

A 21ST CENTURY CONSTITUTIONAL PREAMBLE – AN OPPORTUNITY FOR UNITY RATHER THAN PARTISAN POLITICS

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I INTRODUCTION

Symbolic statements of national unity have a way of emerging from hibernation during times of national joy or national tragedy. Consider the patriotic singing of the Australian national anthem before any football grand final, and consider the emotional rendition of the anthem during the recent memorial service for those who perished in the attacks on the World Trade Center in New York. When circumstances render a people speechless, it is often the prayers and poetry written at an earlier reflective moment that impart encouragement, comfort, edification, unification and renewal of hope and vision. Such timeless words can encourage a people to remember who they are as a body politic, and what values unite them.

It is consistent with this need for unifying national statements that over the past two decades there has been a significant groundswell of support for a new aspirational preamble to be inserted into the *Australian Constitution* ('Constitution'). Despite such support for this proposal, the preamble referendum of 1999 was soundly defeated. This 1999 defeat does not mean that a new preamble will never enter the lexicon of Australian constitutional law. However, there are a series of clear lessons to be learned from the late 20th century attempt to insert a new preamble. My hope is that the 21st century will conceive a memorable and inspiring national statement of some sort – be it a constitutional preamble or a separate 'Declaration of the Australian People'. If the outcome is to be a new constitutional preamble, then I hope its success is assured by close attention to the lessons of the 1999 referendum, and commensurate attention to excellence in content, style and process.

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II THE CALL FOR A NEW PREAMBLE

One argument for a new preamble is already 100 years old. The current preamble has been incomplete ever since the day in 1900 when Western Australia indicated that it too would be joining the Commonwealth.¹ In recent years, the current preamble has been criticised for its technical style and lack of 'soul', its failure to mention Indigenous peoples, and its failure to express shared Australian values and sentiments. It is not then surprising that there have been a variety of proposals for an amended or new preamble. Arguably, there is great merit in the call to create some inspirational constitutional text that our children can learn and identify with. It is ironic that Australians know little about the Constitution, but are often familiar with the '*We the people*' of the preamble to the *Constitution of the United States of America*, and the '*all ... are created equal ... endowed by their Creator with certain unalienable rights*' of the *American Declaration of Independence*.

In 1987, the Individual and Democratic Rights Advisory Committee recommended to the Constitutional Commission that 'the preamble of the Constitution should embody the fundamental sentiments which Australians of all origins hold in common'.² The Constitutional Commission did not accept this suggestion, recommending against altering or repealing the preamble, or adding a new preamble.³ Submissions to the Republic Advisory Committee in 1993 ranged from proposals for simple amendments to the current preamble, to lengthy substitute preambles.⁴ The Republic Advisory Committee did not adopt any of the submissions. Since 1993, there have been numerous other preamble proposals,⁵ and the Constitutional Convention of 1998 included considerable debate about the need for and content of a new preamble. This 1998 Convention was the first such convention to actually support the idea of a new preamble. Perhaps more significantly, it was the first time that official support was given to the incorporation of a reference to Indigenous peoples in the Constitution. It is useful to remember that half of the delegates to the 1998 Constitutional Convention were popularly elected delegates. However, it was both elected and appointed delegates alike who acknowledged that the Constitution did not appropriately give recognition to the place in Australia of the original

1 The list of Colonies in the preamble omits Western Australia, as this Colony only voted to join the new Commonwealth on 31 July 1900. The Parliament of the United Kingdom had passed the final *Commonwealth of Australia Constitution Act 1900* (UK) on 5 July 1900, and the Queen gave assent on 9 July.

2 Advisory Committee to the Constitutional Commission, *Individual and Democratic Rights*, Report (1987) 30.

3 Constitutional Commission, *Final Report* (1988) vol 1, 2, 101.

4 See, eg, Republic Advisory Committee, *An Australian Republic: The Options*, Report (1993) vol 1, 139-40.

5 See the various examples presented by George Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186, 190-2.

inhabitants. After considerable discussion and debate, the Convention recommended that a new preamble contain the following elements:⁶

- 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;
- affirmation of respect for our unique land and the environment;
- reference to the people of Australia having agreed to re-constitute our system of government as a republic; and
- concluding language to the effect that '[We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution'.

