

Restoring the Federation

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*The 1999 Sir Robert Garran Oration, delivered at the IPAA National Conference, Darwin
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As your Conference program reminds you, Sir Robert Garran was secretary of the committee that drafted the Federal Constitution that emerged from the 1897–98 conventions, and was the first Commonwealth public servant, remaining head of the Attorney-General's Department for a staggering 32 years.

On his first day on the job he wrote:

My first duty on 1st of January was to write out in longhand the first number of the *Commonwealth Gazette* and send myself down to the printer with it. The next job was to arrange the elections for the first Federal Parliament.¹

That seems like the right sort of priority order for an accomplished public administrator to set.

He also attended meetings of the Imperial War Cabinet in London during the Great War and was at the Peace Conference in Paris with Billy Hughes. Although he is widely recognised, with co-author John Quick, for the monumental *Annotated Constitution of the Australian Commonwealth*,² it is perhaps less widely known that Garran was an ardent federalist, a kind of 'honorary private secretary' to Edmund Barton in the early 1890s (when Garran was in his mid-

twenties), and a delegate to the historic Corowa conference.

He maintained a lifelong interest in these issues, shown clearly in his autobiography *Prosper the Commonwealth*³ published shortly after his death in 1957, aged almost 90.

I am greatly honoured to have been invited to deliver this year's Garran Oration, which commemorates that unique man's contribution over a long and productive life to our country and to the discipline that most of us here have pursued for some of our working lives — perhaps not always with the same distinction achieved by Garran.

In choosing a theme for this year's Oration I was tempted for a time to address you on the lessons to be drawn from almost 13 years experience in the Northern Territory's public service, which I consider to be one of the most vibrant, imaginative and disciplined in this country. That would have given me a platform, before a very distinguished audience, from which to take a considered swipe at a selection of the new icons of public administration and policy, including, for example, accrual accounting by general government and zero debt tolerance.

I concluded that this would have been a touch self-indulgent and almost certainly ineffective. What I have chosen to do, instead, is to take you back to the most important task performed by Garran — assisting in the drafting of our federal Constitution — and offer some observations on how he might view the results today.

I hasten to point out that I am not going to inflict you with yet another oration on the republic versus the monarchy, although some aspects of what I will be saying to you this evening might show a superficial resemblance to aspects of that current debate. Instead, I invite you to compare the map of Australia with the map of the Federation of Australian states in 1901.

They were, of course, identical. As Edmund Barton said to Garran after a late night working session in the early 1890s:

For the first time in history, we have a nation for a continent, and a continent for a nation.⁴

The Constitution to which the six States jointly subscribed in 1901 applied equally and everywhere within Australia.

I now invite you to make the same comparison, almost a century later, in 1999. The maps *are not the same*. Australia has not changed, but the Federation has an enormous bite out of it, coinciding exactly with the boundaries of the Northern Territory where you are today.

One-sixth of Australia's land mass is now excluded from the Federation, as a result of the 1911 surrender by South Australia of its northernmost territory to the Commonwealth. The Australian Constitution does *not* apply equally and everywhere within Australia, and has not for the past 88 years.

My Pocket Oxford indicates that to orate can be *to hold forth* or *harangue*, and that is what I intend to do about this unsatisfactory state of affairs for the balance of this Oration. I believe that Robert Garran and Edmund Barton would have approved.

Let me start by listing, for those of you who do not know or need to be reminded, the differences from the states that are evident to those who live or legislate within the Northern Territory of Australia:

First: Any Act passed by our Territory Parliament can be overturned by the Federal Government, providing it is disallowed by the Governor-General within six months of its

assent by the Northern Territory Administrator.

A shrinking number of people recall that a Territory Act legalising euthanasia in the Northern Territory was overturned in 1996 by a Private Member's Bill in the Federal Parliament. Not too many realise how simply the Federal Government could have achieved that end, if it had been inclined to do so and had acted within six months of my predecessor's assent to the Territory Act in question.

Second: The Commonwealth can acquire the property of the Territory and its citizens without payment of compensation.

