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The Potential Moral Power of a New Australian Constitutional Preamble

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At first glance, ‘moral power’ might seem an oxymoron. If not oppositional concepts, the former is often seen as a restriction or intangible handbrake on the latter. However, this is not necessarily the case. Power, in its most basic form, is the ability to get what you want and, often, the ability to get others to do what you want. This can apply to individuals or to groups or to States. Joseph Nye notes that nations that are sufficiently powerful and wealthy can use hard power to get what they want (meaning the threat of military force or sanctions), but they can also use soft power (which essentially means that if a nation is popular and respected it can influence others).¹

This chapter applies the work of sociologist Dennis Wrong to the Australian Constitution. Wrong distinguishes between ‘power over’ and ‘power to’.² ‘Power over’ is coercive; it involves control that can be exercised over a person or group. In Nye’s taxonomy, ‘power to’ is a kind of soft power. Characterised by influence, it is when you can inspire or encourage a person or group to act in the ways you want them to. It will be argued in this chapter that a constitutional preamble has a form of moral ‘power to’. This kind of morality is distinct from personal or religious variations. A constitutional preamble offers a form of civic morality tied to notions of good citizenship

1 Joseph S Nye Jr, ‘Get Smart: Combining Hard and Soft Power’ (2009) 88(4) *Foreign Affairs* 160.

2 Dennis Wrong, *Power: Its Forms, Bases, and Uses* (Transaction, 2009).

and pursuing the greater good over individual gain. The key to moral power, to channel Marshall McLuhan, is in the medium rather than the message.³ If an individual, group or government is seen to hold moral authority, they have a form of 'power to' and can influence behaviour in a way others cannot. Similarly, the moral power of a constitutional preamble exists only to the extent that the Constitution itself is popularly respected.

As the rule book under which Australia's States and Territories operate, the Australian Constitution carries supreme legal power. The preamble does not have 'power over' but rather 'power to'. It has the power to articulate national values and to give certain concepts and ideals national significance. It can be argued that it also has the power to influence courts by providing an interpretative lens through which the Constitution can be viewed. Constitution drafters John Quick and Robert Garran believed that the Australian preamble might provide a 'valuable service' to the courts.⁴ In practice, however, the preamble has rarely been used as an interpretive guide with the 1988 Constitutional Commission noting that it lacked legal power.⁵ When alternative preambles were being earnestly debated in the 1990s, it was widely accepted that the purpose of a new preamble would be symbolic only. The 1998 Constitutional Convention resolved that a new preamble was appropriate but that a stipulation should be inserted into ch 3 of the Constitution to explicitly state that the preamble is not a tool for interpreting provisions in the Constitution.⁶ The symbolic nature of a preamble does not mean it is unimportant. As Liav Orgad notes: 'For individuals, preambles are the national consciousness: they define the constitutional identity and, as such, they define who the "we" is.'⁷

Spurred by the prospect of a referendum on the republic in 1999, the 1990s witnessed a period of national self-reflection and debate over national identity. In this atmosphere, a flurry of alternate preambles were drafted by conservative and progressive politicians, historians, Indigenous activists and other citizens. Because of the gravitas of the Constitution, the preamble,

3 Robert Logan, *Understanding New Media: Extending Marshall McLuhan* (Peter Lang, 2010) 353.

4 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 286.

5 However, there is some debate over the preamble's legal status, with the 1993 Republic Advisory Committee suggesting that a minor role cannot be assumed: see Mark McKenna, 'First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99' (Research Paper No 16, Parliament of Australia, 4 April 2000) <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p; query=Id%3A%22library%2Fprspub%2FFV716%22>.

6 John Warhurst and Malcolm Mackerras, *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 8.

7 Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8(4) *International Journal of Constitutional Law* 738, doi.org/10.1093/icon/mor010.

although devoid of legal power, nevertheless has potential moral power. The reason this power is only ‘potential’ is because the current preamble is not used as a statement of national values. Technically, the Australian Constitution does not have a preamble at all. Rather, there is a preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) that approved the Constitution.⁸ Strictly speaking, what is commonly called the Australian constitutional preamble is an introduction to a piece of British legislation. For the sake of clarity, however, this chapter will use the popular term, preamble. Nevertheless, understanding that it was never written to be the foundational text of a new nation goes some way to explaining why it is so bland and uninspiring when held against the relative refulgence of other nations’ preambles. It also explains why so many diverse groups in the 1990s saw value in changing it despite their different stances on what should be included and excluded. The current preamble was never intended to fulfil this high function of exerting moral power and proclaiming the values of the nation. Indeed, the men who wrote and passed it did not see themselves as founding fathers so much as facilitators of Australia’s elevation in status from a collection of British colonies to a unified dominion of Empire.

Gregory Craven notes that there is a ‘deadening contrast’ between the jejune banality of the Australian Constitution and the emotive rhetoric of others.⁹ The Australian preamble drily states:

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.¹⁰

8 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2012) 1.

9 In particular, he contrasts the Australian Constitution with the famous opening to the US preamble, ‘We the People’: see Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 11.

