

SIR ROBERT GARRAN: MEDIO TUTISSIMUS IBIS

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ABSTRACT

Sir Robert Randolph Garran (10 February 1867–11 January 1957) played a unique role in the early development of the Commonwealth. As Secretary to the Drafting Committee of the Australasian Federal Convention of 1897 and 1898, he was intimately involved in the process by which the *Australian Constitution* was produced. As Secretary of the Attorney-General's Department from 1901 to 1932, he was responsible for drafting foundational Commonwealth legislation and he played a key part in establishing coherent interpretations of the *Constitution* in advice to successive Federal Governments. Three aspects of Garran's life and work are explored in this article: the popular movement which established the process by which the *Constitution* was negotiated, drafted, and submitted to referenda for approval; Garran's tenure and legacy as Secretary of the Attorney-General's Department; and Garran's views on federalism and constitutional law.

I INTRODUCTION

Embedded in the pavement of Martin Place between Phillip Street and Macquarie Street in what is now the central business district of Sydney are rectangular metal grilles. Periodically, they emit walls of mist in the shape of Georgian cottages which once stood there. Next to them are bronze bowls representing washrooms once fed by the Tank Stream.

Not far from the site of that installation, on the Elizabeth Street side of Phillip Street where it now meets Martin Place, there once stood a Victorian terrace in which Robert Randolph Garran was born on 10 February 1867. His father, Andrew Garran, was then a journalist with, and was later editor of, the *Sydney Morning Herald*. His mother, Mary Isham Garran, had a deep social conscience and later served on the board of the Sydney Children's Hospital. She also had a deep distrust of milkman's milk. The family kept a cow on the Domain. The cow would wander across Macquarie Street to the backyard of the house in Phillip Street to be milked twice a day. The young Robert Garran grew up happily in a household with five older sisters. So tall did he become, standing at 6' 4" in an age when the average height for an adult male was considerably shorter than it is

* Justice of the High Court of Australia. This is a revised version of the Geoffrey Sawer Lecture delivered at the Australian National University on 12 October 2017. I thank Natalie Burgess and Glyn Ayres for their research and Jane Reynolds for bringing to my attention the fact that 2017 was the 150th anniversary of Sir Robert Garran's birth.

now, that in his youth he was used by friends as a meeting point on social occasions. He attended Sydney Grammar School and studied Arts at the University of Sydney before being called to the New South Wales Bar in 1890.

On 11 January 1957, just a month short of his 90th birthday, Sir Robert Garran GCMG QC died in Canberra where he had lived since 1927. His death was marked locally as that of the much loved Grand Old Man of Canberra.¹ His death was marked nationally as that of the last surviving member of Australia's founding generation.² At the instigation of Prime Minister Robert Menzies, he was given a State funeral. He is buried in the churchyard of St John's Anglican Church in Reid where he and his wife Hilda, whom he married in 1902 and who predeceased him, had been parishioners.

In addition to a translation of the songs of Schubert and Schumann,³ Garran was the author of three books on the *Constitution*. One, published in 1897, was entitled *The Coming Commonwealth*. Another, co-authored with Dr John Quick and published in 1901, was the monumental tome *The Annotated Constitution of the Australian Commonwealth*, dedicated by its authors to 'the people of Australia'. The third, published the year after his death, was his memoir, entitled *Prosper the Commonwealth*. The titles of each, and the dedication of the second, alone bespeak a life of selfless devotion to building the Australian nation.

At the Australasian Federal Convention of 1897 and 1898, Garran, then aged 30 and 31, was Secretary to the Drafting Committee consisting of Edmund Barton, Richard O'Connor and Sir John Downer – each more than 16 years his senior. He would later describe himself in that role as the 'cabin boy' of the *Constitution*.⁴ On 1 January 1901, at the age of 33, he was present at the ceremony in Centennial Park in Sydney when the Commonwealth of Australia was proclaimed, when Lord Hopetoun assumed office as its first Governor-General and when Edmund Barton was sworn in as the first Prime Minister together with a Ministry which included Alfred Deakin as Attorney-General. Later that day, he was present at the first meeting of the Federal Executive Council when the first Departments of State were created. Garran was always careful to disclaim that he was the first Commonwealth public servant in deference to the officers of the six State Departments of Customs and Excise who, by force of s 69 of the *Constitution*, automatically became officers of the Commonwealth on its establishment.⁵ But, as the putative first Secretary of the Attorney-General's Department, Garran was, in that moment, for all practical purposes the only Commonwealth public servant.⁶ Garran's

¹ 'A Great Australian', *Canberra Times* (Canberra), 12 January 1957, 2; 'Sir Robert Garran Laid to Rest', *Canberra Times* (Canberra), 15 January 1957, 3.

