RECOGNISING INDIGENOUS PEOPLES IN THE PREAMBLE:

IMPLICATIONS, ISSUES AND INTERPRETATION

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(updated by Kristyn Glanville, 2011)

The Expert Panel assembled by the Australian Government in 2010 represents a new opportunity to build a national consensus on the place Indigenous Australians have in our foundational legal document.[1] Whilst the Panel is the political bi-product of an agreement made between the Australian Labor Party, Independent Andrew Wilkie and the Australian Greens in forming the requisite support for a Labor minority government,[2] there is "in principle support" by the three major political parties for at least some form of preambular recognition of Indigenous Australians.[3] The Expert Panel is due to report back to the Government with proposals for the referendum and their degree of community support in December 2011.[4]

This is not the first time the issue of whether the Preamble should be altered to recognise Australia's First Peoples has arisen. The 1998 Convention recommended that a new preamble should contain: 'Acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders'.[5] A further matter to be 'considered' for inclusion was: 'Recognition that Aboriginal people and Torres Strait islanders have continuing rights by virtue of their status as Australia's Indigenous peoples.'[6] Such consensus that a reference to indigenous peoples should be included in a new preamble was a reversal of all previous official positions.[7]

There have been numerous historical warnings about the potential legal consequences of a reference to Indigenous peoples in the constitutional preamble. A submission to the 1988 Constitutional Commission criticised an Advisory Committee's recommended preamble,[8] identifying the reference to Aboriginal peoples as leading to potential undesirable legal consequences.[9] The 1993 Republic Advisory Committee did not recommend a new preamble, but merely indicated the various options available if the preamble were to be changed.[10] The failure to make any specific recommendation included concern about constitutional implications 'not foreseen' by the authors.[11] The advice of the Acting Solicitor-General had no objection to a reference to 'prior Aboriginal presence', but did raise caution about a reference to '*rights* of any kind'.[12] Malcolm Turnbull subsequently cited the advice of the Acting Solicitor-General, writing at the time that: 'It is probably far safer, then, not to make reference to controversial issues such as Aboriginal prior occupation of Australia'.[13] Sir Harry Gibbs argued that it was basically 'irrelevant' and 'out of place' to include a reference to Indigenous peoples in a new preamble.[14]

Proposed preambular references to Indigenous peoples have generally included information about the following matters:

- occupation of the land;[15]
- care of the land;[16]
- ownership of the land;[17]
- dispossession of the land;[18]
- distinct cultural status;[19] and
- continuing rights.[20]

The matters that have the greatest likelihood of implementation in some future preamble are those that have enjoyed a degree of endorsement by some political party or constitutional convention: namely matters related to occupation of the land, care (or custodianship) of the land, and Indigenous cultural status.[21] Whilst at present, all three major parties support recognising Aboriginal and Torres Strait Islander People in general terms, only the Greens has framed this recognition in terms of rights, sovereignty, and traditional ownership.[22] Labor and the Liberals have framed their support in rather more circumspect terms: '[recognising] the unique and special place of our first peoples'[23] and 'recognition of Indigenous Australians'[24] respectively.

Debate over the legal significance of a reference to Indigenous peoples has highlighted the diverse motivations of the reformers. The *idealists* focus on the symbolic importance for reconciliation of a reference to Aboriginal peoples in the preamble, and so they emphasise the preamble's non law-making status.[25] The *strategists* hope for wider constitutional reform in the future, but consider that a new preamble might be a stepping stone towards realising substantive change.[26] Indeed, commentators such as Social Justice Commissioner Mick Gooda are of the view that preambular recognition should be accompanied

by other substantive changes:

> [The forthcoming referendum] not only provides us with a chance to reconstruct our national identity through recognition – it will also allow us to remove the provisions within the body of the Constitution that permit, enable or anticipate racial discrimination – namely ss 25 and 51(xxvi).[27]

