

A Preamble: The Issues

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

If it was hoped that the Constitutional Convention of 1998 would produce acceptable recommendations for the reform of the Constitution, those hopes will have been dashed by the outcome of the Convention. The Australian Constitution has worked fairly well for nearly a century, and has indeed proved to be more effective and stable than most others, but it does require reform in certain respects, notably in the area of federal and State relations. The resolutions of the Convention did not touch upon any of the areas in which the Constitution is defective.

In substance, the Convention recommended two changes to the Constitution. First, it was recommended that a model for a republican form of government should be put to the people in a referendum. That model has many serious deficiencies; even committed supporters of a republic recognise that it is significantly flawed.¹ Secondly, it was resolved that the Constitution should include a Preamble which would refer to some matters that I am about to mention, but should not be used in interpreting the Constitution. It is this latter resolution with which I am now concerned.

Although there is no doubt that the first of these recommendations for a referendum will be given effect, it remains doubtful, at the time when I am writing this paper, whether the electors will be asked to approve of legislation for a new Preamble. An Exposure Draft of a Bill – *Constitution Alteration (Preamble) 1999* – has been presented, but controversy has raged concerning the contents of the Preamble which is set out in a schedule to the draft, and it is by no means certain that the Bill, if presented, will be passed.

In considering whether there should be a new Preamble, and if so what it should contain, one should not overlook the fact that the nature and functions of a preamble are well understood for legal purposes. The Privy Council has described a preamble as “an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow”.² Quick and Garran, in their early and authoritative commentary on the Constitution, said:

“The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited before the enactments contained in an Act of Parliament are to be understood. A preamble may be used for other purposes: to limit the scope of certain expressions or to explain facts or introduce definitions”.³

Modern statutes usually do not contain a preamble; when one is used, its purpose is to show the reasons for passing the Act, and to explain matters which may enable the enactments in the statute to be better understood.⁴ The majority of delegates at the Constitutional Convention acted on the view that the preamble to a Constitution may have a more extensive operation, namely that it may set out the beliefs and values which are accepted by the people in adopting the Constitution. It was accordingly resolved that the Constitution should have a Preamble which should begin with the words, “We the people of Australia”, and should refer to the following: Almighty God; the origins of the Constitution; the evolution of the Commonwealth into an independent democratic and sovereign nation under the Crown; the federal system, representative democracy and responsible government; the rule of law; the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders; Australia’s cultural diversity; respect for the unique land and

environment; the agreement of Australians to reconstitute their system of government as a republic, and a reference to ongoing consideration of constitutional change. It was resolved that the Preamble should conclude with the statement that the people of Australia, “asserting our sovereignty, commit ourselves to this Constitution”.

It was additionally resolved that the following further matters should 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.

This wide view, that the preamble to a Constitution may have a symbolic effect, and should reflect what some delegates to the Convention apparently regarded as contemporary beliefs, values and aspirations, has been supported by reliance on the precedent said to be provided by the Constitution of the United States, and by other more modern Constitutions, including those of Ireland and South Africa.⁵ Those preambles stated the purposes for which a new and independent nation was being created (as in the U.S. and Ireland) or an entirely new order of society was being brought into existence (as in South Africa). This, of course, is not the situation in Australia. We are, and have long been, an independent nation.

The proposed changes involved in the creation of a republic are said, by their proponents, to be minimal in effect. Indeed, it has been claimed by the present Attorney-General that the changes would not have significant consequences for the day to day workings of Parliament and Government,⁶ and although one may doubt the correctness of this confident prediction, there is no reason to suppose that the changes would create a new order in society. The circumstances that may have made it appropriate to include a statement of beliefs and values in other Constitutions do not exist in Australia.