² Sir John Latham, 'Sir Robert Garran – An Appreciation' (1957) 30 *Australian Law Journal* 494; K H Bailey, 'Sir Robert Garran' (1957) 29 *Australian Quarterly* 9.

³ Sir Robert Randolph Garran, *Schubert and Schumann: Songs and Translations* (Melbourne University Press, 1946).

⁴ Sir Robert Randolph Garran, 'Constitution Building' in F A Bland (ed), *Changing the Constitution* (New South Wales Constitutional League, 1950) 187, 189.

⁵ Carmel Meiklejohn (ed), *100 Years: Achieving a Just and Secure Society* (Attorney-General's Department, 2001) 13; Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956) 4-5.

⁶ R S Parker, 'Garran, Sir Robert Randolph' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8, 622.

first duty was to write out in long hand the first edition of the Commonwealth Gazette and send himself to a printer in Phillip Street to have it printed.⁷

Garran was formally appointed with effect from 1 June 1901,⁸ soon after the first general election, which he organised,⁹ and remained Secretary of the Attorney-General's Department until his retirement in 1932 on reaching the mandatory public service retirement age of 65. In the 31 years he had then spent as Secretary of the Attorney-General's Department, he had served the Commonwealth of Australia under 16 administrations and 11 Attorneys-General. In addition to Deakin, the Attorneys-General under whom he had served had included Henry Bournes Higgins and Sir Isaac Isaacs. They had also notably included William Morris Hughes, who between 1915 and 1921 held the portfolio of Attorney-General concurrently with that of Prime Minister. Garran likened Hughes' position as Attorney-General during that period to that of the Rector of Göttingen University who 'also held a job as the King of England'.¹⁰ Garran had also held, from its inception in 1916, the statutory office of Solicitor-General of the Commonwealth. That office was during his tenure somewhat different from what it would become in 1964,¹¹ having been created primarily for the purpose of allowing for the exercise by Garran under delegation from Hughes of extensive wartime powers then vested by statute in the Attorney-General.¹² Garran was seen then, as he had always been seen and always was to be seen, as a safe pair of hands. Hughes relied heavily on Garran throughout the First World War, saying of Garran that his 'fountain pen was mightier than the sword'.¹³

A long-time supporter of the establishment of the Australian National University, Garran became its first graduate when he was awarded an honorary LLD in 1951.

We do not want for reminders of Garran. Within the Australian Capital Territory, a suburb is named for him, as is the building in Barton which houses the Attorney-General's Department. There is an annual oration in his honour sponsored by the Institute of Public Administration. Within the Australian National University, a hall of residence is named for him, as is a chair in law the eminent occupants of which have included constitutional lawyers Jack Richardson, Leslie Zines and Michael Coper. A bronze bust of Garran, presented to the University in 1952, has since 1968 stood on a pedestal on the landing of the stairwell in the Law Library. The nose has been made shiny by generations of law students who have rubbed it for luck.

One hundred and fifty years after Garran's birth, in a lecture named in honour of his younger friend Geoffrey Sawer, it is fitting nevertheless to pause to re-examine and to

⁷ Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 143; Meiklejohn, above n 5, 18.

⁸ Meiklejohn, above n 5, 13.

⁹ Garran, *Prosper the Commonwealth*, above n 7, 144.

¹⁰ *Ibid* 158.

¹¹ *Law Officers Act 1964* (Cth).

¹² *Solicitor-General Act 1916* (Cth). See Gabrielle Appleby, *Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart, 2016) 70-3.

¹³ Noel Francis, *The Gifted Knight: Sir Robert Garran, GCMG, QC* (1983) 7. See also Colin Milner, 'Robert Randolph Garran and the Creation of the Australian Commonwealth' in Joan Beaumont and Matthew Jordan (eds), *Australia and the World: A Festschrift for Neville Meaney* (Sydney University Press, 2013) 121, 124.

re-appreciate the contribution of this gentle, learned, cultured and unassuming man to our national development.