The Australian Constitution demands that compensation on just terms be paid to a state when its property is acquired by the Commonwealth. To date almost half of the Northern Territory's landmass has been removed from Northern Territory ownership under the Federal Government's *Aboriginal Land Rights (Northern Territory) Act 1976*, with no compensation whatsoever paid to the Territory.

Third: Unlike in the states, all uranium deposits in the Territory are owned by the Commonwealth rather than the Territory.

As Head of Treasury in the Northern Territory for many years, I was regularly affronted by demands that we become less dependent on Federal funding by raising more revenue from our own resources, knowing full well that a major potential source of revenue available to state governments was barred to us.

Fourth: The vote of other Australians in a national referendum counts, in effect, twice (once as an Australian and once as a state voter), while a Territorian's vote counts but once.

Territory voters play no part in determining the 'majority of the states' requirement for the passage of a referendum. For my part, I take no consolation from the fact that the people of Norfolk Island, the ACT and Christmas Island are similarly deprived.

In short, Territorians do not have the protection of the Australian Constitution in a number of important areas. I am sure that Robert Garran would have found this situation intolerable and indefensible.

The list of significant differences is not yet complete.

Fifth: The administration of two of the Territory's 98 parks and reserves is vested in the Commonwealth.

Uluru-Kata Tjuta and Kakadu national parks

are administered from Canberra, notwithstanding that the Territory Parks and Wildlife Commission has an admirable record of managing the other 96 parks and reserves, many of them under joint management arrangements with Aboriginal Territorians.

As public administrators, you are entitled to query the cost-effectiveness of such a duplication of services and expertise.

Sixth: The head of state of the self-governing Northern Territory of Australia is appointed by the Commonwealth Government, not by the Territory.

The fact that consultation takes place does not diminish the perception of government from another place.

As one of the delegates to our own constitutional convention pointed out, a touch undiplomatically:

another point about having a home-grown, acclimatised head of state is that if we do pick a deadhead, at least it will be our own deadhead.⁵

Seventh: There have been numerous boundary and responsibility changes affecting what we now know as the Northern Territory.

For a long time, the Northern Territory formed part of the Colony of New South Wales and was administered from Sydney. In 1863 responsibility for administration of the Territory passed to South Australia, and upon Federation in 1901 the Territory was incorporated into the original state of South Australia. In 1911 South Australia gave us back to the Commonwealth. In 1926 the Territory was divided into North and Central Australia but that change lasted only five years until 1931, when the division was abolished.

The Territory has grown and shrunk, been reshaped and reshuffled from afar, and there is nothing to stop these unsettling and destabilising administrative experiments starting again tomorrow.

Eighth: Representation of the Northern Territory in the Commonwealth Parliament has crawled forward over the years, and remains subject to political fortune.

It was not until 1922 that the Territory gained a member in the House of Representatives, and a non-voting member at that.

Our Federal Member was allowed to listen to the debates but couldn't vote for 46 years,

until 1968.

We still have only one MHR and two senators, for a constituency more than twice the size of France.

Ninth: When the Northern Territory was transferred from South Australian to Commonwealth responsibility in 1911 the nation was promised:

railway line from Port Darwin southwards to a point on the northern boundary of South Australia proper.⁶

Garran and Quick foreshadowed in 1900 that Clause 51(xxxiv) of the Australian Constitution:

will, no doubt, be first used to authorise the construction of trans-continental lines ... and to extend the South Australian railway at Oodnadatta northward, to join the northern territory railways running southward from Port Darwin.⁷

That became a promise fixed in Commonwealth legislation, but unfortunately without a start or finish date specified! We are still waiting, 88 years later, for the commitment to be honoured.

Indeed, Territorians have grown tired of waiting, and I have no doubt whatsoever that the line will be under construction next year, with only a small fraction of the cost being met by the Commonwealth.

Nine ways in which Northern Territory citizens are treated differently from their fellow Australians.

It gets worse.

You will be aware that there has been a move in Federal Parliament over recent weeks, led by Senator Bob Brown, to overturn Territory legislation which deals with the mandatory sentencing, in defined circumstances, of property offenders.

