime Minister had announced no decision concerning his own role in campaigning for the preamble or whether there would be Government funding for the YES and NO cases. On 10 October 1999, the Prime Minister wrote to Peter Andren, the author of the NO case, explaining his decision not to fund YES and NO cases in the preamble referendum:

The government considers that the measures already in place [the formal YES and NO cases sent to all voters by the Australian Electoral Commission] will provide ample opportunity for Australians to cast an informed vote on the Preamble.⁴⁴

41 Sir Harry Gibbs, 'A Preamble: The Issues' in The Samuel Griffith Society, *Upholding the Australian Constitution* (1999) vol 11, 85, 92.

42 Ibid 92-3.

43 (1995) 183 CLR 273.

44 See Andren, above n 36.

By contrast, AUD\$15 million of Government funding was divided equally between the Committees organising the YES and NO campaigns for the question on the republic.

The task of voters to make sense of the proposed change was made even more difficult by the 'neutral' information communicated to the public about the Government's proposed preamble. The claim made in official advertising that there is 'currently no Preamble to the Constitution itself', while technically correct, was misleading.⁴⁵ Anyone purchasing a copy of the Constitution would have seen on the first page the current Preamble to the British Act.⁴⁶ They could also be forgiven for thinking that the Government was intending to replace this Preamble with a new one. The Government's advertising material did not make clear that the intention was not to replace the existing Preamble, but to leave the existing Preamble intact, thereby creating a Constitution with two preambles, one non-justiciable and formally part of the Constitution, the other justiciable and part of the British Act of Parliament that brought the Constitution into being.

The text of the preamble did not appear on the ballot paper in November – Howard was relying solely on voters reading the Australian Electoral Commission's 71 page *Yes/No Referendum '99* pamphlet, or on descriptions in the press. Given the Prime Minister's personal investment in the writing of the preamble, his reticence to promote the issue during the referendum campaign suggests that his advancement of the preamble was motivated primarily by the possibility of gaining political advantage over republicans. His enthusiasm in penning the preamble also suggested he was tempted by the thought of leaving his mark on the Australian Constitution. Perhaps John Howard had ambitions to be the 'father' of the preamble.

Between 10 October and 1 November, there was little public debate on the preamble. Coverage of the issue varied little from State to State, the few reports in the west and far north often mirroring those that appeared in the major broadsheets in the south east of the country.⁴⁷ With almost no substantial public debate on the issue, the Electoral Commission pamphlet was the most important source of information for voters. The only public supporters of Andren's NO case, albeit with little visibility and with different emphases, were Greens Senator Bob Brown, monarchist Sir Harry Gibbs, sections of the National Party organisation and Pauline Hanson's One Nation Party.⁴⁸ In the formal NO case,

45 George Williams, 'Two Preambles, One Dog's Dinner', *The Australian* (Sydney), 1 November 1999, 17. See also George Williams, 'What any preamble needs: us', *The Australian* (Sydney), 10 August 1999, 15.

46 *Commonwealth of Australia Constitution Act 1900* (Imp).

47 Karen Middleton, 'Rights Bill calls lead to Preamble', *The West Australian* (Perth), 26 October 1999, 10; Karen Middleton, 'A Preamble to Suit all Tastes', *The Mercury* (Hobart), 4 November 1999, 7; *The Northern Territory News* (Darwin), 4 November 1999, 8; *The West Australian* (Perth), 4 November 1999, 8; Annabel Crabb, 'Howard goes into bat for preamble', *The Mercury* (Hobart), 6 November 1999, 4.

48 Michelle Grattan, 'Defining Virtues', *The Sydney Morning Herald* (Sydney), 23 October 1999, 43. Also Greg Roberts, 'Preamble's Native Title Jeopardy', *The Sydney Morning Herald* (Sydney), 31 August 1999, 2.