The following matters were to 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.

The Women's Constitutional Convention of 1998 similarly came to a consensus that there should be a new preamble to the Constitution.⁷ Subsequently, the 'Preamble Quest' organised by the Constitutional Centenary Foundation in 1998 received 383 responses suggesting new preambles,⁸ and a number of prominent political leaders and poets published their own preambles. Without doubt, the idea of contributing to the formulation of a new constitutional preamble intrigued and activated many ordinary Australians. In the context of such overwhelming interest, the subsequent failure of the preamble referendum invites a careful critique.

III THE FAILURE OF THE 1999 PREAMBLE REFERENDUM

The final draft preamble and referendum proposal that was put before the people on 6 November 1999 suffered from four key flaws: the lack of

6 'Constitutional Convention Communiqué' in 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, 2-13 February 1998* (1998) vol 1, 46-7.

7 Women's Constitutional Convention, *Outcomes* (1998) <<http://www.womensconv.dynamite.com.au/outcomes.htm>> at 11 October 2001.

8 Constitutional Centenary Foundation, *'We the People of Australia': Ideas for a New Preamble to the Australian Constitution* (1999) 3.

consultation at the drafting and review stages of the process; the partisan content of the draft preamble; the ill-conceived function of the new preamble; and the inappropriate inclusion of a non-justiciability clause. Each of these flaws is underpinned by a preoccupation with matters of legal significance, a failure to rise above partisan politics, and a consequent failure to respect the sovereignty of the Australian people. As a result, the Government appeared unable to treat the preamble as something to be created in a public context, to be finalised in an atmosphere of consensus, and to be applauded by the majority of Australians.

A A Consultative Closed Shop

The Prime Minister's first draft preamble released as an exposure draft in March 1999 was purportedly a combination of the efforts of John Howard himself and the poet Les Murray.⁹ This initial draft was strongly criticised for its wordiness, its grammatical ambiguity, its failure to incorporate some of the key recommendations of the 1998 Constitutional Convention, and its reference to a number of divisive ideas – most prominent of which were the references to 'dearly valued mateship', and various symbols of liberal ideology. Arguably, none of these weaknesses would have been as pronounced had the Government welcomed the key stakeholders to the drafting table.¹⁰

The monopolisation of the process continued: the Prime Minister did not make public the subsequent 700 submissions that were received from around the nation, and the final version of the proposed preamble emerged from behind closed doors in time to give the Parliament *only one day* to debate it before it was hastily passed. The Bill – the Constitution Alteration (Preamble) 1999 (Cth) – was introduced into Parliament on 11 August 1999, and passed the next day without amendment. It was a fatal error for the Government to prevent both the Opposition and the general public from having adequate time to review, critique, suggest amendments to and eventually offer support for the final draft preamble.

It seems inconceivable that a new constitutional preamble could be drafted without the involvement of the various Indigenous leaders, the republican lobbyists, and the wider general community. After all, it was the Indigenous community that suggested changes to the preamble more than a decade earlier. And it was the republicans who at the 1998 Convention pointed out that a move to a republic would require an amendment to the constitutional preamble. Finally, without the support of the electors, a referendum is doomed from the outset. It is worth noting that the 19th century founding fathers only reluctantly included the words 'humbly relying on the blessing of Almighty God' in the original preamble because they were fearful that the electors would reject the Federation Bill if a reference to God was not incorporated as demanded by over 35 000 signatories to petitions.¹¹ It is a pity that the drafters of the 1999 preamble

9 See Appendix 1.

10 Cf the Opposition Parties' Draft Preamble (Appendix 2), which is a much sharper and more 'measured' draft preamble resulting from collaboration between the Australian Labor Party, the Australian Democrats and the Australian Greens.

11 See Anne Winckel, 'Almighty God in the Preamble' (1999) 4 *The New Federalist* 78.

did not listen and respond to the electors more prudently. In essence, the proposed preamble engendered little sense of public ownership.