You may even have heard an Independent MHR from NSW, Mr Peter Andren, say on ABC Radio very recently:

we should not be overriding laws put in place by the Northern Territory, but there comes a time when you must have a look at the impact of legislation such as this. And you have to draw the line between states' rights and what's right.⁸

What an appalling, condescending statement! Does he really believe that states' rights can be 'wrongs'? Are the legislators he by implication

criticises less intelligent, less sensitive, less humane than he is? Is he presuming that the legislation he doesn't like has been passed against the wishes of the majority of voters in the Territory?

I recall reacting much the same way to the words attributed to another MHR, Mr Kevin Andrews, during the 1996 Euthanasia debate when he said:

Territories do not have rights, they have responsibilities.⁹

Mr Andrews was much closer to the mark than he realised — as I have just enumerated, Territorians have significantly less in the way of rights than other Australians, while shouldering at least their fair share of responsibilities.

We do indeed have responsibilities, as our Territory becomes home for a growing number of people across the world, including from our near neighbours in Asia this very week.

We have responsibilities to be a node of growth within the Australian economy, contributing large and growing amounts of exports and tourism receipts to the Australian balance of payments.

We have responsibilities in caring for the large number of tourists attracted to Australia by the lure of the Territory and its tourism icons such as Ayers Rock.

We have responsibilities in developing effective education and health care services for the significant proportion of Australia's aborigines that live here in the Northern Territory.

We have large and growing responsibilities as Australia's defence forces, and indeed defence forces from other countries such as Singapore and the USA increasingly focus on the Territory for deployment and training.

We can and should develop responsibilities as we are seen to be the logical gateway between Australia and Asia. But to discharge those responsibilities we need rights, and we need certainty about those rights.

We do not want, nor are we likely to have, further experiments with the administrative boundaries of the Northern Territory.

But we do need the certainty of knowing that an Act of the Northern Territory Parliament will remain in force, and be changed only in the rare circumstances of the electorate demanding its elected representatives in *our* parliament change it.

The truly appalling thing about the Andrews and Brown interventions, however, is that a distant legislator, unaccountable to the Australians directly affected, can act to upset legislation established far from his own constituency.

Good self-government in the Northern Territory can be seriously compromised by bad interference from outside the Northern Territory, and the peculiar deals and trade-offs that can sometimes occur during such episodes. Only statehood for the Northern Territory can provide us with a guarantee against capricious intervention in local legislation.

I would like to add one more practical reason for statehood, drawn from my experience in representing the Northern Territory overseas, one which I believe is quite compatible with the theme of this conference: 'Looking Forward, Looking Out'.

The Northern Territory has been very active in pursuing relationships with our near neighbours in South East Asia. The closest capital city to Darwin is not Perth or Adelaide or Brisbane, but Port Moresby. Jakarta is much closer to Darwin than Sydney or Canberra or Melbourne. I'm sure you all sense that sharply today.

Since becoming Administrator of the Northern Territory I have met and hosted more than 150 international dignitaries and commercially important visitors who have come to the Territory. In some ways Government House serves as the Territory's front door for VIP visitors, some of whom have never encountered a creature called 'The Administrator' (other than in the commercial world of distressed and failing enterprises!)

I must confess to sharing some sympathy as these visitors attempt to understand the rationale behind six states and six governors, all of whom are appointed by the Queen, and a Governor-General who is also appointed by the Queen, two mainland territories, one of which has neither a governor nor an administrator, and the other, bigger than three of the states, which is administered by an administrator appointed by the Governor-General — don't ask me how I will explain this if Australia should become a republic!

For some overseas companies considering investment in the Territory, the fact that the Commonwealth Government has retained the right to legislate on specified matters and also has the right to disallow a law enacted in the Territory within six months of its effective date is a matter for concern.

I ask you to envisage how potential investors might view an approval, embedded in Territory legislation, that allows a company to conduct a mining operation somewhere in the Territory, against the knowledge that the legislation could be overturned by a Private Member's Bill in the Federal Parliament.

Is such a scenario more or less likely when party politics is involved and the senate is effectively controlled by a party different in philosophy to the party that controls the Territory's Legislative Assembly?

Against that background, the more appropriate question might well be *why not* statehood rather than *why*?