Andren used some of the same themes as the opponents of the republic, including antagonism towards politicians and fear of change.⁴⁹

It was not until the last week of the referendum campaign, beginning 1 November 1999, that any serious attempt was made to advocate a YES vote on the preamble. In order to address what one of the Prime Minister's staff referred to as 'an information gap', Howard organised a joint press conference with Democrats' Senator Aden Ridgeway three days before the referendum. There he told reporters that the preamble 'would make a very positive contribution to the reconciliation process' while Senator Ridgeway insisted that Indigenous people should support the preamble because some recognition was better than none at all. However, Indigenous leaders refused to support the preamble, with many groups such as the influential Kimberley Land Council, led by Peter Yu, campaigning for a NO vote on both the preamble and the republic.⁵⁰ Howard had dealt cleverly with Ridgeway and the Senator failed to receive support from Indigenous leaders.⁵¹ He was also criticised by the Opposition spokesperson on Aboriginal affairs, Daryl Melham, who broke ranks with the Labor party by advocating a NO vote on the preamble.⁵²

Speaking at his press conference on 3 November, as if preparing the ground for defeat, Howard stated that if the preamble were lost, it would be because people were not 'aware of the words', rather than 'being opposed to the concept or what those words stand for'. But if the people were 'not aware of the words', why did the Prime Minister choose to omit the words from the ballot paper?⁵³ On 4 November, in a last ditch attempt to save the preamble from defeat, Howard authorised television advertisements encouraging a YES vote on the Preamble.⁵⁴

In mid-September, Newspoll registered support for the preamble at above 50 per cent nationally, yet by early November support had declined to 38 per cent.⁵⁵ This suggests that as soon as the extremely negative campaign of the NO case on the republic question began to bite, the preamble suffered as well.⁵⁶ As early as 1 November, Treasurer Peter Costello stated that the implication that politicians could not be trusted to elect a President also suggested they could not be trusted

49 'The Case for Voting "NO"' in Australian Electoral Commission, *Yes/No Referendum '99* (1999) 27.

50 Stuart Rintoul, 'Aboriginal Leaders Go Both Ways on Republic' *The Weekend Australian* (Sydney), 30-31 October 1999, 11.

51 Editorial, 'Preamble Will Unite', *The West Australian* (Perth), 4 November 1999, 9; Margo Kingston, 'Howard Moves to Save His Preamble', *The Sydney Morning Herald*, 2 November 1999, 4; Michael Mansell in Julian Foley, 'Aboriginal People should say No to the Referendum', (October 1999) *Land Rights* 1; Karen Middleton, 'Kimberley Council Urges Double No', *The West Australian* (Perth), 30 October 1999, 9.

52 Rebecca Rose, 'PM Affirms Reconciliation', *The West Australian* (Perth), 8 November 1999, 9.

53 George Megalogenis, 'Preamble Driver's been asleep at the wheel', *The Australian* (Sydney), 5 November 1999, 7.

54 Margo Kingston, 'Jittery PM's last minute ad campaign', *The Sydney Morning Herald* (Sydney), 5 November 1999, 9.

55 Richard McGregor, 'Ridgeway leaves it too late on Preamble', *The Australian* (Sydney), 3 November 1999, 4.

56 Gerard Henderson, 'The Odd Politics of Illogicality', *The Sydney Morning Herald* (Sydney), 26 October 1999, 17.

to draw up a preamble.⁵⁷ Like the republic, the preamble was suffering at the hands of those who were arguing for greater public participation. By 6 November, there appeared little chance of the preamble being approved by the Australian people.

V THE REFERENDUM RESULT

The result of the referendum on the preamble was a resounding NO vote in every State and Territory. The national NO vote was 60.66 per cent (significantly higher than the national NO vote on the republic of 54.87 per cent), with Queensland (67.19 per cent) and Western Australia (65.27 per cent) recording the highest NO Votes.