10 Australian Constitution, preamble.

For modern readers, the preamble might appear jarring and alien with the States of the Commonwealth described as ‘possessions of the Queen’. There is no declaration of independence or sovereignty, a usual inclusion in a preamble.¹¹ The best-known phrase in this poorly known document is ‘indissoluble Federal Commonwealth’. The words immediately following it, however—‘under the Crown of the United Kingdom’—are equally important.

It is not just the included text but what is missing from the preamble that is significant. Ideas like freedom, democracy and equality are all absent. High-minded but abstract concepts are common staples of preambles around the world. Their absence in Australia is because the preamble was not crafted to exert moral power. It is not simply the case that the constitution writers of the late nineteenth century and Australians today have a different concept of patriotism and a different understanding of Australia’s place in the world and its relationship with Britain (although this is certainly the case). For the constitution writers, the objective of the preamble was not to provide an origin myth—they looked to their British heritage for such things—but to introduce the document and to potentially provide clarity if some words or phrases become ‘obscured by the raising of unexpected issues and by the conflict of newly emerging opinions’.¹² The Australian preamble does not exert moral power, but there is value in considering some that do and what a new Australian preamble might look like.

This chapter will briefly consider some constitutional preambles that exert moral power before exploring the often overlooked second question in Australia’s 1999 republican referendum that proposed a new preamble. It will also explore the interplay between preamble writing and seeking justice for First Nations peoples. Finally, it will discuss two proposed preambles to the Australian Constitution: one composed by the author and the other drafted by a group of senior school children. Ultimately, the chapter argues that it is not only possible but also desirable for Australia to replace the current constitutional preamble with a new one. The wording of any new preamble will draw criticism and the ensuing debates will likely be tempestuous. This is not necessarily a bad thing. At a national level, as WEH Stanner argued in his famous Boyer Lectures of 1968, uncomfortable discussions are preferable to great silences.¹³ This is a piece of intellectual infrastructure worth fighting

11 Orgad (n 7) 716.

12 Quick and Garran (n 4) 286.

13 WEH Stanner, *After the Dreaming Black and White Australians: An Anthropologist’s View* (ABC, 1969) 18.

for and, crucially, compromising for. Producing a new preamble that better reflects the modern nation and is specifically designed to exert moral power is not beyond Australia's creative and academic capability.

I. Preamble with moral power

The primary purpose of most constitutional preambles is to serve as a national mission statement and articulate the values of an imagined community.¹⁴ This can be accompanied by a secondary function of guiding the interpretation of the constitution (though, as noted earlier, the Australian preamble is generally not used in this way).¹⁵ A preamble can set the stage and establish the historical context for the constitution to follow. Some are dry and legalistic, others poetic and uplifting. One of the oldest and most influential constitutions is that of the French Republic. Unlike in Australia, the French preamble is considered to be incorporated into the constitution.¹⁶ Significantly, the French preamble also contains references to other important national documents, including the 1789 Declaration of the Rights of Man, and places itself in a specific historical context. The second half of the text speaks to national values. It reads:

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.¹⁷

However well or poorly you may think the French State lives up to these ideals (or if you think the ideals are worthy or not), their strategic position in the preamble gives them a moral authority that has, in turn, shaped policy and perceived national values. In particular, the French tripartite motto, born in the eighteenth-century revolution, has influenced nations around the world.

14 To borrow Benedict Anderson's well-known phrase: Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

15 Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24(2) *University of New South Wales Law Journal* 382, 382–3.

16 David Marrani, *Dynamics in the French Constitution: Decoding French Republican Ideas* (Routledge, 2013) 47, doi.org/10.4324/9780203798652.

17 Anne Wagner and Malik Bozzo-Rey, 'French Commemorative Postage Stamps as a Means of Legal Culture and Memory', in Anne Wagner and Richard K Sherwin (eds), *Law, Culture and Visual Studies* (Springer, 2014) 321, doi.org/10.1007/978-90-481-9322-6_15.

The other great revolution of the eighteenth century has been similarly influential. The first three words of the United States constitutional preamble, ‘We the people’, have had a great influence on that nation and others.¹⁸ This opening line places the emphasis on the people and removes it from either the monarchy or an imagined divinity. Contrast this with the preamble of the Republic of Ireland, which begins: ‘In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.’¹⁹ It goes on to specifically recognise Christianity as the national religion with a reference to ‘our Divine Lord, Jesus Christ’.²⁰ The Australian preamble has echoes of both with references to ‘the people’ and ‘Almighty God’. In Australia, the word ‘God’ was included at the 1898 Constitutional Convention but is counterbalanced by s 116 of the Constitution, which prohibits the establishment of a State religion or the use of any religious test to hold public office. As we will see, despite Australians in 1998 being far less religious than in 1898 (and even less religious today), many of the proposed alternative preambles, including the one put to a referendum, maintained a reference to ‘God’.

