

Preambulations

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A few months ago, John Stone rang me and gave me that most terrible of all possible speaking assignments. He charged me with the task of being funny and witty about the Constitution; a task not unlike being asked to discourse persuasively on the virtues of alcohol to a meeting of the Christian Women's temperance league. Of course, at least on such occasion one could start by observing firmly in alcohol's favour that it was only by imbibing several glasses of medicinal ale that the task one was currently undertaking could ever be attempted.

To make matters worse, John Stone felt it perfectly reasonable to require me to sound intelligent on the subject while conscious of being followed in my presentation by Sir Harry Gibbs.

The full enormity of the task that John Stone felt free to load on me should now be obvious to everyone: to be funny and witty about a document which reads, as Greg Craven once memorably said, like the deed of grant of powers it is *and* be followed by Australia's most eminent legal mind, talking on the very same subject.

At this point, one is left racking one's brain about what terrible error or injury I had done John Stone that he should feel free to visit this speaker's purgatory on me. It certainly seems a punishment fitting to be inflicted upon some errant individual by a gentleman who was once famously described as eschewing any resort whatever to the knife in the back since he had always found the axe in the forehead quite sufficient.

One remembers, at the time of the election of the Hawke Government, rumours went around that they were contemplating moving John Stone from his position of signing dollar notes to being Secretary of Defence. It was felt that, while Ministerial control of the armed forces might then be in doubt, civilian control at least would have been assured.

Now, as it happens, this is the second time I have been in a double bill with Sir Harry. The previous occasion was when Sir Harry was kind enough to launch a book I had written. On that occasion, I, fortunately, was the following speaker and, forgoing any attempt to match the preceding speaker, merely thanked him for his kind words and offered myself up for questions.

No such luck this time: I actually have to speak.

But then there is the great saving grace of this awful task. I actually only have to be amusing about the proposed new Preamble.

No real problem at all, then. Indeed, it is such a little problem that I defy anyone not of the lofty eminence of Sir Harry Gibbs to discourse for any length of time about the proposed Preamble without collapsing into some sort of laughter, drollery or uncontrollable merriment — intentionally or otherwise.

If ever there was a thing of smokes and mirrors signifying, as all really good jokes do, at once far too much and yet nothing at all, it would have to be the proposed Preamble.

Just consider the paradoxes. First, there is something so important that we have to go through all the expensive and time-consuming, and relatively rare, effort of a constitutional referendum campaign to consider it.

Yet this something is so insignificant that we are gravely assured that it will have no legal effect on anything at all.

Yet this thing without legal effect is nevertheless so important that the words of our unofficial poet laureate have to be amended for vital legal reasons.

Yet it is so unimportant that it need not bother with such elementary constraints as good English expression.

To discourse on such an object is to be landed, without effort at all, in the land of the surreal – as strange a place as one can imagine, outside the Party room of the Australian Democrats. Humour must inevitably follow, of some variety or other.

In fact, Natashas and Natashas of humour, which can but Lees one in huge Kernots of mirth before one can say “all change”, like a carrot from its virtuous, noble raw untaxed nirvana to its nasty, shredded, fast-food, taxed purgatory. But I have to Stott there, or I will Despoja the joke.

Australians, one is glad to say, have lived up to their reputation as folk who like a joke – one has to have an advanced sense of humour to even pretend to give such personages as Philip Adams (Mr “I have a dream – and you’re not in it”) or Robert Manne (our very own distaff Disraeli – “Is that two, or possibly only One, nation I see before me?”) status as workaday Sages. Indeed, both display a standard feature of so many Australian commentators: in the wonderful words of Jagdish Bhagwati about Chalmers Johnson, they refrain from permitting their contempt for their opponents’ views to breed familiarity with what they actually say.

Australians have lived up to their reputation, and realise that Preambulation is a game anyone can play.

Gareth had already offered his own thoughts, of course, but someone who managed to show that too much reading of Biggles when young is dangerous even in the relatively un-aeronautical position of Federal Attorney-General can surely not be absent when nominations for Pomposity in a major national role are being handed out.

Jeff Kennett entered in, playing his long-running feature of anything-you-can-do-I-can-do-better and gave, one must say, a not discreditable performance.

The Democrats and the ALP got together and agreed on a version – basically a few minor amendments to Gareth’s original offering. As we contemplate the joys of now-you’re-in-now-you’re-out’ exempt, but-only-when-we-say-so, food – the Lees-Howard reprise of the well-known Kernot-Reith performance of the previous Parliament – we have to conclude that anything cobbled together with the Democrats has to have a bad look. And this one was agreed with the Greens as well, just for added (in)credibility.