TABLE 1: PREAMBLE REFERENDUM OUTCOME⁵⁸

	YES	NO
National majority	39.34%	60.66%
New South Wales	42.14%	57.86%
Victoria	42.46%	57.54%
Queensland	32.81%	67.19%
Western Australia	34.73%	65.27%
South Australia	38.10%	61.90%
Tasmania	35.67%	64.33%
Australian Capital Territory	43.61%	56.39%
Northern Territory	38.52%	61.48%

The highest YES votes for the preamble were located in safe Labor and Liberal seats in the cities, especially those with large Asian populations, perhaps because of the preamble's recognition of cultural diversity. On the other hand, the preamble did not fare well in seats with a high Indigenous population, which probably reflected the significant opposition to the preamble by many Indigenous leaders.⁵⁹

As with the question on the republic, rural seats recorded a higher NO vote on the preamble than did those in the inner cities. This was especially so in Queensland, the Northern Territory and Western Australia, where the NO vote on the preamble sometimes climbed as high as 75 per cent. Only 7 seats in New South Wales and 9 seats in the Melbourne area voted YES for the Preamble. Fittingly, the highest YES vote recorded, 52.49 per cent, was in Bennelong on

57 Phillip Coorey, 'Costello Fears for Fate of Preamble', *The Mercury* (Hobart), 1 November 1999, 7.

58 Australian Electoral Commission, *Australian Referendums 1906-1999* (1999). This publication (on CD ROM) is the source of the Table 4 and the following seat-based conclusions.

59 David Nason, 'Preamble defeat blow to Howard', *The Australian* (Sydney), 8 November 1999, 5.

Sydney's North Shore, the seat of Prime Minister Howard. In Tasmania, South Australia, Queensland, Western Australia, the Northern Territory and the Australian Capital Territory, the preamble was unable to muster a YES vote in one seat. By any standards, this was a devastating defeat.

The meter measuring voter disaffection with politicians and 'Canberra' moved to red the further one drove from the Houses of Parliament in Australia's major cities.⁶⁰ The 'politician's republic' and 'politician's preamble' received what was seen as their just deserts. Voters in the bush believed there were more pressing practical and everyday concerns than the republic and the preamble.

When asked to explain the defeat of the preamble, Howard claimed it was 'probably defeated by apathy or ignorance, not by hostility'. Refusing to admit any personal responsibility, he lamented the fact that the people had rejected his 'noble and gracious' words.⁶¹

Several reasons explain the defeat of the preamble. Most significantly, neither its advocates nor its opponents campaigned with much enthusiasm, and there was no substantial public focus on the preamble after August 1999. To some extent, the preamble was lost in a sea of indifference, or submerged beneath the republic question, and frequently tarnished by partisan political posturing. This and the drafting history of the preamble meant that the central arguments of the NO case against the republic told here as well. The arguments 'Vote No to the Politician's Republic' and 'Don't Know – Vote No' applied to both the preamble and republic questions with equal force.⁶² Issues such as the justiciability of the preamble and s 125A appear to have had little or no impact. There was simply not enough discussion or media coverage of the preamble to bring such issues to public attention.

The same man who had driven from his rural retreat in northern New South Wales to Canberra in March, to help a then enthusiastic Prime Minister draft his first preamble, now exclaimed his joy on hearing of the preamble's defeat. Poet Les Murray joked that the Australian people had mercifully taken it out the back and shot it. He was annoyed that so many of his original words had been deleted, and was convinced he would never undertake a similar task again. 'The [preamble]', said Murray, 'was slowly taken apart and turned into mush in a process of political compromise'.⁶³

60 See David Marr et al, 'Danger Ahead for Howard as Battlers Rush to Vote No', *The Sydney Morning Herald* (Sydney), 8 November 1999, 14; on the high NO vote in rural areas, see generally *The Australian* (Sydney), 8 November 1999.