The French and American preambles have influenced other democratic nations around the world. Perhaps the clearest example is the preamble of India, which presents a quartet of national values. With allusions to France and the United States, it notes:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

18 Orgad (n 7) 714.

19 Donal K Coffey, *Drafting the Irish Constitution, 1935–1937: Transnational Influences in Interwar Europe* (Palgrave, 2018) 41, doi.org/10.1007/978-3-319-76246-3_2.

20 Ibid.

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.²¹

In this short passage, several important concepts are highlighted. Each of the five descriptors of the Indian State are significant, as is the order. First and foremost, having endured centuries of British colonisation, the preamble declares that it is, above all, a sovereign State. The words ‘socialist’ and ‘secular’ were inclusions by Prime Minister Indira Gandhi as part of the wide ranging 40-second amendment in 1977, but the terms had been popularly used since independence.²² Finally, the Indian State will adhere to democratic principles and adopt a republican form. If the word republic was swapped for federation, then all five would describe the Australian State (provided ‘socialist’ was understood in its broad meaning, as used in India). Instead, Australia’s preamble uses the outdated term ‘possessions’.

As well as articulating four key national values, the Indian preamble serves as a declaration of decolonisation. This is a common theme in the constitutions of the many nations in Asia and Africa that gained independence from European empires in the wake of World War II. The preamble to the Indonesian Constitution explicitly condemns the negative impact of Dutch colonisation and speaks to the right of nations to self-determination. It begins with the emotive line: ‘Whereas freedom is the inalienable right of all nations, colonialism must be abolished in this world as it is not in conformity with humanity and justice.’²³ The South African preamble also highlights historical wrongs and offers a set of values to guide the nation into the future. It recognises the ‘injustices of our past’ and suggests part of the constitution’s role is to help ‘[h]eal the divisions of the past’.²⁴ Again, the contrast with Australia’s preamble is stark. It was composed by colonists and reflects British imperialism of the late nineteenth century. It does not recognise past injustices against First Nations or include any desire to provide healing. These concepts would have made no sense to the constitution writers but are clearly relevant to modern Australia.

21 Stuart Corbridge and John Harriss, *Reinventing India: Liberalization, Hindu Nationalism and Popular Democracy* (Polity Press, 2006) ch 2.

22 Rachel Fell McDermott et al, *Sources of Indian Traditions: Modern India, Pakistan, and Bangladesh*, (Columbia University Press, 3rd ed, 2014) vol 2, 885, doi.org/10.7312/mcde13828.

23 Denny Indrayana, *Indonesian Constitutional Reform, 1999–2002: An Evaluation of Constitution-Making in Transition* (Kompas, 2008) 431.

24 Hennie PP Lötter, *Injustice, Violence and Peace: The Case of South Africa* (Rodopi, 1997) 120, doi.org/10.1163/97890004458963.

The inclusion in a preamble of lofty notions like freedom and equality does not mean that the nation will live up to them; nor does the denunciation of past wrongs mean that they will not be repeated. The people of Timor-Leste may have seen some hypocrisy in the Indonesian preamble when they fought for their own independence from the 1970s to the early 2000s. This view was shared by some Indonesian leaders, especially Dewi Fortuna Anwar, who argued for a policy shift to realign the Habibie administration with the spirit of the preamble.²⁵ With the resurgence of Hindu nationalism under Prime Minister Narendra Modi, India's commitment to secularism can be questioned.²⁶ Conservative Catholics might see Ireland's decision to legalise same-sex marriage in 2015 and abortion in 2018 as a deviation from the spirit of their preamble (while progressives may counter that it is the preamble that should change). More generally, with the rise of right-wing populism and anti-immigration political parties around the world, many nations with preambles that refer to 'the people' are negotiating who exactly this includes and excludes. It is worth reiterating that a constitutional preamble offers a moral 'power to' not a 'power over'. It has the power to articulate a certain national vision and to influence the way citizens interact, and even how the constitution itself should be interpreted. It is, however, a limited form of soft power, and other influences may well prove greater at any particular moment in history.

The preambles of the nations mentioned above, and many others besides, do exercise a form of moral power. They set out the key principles for their societies and provide a historic context through which the constitution proper can be read. Whether secular like India or religious like Ireland, because of the legal gravitas of the constitution itself, the words in the preamble carry moral weight. In Australia's case, they do not because they were never designed to serve this function. The Australian preamble is not memorised by school children, recited at citizenship ceremonies or embedded in the popular consciousness. While its lack of moral power does not impact the functioning of the Constitution, it is a missed opportunity and, as the passionate debates of the 1990s demonstrate, many feel strongly that a new preamble is appropriate. The potential moral power of a new preamble has been recognised, not only by progressive reformers but also by

25 Lena Tan, 'From Incorporation to Disengagement: East Timor and Indonesian Identities, 1975–1999', in Daniel Rothbart and Karina V Korostelina (eds), *Identity, Morality, and Threat: Studies in Violent Conflict* (Lexington, 2006) 201.

26 See Ian Hall, *Modi and the Reinvention of Indian Foreign Policy* (Bristol University Press, 2019) 41–60, doi.org/10.1332/policypress/9781529204605.003.0003.

conservatives. It was Prime Minister John Howard, leader of the conservative Liberal Party, who insisted on a secondary debate about a new preamble to accompany the republic debate leading up to the 1999 referendum.