What they came up with was:

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.

Funny, I thought we were already committed to the Constitution, having voted it in by two

rounds of referenda and considered no less than 42 amendment proposals since. But more of that later.

The Australian newspaper, following its self-appointed role as definer of national identity, and perhaps continuing the role which led the late Paddy O'Brien to call it "The Daily Keating", decided that this was a task beyond, or perhaps beneath, its own august sages and threw the matter open to public competition. Write your own Preamble, our judges to pick the winner: constitutional drafting as national game-show. But "Do You Want to Be A Preamble Drafter?" was only a low-grade version, with more effort and much less money or fame than the prime-time original.

And they duly flooded in; people's earnest, and not-so-earnest, attempts to express what they felt a constitutional Preamble should say.

What is a Preamble anyway? In an Act, it is an expression of what the ensuing document is about. In the words of the Macquarie Dictionary: "an introductory part of a statute....stating the reasons and intent of what follows".

Which, of course, the current document already has:

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

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

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

Not great poetry of language, perhaps, but it has the great virtue of being true and, even better, not something even the most activist judge is likely to go into a legal frolic over.

Which is the great problem with adding a Preamble. It gives an added gloss on the document; it invites judges to interpret the words in its light.

At which point one contemplates how utterly surreal the whole thing is. Because this must be the only time anyone has seriously suggested that a Preamble should be added to a document a full century after it was written – a sort of retrospective attempt to tell us what the whole thing was about as if, somehow, we didn't already know.

Then again, when we have a High Court which can discover in the Constitution, albeit with some shuffling back most recently, an implicit Bill of Rights no-one had noticed for over 90 years, perhaps retrospective allocation of purpose is perfectly reasonable. Not surreal at all, merely cutting-edge legal theory finally getting its full run.

Or perhaps it is modern legal theory which is surreal, a dream of the mind connected only in the most tenuous terms to any sort of reality.

Perhaps. But what the Preamble seems to be really about in people's minds is defining what sort of nation Australia is, or ought to be, or likes to think it is, or would like to be, or something. An expression of national values, but one, mind you, which has no legal implications, but is terribly, terribly important anyway. Without actually mattering.

What did John Howard and Les Murray offer us?

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

its citizens.

The Australian nation is woven together of people of 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.

But how much of this is, in any sense, about a *Constituton*?

Do nations have purposes? Should nations have purposes? Does one drag out one's Oakeshott, and contemplate the difference between society as a civil association – a structure within which people pursue their own ends – and society as an enterprise association – something with a common purpose ?

Should nations have statements of national purpose?

If one is the United States, the answer is clearly “Yes”. But the United States of America is the only nation-state in human history explicitly organised around a set of ideas: ideas that it took a great revolutionary war to forge, and then a murderous civil war to temper. The ideals are indeed grand, but the cost was high.

Unlike the United States, Australia is not an ideocratic state. We were not born in blood and revolution. There was no withdrawal or expulsion of defeated Tories to confirm the nature of the new order. On the contrary, Australia was born in perhaps the most civilised, and the most democratic, creation of a nation and constitutional order in human history.

A nation born in discussion, by popular vote, without shedding a drop of blood. A grand achievement, actually.

So is it appropriate for Australia to inspire to the grandeur of the US preamble?

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Only if we express the ideals of our original constitutional creation. Which, surely, must give us pause. Not because those ideals are outdated – the crucial ones surely aren't. Indeed, our own revisiting of Constitutional Convening actually showed much less democratic confidence, and much less seriousness of purpose, than the original Conventions. It is surely entirely appropriate that the memoir of the ConCon was written, not by a soon-to-be Prime Minister in Deakin, but by Steve Vizard, someone well-known for being a comedian.

No, the reason to give us pause is, if the constitutional founders did not write a Preamble of grand vision back in the 1890s, why should we attempt to do so on their behalf a century later?

Perhaps we can only speak on our own behalf. But what are the current, new purposes? John Howard and Les Murray had a go, but reaction showed that there was no consensus on

that point, nor for the set put together by the ALP, Democrats and Greens.

We are left with the purposes of the founders, and their refusal to import a grand vision into our founding national document.

Or perhaps they did. Perhaps those workaday words expressed perfectly accurately the workaday nature of what they did. What was, in its understated way, as fine an achievement as the oft-cursed hand of the political animal has created.

Yes, well, perhaps the Preamble is no laughing matter at all; apart from the attempt to add one on 100 years later.