Pragmatists, from both the conservative groups and the reform-oriented groups, recognise that public opinion is behind the call to recognise Indigenous peoples in the preamble, but that political pressure will constrain the breadth of the reference.[28] Finally, there are those whose desire for substantive reforms causes them to approach a preambular recognition of Indigenous peoples with scepticism,[29] considering the preamble proposal to be a distraction from the core matters of reform.[30]

STATUS OF THE REFERENCE TO INDIGENOUS PEOPLES

No matter how radically progressive an approach to constitutional interpretation is adopted, in all instances, a preamble is still considered to be a non law-making part of the instrument.[31] Thus, a reference to 'continuing rights' would not be a declaration of law; and a statement about ownership of land would not establish legal title in property law. Furthermore, the Federal Government would not be authorised to legislate on any matter with respect to Indigenous peoples, purely by virtue of the preambular recitals. Similarly, a reference to 'continuing culture' would not automatically make lawful all aspects of that culture. In order to remain consistent with the non law-making status of a preamble, Mark McKenna has argued that it is important to avoid using the word 'rights' in a new preamble, as the appropriate place for such a word is in a Bill of Rights.[32]

The traditional approach to statements of fact in a preamble, is to acknowledge that they are evidence of the opinions of the Legislature; not true by virtue of their recital, but prima facie evidence of the truth; and admissible in court.[33] It is partly this legal status that has caused some commentators to reject a reference to ownership or dispossession in a preamble.[34] However, others have argued that *Mabo's Case*[35] established as much about the dispossession of Indigenous peoples as any preamble is likely to do.[36]

In any case, the non law-making nature of a preamble means that the facts recited within it might conceivably be subject to judicial disregard in the future, just as the current preambular reference to the Crown is now considered to be partially inaccurate.[37]

INTERPRETIVE ROLE OF THE REFERENCE TO INDIGENOUS PEOPLES

Analysis on the interpretive role of the preamble to the constitution assumes that any new preamble inserted before the substantive Constitution is in fact drafted as a "preamble" – with reference to the preamble's established nature as part of an Act of Parliament. The legal and constitutional significance of such text is much easier to assess than the very different scenario, where if the text that were proposed was not actually a "preamble" but rather something completely new like a "declaration of the people of Australia." Much of the confusion and misinformation surrounding the significance oa a preamble has actually stemmed from a misunderstanding of what a "preamble" actually is.[38]

A reference to Indigenous peoples in a new preamble could foreseeably lead to arguments with respect to the interpretation of at least three constitutional provisions. Firstly, the race power in s 51(xxvi) includes the statement, 'for whom it is deemed necessary to make special laws'. Judicial debate has occurred over whether laws created under the race power can be detrimental to Aboriginal people, or must be only beneficial to them.[39] Secondly, the issues of Indigenous ownership and dispossession of land can arguably be relevant to the application of the provision for the acquisition of property on just terms in section 51(xxxi). Whilst *Wurridjal v Commonwealth*[40] determined that the just terms provision does apply to Aboriginal Land, whether this position would be entrenched or altered by preambular recognition would be left open. Thirdly, for decades, and more recently in light of the *Declaration of the Rights of Indigenous Peoples*, many Aboriginal leaders such as Les Malezer have argued for self determination,[41] which challenges the very fabric of the federal structure of Australia.

Another matter which could potentially be raised in the context of a debate about continuing Indigenous culture, is the status of Aboriginal customary law. This is already a contentious issue within the criminal law, as New South Wales courts have utilised Aboriginal Customary law to inform the sentencing outcomes of Aboriginal offenders.[42]

Comments by early drafters, commentators and courts, indicate that the ordinary principles governing statutory preambles were intended to be applied to the Constitution of Australia.[43] A review of the treatment of the current Australian constitutional preamble by the High Court indicates that in fact the judgments are largely consistent with the application of the ordinary principles governing preambles.[44] However there is no doubt that the distinctive

demands of constitutional interpretation mean that judicial progressive approaches are increasingly being seen alongside the traditional approaches of original intention and literalism.[45]

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. A traditional Act of Parliament approach to interpretation - which accords both a constructive and a contextual role to the preamble - emphasises the fact that the preamble is a good guide to the intentions of the drafters with respect to the intended meaning of the text.[46] Unless the preamble is comprehensively clear in comparison to the ambiguous substantive provision, the preamble will have no influence on the meaning of the text.[47] Furthermore, where it is clear that the text intends to apply beyond the scope of the preamble, then the substantive text will prevail. In this environment, the race power could not be restrained, the just terms provision would not be influenced and no matters of self-determination are raised.