II. The preamble referendum, 1999

The Australian referendum on 6 November 1999 is often called the republic referendum, and the issue of severing constitutional ties with the British monarchy certainly dominated the debate. Nevertheless, it was a two-part referendum, and the second question asked Australian citizens if they approved an alternative preamble. Despite actively campaigning against the republic, Howard authored a constitutional preamble with help from poet Les Murray, conservative historian Geoffrey Blainey and two of his staff members, Catherine Murphy and Michael L'Estrange.²⁷ The new preamble was to serve as a statement of values for the Australian nation. Cynics may argue that, as a staunch monarchist and shrewd politician, the inclusion of a second question was a tactical move to obfuscate discussion on the republic. In January 1999, the Australian Republican Movement and the Australian Labor Party (which officially endorsed Australia becoming a republic) argued that the preamble question should be dropped as it was a distraction.²⁸ Given how passionately Howard advocated for the preamble and the personal interest he showed in the issue, it is more likely that he genuinely believed the preamble held potential moral power that should be tapped into (provided he could dictate the terminology).

Australian politics in the 1990s was dominated not only by the republic debate but also by discussions of the historic and ongoing injustices faced by Australia's First Nations. Under the Labor prime ministership of Paul Keating, who delivered the historic Redfern address in 1992, there were hopes that the 1990s would be the decade of reconciliation between Indigenous and non-Indigenous Australians. The Keating government established the Council for Reconciliation, passed the *Native Title Act 1993* (Cth) and instigated a national inquiry into the Stolen Generations. When Howard and the Liberals were swept to power in 1996, it was against this backdrop of serious conversations about reconciliation and how Indigenous Australians

27 Mark McKenna, Amelia Simpson and George Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24(2) *University of New South Wales Law Journal* 406.

28 McKenna (n 5).

should be recognised. Howard faced sustained criticism for his refusal to offer an apology to members of Stolen Generations—a recommendation from the *Bringing Them Home Report* endorsed by the Council for Reconciliation and enacted by all State and Territory governments—and was seen as being out of step with public sentiment.²⁹ Howard felt strongly that a so-called ‘black armband’ view of history, a phrase coined by Blainey, dominated public consciousness in the early 1990s.³⁰ In response, he sought language that presented the Australian story as one of ‘heroic and unique achievement against great odds’.³¹ This partly explains why he insisted on a ‘statement of regret’ rather than an apology on behalf of the federal government. As Jacob Levy notes, Howard’s personal statement was ‘no more than the expression of sorrow of an onlooker to a tragedy’ and it was specifically worded to deny any responsibility of behalf of the government.³²

Turning to the proposed preamble, Howard explained that recognition of First Nations in the Constitution was part of the *raison d’être*. He claimed in Parliament that:

I think that as we approach the Centenary of Federation there are 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.³³

A few days before the 1999 referendum, he spoke with 2GB Radio’s Mike Jefferies about why he supported a new preamble despite opposing Australia becoming a republic. He again stated that recognition of First Nations was his primary motivation in pursuing a new preamble:

I would like to see the republic defeated but I would like to see the preamble succeed. The great advantage of the preamble, and bear in mind all your listeners, a preamble is just a simple statement of basic values and beliefs. It doesn’t have any legally binding effect and

29 Wayne Warry, *Ending Denial: Understanding Aboriginal Issues* (University of Toronto Press, 2007) 63. See also Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge University Press, 2009) 174–5, doi.org/10.1017/CBO9780511581502.

30 Paul Kelly, *The March of Patriots: The Struggle for Modern Australia* (Melbourne University Press, 2010) 335–6.

31 ‘Sir Thomas Playford Memorial Lecture, Adelaide Town Hall’, *Department of Prime Minister and Cabinet* (Web Page, 5 July 1996) 1–2 <pmtranscripts.pmc.gov.au/release/transcript-10041>.

32 Jacob T Levy, *The Multiculturalism of Fear* (Oxford University Press, 2000) 246, doi.org/10.1093/0198297122.001.0001.

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

it talks about things like recognising the place of the aborigines as the first people of the nation. It talks about the sacrifice of people in war about the common values that bind us together as Australians.³⁴

As with the statement of regret, Howard appeared willing, even enthusiastic to recognise First Nations, but only, and ironically, if he was able to dictate the terms to them and choose the language to be used.