In his preface to *Prosper the Commonwealth*, Garran recalled a visit to Sydney in his youth by a French comedy company. The company included in its repertoire a comedy the title of which translated to 'The Voyage of Mr Perrichon'. Perrichon was a pretentious simpleton who treated himself and his family to a tour in Switzerland. At a hotel, he was approached by a painter with a proposal to paint his portrait with Mont Blanc in the background. The Frenchman, according to Garran, was charmed with the idea, but insisted on 'a very little Mont Blanc, and an enormous Perrichon'. Garran expressed the hope that the result of the writing of his memoir was 'not too much Perrichon and too little Mont Blanc'.¹⁴ He need not have been concerned about the proportions. Sir Kenneth Bailey, who was a successor to Garran in the offices both of Secretary of the Attorney-General's Department and of Solicitor-General of the Commonwealth, recorded soon after Garran's death: 'It is hard to write about Sir Robert Garran otherwise than in superlatives. There was in fact nothing 'average' about him. In ability, in character, in attainments, even in length of body and of life, he was altogether exceptional'.¹⁵

Amongst the characteristics which Bailey ascribed to Garran were 'a sense of proportion and moderation, a capacity for enthusiasm without fanaticism, for fellowship without loss of dignity and reserve'.¹⁶ Bailey awaited Garran's memoir, then still to be published, as 'the reflections of a wise, mellow and distinguished old man upon great times, in so many leading events of which he had himself been not only witness but participant'.¹⁷

Writing around the same time, Sawyer described Garran in similarly superlative and affectionate terms. 'The Commonwealth', said Sawyer,

was fortunate in having through so much of its early history the services of such a man – superbly intelligent, with great practical commonsense, a Christian both in moral rectitude and in loving-kindness, selfless, devoid of any faintest touch of arrogance, priggishness or conceit, with a sense both of humour and of fun.¹⁸

Bailey and Sawyer each wrote that Garran's life could be seen to have had four distinct phases.¹⁹ The first was the period of his formation in the years to 1890. The second was the period of constitution-making between 1890 and 1900. The third was the period of 31 years between 1901 and 1932 which he spent as Secretary of the Attorney-General's Department. The last was the further period of nearly 25 years which he spent productively in retirement contributing to the intellectual and social life of Canberra.

I will touch on one important but often neglected aspect of the second of those periods before concentrating on the third. I will then turn to Garran's later reflections on the nature and practice of constitutional law.

¹⁴ Garran, *Prosper the Commonwealth*, above n 7, viii.

¹⁵ Bailey, above n 2, 9.

¹⁶ *Ibid* 14.

¹⁷ *Ibid* 15.

¹⁸ Geoffrey Sawyer, 'Sir Robert Garran' (1957) *Australian National University News*, no 31.

¹⁹ Bailey, above n 2, 9; Sawyer, 'Sir Robert Garran', above n 18. See also Helen Irving, 'Garran, Robert Randolph' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 292, 292–3; Parker, above n 6, 622–4.

II THE POPULAR MOVEMENT

The aspect of constitution-making on which I want to touch featured prominently in Garran's own writing on the federation movement.²⁰ It has received some attention in the writings of constitutional historians,²¹ but it has not featured prominently in mainstream writings on constitutional law.²² It concerns not the well-documented proceedings of the Australasian Federation Conference of 1890, of the National Australasian Convention of 1891, or even of the Australasian Federal Convention of 1897 and 1898. Nor does it concern the successive drafts of the *Constitution* which emanated from those Conventions, including those which emanated from the Convention of 1897 and 1898 in which Garran as Secretary to the Drafting Committee was intimately involved. It concerns rather what Garran described as the 'popular movement' during the period between 1891 and 1897 when, in Garran's words, having been '[l]eft for dead by the politicians, federation was brought to life by the people'.²³

The Conference of 1890 had been primarily a conference of colonial Premiers. The Convention of 1891 had been a conference of delegates of colonial Parliaments. The holding of the Conference of 1890 and the Convention of 1891 had owed much to the political drive of Sir Henry Parkes. The Convention of 1891 had produced a complete draft of an Australian Constitution, attributable in large part to the technical expertise of [Sir Samuel Griffith. But after the Convention came what Garran described as the '[d]oldrums'.²⁴ The 1891 draft of the Constitution 'had been born helpless into a world busy with other affairs, and had been left to the accidents and delays of political opportunity'.²⁵ To become law, the Constitution needed to be enacted by the Imperial Parliament. But no mechanism had been established by which that was to be achieved. Parkes' energy and political influence waned after 1891, and colonial Parliaments became distracted with local issues.

Parkes' 'mantle', as Garran put it, in those circumstances fell on the shoulders of Barton. Garran described Barton as 'a very "clubable" man ... not easily roused to

²⁰ Robert Randolph Garran, *The Coming Commonwealth* (Angus and Robertson, 1897) 116–21; John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 150–65; Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (Australian Government, 1981) vol 1, 393–4; Sir Robert Garran, 'The Federation Movement and the Founding of the Commonwealth' in J Holland Rose et al (eds), *The Cambridge History of the British Empire* (Cambridge University Press, 1933) vol 7, ch XV; Garran, 'Constitution Building', above n 4, ch VII; Sir Robert Garran, Comment on K H Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 337, 339; Garran, *Prosper the Commonwealth*, above n 7, ch VIII.