If a more progressive Act of Parliament approach is adopted, then potentially a preamble could be used to confirm the existence of various underlying constitutional principles, and the preamble might indicate a preferred interpretation of ambiguous provisions. Potentially, a preambular reference to Indigenous culture or rights could lead to the inference of a constitutional principle of protection of the equality and rights of Indigenous peoples. However, unless such a principle was reflected in the wider Constitution, there could be little influence in constitutional interpretation without inadvertently according the preamble a substantive status. For instance, it is untenable to argue that a preambular reference to a distinct Indigenous culture indicates that the marriage power in s 51(xxi) cannot be used to prohibit marriages which are polygamous or involving under-age girls.[48] It is inconceivable that the drafters would intend such a legal result. One of the disadvantages of using a new preamble as a guide to a preferred interpretation is the fact that a new preamble could probably be used on both sides of the argument.

However, a different argument might be put with respect to the race power. The race power has already been the subject of debate because of its ambiguity, and a progressive court might consider that a new preamble was confirmation of a principle already evident in the amended s 51(xxvi). If the minority view of Kirby J in the *Hindmarsh Island Bridge Case*[49] were adopted with respect to the nature of the race power, it is conceivable that a new preamble might be used by the High Court to support an interpretation which limited the race power to laws that were 'beneficial' and not detrimental. Despite the possibility of progressive court using a new preamble to clarify an ambiguous constitutional provision, it is not likely or appropriate that the Australian High Court will adopt a wholly new approach which gives the preamble equal status with the substantive text of the constitution. This would be a complete paradigm shift in Australian constitutional interpretation, and in truth, if such a change occurred, then the legal effect of any preamble would surely be overshadowed or swamped by other more radical influences allowed by such a liberal approach to constitutional interpretation.[50]

The most controversial issue in the 1999 referendum debate was the implications for matters of native title and compensation if a reference to 'ownership' of land were included in a new preamble. 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.[51] 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.'[52] 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 direction that the law has taken in the years following *Mabo's Case*. The law in this area is far more settled, and a large number of Native Title claims and Indigenous Land Use Agreements are consented to by the relevant Indigenous communities, government bodies and other private interests following negotiations.[53] Also, it is now evident that the common law principles established in *Mabo's Case*[54] have the potential to be altered by future amendments to the *Native Title Act*, as highlighted by *Yorta Yorta.*[55]

A potential area of contention for the present debates may focus on broader questions of whether preambular recognition would attract compensation for past injustices, for example the Stolen Generations, or funding to facilitate communal rights more generally, for example, welfare schemes targeted at Indigenous people. This was demonstrated through the discourse following the 2008 Apology by former Prime Minister Kevin Rudd[56] on whether or not compensation was owed on the basis of the apology.[57] In a similar vein, whilst the preambles

of New South Wales,[58] Victorian[59] and Queensland[60] State Constitutions have all been amended to recognise Indigenous Australians, they also expressly state that the recognition attracts no rights, liabilities or interpretive meaning. The expressly non-binding nature of the recognitions provided appears to reflect the fear that courts might utilise the preamble when interpreting legislation or determining lawsuits, forcing governments to pay compensation or curtailing them from enacting legislation which purports to limit the rights of Indigenous People. Such proposed judicial treatment of a preamble goes far beyond anything permitted by the traditional Act of Parliament approach to preambles used by the High Court in Australia. It would be misguided to think that a preamble could be treated like a Bill of Rights, and so provide for a much broader judicial reference point. This misguided view about a wildly elevated view of the legal power of a preamble is part of the rationale for the various non-justiciability provisions that have been proposed to accompany preambles – including the proposed s 125A which failed at the 1999 referendum. Such an approach is arguably both unnecessary, inappropriate, and bound to create an impression of insincerity and defensiveness on the part of the legislature.[61] Nevertheless, if the final proposed text is actually more like a "declaration of the people of Australia" rather than a true "preamble," then the common sense approach would be to have an accompanying non-justiciability clause.