The initial draft of Howard's preamble was released to the press on 23 March 1999 and received widespread criticism from Indigenous rights activists and many others.³⁵ It was seen as insufficient for only noting that First Nations 'inhabited' Australia, with no reference to their continuing role as custodians of their traditional lands. Overwhelmingly, Indigenous leaders refused to support the preamble (in either this form or its final draft), with several calling for the second referendum question to be dropped altogether.³⁶ Howard's preamble also included a line perceived as 'blokey' if not sexist: 'We value excellence as well as fairness, independence as dearly as mateship.'³⁷ The inclusion of the word 'mateship' was impolitic but something Howard felt strongly about. The following month, Murray claimed, in an open letter published in *The Sydney Morning Herald*, that, on mateship, he 'bowed to the Prime Minister's preference'.³⁸ Speaking to John Laws, Howard defended its inclusion, noting: 'whatever its male origins might be, it has acquired a generic meaning'.³⁹ Nevertheless, criticism from many high-profile women, including Meg Lees, whose Democrats Party held the balance of power in the federal Senate after July, saw the phrase removed.⁴⁰

34 'Transcript of the Prime Minister the Hon John Howard MP Radio Interview with Mike Jeffries (2GB)', *Department of Prime Minister and Cabinet* (Web Page, 1 November 1999) <pmtranscripts.pmc.gov.au/release/transcript-10989>.

35 For example, former chairperson of the Aboriginal and Torres Strait Islander Commission Lowitja O'Donoghue called the preamble 'pathetic': see 'Preamble Pathetic', *The Sydney Morning Herald*, 16 April 1999, 7. See also McKenna (n 5).

36 Mark McKenna, *This Country: A Reconciled Republic* (University of New South Wales Press, 2004) 58.

37 Les Murray, 'Mates Lost and Saved: Drafting the Constitutional Preamble', in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 82–3.

38 Ibid 84.

39 'Transcript of the Prime Minister the Hon John Howard MP Interview with John Laws—Radio 2UE', *Department of Prime Minister and Cabinet* (Web Page, 23 March 1999) <pmtranscripts.pmc.gov.au/release/transcript-11116>.

40 Wayne Errington and Peter Van Onselen, *John Winston Howard: The Definitive Biography* (Melbourne University Press, 2008) 286.

Beyond these points, the initial draft was also criticised for ignoring many of the recommendations of the Constitutional Convention and, despite the assistance of Howard's celebrated co-author, containing the odd solecism (the term 'woven together' was often singled out).⁴¹ Addressing Parliament on 24 March 1999, senior Labor figure and former Foreign Minister Gareth Evans gave a scathing rebuke of Howard's preamble, accusing the prime minister of being too controlling and refusing to listen to the broader Australian public. Dismissing it as a 'clunker of a document which has satisfied practically no one in this country', Evans stated:

If he had listened for a start to Aboriginal and Torres Strait Islander Australians, they would have told him that his flora and fauna type references ... and his theme park reference to their cultures were just not good enough ... if he had listened to Australian women, he would not have put into his draft a word like 'mateship' ... If he had listened again to the delegates to his own Constitutional Convention ... [he] would have had a reference to custodianship. He would have had 'We the people of Australia' language in there. He would have had an affirmation of respect for our unique land and environment.⁴²

In the face of such a backlash, Howard was compelled to either abandon the preamble or undertake a substantial rewrite. He chose the latter, but did not involve Murray. Instead, he sought advice (and much-needed political support) from the new Democrats Senator and Gumbaynggirr man Aden Ridgeway.

The final version of the preamble read:

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;

⁴¹ McKenna, Simpson and Williams (n 15).

⁴² 'Address by the Hon Gareth Evans QC MP to the House of Representatives, Canberra', *Gareth Evans* (Web Page, 24 March 1999) <www.gevans.org/speeches/old/1998-1999/240399_preamble_australian_constitution.pdf>.

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.⁴³

As Mark McKenna notes, this version was generally seen as an improvement but still faced much criticism.⁴⁴ Even Les Murray said he would not vote for it.⁴⁵ Perhaps the most consistent objection was that Howard had failed to consult with Indigenous leaders or use the word 'custodians' in reference to the traditional owners.⁴⁶ In March, a journalist had asked Howard 'why did [you] feel unable to go the extra step and mention the word custodianship especially given that this is going to have no legal implications?'⁴⁷ His response was simply that 'I think this better expresses what happened and in a more poetic flowing fashion'.⁴⁸ It is difficult to accept that Howard refused to include the word in either the first or final draft purely for poetic reasons. Like his insistence on 'regret' rather than 'apology', he chose his words with care and wanted to stamp his conservative seal on the foundational national document. Further amendments suggested by Labor and the Greens were rejected and, with support from the Democrats, the above version was put to the people on 6 November.

43 Les Murray, 'Mates Lost and Saved: Drafting the Constitutional Preamble', in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 84–5.

44 McKenna (n 5).

45 Murray (n 37) 85.

46 McKenna (n 5).

47 'Transcript of the Prime Minister the Hon John Howard MP Press Conference Prime Minister's Courtyard, Parliament House', *Department of Prime Minister and Cabinet* (Web Page, 23 March 1999) <pmtranscripts.pmc.gov.au/release/transcript-11109>.