²¹ See W G McMinn, *Nationalism and Federalism in Australia* (Oxford University Press, 1994) ch 9; Helen Irving, *To Constitute a Nation* (Cambridge University Press, 1997) ch 8; J M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) ch 20. Cf J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

²² For a rare exception, see W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) 45.

²³ Garran, *Prosper the Commonwealth*, above n 7, 101.

²⁴ *Ibid* 99.

²⁵ Garran, 'The Federation Movement and the Founding of the Commonwealth', above n 20, 439.

exertion except in something in which he had an interest',²⁶ who 'found that interest in the idea of Australian union, and threw himself into the cause with amazing energy'.²⁷ Barton was no stranger to colonial political office. He was briefly Attorney-General of New South Wales but he chose to pursue the cause of federation as an outsider. Increasing agitation in Victoria from the Australian Natives' Association and formation of Federation Leagues in New South Wales, especially in the Riverina, prompted Barton to convene a public meeting at Sydney Town Hall at the beginning of July 1893, the result of which was the formation of an Australasian Federation League.²⁸

On the last day of that same month, July 1893, a Conference of the Australian Natives' Association and the various Federation Leagues was convened in Corowa at which 74 delegates attended.²⁹ It was at the Corowa Conference that the older and more ponderous Quick, who was representing the Bendigo branch of the Australian Natives' Association, first met the younger and more nimble Garran, who was representing the Sydney branch of the Australasian Federation League.³⁰

On the second day of the Corowa Conference, Tuesday, 1 August 1893, Quick moved a long-winded motion which attempted to encapsulate the aim of the Conference.³¹ The motion was to the effect that the Conference should resolve to establish a non-party Australia-wide league to encourage formation within each of the colonies of a Federation Party. To that motion, according to Garran, came an exasperated cry from another delegate of 'Words, words, words – can't we do something?', to which there was a chorus of approval.³² Quick sought a short adjournment, the result of which was the formulation within half an hour of a resolution which came to be passed in the following terms:

That in the opinion of this Conference the Legislature of each Australasian colony should pass an Act providing for the election of representatives to attend a statutory convention or congress to consider and adopt a bill to establish a Federal Constitution for Australia and upon the adoption of such bill or measure it be submitted by some process of referendum to the verdict of each colony.³³

Quick was not quick. Garran would come later to be weighed down by the tedious and laborious process of their co-authorship of *The Annotated Constitution of the Australian Commonwealth*, in which he likened his role to that of junior partner of a steam-roller.³⁴ Garran would forever-after be a little embarrassed by the bulkiness of the result of their joint labours. His copy of the book, he said, he found useful as a doorstep.³⁵ But in that half hour in Corowa on 1 August 1893, Garran credits Quick with having come up with the essential elements of the plan by which the Australian people would

²⁶ Garran, 'Constitution Building', above n 4, 193.

²⁷ Garran, *Prosper the Commonwealth*, above n 7, 101.

²⁸ *Ibid* 102.

²⁹ *Official Report of the Federation Conference, Corowa*, 31 July and 1 August 1893.

³⁰ Garran, *Prosper the Commonwealth*, above n 7, 136; Helen Irving, 'When Quick Met Garran: The Corowa Plan' (1998) 32 *Papers on Parliament* (Department of the Senate, Canberra) 13, 19.

³¹ Garran, *Prosper the Commonwealth*, above n 7, 102-3. See *Official Report of the Federation Conference*, above n 299, 32-3.

³² Garran, *Prosper the Commonwealth*, above n 7, 103.

³³ *Ibid*. See *Official Report of the Federation Conference*, above n 299, 37.

³⁴ Garran, *Prosper the Commonwealth*, above n 7, 137.

³⁵ Garran, 'Constitution Building', above n 4, 188.

ultimately propel the Australian continent to a single political entity.³⁶ The detail of the 'Corowa Plan' was filled in by Quick on his return to Bendigo in the form of an Australasian Federal Congress Bill which was adopted by the Australasian Federation League and published in 1894.³⁷

In November 1894, a delegation from the Australasian Federation League put a version of the Corowa Plan to George Reid, who had become Premier of New South Wales following a general election three months before.³⁸ Reid, as Garran described him, was at that time a lawyer-politician 'whose devotion to free trade left little room for the intrusion of other ideas'³⁹ and who proudly kept 'a complete set of Herbert Spencer in his [c]hambers among his law-books'.⁴⁰ Reid had no enthusiasm for federation and his legacy would come later to be tainted by the sobriquet 'Yes-No Reid' for his ambivalence.⁴¹ But '[t]he people were evidently on the march under Barton's banner, and Reid saw his leadership in New South Wales threatened'.⁴² Reid declared that he was impressed by the plan and promised to put it to a Premier's Conference.⁴³ That he did, in Hobart in January 1895, at which it was agreed.⁴⁴