Such preoccupation with matters of legality in relation to a new preamble has caused the Government, and other commentators, to lose sight of the equally important issue of symbolism in the Constitution.[62] Gatjil Djerrkura reminded us that it is not only the substantive clauses of the Constitution which are important, but also the 'nation's vision'.[63] In the words of Mick Gooda:

> [I]t is important that all Australian's are aware that constitutional reform is not just about Aboriginal and Torres Strait Islander people... It's not about looking back. It's about looking forward and moving forward as one, united nation... This will be a great and rare opportunity, to reframe and reset our relationship as a nation.[64]

This article is based on a Case Study contained in Anne Winckel, The Constitutional and Legal Significance of the Preamble to the Commonwealth Constitution, Past, Present and Future *(LLM Thesis University of Melbourne, 2000) 214. The 2000 Case Study has been updated by Kristyn Glanville to reflect more recent developments.*

1 Prime Minister, Minister for Indigenous Affairs, and Attorney-General (Cth), 'Expert panel on constitutional recognition of Indigenous Australians appointed' (Media Release, 23 December 2010) < http://www.pm.gov.au/press-office/expert-panel-constitutional-recognition-indigenous-australians-appointed>.

2 Sean Brennan, 'Chance for change: Sean Brennan on Indigenous Australians & constitutional change' Lawyer's Weekly (online), 11 August 2011 <http://www.lawyersweekly.com.au/blogs/opinion/archive/2011/08/11/chance-for-change-sean-brennan-on-indigenous-australians-amp-constitutional-change.aspx>.

3 Liberal Party of Australia, 'The Coalition's Plan for Real Action for Indigenous Australians' (Coalition Election Policy, 2010) 2, 4 <http://www.liberal.org.au/~/media/Files/Policies%20and%20Media/Community/Indigenous%20Australians%20Policy.ashx>; The Australian Greens, 'Constitutional Reform and Democracy' (Australian Greens Policy, June 2008) [8], [18], [19] <http://greens.org.au/sites/greens.org.au/files/policydownloads/E1%20Constitutional%20Reform%20and%20Democracy%20June%202008.pdf>; Jenny Macklin, 'Recognising Aboriginal and Torres Strait Islander peoples in the Constitution' on Australian Labor Party, *Labor Blog* (17 November 2010) <http://www.alp.org.au/blogs/alp-blog/november-2010/recognising-aboriginal-and-torres-strait-islander-/>.

4 Brennan, above n 2.

5 'Communique', *Report of the Constitutional Convention: 2-13 February 1998*, vol 1, Report of the Proceedings, 46.

6 Ibid, 47.

7 See, eg, *Final Report of the Constitutional Commission*, vol 1(1988) 2, 101; Republic Advisory Committee, *An Australian Republic: The Options - The Report*, vol 1 (1993) 9, 137.

8 The rejected proposal included a reference to indigenous peoples: 'Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership': Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution* AGPS, 1987, Chapters 3 and 4.

9 *Final Report of the Constitutional Commission*, above n 7, 108.

10 Ibid, 138-41.

11 Ibid, 137.

12 Republic Advisory Committee, *An Australian Republic: The Options – The Appendices*, vol 2 (1993) 304-5.

13 Malcolm Turnbull, *The Reluctant Republic* (1993) 182.

14 Sir Harry Gibbs, 'A Preamble: The Issues' (Paper, The Samuel Griffith Society, August 1999) 9.

15 Eg, 'prior and continuing occupiers': Frank Brennan (1999); 'nations first people': Referendum proposal (6.11.99).

16 Eg, 'custodians of our land': Opposition parties (29.4.99); 'deep kinship with their lands': Referendum proposal (6.11.99).