B A Partisan Approach to Content and Style

The final preamble proposal was certainly an improvement on the initial exposure draft.¹² Nevertheless, it still suffered from the dissent created by a lack of consultation with key Indigenous leaders, and the failure of the Government to adopt the language preferred by the Aboriginal people (and supported by the Constitutional Convention) in relation to the past 'custodianship' of the land. Furthermore, while the final draft reflected a number of the recommendations of the Convention, there were still surprise inclusions that had no origin in consensus or public debate – such as the reference to the sacrifices of those who defended our country. One of the most disappointing omissions was the failure of the Government to respond to the recommendations of the Convention that there be references to representative democracy, responsible government and the sovereignty of the people. Also, an effective method of counteracting the masculine nature of the rest of the Constitution would have been to make reference to both men and women in the preamble. Sadly, the manner in which the whole process was managed was indicative of a Government that failed to draft the preamble transparently in the interests of the people.

Past Governments and Conventions have consistently resisted the call for a new preamble, often articulating the fear of unknown legal consequences. I have argued at length that much of the resistance to a new preamble is based on either an understated or an over-inflated view of the legal significance of preambles.¹³ While constitutional preambles certainly have differences from ordinary statutory preambles, nevertheless, it is evident from a review of the early drafters, commentators and courts that the ordinary principles governing statutory preambles were intended to be applied to the Constitution. A review of 20th century High Court of Australia ('High Court') decisions is not inconsistent with this conclusion. However, to overcome many of the misconceptions that have plagued the discussion of the legal significance of preambles, it would be useful for the High Court to follow the example of many overseas courts and clearly articulate the ordinary principles governing preambles.

Preambles are certainly 'part of' the Act as a whole, but they are never a 'law-making part'. The extent to which preambles can be used to assist in the interpretation of substantive sections¹⁴ is limited by a series of qualifying principles such as: that a preamble can have little effect if it is itself ambiguous; a preamble cannot affect the substantive text if the legislature intended to legislate beyond the preamble; a preamble will not prevail over the substantive text where both have equal clarity; and the effect of a preamble will depend on

12 See Appendix 3.

13 See Anne Winckel, *The Constitutional and Legal Significance of the Preamble to the Commonwealth Constitution, Past, Present and Future* (Master of Laws thesis, University of Melbourne, 2000).

14 See my description of the contextual and constructive roles of preambles in: Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184.

whether or not it indicates a 'compelling' alternative to the meaning otherwise suggested by the substantive text. Also, a statement is not automatically true just by virtue of its recital in a preamble.

Many of the historical warnings about the possible legal consequences of a new constitutional preamble have focussed on a potential reference to Indigenous peoples in the preamble. For instance, Prime Minister John Howard frequently expressed concern about the consequences of using, in a new preamble, the word 'custodianship' in relation to the original occupation of Australia by Aboriginal peoples.¹⁵ However, no matter what radically progressive approach to constitutional interpretation is adopted by constitutional courts around the world, there is no doubt that under all approaches, a preamble is still considered to be a non law-making part of the instrument. Thus, a reference to 'custodianship' would not be a declaration of law, just as a statement about ownership of land would not establish legal title in property law. Consistent with this non law-making status of a preamble, there is therefore a commensurate argument that it is important to avoid using the word 'rights' in a new preamble, as the appropriate place for such language is in a Bill of Rights or in the substantive law-making provisions of the Constitution.

Just as a preambular reference to Indigenous people can never be a law-making provision, so too is it doubtful that it could ever have a significant interpretive influence. Certainly, if the traditional principles governing statutory preambles were applied to a new constitutional preamble, then it is arguable that any reference to Indigenous peoples could make no difference to the current constitutional situation. Similarly, even if a more progressive approach were taken by the High Court, it is still arguable that a new preamble would have little effect. Take for example the traditional role of a preamble in shedding light on ambiguous constitutional provisions combined with the more progressive role of a preamble in confirming the existence of various underlying constitutional principles. The race power (s 51(xxvi) of the Constitution which includes the statement, 'for whom it is deemed necessary to make special laws') has already been the subject of debate because of the ambiguity associated with whether laws created under the power can be detrimental to Aboriginal people, or must be only beneficial to them.¹⁶

A progressive argument might be to suggest that a new preamble was confirmation of a constitutional principle already evident in the amended s 51(xxvi). If the minority view of Kirby J were adopted with respect to the nature of the race power,¹⁷ it is conceivable that a new preamble might be hailed as supporting an interpretation that the race power is limited to laws that are 'beneficial' and not detrimental. However, the *general* nature of the preamble weakens this argument. For instance, if a new preamble also included references to democracy and representative government, it could be argued that such

15 Gervase Greene, 'Preamble Mateship Call by PM', *The Age* (Melbourne), 23 March 1999, 1; Richard McGregor, 'Preamble a War of Words', *The Australian*, 30 April 1999, 1.