The result was the eventual enactment by the Parliaments of each of the participating colonies of Federation Enabling Acts which had built into them from the outset a mechanism which would see federation carried forward, if at all, by a single and continuous democratic process.⁴⁵ In all colonies except Queensland (which did not pass an Enabling Act until 1899),⁴⁶ that process involved: the election by electors (or, in the case of Western Australia, by Members of Parliament from a pool of persons nominated by electors) of a representative Convention; the framing by that Convention of a Constitution in the form of a Bill for enactment by the Imperial Parliament; an

³⁶ Garran, *The Coming Commonwealth*, above n 20, 117; Garran, 'Constitution Building', above n 4, 193; Garran, *Prosper the Commonwealth*, above n 7, 103–5. For a rival view, attributing Quick's inspiration to Henry D'Esther Taylor, see Irving, 'When Quick Met Garran', above n 30, 15.

³⁷ Australasian Federation League, *Rules and Proposals of the Australasian Federation League* (Charles Potter, 1894) 14; Quick and Garran, above n 20, 153; Irving, 'When Quick Met Garran', above n 30, 16.

³⁸ Garran, 'The Federation Movement and the Founding of the Commonwealth', above n 20, 439.

³⁹ *Ibid.* 437.

⁴⁰ Francis, above n 133, 181.

⁴¹ See generally W G McMinn, 'Reid, Sir George Houston' in Geoffrey Serle (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1988) vol 11, 347; L F Crisp, *Federation Fathers* (Melbourne University Press, 1990) ch 1.

⁴² Garran, 'The Federation Movement and the Founding of the Commonwealth', above n 20, 440.

⁴³ *Ibid.*

⁴⁴ Quick and Garran, above n 20, 158–9.

⁴⁵ *Australasian Federation Enabling Act 1895 (NSW)*; *Australasian Federation Enabling Act (South Australia) 1895 (SA)*; *Australasian Federation Enabling Act 1896 (Vic)*; *Australasian Federation Enabling Act of 1896 (WA)*; *Australasian Federation Enabling Act (Tasmania) 1896 (Tas)*. See generally Williams, above n 21, ch 21.

⁴⁶ *Australasian Federation Enabling Act (Queensland) 1899 (Qld)*. For an explanation of the path Queensland took to federation, see Anne Twomey, *The Constitution – 19th Century Colonial Office Document or a People's Constitution?*, Parliamentary Research Service, Background Paper No 15 (1994) 9, 16, 24, 26–8.

adjournment of the Convention, after it had framed a draft Constitution, so as to give the Parliaments of the colonies an opportunity to consider the draft and to make suggestions which were then to be considered by the Convention before it produced the final version; submission of the final version of the Constitution as soon as practicable after the close of the proceedings of the Convention for acceptance or rejection by a majority of electors in referenda in each colony; and, if accepted by majorities of electors in referenda in three of the colonies, transmission of the Constitution to the Queen by an address from the Parliaments of those colonies praying for its enactment by the Imperial Parliament.

The Convention of 1897 and 1898, the subsequent referenda of 1898, 1899 and 1900, and the transmission of the *Australian Constitution* for enactment by the Imperial Parliament in 1900, followed with only minor disturbances in the trajectory which had been set by the Federation Enabling Acts. They were the outworking of the Corowa Plan. The democratic spirit of the Corowa Plan was further reflected within the affirmation in the preliminary resolution of the Convention of 1897, which Garran attributed to the suggestion of Bernhard Wise. The resolution affirmed that the purpose of creating a 'federal Government' was 'to enlarge the powers of self-government of the people of Australia'.⁴⁷ As Garran explained it:

This happy phrase of Wise's directed attention to the fact that the individual citizen would surrender nothing. All that was withdrawn from his local citizenship would be handed back to him, enlarged and more effective, in the gift of a new Commonwealth citizenship, by virtue of which his national affairs were transferred to a national plane.⁴⁸

The opening words of the preamble to the Imperial Act for the *Australian Constitution* as it emerged from the Convention of 1897 and 1898 and as it came to be enacted by the Imperial Parliament—'Whereas the people [of the colonies which have adopted the *Constitution*] have agreed to unite in one indissoluble Federal Commonwealth'—were explained in Quick and Garran's annotations to have flowed directly from the mode of assent for which provision was made in the Federation Enabling Acts.⁴⁹ The words contrast markedly with the preamble to the draft Constitution as it had emerged from the Convention of 1891 which began 'Whereas the Australasian colonies [which have adopted the *Constitution*] have ... agreed to unite in one Federal Commonwealth'.⁵⁰ The words also contrast favourably in their historical accuracy with the stirring but abstracted and metaphorical 'We the people' of the *United States Constitution*. What the enacted words proclaim, as Quick and Garran fairly summed them up in 1901 in terms which have striking contemporary resonance, is 'that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern'.⁵¹

⁴⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 17 (Edmund Barton).