48 Ibid.

The result of the 1999 referendum was a double defeat. The proposed republic failed with 45.1 per cent of voters supporting it while the preamble was backed by just 39.3 per cent.⁴⁹ In a sense, the result is the opposite of what one might expect. The republic issue was far more divisive and complex, whereas, in principle at least, a broad cross-section of Australians across the political spectrum believed that the preamble should be updated. The low result for the preamble should not be entirely placed on inadequacies in the document itself. As Wayne Errington and Peter Van Onselen note, in the combative political environment of the late 1990s, ‘opposing the preamble became a shorthand way of opposing Howard’s values’.⁵⁰ One lesson that emerges from the 1990s debates is that language matters and, even without legal power, the constitutional preamble does have a potential moral power. This helps explain the heated debate over the wording. The language of the current preamble is so antiquated that it can be seen as politically neutral. In contrast, Howard’s preamble became both politically partisan and embroiled in a larger culture war. Howard’s preamble was defeated in 1999 as much for its author as its content, but the potential to exert moral power through the Constitution remains worthy of consideration.

III. A minimalist preamble

Although Howard’s preamble was the only one to go to a referendum, the 1990s saw a raft of alternative compositions put forward. Despite many worthy options being in the public arena, in 2018, I published my own alternative preamble in a book called *This Time: Australia’s Republican Past and Future*.⁵¹ It was with some trepidation that I made another offering to a crowded marketplace, but my logic was that it is pernicious to criticise either Howard’s preamble or the current preamble without suggesting an alternative. My preamble reads:

We, the Australian people, hold these three dear: democracy,
meritocracy and community.

We cherish the ancient and continuing cultures that belong to this
land,

49 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) 195.

50 Wayne Errington and Peter Van Onselen, *John Winston Howard: The Definitive Biography* (Melbourne University Press, 2008) 286.

51 Benjamin Jones, *This Time: Australia’s Republican Past and Future* (Redback, 2018).

We honour those who have served this nation in war and in peace,

And we commit ourselves to one guiding principle: all citizens of this indissoluble Commonwealth are equal.

With respect for country and love for justice, liberty and freedom, we pledge to stand truly by each other to defend our constitution.⁵²

As I stress in the book, my primary purpose in composing a new preamble is to prompt discussion. One of the startling features of the 1999 referendum is how little time for public discussion was allowed on the second question. With a fixed timeline in place, Howard's preamble was offered in a 'take it or leave it' fashion. Australians chose the latter, but that does not mean a new, inclusive national discussion could not be fruitful.

My preamble is clearly minimalist in style. I resisted the urge to try to comprehensively cover all aspects of Australian history and cultural life, and to squeeze every national value into one document. My preamble does not include all the elements suggested at the 1998 Constitutional Convention but attempts to be a concise statement of civic values that could serve as a national oath as well as an introduction to the Constitution. References to the Crown and to God are replaced by the Australian people. Although there was agreement in 1998 that the words 'Almighty God' should be maintained, Australia's religious demographics have changed substantially. Between 2011 and 2021, Australians professing 'No Religion' rose from 22.3 to 38.9 per cent.⁵³ In 2017, the Australian Bureau of Statistics noted that the number of people without religion was 'rising fast'.⁵⁴ Recognising this trend, a reference to 'God' is more likely to be more divisive than unifying. Similarly, references to the Queen and monarchy are replaced with democracy and meritocracy. Even if this preamble were adopted without Australia becoming a republic, this is still a more accurate reflection of how Australia operates.

My version includes a nod to the current preamble with the words 'indissoluble Commonwealth' and also to the Eureka Stockade, the mythical birthplace of Australian democracy, with the 'pledge to stand truly by each other'. The line honouring First Nations is, perhaps, the most likely to attract

52 Ibid 120.

53 'Religion in Australia', *Australian Bureau of Statistics* (Web Page, 2021) <www.abs.gov.au/media-centre/media-releases/2021-census-shows-changes-australias-religious-diversity>.

54 Anthony Mellor, *Karl Rahner, Culture and Evangelization: New Approaches in an Australian Setting* (Brill, 2019) 57, doi.org/10.1163/9789004400313.

criticism. It states that Indigenous connection to the land is both ancient and ongoing and that this should be cherished by all Australians. Much more could justifiably be included. The phrasing of Lowitja O'Donoghue's proposed preamble is particularly worthy of consideration. Her draft includes the line: 'Australia recognises the Aboriginal peoples and Torres Strait Islanders as its indigenous peoples with continuous rights by virtue of that status'. The brevity of my acknowledgement is in keeping with the minimalist style of the whole preamble, but I would certainly welcome edits and improvements, particularly from Indigenous leaders. As stated above, its purpose is to act as a conversation starter, and any conversation on a new preamble must include First Nations peoples.

The clear theme in my preamble is the equality of Australian citizens. This is a principle that reaches across the political divide and sits at the heart of Australian democracy. It is for others to judge the shortcomings of this preamble, but I have some confidence that it at least holds up well against the current one and offers a better reflection of Australian civic values. Further, it offers a moral power that can be drawn upon. During the debates over marriage equality, for instance, would it have had any impact if campaigners could point to the preamble and note the guiding principle of equality? Or consider supporters of the Uluru Statement (I count myself in this camp). Would it make the case for a treaty and Voice to Parliament stronger if campaigners could point to the constitutional preamble and remind politicians that they are morally bound to cherish the ancient and continuing cultures that were here for tens of thousands of years before British colonisation? In both cases, the preamble would not have legal 'power over' and could not compel legislative change. A preamble such as mine would, however, exert a moral 'power to' and play some role in influencing opinions.