16 See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361-8 (Gaudron J), 381-3 (Gummow and Hayne JJ), 411-19 (Kirby J, dissenting) ('*Hindmarsh Island Bridge Case*').

17 *Ibid* 411 (Kirby J, dissenting).

principles require that s 51 should be interpreted liberally, so as to allow the elected representatives in the legislature to implement the views of the electorate. This potential arbitrary use of a preamble in constitutional interpretation highlights why it is inadvisable to progressively accord a preamble any more than the traditional interpretive role with its attendant qualifying principles, as developed by the common law courts.

The most controversial issue in the recent referendum debate was the implications for matters of native title and compensation if a reference to 'ownership' of land was included. However, despite the recommendation of the 1998 Constitutional Convention, the final referendum proposal did not even use the word 'custodianship' – a word that arguably only speaks of stewardship and care of land, and not ownership. Patrick Dodson considered the referendum proposal offensive in that it denied the 'true status of indigenous Australians as the custodians and owners of the land, and suggest[ed] that we are nothing more than gardeners at the station homestead'.¹⁸ In any case, even if a new preamble did refer to custodianship or ownership of land, there is still a persuasive argument to suggest that the implications are insignificant in comparison with the common law principles established in *Mabo v Queensland [No 2]* ('*Mabo*').¹⁹

Arguably, the preoccupation with matters of legality in relation to a new preamble has caused the Government to lose sight of the equally important issue of symbolism in the Constitution. Gatjil Djerrkura reminded us that it is not only the substantive clauses of the Constitution that are important, but also the 'nation's vision'.²⁰

C An Ill-Conceived Purpose

One of the problems plaguing the preamble referendum from the outset was the fact that the final preamble proposal lacked a couple of the core characteristics that are typical of preambles generally. While constitutional preambles are meant to be aspirational, they are also still functionally preambular in essence. They introduce the law that follows and often provide background information or reasons for the enactment. They are also generally followed by an enactment clause. The 1999 draft preamble lacked both of these elements.

Compare the 1999 draft preamble with the original preamble, which is a good example of a 'technical' preamble. It is followed by a clear enacting clause, and it recites facts that are relevant to the passage of the Act (such as the agreement to unite), and it indicates the intention of Parliament with respect to the purpose of the enactment (such as the need to provide for the admission of new States). Having said that, the founding fathers also understood the need for a

18 Patrick Dodson, 'Until the Chains are Broken: The Fourth Annual Vincent Lingiari Memorial Lecture 1999' (1999) 10 *Public Law Review* 248, 249.

19 (1992) 175 CLR 1, 16-76 (Brennan J; Mason CJ and McHugh J concurring), 76-120 (Deane and Toohey JJ).

20 Gatjil Djerrkura, 'Making the Republic Important to a Majority of Australians' in John Uhr (ed), *The Australian Republic: The Case For Yes* (1999) 92, 96.

constitutional preamble to rise above the functional role. They recognised that the introductory words of the Constitution needed to be more 'stately' and 'expressive' so as to appeal to the understanding of the layperson.²¹ Similarly, many of the arguments in support of a reference to God in the original preamble also focussed on the need for the Constitution to include aspirational words which 'remind us of ideals ... and of hopes that lift us higher than the vulgar realities of the day'.²²

Unlike the original preamble, the 1999 proposal has been accused of not being a 'preamble' at all. P H Lane described it as a 'stand-alone miscellany of facts, a credo of beliefs'.²³ Indeed, the Prime Minister himself described his new preamble as 'a statement about the kind of Australia that we hold dear and about the fundamental values and verities of Australian society in 1999'.²⁴ My view is that a declaration of values is valuable in itself, but it should not be mistaken for a preamble.