⁴⁸ Garran, *Prosper the Commonwealth*, above n 7, 113.

⁴⁹ Quick and Garran, above n 20, 283.

⁵⁰ *Official Report of the National Australasian Convention Debates*, Sydney, 9 April 1891, 943.

⁵¹ Quick and Garran, above n 20, 285.

III THE ATTORNEY-GENERAL'S DEPARTMENT

Bailey commented soon after Garran's death that the non-party-political, confidential, behind-the-scenes nature of Garran's role as a senior public servant in the 31 years in which he occupied the position of Secretary of the Attorney-General's Department meant that Garran's personal share in shaping the constitutional development of Australia between 1901 and 1932 cannot be ascertained. Bailey also fairly commented that, during Garran's lifetime, war had done more to shape Australia's constitutional development than had any individual.⁵² Garran no doubt played a role in the emergence of Australia as a nation in international affairs through his participation in the work of the Imperial War Conference of 1918,⁵³ the Peace Conference of 1919,⁵⁴ and the Imperial Conference of 1930,⁵⁵ where he was made chairman of the drafting committee and where the 'finishing touches'⁵⁶ were put on the *Statute of Westminster* before it was enacted by the British Parliament in 1931⁵⁷ and ultimately adopted by the Commonwealth Parliament in 1942.⁵⁸ A more complete appreciation of Garran's contribution in those respects awaits the work of a biographer with fuller access than is now readily available to archival material.

What can now be assessed with some confidence is the contribution Garran made to constitutional development as an Australian government lawyer. The Attorney-General's Department, of which Garran was for a time both 'the head and the tail', was throughout his term as its Secretary deliberately kept by him as a small professional department with minimal administrative responsibilities, having as its principal functions the giving of legal advice to other Departments of the Commonwealth, the drafting of Commonwealth statutes and statutory rules, and the conduct of litigation in which the Commonwealth might be involved.⁵⁹

Harry Frederick Ernest Whitlam, father of Gough Whitlam, who joined the Attorney-General's Department in 1913 and who remained under Garran's leadership for the next two decades, provided this description of Garran's decision-making style:

In the less complex matters, so long as one was thoroughly prepared with the ascertainable facts, and was able to present them concisely and in their proper relation and proportion and indicate the contingencies – and this was what he would expect – his conclusion was unhesitating and decisive. In the more complex matters, where principles were involved which required discussion, the discussion was free, subject only, of course, to the limits of relevance; there was, on his part, no restriction to orthodoxies or conventional thinking but a hospitality to all ideas that might have a bearing on the problem in hand, an enlightened weighing of pros and cons, and a firm choice of the course to be pursued. Never could it be said of him that he was legalistic in his views in the sense of being ultra-formal, ultra-logical, or narrow in conception or construction. Such discussions did not result in imposed decisions; rather they were the confident movement of thought under instinctive and

⁵² Bailey, above n 2.

⁵³ Garran, *Prosper the Commonwealth*, above n 7, ch XVIII.

⁵⁴ *Ibid* ch XIX.

⁵⁵ *Ibid* ch XXI.

⁵⁶ *Ibid* 323.

⁵⁷ *Statute of Westminster 1931* (UK).

⁵⁸ *Statute of Westminster Adoption Act 1942* (Cth).

⁵⁹ Garran, *Prosper the Commonwealth*, above n 7, ch XII.

sympathetic leadership to reasoned conclusions, acceptable to all engaged in the discussions.⁶⁰

It was Garran who, as the first Parliamentary Draftsman, opened the Commonwealth statute book.⁶¹ Together with Gordon Harwood Castle, he established the initial style of Commonwealth legislative drafting which persisted throughout his tenure and until well after his retirement. His aim from the outset was to 'set an example of clear, straightforward language, free from technical jargon'.⁶² He set his face against what he described as 'the practice dear to earlier draftsmen of never mentioning a horse without adding mare, foal, colt, filly, or gelding'.⁶³ No word in a Commonwealth statute was to be superfluous.