17 Eg, 'previously owned': Constitutional Commission Advisory Committee on Individual and Democratic Rights (1987); 'traditional titles to the land': Aboriginal and Torres Strait Islander Commission (1993).

18 Eg, 'never ceded ownership': Constitutional Commission Advisory Committee on Individual and Democratic Rights (1987); 'dispossession and dispersal': Aboriginal and Torres Strait Islander Commission (1993).

19 Eg, 'distinct cultural status': Aboriginal and Torres Strait Islander Commission (1993); 'ancient and continuing cultures': John Howard (23.3.99) & Referendum proposal (6.11.99).

20 Eg, 'continuous rights': Lowitja O'Donoghue (1996); 'continuing rights': Frank Brennan (1999).

21 See, the preambles to the *Council for Aboriginal Reconciliation Act 1991* (Cth) and the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

22 The Australian Greens, above n 3.

23 Jenny Macklin, above n 3.

24 Liberal Party of Australia, above n 3.

25 Eg, Mark McKenna, 'The Preambles Shambles' in John Uhr (ed), *The Australian Republic: The Case For Yes* (1999) 132, 138-9.

26 Eg, Gatjil Djerrkura, 'Making the Republic Important to a Majority of Australians' in John Uhr (ed), *The Australian Republic: The Case For Yes* (1999) 92, 95-6. See also the Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995) 36.

27 Mick Gooda, 'Constitutional Reform: Creating a Nation for all of us' (Speech delivered at Eidos Institute Event, The State Library Brisbane, 23 February 2011) <http://www.hreoc.gov.au/about/media/speeches/social_justice/2011/20110223_eidos.html>.

28 See Frank Brennan, 'The Prospects for National Reconciliation Following the Post-Wik Standoff of Government and Indigenous Leaders' (1999) 22 *UNSW Law Journal* 618, 623.

29 See, eg, Patrick Dodson, 'Until the Chains are Broken: The Fourth Annual Vincent Lingiari Memorial Lecture 1999' (1999) 10 *Public Law Review* 248, 249; Frank Brennan and James Crawford, 'Aboriginality, Recognition and Australian Law: The Need for a Bi-Partisan Approach' (1990) 62 *The Australian Quarterly* 145, 160.

30 For instance, there are numerous examples of countries that have provided specific laws for self government or indigenous seats of Parliament: see Garth Nettheim, 'Indigenous Australians and the Constitution' (1999) 74 *Reform* 29, 32; Patrick Macklem, 'Indigenous Peoples and the Canadian Constitution: Lessons for Australia?' (1994) 5 *Public Law Review* 11, 32.

31 See, eg, examples from India, Canada, the United States, Botswana and Solomon Islands; Anne Winckel, 'Chapter 4: Preamble to the Constitution: Future Possibilities' in Anne Winckel, *The Constitutional and Legal Significance of the Preamble to the Commonwealth Constitution, Past, Present and Future* (LLM Thesis University of Melbourne, 2000), 181 [n 336].

32 Mark McKenna, 'The Preambles Shambles' (1999) above n 25, 138.

33 Anne Winckel, 'Chapter Two: Preambles in Ordinary Statutes', in Anne Winckel,*The Constitutional and Legal Significance of the Preamble to the Commonwealth Constitution, Past, Present and Future* (LLM Thesis University of Melbourne, 2000), [2.3].

34 SeeRichard McGregor, 'Preamble a War of Word', *The Australian*, 30 April 1999, 1.

35 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 16-76 (Brennan J; Mason CJ & McHugh J concurring) & 76-120 (Deane & Toohey JJ) (*Mabo's Case*).

36 Eg, Mark McKenna, 'The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights' (Research paper No 12, Parliamentary Library, Parliament of Australia, 1996-97) 10-11.