In any case, one may wonder why Australia should take as a model Constitutions which have not endured so long, or proved to be as successful, as ours. That last remark, of course, does not apply to the United States’ Constitution, but that Constitution was considered closely by the framers of our Constitution in the 19th Century, and the Preamble which it contains was not followed by them as a precedent. In any case, the Preamble to the Constitution of the United States does not do more than state (eloquently) the purposes for which that Constitution was ordained and established. The Preamble suggested by the Convention would go much further than that.⁷

The Constitutional Convention recommended that the preamble to the *Commonwealth of Australia Constitution Act* should be kept. Apparently it was suggested in the course of discussion that the existing Preamble should be put in an attachment to the Constitution,⁸ and also that the new Preamble should be built on the old.⁹ Suggestions of this kind ignore the fact that the existing preamble forms part of an Act of the Parliament of the United Kingdom passed in 1900; it would be absurd to amend that preamble by an Australian law passed in 1999. I need not digress to discuss whether it would be possible to amend that statute by a referendum carried only in a majority of States, since what is now proposed is to insert a new Preamble in the Constitution itself, after the title.

The new Preamble was intended by the Convention to be an introduction to the Constitution when it was amended to convert Australia to a republic. The Government has since decided that the Australian people should have an opportunity to adopt a Preamble, irrespective of whether or not Australia becomes a republic.¹⁰ If the referendum to make the changes necessary to bring about a republic fails, it would seem incongruous to enact a new Preamble to explain or introduce, retrospectively, a long established Constitution.

It was argued by supporters of the Australian Republican Movement that the proposed law to insert a Preamble should be considered separately from the other proposals for constitutional change. They appear to have thought that consideration of the Preamble might distract attention from, or weaken support for, the republican case. A Preamble cannot exist in isolation; if a new preamble is to be considered at all, it should be considered in relation to the provisions of the constitutional amendments which it is intended to introduce. It is difficult to find any justification for having a new Preamble if the referendum to convert Australia to a republic should fail. On the other hand, if that referendum should, unfortunately, succeed, there would be no point in inserting a Preamble of the kind now proposed by the Government, since it makes no mention of a republic.

The Constitution does not, in its present form, and would not if amended in accordance with the recommendations of the Convention, refer to a number of the matters which the Convention recommended that the Preamble should contain. In particular, there is nothing in the existing Constitution, and would be nothing in the amended Constitution, to refer to the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders or to the continuing rights of those people; or to Australia's cultural diversity; or to respect for the unique land and environment; or to the recognition of gender equality. Reference to these matters in a Preamble would not explain or introduce anything in the Constitution. They would be irrelevant to the provisions of the Constitution and out of place in it.

There are reasons, besides those of form and style, why a preamble should not include a statement of values or beliefs not reflected in the existing words of the Constitution. In the absence of a provision prohibiting the use of the Preamble in the interpretation of the Constitution, it would be permissible to refer to the Preamble to resolve an ambiguity or uncertainty in the enacting words of the Constitution; and in deciding whether those words are ambiguous or uncertain, the Preamble forms part of the context to which the Court must have regard.¹¹

It should be obvious to anyone familiar with the course of constitutional development in Australia that the High Court might use a preamble of the kind suggested by the Convention as the basis for an interpretation leading to extensive constitutional change, unless effectively prohibited from doing so, and it appears that at one stage of the Convention some delegates hoped that the Preamble might in effect introduce a Bill of Rights into the Constitution by a back door.¹² Some delegates may still cling to those hopes. However, as I have already mentioned, the Convention resolved to exclude the use of the Preamble for the purposes of the interpretation of the Constitution. The Exposure Draft of the *Constitutional Alteration (Preamble) 1999* goes a little further; section 125(A), if inserted in the Constitution, would provide:

“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”.

It is obvious that a provision of this kind would detract from any symbolic force that the Preamble might otherwise have had. Those hoping to find comfort in the Preamble would be entitled to regard it as no more than empty words – as the Romans would have scornfully said, *vox et praeterea nihil*. That is not to deny the practical value of the section; however, the protection which it is designed to afford may be to some extent illusory.

The Courts have held that a preamble may have wider effects than as an aid to

interpretation. A reference in a preamble to a matter will make evidence of that matter admissible.¹³ Recitals in a preamble are *prima facie* evidence of the facts recited.¹⁴ It would be arguable that these rules were not excluded by a provision that the Preamble has no legal force.