Garran admitted that the minimalist style was on occasions carried too far, and he accepted in good humour O'Connor J's parody of the style as follows:

Every man shall wear –

(a) Coat

(b) Vest

(c) Trousers

Penalty: £100.⁶⁴

To look at early Commonwealth statutes for the drafting of which Garran was primarily responsible is, however, to see precision of thought reflected in economy of language leaving admirably little scope for ambiguity. The *Acts Interpretation Act 1901* (Cth) (which he styled as an Act 'for the interpretation of Acts of Parliament, and for shortening their language'), the *Audit Act 1901* (Cth), the *Customs Act 1901* (Cth), the *Commonwealth Public Service Act 1902* (Cth), the *Commonwealth Franchise Act 1902* (Cth), and the *Claims against the Commonwealth Act 1902* (Cth) are amongst the numerous statutes establishing the machinery and laying out the responsibilities of the various components of the national government which were primarily the product of his hand. 'When war expenditure compelled the Commonwealth to resort to direct taxation', Garran became the principal author of the *Income Tax Assessment Act 1915* (Cth) which in its original form was, as he playfully put it in his own assessment, 'a thing of beauty and simplicity that would not have shamed Wordsworth or TS Eliot'.⁶⁵

The Commonwealth statute book aside, Bailey was undoubtedly correct in suggesting that 'the greater part of Garran's contribution to the actual development of Australian public law will always remain in the confidential files of many Departments of State and in the Opinion Book of his own Department'.⁶⁶ Bailey was referring to the advisory function of the Attorney-General's Department, the importance of which

⁶⁰ H F E Whitlam, *Sir Robert Garran and Leadership in Public Service* (Royal Institute of Public Administration, 1959) 7–8.

⁶¹ Carmel Meiklejohn, *Fitting the Bill – A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012) 12.

⁶² Garran, *Prosper the Commonwealth*, above n 7, 145.

⁶³ *Ibid* 146.

⁶⁴ *Ibid* 145. The point is not without contemporary relevance: see *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 651–2 [73] (Kirby J).

⁶⁵ Garran, *Prosper the Commonwealth*, above n 7, 146.

⁶⁶ Bailey, above n 2, 11.

Garran had emphasised to Deakin in a report Garran had prepared for Deakin in 1903. What Garran had then said was this:

The Federal relation involves a most intricate apportionment of constitutional powers and duties between the Commonwealth and State Governments; and in the administration of the Federal Departments, no less than in the drafting of legislative measures, questions of the utmost nicety and importance, of a kind which have never before had to be dealt with in the separate colonies, will continually arise ... A vast mass of American and Canadian authorities bear upon these questions, but the Constitution of the Commonwealth is so different, in principle and details, from the Constitution of the United States, or of the Dominion of Canada, that a code of interpretation for the Australian Constitution must inevitably arise. It is the province of the Attorney-General's Department to advise all the Departments on questions of this kind, and to lay down the lines of a sound and consistent interpretation of Federal rights, responsibilities, and duties.⁶⁷

Sir John Latham would later describe Deakin, 'though a barrister', as 'a statesman rather than either a practising or an academic lawyer'.⁶⁸ Deakin was also a clear and creative thinker and a gifted writer. Garran recalled in his memoir his pleasure in working with Deakin on difficult opinions. Garran would prepare a draft. Deakin would play the role of opposing counsel, attacking it from every side. Garran would rewrite it. 'The rewritten opinion,' recorded Garran, 'with the joints mended where he had pierced them, might reach the same conclusions, but would be more satisfying to [himself] and, [he] hope[d], more convincing to others'.⁶⁹

Together, Garran and Deakin produced in the first three years after the establishment of the Commonwealth some of the most elegant, profound and enduring expositions of the interpretation and application of the *Australian Constitution* ever to have been penned. Anticipating the decision of the High Court in *R v Burgess* in 1936,⁷⁰ they advised on 28 May 1901 that the external affairs power of the Commonwealth Parliament 'is ample to cover adherence to treaties and all matters in connection with them'.⁷¹ Anticipating the decision of the High Court in *Cowburn's Case* in 1926,⁷² they advised on 4 June 1902 that a State law was 'inconsistent' with a Commonwealth law within the meaning of s 109 of the *Constitution* when the 'evident intention' of the Commonwealth law was to 'supersede' the State law and 'regulate itself the whole subject-matter' of the State law.⁷³ On 12 November 1902, in an opinion subsequently tabled in the Commonwealth Parliament⁷⁴ which was to become known as 'the *Vondel* opinion' and which was to establish the practice followed thereafter,⁷⁵ they advised that the proper channel of communication with the Imperial Government in matters affecting external affairs was the Commonwealth Government and not a State Government.⁷⁶ In

⁶⁷ Brazil and Mitchell (eds), above n 20, v.

