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The con-cons' constitutional conundrum

GREG CRAVEN THE AUSTRALIAN FEBRUARY 19, 2014 12:00AM

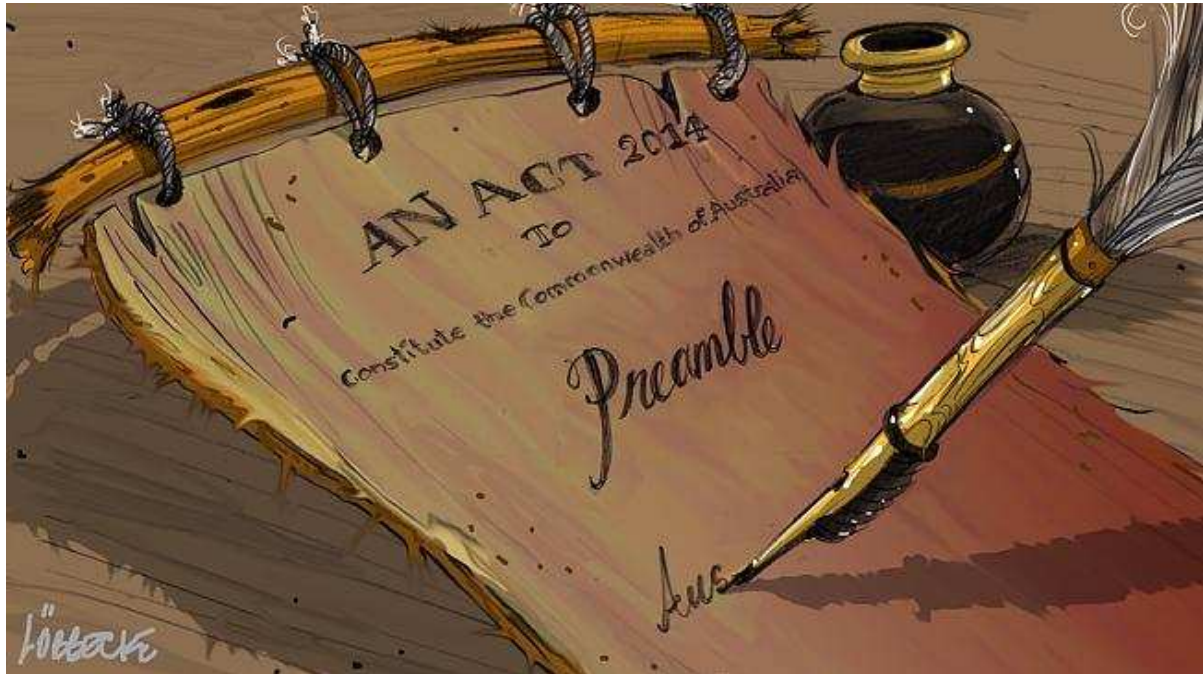


Illustration: Eric Lobbecke Source: Supplied

THE worst thing about moments of great opportunity is they also are moments of vast potential failure. Australia faces one of these right now.

Over the next two years, we will decide if and how our Aboriginal people will be recognised in our Constitution. We have a committed Prime Minister, and a committed opposition. We have a receptive electorate. There will never be a better time.

We have no choice but to address the question. If constitutions deal with fundamental things, our indigenous heritage is pretty fundamental. Anyway, the Constitution already contains enough references and silences to beg the question.

Paradoxically, there are two very different groups whose conduct will both frame and decide this issue.

The first, naturally, is our indigenous people. There is no point in doing something they do not support. Correspondingly, if their demands are so radical their fellow Australians will never agree, the exercise is doomed from the outset.

This was the problem with the Gillard government's expert panel, which went beyond its brief and demanded a bill of rights-style sweeping guarantee of general equality.

The other critical group is Australia's small but influential band of constitutional conservatives. With a conservative government and a referendum-phobic electorate, they can kill a proposal stone dead, as they did with the proposed recognition of local government last year.

But indigenous recognition is not local government. The central loyalty of con-cons always will be to the Constitution itself. But they are as alive to the just claims of indigenous people as anyone else.

Which means they face a grave moral dilemma. If they enthusiastically oppose a proposal, it will collapse. Equally, if they concede ground too easily the proposal will become too radical for Australia's delicate constitutional stomach, with the same result.

Worse, this would be no ordinary loss. Popular rejection of a proposal for indigenous recognition would be a rebuke to Aboriginal people so stinging it would amount almost to a repudiation of the 1966 referendum result. No decent conservative wants this.

Privately, con-cons are agonising over this conundrum.

They know the best way forward is in lockstep not only with each other, but with the indigenous community.

But what tune would produce this remarkable harmony?

There are three sets of issues to be resolved around indigenous recognition. Loosely, they comprise the technical, the symbolic and the operational.

Surprisingly, the technical constitutional issues probably are the easiest to resolve. With a modicum of goodwill and fair dash of restraint, it should be possible to fix both the constitutional provisions dealing with race, one relating to elections and the other to the powers of the commonwealth parliament.

Symbolism is much harder, because it engages the emotions. On one level, by definition, symbols do not practically matter. But try saying that about other symbols, like the flag and the monarchy.

The main issue here is the preamble, effectively the poem at the beginning of the Constitution.

Should it contain a short, dignified inclusion of indigenous people, along with the present references to the states, federalism and the monarchy?

On this, conservatives are divided. Many including myself believe a carefully drafted statement could only improve the Constitution. Others, in complete goodwill towards indigenous people, fear what an adventurous High Court might do with such words.

Unfortunately, the record of that court is not entirely encouraging on the point of interpretative fidelity. But cautious wording would minimise the problem.

There are, however, alternatives that need to be considered, and this is where the symbolic overlaps with operational.

If there are particular problems in toying with the preamble or the Constitution, could we have our cake and eat it too?

Symbolically, could our national parliament - or all our parliaments together - enact some special opening statement to precede even the preamble, solemnly recognising the position of indigenous people?

It would not technically be part of the Constitution, but it would be printed with and introduce it. Culturally, the distinction over time would be negligible.

Operationally, could we go further? At the end of the constitution booklet, could there be a much longer solemn Declaration of Reconciliation, enacted by the same process?

This might contain many of the wider matters canvassed by the expert committee, such as commitment to Aboriginal language and culture which never realistically will make it into the Constitution.

The declaration would not have legal force, but its moral power would be immense. Its status as neighbour to the Constitution would make this clear.

The question is, which combination of moderation will win the day?

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