For example, it might be held that there is a presumption of fact that the recitals are *prima facie* correct, because, as was said more than 300 years ago, it cannot be thought that a statute made by the authority of the whole realm will recite a thing against the truth.¹⁵ One can only conjecture, for example, what effect might be given in legal proceedings to the presumption that Aboriginal peoples were the original occupiers and custodians of Australia, since these words import that the Aboriginal peoples had possession of the land of Australia and the power to direct what should be done with it.¹⁶

Quite apart from these matters, however, a Preamble, even if devoid of legal force, could significantly affect ministers and other executive officers in the exercise of their discretionary powers. The decision in *Minister for Immigration and Ethnic Affairs v. Teoh*¹⁷ seems to provide authority for holding that there would be a legitimate expectation that a decision maker would act in conformity with the statements in the Preamble, whenever they were relevant to the decision proposed to be made. If a minister or other officer proposed to make a decision inconsistent with that legitimate expectation, procedural fairness would require him or her to give the person affected notice and an adequate opportunity to present a case against the making of such a decision. A decision which was made without allowing procedural fairness to the person affected could be set aside. The fact that the Preamble had no legal force would not matter: to use some words from *Teoh's Case*,¹⁸ the Preamble could not be dismissed as a "merely platitudinous or ineffectual act".

In addition, there can be no doubt that reliance could be placed on the words of the Preamble by interested groups seeking, for example, to establish Aboriginal rights, or to seek privileges for an ethnic group, or to prevent mining or development which it is claimed may damage the environment. The Preamble could form the basis of claims for compensation or of arguments for political change. And can no one doubt that those organs of the United Nations which our governments have unwisely allowed¹⁹ to intrude into our affairs, in derogation of our national sovereignty, would be entitled to regard the preamble as stating values which Australia was obliged to respect and observe?

For all these reasons, if there is to be a Preamble, it should be narrowly and circumspectly drawn. It would seem appropriate enough, and not unsafe, to mention the origins of the Constitution; the evolution of the Commonwealth into an independent democratic and sovereign nation under the Crown; the federal system, representative democracy and responsible government; the rule of law and (if the referendum for a Republic is passed) the agreement of Australians to reconstitute the system of government as a Republic. It would, in my opinion, be inappropriate and unsafe to include a statement of beliefs, values and aspirations. Even something so apparently unobjectionable as an affirmation of the equality of all people before the law would have its dangers, since it might lead to confusing results similar to those caused by the provision in the American Bill of Rights which guarantees to Americans the equal protection of the laws.

Let it be assumed that all that I have said so far is rejected, and that it is decided that there should be a Preamble which sets out the beliefs, values or aspirations which the Australian people accept, or promote. It must then surely be agreed that only those things should be said which would meet with the general approval of the Australian community. Clearly, a

statement affirming the original occupancy and custodianship of Australia by Aboriginal peoples would not meet this test. Certainly it might be agreed that, so far as is known, the Aboriginal peoples were the original inhabitants of Australia, but most Australians would have only a vague and imprecise notion of the nature of the relation of the indigenous peoples to the land. Whether that relationship could be described as occupancy and custodianship is a question which would provoke controversy. To include a statement of that kind would cause acrimony rather than advance reconciliation.

The suggested reference to Almighty God raises delicate questions; the devout might press for its inclusion, but that would not be acceptable to all Australians, many of whom profess religions in which that expression would not be appropriate, and some of whom profess no religion at all. Delegates at the Convention justified the inclusion of the reference by attributing to the word "God" a wide and imprecise meaning. The reference to God was one of the few matters in the preamble to the *Commonwealth of Australia Constitution Act* that excited discussion in the Constitutional Conventions of the 19th Century, and the fact that the reference was to be made influenced the framers of the Constitution in inserting s.116, which protects religious freedom.²⁰

Other matters suggested by the 1998 Convention which may lead to disagreement are the references to cultural diversity and to respect for the environment. Even if one presumes to think that all right minded citizens should agree on such matters, it by no means follows that the Preamble should mention them, if in fact they are sources of contention.

I would suggest that if beliefs, values or aspirations are to be mentioned in the Preamble, they should not only be generally acceptable today, but also should be likely to be generally acceptable during the whole life of the Constitution. The present Constitution has endured for nearly one hundred years, and during that time there have been vast changes in popular sentiment. To take, as examples, matters which the 1998 Convention suggested should be considered for inclusion in the Preamble, few Australians in 1901, when the Constitution was enacted, would have subscribed to a belief in gender equality or to the continuing rights of Aboriginal people. It would be unwise to incorporate in a Preamble ideas which may be in favour today, but out of favour tomorrow, thus attempting to force future generations to accept notions current at present.