There are a couple of reasons why the final preamble proposal bore little resemblance to a traditional preamble. Firstly, the new preamble was proposed independently of the republic referendum.²⁵ This meant that the new preamble was not followed by new constitutional text needing an introduction. In other words, the draft preamble included no reference to a proposed republic and the associated reasons for the change, which of course led to the absurd possibility that Australians may have elected to become a republic, and simultaneously approved a preamble that made no mention of this landmark transition.

Secondly, the new preamble proposal was not followed by a clear enacting clause. Instead it included the passive language that 'We the Australian people commit ourselves to this Constitution'. I call this passive in that to 'commit' ourselves to the Constitution is indicative of a constitution being imposed from above, rather than one being authorised by the will of the people. Indeed, this choice of words had the effect of symbolically diminishing the sovereignty of the Australian people. To emphasise the popular sovereignty of the Australian people, it would be more appropriate to use *assertive*, authoritative words such as 'affirm and declare'.

It is interesting to note that the version of enacting words initially proposed by the relevant Working Group at the 1998 Constitutional Convention recommended that a new preamble should conclude with 'an enactment clause

21 Adelaide, *Official Report of the National Australasian Convention Debates* 22 March - 5 May 1897, 22 April 1897, 1184 (Alfred Deakin). Deakin was arguing that the words 'agreed to form' be replaced with 'agreed to unite'.

22 Melbourne, *Official Record of the Debates of the Australasian Federal Convention* 20 January - 17 March 1898, 2 March 1898, 1733 (Patrick McMahon Glynn).

23 P H Lane, 'Referendum of 1999' (1999) 73 *Australian Law Journal* 749, 749-50.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 6497 (John Howard, Prime Minister).

25 While this outcome was inconsistent with the initial recommendation of the 1998 Constitutional Convention, ironically it was an approach supported, after considerable debate, by the Republican Convention that was held in early 1999.

recognising the sovereignty of the Australian people'.²⁶ This resolution was one of the few unanimous decisions of the group. The Subgroup report included an example of such concluding words: 'We, the people of Australia, do hereby enact and give to ourselves this Constitution'.²⁷ However the final choice of words that emerged from the subsequent Resolutions Group had been reduced to a phrase that used the word 'commit'.

In order to avoid proposing a preamble that is really nothing more than a 'Declaration of the People', it is arguably appropriate to wait until such a time as the constitutional text is being changed (for instance at the transition to a republic) before proposing another new preamble. A constitutional preamble is inherently connected to the text that follows. It is not a detachable 'soft top'. Similarly, it is not a law-making part of the vehicle, and a following clear enacting clause is effective in making that distinction.

D An Inappropriate Non-Justiciability Clause

I believe that one of the key flaws of the 1999 referendum was the inclusion of a substantive non-justiciability provision. The referendum preamble proposal included the insertion into the Constitution of a new s 125A, which was to state:

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.²⁸

The drafters of the referendum proposal were responding to the recommendation of the 1998 Constitutional Convention: 'That Chapter 3 of the Constitution state that the Preamble not be used to interpret the other provisions of the Constitution'.²⁹

The non-justiciability clause proposal was basically the result of persistent warnings with respect to the legal significance of a new preamble, and it sought to prevent the realisation of fears about the future judicial use (or misuse) of the preamble. The clause also had a secondary purpose, in that its existence allowed for a more liberal approach to the drafting of the preambular text. However, a review of the debates at the 1998 Constitutional Convention suggests that the final decision to recommend a non-justiciability clause was due partly to a successful fear-campaign, and also to the perpetuation of certain legal misconceptions about preambles. I believe that s 125A was unnecessary; and furthermore, that there are a number of policy arguments that suggest that a constitutionally entrenched non-justiciability clause is an inappropriate means by which to resolve the debate about preambular legal significance.

The 1998 Constitutional Convention was the perfect venue for a theatrical climax about the doubtful role of a new preamble. A combination of politicians,

26 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, 2-13 February 1998* (1998) vol 3, 422 (Dr Cocchiario, reporting for Subgroup (i)).