Garran and Quick, writing in 1900, commented that:

Apart from New Zealand and the northern territory of South Australia, new states are hardly likely to be formed except by the subdivision of existing states.¹⁰

Subsequently, arguments against statehood for the Northern Territory have generally boiled down to assertions that the Territory's population is too small and/or the Territory's finances are too dependent on the Commonwealth Government. If absolute numbers had been a criterion for admission to the federation in 1901, presumably Western Australia and Tasmania would have missed out, since their respective populations at the 1901 census were less than the Territory's today.

The *nations* of Iceland and Brunei exist today with populations not that much greater than the Northern Territory of Australia, and maintain membership of the United Nations to boot. Alaska became one of the United States of America, notwithstanding a land mass bigger than the Northern Territory and a similarly low population density.

Finally, it needs to be remembered that *all* Australian states are heavily dependent on Commonwealth funding, essentially because of the distribution of tax powers and the complementary revenue sharing arrangements in place, which have included the Northern Territory since 1988 precisely as if it were a state. It's just a matter of degree.

The statement sometimes made that the Territory's political and administrative systems are immature, usually interpreted to mean too aggressive and flamboyant, is not really worthy

of consideration.

The fact is that none of these observations have any real relevance to the issue. This is not to deny that influential people and groups, notably but not only in Canberra, appear to be philosophically opposed to the creation of a new state in the federation.

The only serious prerequisite for statehood for the Northern Territory is willingness on the part of the Territory, the present states and the Federal Government for it to happen.

As Garran and Quick put it:

The Federal Parliament will have to determine when the moral, political and material conditions of the population ... are sufficient to justify the belief that its people are able to exercise the power of State Government and fit to participate in Federal Government.¹¹

There is no question about our maturity to govern, the people of the Northern Territory have been self-governing and exercising sovereign power in a large number of areas for over 21 years. They are ready now.

But do they want to proceed to statehood?

Back in 1962, citizens of the Northern Territory sent a Remonstrance to Canberra protesting, among other things:

- the inferiority of Territorians' rights compared to other citizens of Australia;
- the failure of the Commonwealth to develop the railway as promised;
- the lack of Territory say over allocation or expenditure of government monies in the Territory; and
- the lack of population stimulation incentives.

Thirty-four years later, on 27 October 1996, the Northern Territory Parliament presented a second Remonstrance to Federal Parliament, protesting against that Parliament's (eventually successful) attempt to override a particular Territory law.

Then, the October 1998 Referendum created some doubts about whether territorians wanted to press on towards the obvious solution, and I would like briefly to address that issue.

The question asked in the October Referendum was:

Now that a draft constitution for a State of the Northern Territory has been recommended by the Statehood Convention and endorsed by the

Northern Territory Government DO YOU AGREE THAT WE SHOULD BECOME A STATE?

The result was 48.7 percent of the electorate voted 'Yes', notwithstanding the triple-barrelled form of the question, but 51.3 percent voted 'No'.

The referendum question was framed in an ambitious attempt to roll together two of the very important issues that must be addressed to create a new state: the basic question of the desire for statehood and the perceived requirement for a Constitution.

In the subsequent hearings by the NT Standing Committee on Legal and Constitutional Affairs,¹² the view was reached that many people had voted no, not because they were opposed to statehood, but because of lack of information, dissatisfaction with the process or dislike of the politicians.

The opinion poll taken for this committee after the Referendum showed that, asked the simple Yes/No question on statehood, 63 percent supported statehood, 27 percent did not want it and 10 percent had not made up their minds.¹³

I do not believe Territorians rejected statehood in October 1998 — they rejected the approach that was being used to achieve it. I do believe a convincing majority of Territorians want the Territory to be a state — in other words, they want equal rights with their fellow Australians. They want, however, a better process to be followed in getting to that point.

So, what can be said about the process?

Under the terms of the Australian Constitution, the Federal Government is able to lay down the conditions under which a new state may enter the federation.

Section 121 of the Constitution, which allows the Commonwealth to impose terms and conditions before a new state is admitted to the federation, is restricted only in so far that the conditions it imposes must be consistent with the wider provisions of the Australian Constitution. Under s. 121, the Commonwealth might choose to lay down small parts, large parts or even the entire Constitution for a new state.