IV. The voice of the young

The 24th National Schools Constitutional Convention took place in Canberra from 19 to 21 March 2019. One hundred and twenty high school students from around Australia were selected to take part and discuss the constitutional preamble and debate if it should be changed. The convention included guest speakers (of which I was one), set readings and a chance to compare Australia's preamble to that of other nations. By far the most exciting part for students and facilitators alike was when the students broke

up into small working groups and drafted alternative preambles. After these were presented, the students voted on their preferred draft. Once an initial winner was selected, all students could propose amendments and edits that were voted upon until their draft reached a final form.

The final version read as follows:

We the Australian people, united as an indissoluble Commonwealth, commit ourselves to the principles of equality, democracy and freedom for all and pledge to uphold the following values that define our nation.

We stand alongside the traditional custodians of the land and recognise the significance of Aboriginal and Torres Strait Islander cultures in shaping the Australian identity, their sovereignty was never ceded.

As a nation and indeed community, we are united under the common goal to create a society catered to all, regardless of heritage or identity.

We pledge to champion individual freedom and honour those who have served and continue to serve our nation.

As Australians, we stand for the pursuit of a democratic State that upholds the fundamental principles of human values as set out by this Constitution.⁵⁵

After three days of robust discussion, students took part in one final vote to ratify their constitutional preamble. If ratified, it was explained that the preamble would be tabled in the Australian Senate. The penultimate vote saw a resounding 70.9 per cent ‘Yes’ result. It was endorsed by an absolute majority and a majority from each individual State and Territory. Only the students from New South Wales were close to rejecting the proposal with a vote of 15 ‘Yes’ and 13 ‘No’. The students’ preamble was tabled in the Senate on 2 April 2019 and entered into Hansard.

Some of the themes from the student’s preamble would have resonated with Australia’s constitution drafters but many others would appear quite alien. Direct similarities include the reference to an ‘indissoluble Commonwealth’ and the appeal to the ‘people’. In the latter case though, it must be

55 Benjamin Jones and John Warhurst, ‘Young Australians Champion “Democracy” and “Freedom” in Designing Constitutional Change’, *The Conversation* (online, 17 June 2019) <theconversation.com/young-australians-champion-democracy-and-freedom-in-designing-constitutional-change-118530>.

remembered that the students' conception of who is included in this often nebulous term 'the people' is likely broader than that of the constitution writers.⁵⁶ Soon after federation, women were included in the Australian polis through the *Commonwealth Franchise Act 1902*, but First Nations peoples were generally excluded. Similarly, the first significant legislation of the new federal Parliament was the *Immigration Restriction Act 1901*, part of the legislative architecture of the broader White Australia policy. The students' commitment to the 'principles of equality, democracy and freedom' would have been familiar to the constitution writers, and possibly approved by them, as they were proud of the democratic nature of their constitution. But the concept of equality would have had a different meaning. In 1901, in its narrowest form, it would have meant equality for white, adult, male British subjects; the broader conception would have included white, British women. However, for the students, it means equality for all adult Australian citizens 'regardless of heritage or identity'.

Other concepts from the students' preamble would have been completely foreign to the constitution writers. Although it did not make the final draft, the students debated if a commitment to protecting Australia's natural environment should be included—a notion that would not have occurred to many in 1901. The most controversial line in the students' preamble was the admission that 'sovereignty was never ceded'. There was much debate over the inclusion of this line and around a quarter of the students supported a motion to remove it. It is a line that would have made no sense to constitution writers who saw themselves as bringing the blessings of British civilisation and Christianity to Indigenous peoples. Today, the treatment of First Nations people, the negative impact of colonisation and the way Australian history is taught has been caught up in a culture war.⁵⁷

A key message from the students' preamble is that values matter and that the constitutional preamble is a place to house and express national ideals. Just like Howard's preamble in the 1990s, the wording of the students' preamble sparked passionate debate about what Australian national values are and how they can best be articulated. In both cases, there was an implicit recognition that, unlike the current preamble, a new preamble, deliberately crafted to serve as an important civic document, would carry moral power. While there is a great diversity of opinions as to what should be included

56 See Elisa Arcioni, Chapter 2, this volume, for further reflection on the meaning of 'the people' in the Australian Constitution.

57 See Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2003).

and excluded from a new constitutional preamble, there has been a general consensus since the 1990s that the current preamble does not accurately reflect the Australian polis and its democratic pillars.

V. Conclusion

In many nations, the constitutional preamble is well known. It is studied at school, recited regularly and exists as part of the nation's moral fabric. The Australian constitutional preamble, by contrast, is largely unknown. It is a legalistic document that primarily reflects Australia's place in the turn of the century imperial order. It does not attempt to establish national values or ideals. Despite broad agreement in the 1990s that the preamble should be changed (and no shortage of alternative preambles to consider), Howard's offering at the 1999 referendum lacked popular support.