61 Margo Kingston, 'Ignorance killed Preamble', *The Sydney Morning Herald* (Sydney) 8 November 1999, 13; See generally *The Australian* (Sydney), 8 November 1999. Rose, above n 52.

62 Australian Electoral Commission, above n 49, 9. See George Williams, 'Why Australia Kept the Queen' (2000) 63 *Saskatchewan Law Review* 477, 497-8 for discussion of these arguments.

63 Margo Kingston, 'Howard Keen to Reconcile', *The Sydney Morning Herald* (Sydney), 9 November 1999, 8.

VI CONCLUSION

After suffering an enormous defeat, the possibility of a new preamble in the near future appears bleak. Many 'noble' aspirations came to nought. However, despite its failure at the referendum, the question of a new preamble generated a prolonged public debate on issues of vital importance to Australia's civic culture. It increased public awareness of the Constitution and our democracy. Thousands of people across the nation also took up their pens and drafted preambles. These are encouraging and healthy signs of a vibrant democracy built upon engagement and participation.

With the benefit of hindsight, it is possible to identify the most important lessons from the 1999 'preamble experience':

- If a new preamble is to provide the Australian people with a declaration of their values and aspirations, a process of lengthy and genuine public consultation needs to be set in place. Preambles written by those outside Parliament must be considered for adoption. A national preamble competition and a plebiscite on several winning entries is one possible process.
- If it is to be an inclusive and unifying document, a preamble should not become the sole property of partisan politics. No preamble can claim democratic legitimacy if it is drafted by two or three individuals, or a single political party.
- If a preamble is to serve as one step towards reconciliation with Indigenous Australians, a broad cross-section of Indigenous leaders must be consulted and involved in drafting the preamble, especially in regard to the reference to Indigenous Australians. Similarly, other groups, such as ethnic communities, ought to be consulted on aspects of the preamble that might have special significance for them.
- So long as Australia remains a constitutional monarchy, the need for a new preamble is unlikely to arise, except perhaps as part of a constitutional package that deals with reconciliation and Indigenous recognition issues. In the context of change to a republic, a preamble occupies a position of crucial symbolic importance. It makes sense to introduce a new preamble simultaneously when – or soon after – a republic has been achieved. This is the time debate on a preamble is most likely to resurface. If the sovereignty of the Crown is to be removed, there is then a clear case for articulating the sovereignty of the people and writing a new preamble that will replace the current Preamble.
- Insisting that a new preamble be non-justiciable is of questionable political utility in a referendum context, and opens any preamble up to the charge of being little more than window dressing. Legal opinion on the possible effect of the Howard Government's proposed constitutional provision to ensure the legal impotence of the preamble was, in any case, divided.⁶⁴

⁶⁴ This was a point made effectively by the formal NO case on the preamble. See Australian Electoral Commission, above n 49, 35.

- Although Howard appeared to be committed to the concept of a new preamble, he underestimated the difficulty of achieving consensus on its content. Naturally, there will be those who remain sceptical of any attempt to articulate the shared democratic principles of 19 million people from over 140 different cultures. As Jeremy Webber has argued, in seeking to define a society's values, a preamble can miss much of the subtlety and ambiguity evident in a political culture.⁶⁵ But Webber does not make an argument against preambles as such,⁶⁶ and a preamble need not be written to capture the spectrum of subtlety and ambiguity, nor to express every nuance evident in a political culture. For Australians, there may be a higher price to be paid for remaining silent. We share the same continent, the same institutions, and the same citizenship and perhaps it is in the area of defining and establishing broad themes of citizenship that a preamble can play a positive and educative role.