It is obvious that whatever is written must be consistent with:

- the Australian Constitution;
- the *Australia Act 1986*;
- International treaties/legislation to which Australia is a party;

- (probably) the existing *Northern Territory (Self-Government) Act 1978*, since it has proved remarkably workable in practice; and
- the *Aboriginal Land Rights (Northern Territory) Act 1976*.

In many ways, the outcome in regard to the *Aboriginal Land Rights Act* of the Commonwealth Parliament, and its patriation to the NT legislative system, will be the litmus test for progress towards true statehood for the Northern Territory.

I would also expect a Constitution to be written to follow Westminster system conventions, rather than obligations set in law (and here I will be coming back to the requirement that the governor act only in accordance with Executive Council advice).

But let me pause at that point.

The fact is that the Northern Territory already has a 'constitution' in our Self-Government Act.

This Act has been in operation now for over 21 years.

None of the states had an apprenticeship quite like this before self-government. With quite modest amendment, it could serve very nicely as an interim Constitution for the new state of the Northern Territory. And the Commonwealth could hardly object, since it is a Commonwealth Act.

The most important amendment — and the only one of any real significance — would be the removal of Clauses 8, 9 and 10 which allow the Governor-General to overturn Territory Acts within six months of their passage, about which I have harangued you today.

There would be some tidying up required in taking the Governor-General totally out of the picture, and the opportunity might be taken to remove unnecessary references to the Crown. It would need some fine-tuning to reflect the process of appointing a governor instead of an administrator and the scope of powers that the new state government can exercise would need to be the same as for other states.

The existing Act provides more than the main body of a proven and effective constitution. It opens the possibility of the Northern Territory being *admitted* as a state (with its own interim Constitution), as an alternative to *establishment* of the state with a new Constitution approved by the Federal Parliament.

I am not suggesting that this modified Self-Government Act should be the final Constitution, indeed I would go so far as to say that it should not be. It would, however, be the framework that

supports the new state until the process of developing a lasting Constitution can occur in an unhurried, careful and considered manner, under the protective umbrella of the Australian Constitution, and can involve all Territorians who wish to be involved.

That process should not be so unhurried or so anxious to please all that it never finishes.

I therefore consider the eventual Constitution should confine itself (outside the basic machinery clauses regarding election of parliaments and the appointment of ministers) to broad principles, rather than provide prescriptions.

It should be written in *plain* English.

It should not add more and more constitutional layers of surveillance, checks, balances and audits to those that already exist.

The draft Northern Territory Constitution prepared by our Statehood Convention and endorsed by our Legislative Assembly fills almost 40 pages.¹⁴ By way of contrast, stripped of footnotes and annotations that usually accompany the printed document, the seven Articles and 27 Amendments comprising the United States Constitution occupy but seven pages of my *Encyclopaedia Britannica*. The draft Constitution prepared by the Sessional Committee on Constitutional Development of the Legislative Assembly was even longer.¹⁵

One of the features that adds length to the Sessional Committee's work is its preamble which, while rich in historical references and geographical facts, will simply serve to divert the average reader to other pursuits long before he or she gets to the principles and processes under which the Territory is to be governed. I suspect it might simply have been a bin into which a number of committee problems were tipped in order to promote the largely bipartisan report which emerged, or at least to foster some of the warm glow in which such an outcome was conceivable.

I draw no parallel with recent experience at the national level.

I much prefer, as a preamble, the second paragraph of the American Declaration of Independence, which predated the American Constitution by some 11 years:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these, are life, liberty and the pursuit of happiness.

While the words best remembered tend to be 'life, liberty and the pursuit of happiness' (not even a whiff of 'user pays', 'corporate governance' or 'accountability', to pick at random three uninspiring examples of present-day objectives!), the words that leap out at me are 'all', 'equal' and 'rights'.

I guess that leaves me squarely with the proponents of the simple, direct and intelligible 'life, liberty and pursuit of happiness' school of Constitution drafters, and the three words I plucked from the Declaration of Independence, and now choose to run together — *all equal rights*.