37 Anne Winckel, 'Chapter Three: Preamble to the Constitution: Past & Present',' in Anne Winckel, *The Constitutional and Legal Significance of the Preamble to the Commonwealth Constitution, Past, Present and Future* (LLM Thesis University of Melbourne, 2000), [3.4]

38 Anne Winckel, "So What Exactly Is a Preamble?" (2000) 25 *Alternative Law Journal* 85.

39 Eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361-8 (Gaudron J), 381-3 (Gummow & Hayne JJ) & 411-19 (Kirby J, dissenting). See also, George Williams, Stephen Gageler and Geoffrey Lindell, 'October Symposium - The Races Power' (1998) 9 *Public Law Review* 265.

40 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2.

41 See, eg, Les Malezer and Naomi Hart (2009) 'An Interview with Les Malezer' 7(11) *Indigenous Law Bulletin*, 9-12.

42 See, eg, Law Reform Commission (NSW), Sentencing: Aboriginal Offenders, Report 96 (2000) [3.31-3.32].

43 Anne Winckel above n38, 66-79.

44 Anne Winckel, above n 38, 80-93.

45 Anne Winckel, above n 33 132-139.

46 See Anne Winckel, "The Contextual Role of a Preamble in Statutory Interpretation" (1999) 23 MULR 185-186.

47 Zines has suggested that a preambular reference to 'continuing rights of Aborigines' is ambiguous and 'uncertain', Leslie Zines,"Preamble to a Republican Constitution" (1999) 10 *Public Law Review* 67, 68.

48 See Garth Nettheim, 'Indigenous Australians and the Constitution' (1999) 74 *Reform* 29, 32.

49 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 411 (Kirby J, dissenting).

50 Anne Winckel, above n 33, Chapter 4,176-181.

51 For a discussion of the various proposals put at the 1998 Constitutional Convention, see Frank Brennan, 'The Prospects for National Reconciliation Following the Post-Wik Standoff of Government and Indigenous Leaders' (1999) 22 *UNSW Law Journal* 618, 622.

52 Patrick Dodson, above n 29, 249.

53 For further details, see Native Title Tribunal, *Native Title in Australia: National Perspective* (31 December 2010) Commonwealth of Australia <http://www.nntt.gov.au/NATIVE-TITLE-IN-AUSTRALIA/Pages/National-Perspective.aspx>; Native Title Tribunal, *About Indigenous Land Use Agreements*, Commonwealth of Australia <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/About_iluas.aspx>; Native Title Tribunal, *Three Approaches to negotiating Native Title*, Commonwealth of Australia <http://www.nntt.gov.au/What-Is-Native-Title/Pages/Approaches-to-Native-Title.aspx>.

54 *Mabo's Case*above n 35, Mark McKenna, above n 36.

55 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422, [45]-[47], [74]-[77] (Gleeson CJ, Gummow J, and Callinan J), [109]-[11] (Gaudron and Kirby JJ).

56 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister) ('Apology to Australia's Indigenous Peoples').

57 See, for example comments by former Opposition Leader Brendan Nelson: 'There is no compensation fund, nor should there be.' Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 175 (Brendan Nelson, Opposition Leader). See also Michelle Grattan and Tony Wright, 'Rudd rules out compensation' *The Age* (online), 2 February 2008 <http://www.theage.com.au/news/national/rudd-rules-out-stolen-generation-compensation/2008/02/01/1201801035355.html>.

58 *Constitution Act 1902* (NSW) s2.

59 *Constitution Act 1975* (Vic) s1A.

60 *Constitution (Preamble) Amendment Act 2010* (QLD) s4(c).

61 Anne Winckel, "A 21st Century Constitutional Preamble – An opportunity for unity rather than partisan politics" 24(3) *UNSW Law Journal* 636, 644-648.

62 Jeremy Webber, 'Constitutional Poetry: The tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 276; Mark McKenna 'The Tyranny of Fashion: John Howard's Preamble to the Australia Constitution' (1999) 10 *Public Law Review* 163, 165.

63 Djerrkura, above n 26, 96.

64 Mick Gooda, above n 27.