27 Ibid.

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

29 Resolution D3 moved by Kevin Andrews MP: 1998 Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, 2-13 February 1998* (1998) vol 4, 803. Purported to have been drafted by the Attorney-General Daryl Williams MP.

academics, lawyers and laypeople set the stage for a number of extreme conclusions to be reached about the role of preambles. Professor Greg Craven initiated the fears that slowly gained support, with the following words:

It is being suggested that the preamble is the place to put the values that we are not prepared to debate here and put in the Constitution proper and that we will be able to go and harmlessly put away any number of rag bags of values and declarations of faith in that particular place. That will have a disastrous effect for this reason: the preamble is effectively the lymph gland of the Constitution. It pumps things throughout the whole Constitution.³⁰

Craven went on to warn of the rise of future bewilderment as to 'how it is that we got those High Court decisions'.³¹ Malcolm Turnbull then cited the case of '*Leeth v R [sic]*' as an example of how the High Court might rely on the preamble.³² Craven also said that he believed a preamble laden with values would be 'extraordinarily dangerous',³³ and he commented that:

[T]he insertion of vague terms like 'equality', 'democracy' and 'freedom' in a preamble would almost certainly encourage the courts to take those values throughout the Constitution as if they were substantive and controlling values.³⁴

Despite the fact that Craven was clearly in the minority, and unable to convince his working group of his views,³⁵ his warnings nevertheless finally prevailed. In supporting the warnings posed by Greg Craven, Michael Lavarch recommended to the Convention the idea of the non-justiciability clause as a way to 'quarantine the legal effect of the preamble'.³⁶

Unfortunately, these warnings led to an increasing level of misunderstanding about the legal role of preambles. A number of delegates took these warnings to mean that it was inappropriate for the High Court to make any reference to the preamble in interpretation. For instance, Denver Beanland commented that:

[I]f we are going to spell out details in the preamble, certainly we will have to spell out in the Constitution that the judiciary cannot be referring to the preamble and start using it in judicial decisions.³⁷

Of course, the judiciary has been 'referring to' the preamble and 'using it' in decisions ever since 1904.³⁸ Furthermore, Carl Moller misleadingly spoke of the case of '*Leith [sic]*' as: 'The one case in which the High Court has had some difficulties, or in which it has at least referred to the preamble in interpreting the Constitution'.³⁹ Julian Leaser showed an equal misunderstanding of *Leeth v Commonwealth* ('*Leeth*'), in stating that 'the *Leith* decision [*sic*] was overturned

30 1998 Constitutional Convention, above n 26, 29.

31 Ibid.

32 Ibid 30, alluding to *Leeth v Commonwealth* (1992) 174 CLR 455.

33 Ibid 425.

34 1998 Constitutional Convention, above n 29, 472.

35 See, eg, the comments of Marguerite Scott: ibid 476.

36 1998 Constitutional Convention, above n 29, 804.

37 Ibid 493.

38 See, eg, *Tasmania v Commonwealth* (1904) 1 CLR 329, 359-60 (O'Connor J). See also *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association* (1906) 4 CLR 488, 534 (Griffith CJ) ('*Railway Servants Case*'); *Baxter v The Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1104 (Griffith CJ, for Barton and O'Connor JJ).

39 1998 Constitutional Convention, above n 29, 496.

in the Kruger case'.⁴⁰ To the contrary, *Kruger v Commonwealth* ('*Stolen Generations Case*')⁴¹ merely confirmed that the High Court had never accepted the line of reasoning put in dissent by Deane and Toohey JJ in *Leeth*.⁴² In any case, the arguments of Deane and Toohey JJ in *Leeth* did not reflect an unorthodox use of the preamble, but rather an unorthodox attempt at identifying a constitutional implication previously not recognised in the Constitution. In this pursuit, Deane and Toohey JJ merely referred to the preamble in its ordinary contextual capacity as part of the wider Act.⁴³

With academic, legal and political weight behind the fears about the preamble, the Constitutional Convention delegates were left with no clear explanation of either the ordinary role of a preamble, or the usual treatment of the current preamble by the High Court. It is not then surprising that the Convention approved the resolution that a non-justiciability clause be inserted into Chapter III of the Constitution.

Despite the fears that drove the 1998 Constitutional Convention to the point of recommending a non-justiciability clause, there is still little evidence to support the suggestion that the High Court would make unorthodox use of a new preamble. Apart from this fact that a non-justiciability clause can be considered legally unnecessary (and so be accused of being an inelegant example of 'over-kill'), there are also various other policy arguments that overwhelmingly suggest the inappropriateness of a clause like the proposed s 125A.