Finally, I would expect the ultimate Constitution for the Territory to be written to allow governments, including future governments, to govern and the flexibility for future Territorians to amend it as needs and standards change over time.

Addressing the Legislative Assembly of the Northern Territory in November 1997 I said, in announcing the government's commitment to progress to statehood:

I will ... inject a note of caution for the many learned representatives of our community who will sit down together to plan the Territory's own Constitution. If our Constitution is to be truly ours and truly in touch with the people that it serves, then it should be understood and owned by the people. The temptation to cover every eventuality, to entrench the rights of every minority, to cement into fundamental law that which seems appropriate today, will be great, but should be resisted. Brevity rather than verbosity, flexibility rather than immutability, simplicity rather than complexity — these should be the features of a Northern Territory Constitution which will serve our people well.¹⁶

The end result will contain the checks and balances, the countervailing powers, the room for pragmatic answers needed to keep a potentially unruly and headstrong mob moving in generally the same direction for most of the time.

I want to conclude by mentioning one of the crucial checks and balances on which I believe I may have a different view from the Committee, and maybe the Northern Territory Government as well.

As is the case in the states, the ministers of

the Territory Government together form the Executive Council. This is convened by the Administrator, who is 'entitled to attend' and, if he does attend, presides. To complete this rather ingenious arrangement of checks and balances, in exercising the powers and performing the functions of his office in relation to transferred matters the administrator acts, *by convention*, in accordance with the advice of the Executive Council.

I think it would be a mistake to *bind* the governor to perform only on Executive Council's advice. I much prefer the Westminster convention which leaves room for intelligent parties in difficult circumstances to hammer out a solution.

Since you have to leave a hand free for the governor to sign assent to legislation, allow that hand also to wave a caution, make a suggestion, or even pass the message back for another look from time to time. There must be enough discretion left, enough room for individuals of goodwill but under severe stress (be they governors or chief ministers or whomever) to seek out and implement commonsense, pragmatic solutions to difficult questions and unprecedented situations.

I warned at the outset of this Oration that you would be harangued, and you have been. The older I get, and the longer I spend in the Northern Territory, the more I know that its success against the odds of isolation, under-population and a relatively harsh environment is due to the special features of its population — its youthful exuberance, its willingness to take a chance, its frontier spirit. It is important for all Australians that these qualities be protected, and I consider restoring the Federation to be vital to that end.

I urge you, as influential public administrators, to carry the message forward about the readiness of the Northern Territory to become the seventh state of Australia, with the permanent and irreversible setting of its boundaries, its citizens' rights and their responsibilities.

There is one question I have not addressed directly, and that is: '*When should this happen?*'

It is only proper that I allow Robert Garran himself the last word on that question. In 1895, he began an article entitled *The Urgency of Federation*¹⁷ with the following short verse:

Better today than tomorrow
 Better at sunrise than noon
 Let doing not wait on delaying
 Nor Now be the servant of Soon.

I agree, and hope you do too.

Notes

1. Sir Robert Garran, *Prosper the Commonwealth*, Angus and Robertson, 1958:143.
2. John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, 1901.
3. Garran, op cit.
4. Garran, op cit, p.101.
5. *Report of the Statehood Convention*, Northern Territory Government, April 1998, Volume 2, p.118.
6. *The Northern Territory Acceptance Act 1910*, s14.
7. Quick & Garran, op cit, p.645.
8. *The World Today*, 24 August 1999.
9. Hansard, 28 October 1996:5904.
10. Quick & Garran, p.376.
11. *Ibid.*, p. 969.
12. Legislative Assembly of the Northern Territory, Standing Committee on Legal and Constitutional Affairs, *Report on the Reference that the Legal and Constitutional Affairs Committee of the Legislative Assembly inquire into the appropriate measures to facilitate Statehood by 2001*, Northern Territory Government, April 1999.
13. *Ibid*, Annex C, Table 27.
14. Statehood Convention, *A New State Constitution for the Northern Territory*, Northern territory Government, 30 April 1998.
15. Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, *Foundations for a Common Future*, Northern Territory Government, 27 November 1996.
16. Hansard, 27 November 1997:6.
17. Garran, op cit, p.426.