The issue regained some momentum in 2012 when Prime Minister Julia Gillard launched the 'Recognise' campaign. She promised that: 'If re-elected, I will put to the Australian people within 18 months a referendum to formally recognise Indigenous Australians in our Constitution.'⁵⁸ However, Gillard would not face the 2013 election. She was replaced by former Prime Minister Kevin Rudd who would then lose the 2013 election to the Liberals, led by Tony Abbott. The Recognise campaign persisted but was criticised for its narrow scope and for appearing tokenistic. As Referendum Council member and law professor Megan Davis notes, even the word 'recognition' has been 'really problematic'.⁵⁹ On 6 July 2015, Aboriginal and Torres Strait Islander leaders met the prime minister to deliver the Kirribilli Statement on constitutional recognition. In it they stated:

A minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.⁶⁰

58 Julia Gillard, 'Prime Ministerial Statement: "Closing the Gap"', *Department of the Prime Minister and Cabinet* (Web Page, 15 February 2012) <pmtranscripts.pmc.gov.au/release/transcript-18388>.

59 Bridget Brennan, 'Recognise Campaign Ends after Making "Significant Contribution"' (online, 11 August 2017) *ABC News* <www.abc.net.au/news/2017-08-11/recognise-campaign-wound-up/8797540>.

60 'Statement Presented by Aboriginal and Torres Strait Islander Attendees at a Meeting Held with the Prime Minister and Opposition Leader on Constitutional Recognition', *ANTaR* (Web Page, 6 July 2015) <www.austlii.edu.au/au/journals/ILB/2015/37.pdf>.

The Recognise movement has since been eclipsed by the 2017 Uluru Statement from the Heart that calls for structural change, including a Voice to Parliament, Treaty and a Makarrata (or truth-telling) Commission.⁶¹ The message from supporters of the Uluru Statement is clear: recognition in the preamble, by itself, is inadequate. As Davis puts it: ‘However important symbols are ... Aboriginal and Torres Strait Islander peoples do not seek more symbols.’⁶² There is an important nuance, however, between updating the preamble in an attempt to achieve reconciliation and doing so as part of a broader project of updating Australia’s impartial symbols. John Pyke argues that ‘if the consultation with Indigenous Australians shows that they do not want recognition by way of a “preamble”, then we should not add a new preamble *as part of the recognition project*’.⁶³ A new constitutional preamble is not a substitute for structural change and should not distract from that mission. Nor should politicians be able to use a new preamble as a quick fix or excuse to stop listening to Indigenous voices. Nevertheless, updating the preamble remains a worthy goal and one that requires deep discussion and wide consultation. Further, any new preamble would have to acknowledge both the historic and continuing place of First Nations peoples in Australia.

As a multicultural and secular democracy, Australian values are contested and malleable. They spring from its citizens, not from any document, however revered. Of course, just writing something down in a preamble does not make it so, but neither is it meaningless to write it down. To this end, there is a symbiotic relationship between the lived values of a people and their stated values in a preamble or anywhere else. Each can reinforce and support the other. Although it would not be legally binding, a statement of values in the preamble to the Australian Constitution would lend it a moral authority to both guide and reflect national identity. The moral power of a preamble is what Max Weber called an ‘ideal type’.⁶⁴ In other words, the values will not exist in reality, at least not in a pure form, but can be an aspiration. Hans Kohn makes the important distinction between ethnic and civic nationalism. The former is exclusive and race-based while the latter is

61 ‘Uluru Statement from the Heart’, *Referendum Council* (Web Page) <www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>.

62 Megan Davis, *Constitutional Recognition for Indigenous Australians Must Involve Structural Change, Not Mere Symbolism* (online, 18 February 2020) *The Conversation* <theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>.

63 John Pyke, ‘Reasons Not to be Scared of a New Constitutional Preamble’, *AUSPUBLAW* (Blog Post, 18 May 2015) <auspublaw.org/2016/05/reasons-not-to-be-scared/> (original emphasis).

64 Max Weber, tr Edward A Shils and Henry A Finch, *Methodology of Social Sciences* (Routledge, 2011) 43.

inclusive and rights-based.⁶⁵ For much of the twentieth century, parts of the Australian Constitution, as well as many laws, were overtly racist and built on the presumed superiority of a white British monoculture. A new preamble, explicitly based on civic national ideals, clearly stating the equality of citizens and acknowledging the prior occupation of First Nations, would possess moral power and be a conscious act of decolonisation.

There will never be perfect agreement on the wording of a new preamble. To survive a referendum, Australians must be willing to compromise and cooperate. If a new preamble, doubtless still with critics, is put to a referendum, Australians will be called on to calmly consider if the proposed alternative serves the nation better than the present one. If the perfect becomes the enemy of the good, the States and Territories that make up the Australian Commonwealth will be known in perpetuity as a 'possession of the Queen'.

65 Hans Kohn, *The Age of Nationalism: The First Era of Global History* (Greenwood Press, 1962).

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