Firstly, there is the obvious criticism that the proposed s 125A represented a direction in constitutional drafting not taken by other countries in the world.⁴⁴

Secondly, there is the issue of the negative impression given by a non-justiciability clause. To draft a new preamble that is immediately qualified by a non-justiciability clause such as the proposed section 125A is to create an impression of defensiveness and insincerity. It is not surprising that the public might find distasteful a clause that appears to make a mockery of the sentiments expressed in the preamble.⁴⁵ It is also possible for another misleading impression to be created – the impression that a preamble standing alone without legal restraint is somehow immensely powerful and potentially dangerous. In effect, the non-justiciability clause is giving credibility to fears and arguments about the use of the preamble that are by no means conclusive; including the unsubstantiated implication that a constitutional preamble can have a legal effect on 'the law in force in the Commonwealth or any part of the Commonwealth'.⁴⁶ This latter part of s 125A is an example of where the final referendum proposal went much further than the recommendation of the Constitutional Convention,

40 Ibid 497.

41 (1997) 190 CLR 1.

42 Ibid 44-5 (Brennan CJ), 63-8 (Dawson J), 142 (McHugh J), 153-5 (Gummow J); reflecting on *Leeth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ).

43 See 'Current Views on the Interpretive Role of the Preamble' in Winckel, above n 13, ch 3, 98-102.

44 Although there is evidence that a preambular non-justiciability provision existed in a Seychelles Constitution under an earlier socialist regime: *Constitution of the Second Republic of The Seychelles* sch 3, s 8, referred to in *Republic v Georges [Seychelles]* [1999] 4 LRC 146, 154 (Allgear CJ).

45 See, eg, the comments of Peter Grogan, 1998 Constitutional Convention, above n 29, 475.

46 Proposed s 125A, Constitution Alteration (Preamble) 1999 (Cth) s 4.

which was confined to a non-justiciability clause in relation to the interpretation of the Constitution alone.

Thirdly, one of the weaknesses of s 125A was the presence of an internal ambiguity in the section. The reference to 'The preamble to this Constitution' could *prima facie* apply to both the current preamble and the proposed new one.⁴⁷ A purposive approach to interpretation would have guided us back to the fact that the clause was intended to apply to 'the' new preamble being inserted, but nevertheless, the ambiguity may have given cause for dispute. However, there was no simple remedy for the subsequent lack of care and rigour with respect to the drafting of the new preamble itself.⁴⁸ It is almost as if the perception of legal impotence resulted in the Prime Minister exercising creative fervour in the drafting process, with the preamble's content accordingly straying from the recommendations of the Constitutional Convention.

There is of course an argument that a non-justiciability clause improves the drafting of the preamble. George Winterton argued that a non-justiciability clause was a 'small price to pay' for a preamble that rightly would have 'moral, educational and socially unifying function[s]'.⁴⁹ However, history now reveals that even with the apparent safeguard of s 125A, the Government still failed to draft a preamble that was socially unifying.

Fourthly, and most seriously, is the potential detrimental impact of a non-justiciability clause on judicial reasoning. Since High Court judges already refer to concepts such as democracy, the rule of law, and the federal nature of our nation, it would appear that an edict that the preamble 'shall not be considered' could potentially require judges to be involved in mental high jinks. They might be forced into the unenviable situation where in the context of discussing some principle, they are constrained to immediately qualify their discussion with a denial that their view had any roots in the preamble. In an era when judicial transparency is valued, such a muddying of the waters is an unwelcome direction. Jeremy Webber has argued for judicial transparency, and suggested that the non-justiciability proposal relied on the mistaken belief that constitutional interpretation can be separated from broader interests and concerns.⁵⁰ He warned against trying to 'chase the chimera of trying to exclude constitutional interpretation' and advocated a return of focus to what should actually be written into the preamble.⁵¹

There are sound legal and policy arguments which refute the non-justiciability approach to a new preamble. Arguably, the situation can be resolved through

47 Certainly the Constitutional Centenary Foundation believed that this confusion was possible: Constitutional Centenary Foundation, *The Preamble: Background Paper* (1999) <<http://www.centenary.org.au/preamble/background.html>> at July 1999.