The Preamble in the schedule to the Exposure Draft of the Bill²¹ has been criticised for reasons of style. There is little advantage to be gained by debating questions of that kind. The substantive issue that is seized upon for political purposes is whether a Preamble should contain a reference to the original occupancy and custodianship of the Aboriginal people. I have already indicated why I consider that it would be unwise to include that expression. Indeed, it would seem futile to seek for any other word or compendious expression that would accurately describe, in a way generally acceptable, the relationship of the indigenous peoples to the land. In any case, there is no logical reason for mentioning in a Preamble that matter, which has no bearing whatever on constitutional development in Australia.

If a Bill for a Preamble is presented, and is placed before the electors at a referendum, the following questions would arise:

1. Is there a need for any Preamble if the referendum for a republic fails?
2. If the referendum for a republic succeeds, should a Preamble contain anything more than a brief account of the development from a constitutional monarchy to a republic?
3. If either of these questions is answered Yes, should a preamble incorporate any expression

of opinions or values, however firmly held by those who may claim to be an élite, unless it is certain that those opinions and values are generally accepted by Australian society as a whole, and are likely to continue to command general acceptance?

My own answer to all three questions would be “No”.

Endnotes:

1. See *University of New South Wales Law Journal* Forum at p.7 (Professor Winterton) and p.11 (Professor Saunders).
2. *Olivier v. Buttigieg* [1967] 1 AC 115, 128.
3. Quick and Garran: *Annotated Constitution of the Australian Commonwealth* (1901) at p.284.
4. Craies, *Statute Law*, 7th ed. (1971), at pp.199-203; Pearce, *Statutory Interpretation in Australia*, 2nd ed. (1981) par.11; Bennion, *Statutory Interpretation*, 2nd ed. (1992) at p.499.
5. See *University of New South Wales Law Journal* Forum, at pp.25, 27 (note 1) and Constitutional Centenary Foundation, *Quest for a Preamble*, in *Round Table* (No 2, 1998) at p.3.
6. See video address to Local Constitutional Conventions Forum, 29 April, 1999, by the Attorney-General (Hon Daryl Williams, AM, QC), paras.18-20.
7. The original draft of the preamble to the United States’ Constitution read:

“We the people of the states of (13 named States) do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity”.

This was thought to be unsatisfactory since not all of the named States might ratify the Constitution. The delegates accordingly appointed a Committee on Style and Arrangement, which submitted a new preamble which was accepted without dissent. It reads:

“We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defence, 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”.
8. See Constitutional Centenary Foundation, *What Kind of Republic?*, under heading “Issues to be Considered”.
9. See *University of New South Wales Law Journal* Forum at p.25.
10. Explanatory Statement to Exposure Draft of *Constitutional Alteration (Preamble) 1999*, para.1.5.
11. *AG v. Prince Ernest Augustus of Hanover* (1957) AC 436, 461; *Wacondo v. the Commonwealth* (1981) 148 CLR 1, 23.
12. See *University of New South Wales Law Journal* Forum at p.19 (Professor Craven).
13. *Deputy Federal Commissioner of Taxation (NSW) v. WR Moran Pty Ltd* (1939) 61 CLR 735, 754, 767, 796.
14. *Dawson v. the Commonwealth* (1946) 73 CLR 157, 175; *Australian Communist Party v. the Commonwealth* (1951) 83 CLR 1, 224, 263-4; Craies, *op.cit.*, at p.199; Bennion, *op.cit.*, at p.500.
15. *Co. Litt.*, 19b.

16. See *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256.
17. (1995) 183 CLR 273.
18. *Ibid.*, at 291.
19. For example, by the Optional Protocol to the *International Covenant on Civil and Political Rights*.
20. *Official Record of the Debates of the Australasian Federal Convention* (1986 reprint), Volume III, pp. 1184-9; Volume IV, pp. 1732-1741, 1769-1779.
21. The Preamble in the Schedule to the Exposure Draft of the Bill is as follows:

“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.”