Despite the rejection of the preamble at the 1999 referendum, there are building blocks already in place for consensus on the values of Australian democracy. In 1989, the National Agenda for a Multicultural Australia included an official statement of core values, as did the Keating Government's response to the Civics Expert Group in 1995, and the Women's Constitutional Convention in 1998.⁶⁷ Based on a reading of the above, the Republic Advisory Committee Report, the Report of the 1988 Constitutional Commission, the extraordinary bipartisan declaration made in the Commonwealth Parliament on 30 October 1996 (which affirmed Australia's commitment to 'equal rights' regardless of 'race, colour, creed or origin')⁶⁸ and the recommendations of the Convention in 1998, it is possible to distil the essence of those principles which have been most frequently mentioned as the core values of Australian democracy. These fall into seven broad categories:

- (1) the sovereignty of the people;
- (2) the equality of all Australians under the law;
- (3) tolerance of difference and cultural diversity;
- (4) the equality of men and women;
- (5) equality of opportunity;
- (6) respect for the Constitution and the rule of law; and
- (7) respect for the environment.⁶⁹

65 Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260.

66 Ibid 262 fn 7. Webber suggests: 'In our constitutional drafting we should make sure that we leave open sufficient room for ... experimentation, exploration, and even mystery. That way we will keep faith with the open and evolving character of our communities – and, not incidentally, with our democratic character': *ibid* 277.

67 See the outcomes of the Convention, which are available online at the website of the National Library of Australia, <<http://pandora.nla.gov.au/tep/10129>> at 13 September 2001. See also John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 351.

68 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1996, 6156.

69 Republic Advisory Committee, *An Australian Republic: The Options* (1993) vol 1, 139-41; Constitutional Commission, *above n* 31, vol 1, 104-9.

In addition, in light of the Convention Communiqué it is clear that there is now a broad consensus that any new preamble should also recognise Aboriginal and Torres Strait Islanders as Australia's Indigenous peoples. After the referendum debate on the preamble, there appears to be considerable support for the Convention's reference to Indigenous Australians as 'custodians' of the land, although such a reference would clearly also attract opposition.

Unlike the debate on the republic, the preamble debate in the 1990s was not framed by a desire to break away from Britain – it was not an act of definition dependent on distancing itself from another country, monarch, or colonial past. It was simply about us as a people, not about us and them. This exposes the greatest flaw in the political process that led to the 1999 referendum on the preamble: the lack of consultation with the wider community. In every respect, the 1999 preamble was not the people's, but the Prime Minister's. Even with the support of all major political parties, the preamble failed to win the support of a majority of Australians. The response of ATSIC chairman Gatjil Djerrkura on Monday, 8 November to the defeat of the preamble and the republic contains some valuable lessons:

A lack of proper consultation with the Australian people sunk the referendum on the republic and the preamble. This is the clear lesson from referendum results at all levels, national, state and territory ... The preamble, which was meant to be an aspirational document to unite the nation, had been drafted behind closed doors without any meaningful consultation with the Australian people, Indigenous and non-indigenous ... It did not promote reconciliation or advance our aspirations. I welcome its resounding defeat. The republic question suffered a similar fate for similar reasons. I look forward to a new era of proper consultation between the major political parties and the Aboriginal and Torres Strait Islander peoples.⁷⁰

Djerrkura's comments remind us of what we have learnt from the failure of the referendum questions in 1999. Yet to be overly pessimistic concerning the prospect of a new constitutional preamble would be to overlook the distance Australia has travelled since 1991. Much has been learned and many things have been discussed openly for the first time. This is something new in the modern history of Australian democracy. Beneath the failure of the 1999 referendum lie the seeds for consensus. Having embarked on the difficult process of constitutional renewal in the 1990s, Australia is only at the beginning of an ongoing national discussion that will recast the self-image and identity of the Australian people in the 21st century.

70 Gatjil Djerrkura, *Lack of Proper Consultation Sinks Referendum*, ATSIC Media Release (8 November 1999). See also Brennan, above n 5, 622-3; Greta Bird and Loretta Kelly, 'Women Speak Out: Critical Perspectives on the Proposed Preamble to the Constitution' (2000) 6 *Australian Journal of Human Rights* 265.