48 For instance, the closing sentence of John Howard's first draft preamble was grammatically ambiguous, leading to confusion over what exactly was never to be 'infringed by prejudice or fashion or ideology nor invoked against achievement'.

49 George Winterton, 'The 1998 Convention: A Reprise of 1898?' (1998) 21 *University of New South Wales Law Journal* 856, 863.

50 Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 269.

51 *Ibid.* See also Jeremy Webber, 'Constitutional Poetry' (1999) 74 *Reform* 17, 20.

good drafting of the preamble, and through greater parliamentary and judicial clarity about the ordinary preambular role.

IV A WAY FORWARD

Arguably, the new preamble proposal might have gained support in 1999 if there had been a more transparent process and greater public consultation throughout the drafting stage, a closer attention to the recommendations of the Constitutional Convention, a more thoroughly polished product, and a more orthodox treatment of the preamble as a technical component of a constitutional document.

The whole debate surrounding the creation of a new preamble would be greatly assisted in the future if the commentators and the courts take a more active role in correcting the misconceptions about preambles that have been perpetuated in recent years, and in clearly confirming the principles that govern the status and interpretive role of preambles. The fact that the constitutional preamble is governed by the ordinary principles associated with preambles could be reinforced by a consistent reflection of this message in the second reading speech, the explanatory memorandum, and the 'yes case' associated with a new preamble proposal. The preamble to the amending legislation could also reflect this intention.

Once the confusion about the legal significance of the preamble has been dissipated, then the preoccupation with matters of legality can be replaced with more constructive debate about the nature of the preambular text itself. The perceived need for a non-justiciability clause will also be dissolved when politicians and academics consider that there is nothing to be feared in allowing a constitutional preamble to play its ordinary role (which is attended by many safeguards in the form of qualifying principles) in constitutional interpretation.

A new preamble should be inspiring and memorable, and it should evoke unity, consensus and a resounding 'yes' from the majority of Australians. The sovereignty of the Australian people should be highlighted both in the text itself, and in the consultative process that accompanies the drafting of the text. In particular, the consensus of Indigenous leaders should be respected, and the new preamble should contain appropriate language recognising the original occupation and custodianship of Australia by Indigenous peoples. This would be added as a statement of historical fact, not as an instrument of legal change.

It would be uplifting at times of national pride and at times of national mourning for there to be a constitutional statement or phrase that resonates with the majority of Australians as a symbol of unity. If we listen to the voices of Australians, there are a number of common themes: equality, justice, diversity and democracy are just a few. It is these and other similar themes that were echoed in the debates of the 1998 Constitutional Convention. I look forward to an occasion when bipartisanship actually means a genuine joint effort, when the Government resists the tendency to be reactionary, and the Opposition resists the tendency to undermine, and together they facilitate the creation of a statement

for all Australians (be it a preamble or a declaration) that we are eager to recite and to teach to our children.

APPENDICES

Appendix 1: John Howard's Initial Exposure Draft (25 March 1999)

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 an 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.⁵²

52 Constitution Alteration (Preamble) 1999 (Cth) Exposure Draft, released 25 March 1999. This exposure draft was written primarily by Prime Minister John Howard and poet Les Murray: see Gervase Greene, 'Mateship Raises Ire, Custodianship the Big Issue: Outcry on Preamble', *The Age* (Melbourne), 24 March 1999, 1.

Appendix 2: Draft by Opposition Parties – Australian Labor Party, Australian Democrats and Australian Greens (29 April 1999)

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.⁵³

Appendix 3: 1999 Referendum Proposal (6 November 1999)

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;

53 As cited in Gervase Greene, 'PM's Preamble Doomed: The Latest Preamble', *The Age* (Melbourne), 29 April 1999, 1; based on an initial draft by Gareth Evans (see 'Labor's Proposed Preamble', *The Australian*, 24 March 1999, 4).

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.⁵⁴

54 Redrafted by Prime Minister John Howard: Constitution Alteration (Preamble) 1999 (Cth); passed by the Commonwealth Parliament on 12 August 1999, and put to the people at a referendum on 6 November 1999.