⁶⁸ Latham, 'Sir Robert Garran – An Appreciation' (1957) 30 *Australian Law Journal* 494, 495.

⁶⁹ Garran, *Prosper the Commonwealth*, above n 7, 155.

⁷⁰ (1936) 55 CLR 608.

⁷¹ Brazil and Mitchell (eds), above n 20, Opinion 2, 3.

⁷² *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

⁷³ Brazil and Mitchell (eds), above n 20, Opinion 70, 89–90.

⁷⁴ Commonwealth, *Parliamentary Papers* (1903) vol II, 1160.

⁷⁵ See Sawyer, *Australian Federal Politics and Law 1901–1929*, above n 5, 31–2; Leslie Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 1, 16–19.

⁷⁶ Brazil and Mitchell (eds), above n 20, Opinions 224, 234, 267, 312.

⁷⁶ Brazil and Mitchell (eds), above n 20, Opinion 107, 129–35.

so doing, they expressed the view, taken up by Mason J in the *Australian Assistance Plan Case* in 1975⁷⁷ and commonly assumed into the 21st century,⁷⁸ that '[i]t is impossible to resist the conclusion that the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends'.⁷⁹

The more significant opinions of Attorneys-General under whom Garran served, as well as the more significant opinions which Garran authored alone, have now been published.⁸⁰ Collectively, they bear out Bailey's description of Garran that:

His advice, always enviably well expressed, was never conceived in any negative, narrow or pedantic spirit. His learning was always put to essential constructive ends. History, for him, provided a key to the explanation of the present, but did not confine the future to the limits of the past.⁸¹

More important, perhaps, than any individual opinion was the system of opinion-giving established by Garran to which Bailey alluded in his reference to the 'Opinion Book' of the Attorney-General's Department. The system was still in existence when I was an officer of the Department between 1985 and 1990. The system was that all significant advice was reduced to writing and copies of all written advice were retained within the Department, where they were bound in chronological order and indexed by author and subject-matter. The Opinion Book, which by the time I joined the Department had grown to resemble a series of law reports and was housed in the 'Opinions Room', was treated as an internal system of precedent. A view expressed in an earlier opinion would be adhered to in a later opinion unless departed from, for good reason, by an author of equivalent or higher status. The system contributed to the continuing fulfilment of Garran's goal of the Department which he founded providing sound and consistent interpretation of the rights, responsibilities and duties of the Commonwealth.

IV REFLECTIONS ON CONSTITUTIONAL LAW

In an occasional lecture he gave at Parliament House in 2005, Professor Zines recounted a story told to him by Sawyer about being asked to come to see Garran when ill in bed not long before he died.⁸² Garran had just read some articles in the journal *The Listener* about a school of legal theory known as American Legal Realism and he wanted to discuss its ramifications.

Garran had evidently become exposed at that late time in his life to some of the more extreme views of Jerome Frank. Frank, opined Garran in the concluding pages of his memoir, was a theorist who spoilt his case by overstatement.⁸³ But Garran was evidently captivated. Garran's own ideas about constitutional law, by that time, were not

⁷⁷ *Victoria v Commonwealth* (1975) 134 CLR 338, 396-7.

⁷⁸ See now *Williams v Commonwealth* (2012) 248 CLR 156.

⁷⁹ Brazil and Mitchell (eds), above n 20, 131.

⁸⁰ Brazil and Mitchell (eds), above n 20; Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (Australian Government, 1988) vol 2; James Faulkner et al (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (Australian Government, 2013) vol 3.

⁸¹ Bailey, above n 2, 11-12.

⁸² Leslie Zines, 'Sir Robert Garran' (Papers on Parliament No 44, Department of the Senate, 2005).

⁸³ Garran, *Prosper the Commonwealth*, above n 7, 416-17.

markedly different from Frank's more mature, more moderate and more constructive contemporary, Karl Llewellyn,⁸⁴ whom Garran unfortunately had no opportunity to read.

Garran wrote in his memoir that law was 'the sublimation of common sense'.⁸⁵ He emphasised the need for the *Constitution* to 'be able to develop to meet the changing needs of the community' lest it 'cramp the growth of the community till breaking-point is reached'.⁸⁶ One of the ways in which the *Constitution* could adapt itself to the changing conditions of the body politic, Garran had by then long maintained,⁸⁷ was by the process of judicial decision. In that context, he wrote that '[l]aw is an applied science, not an abstract one, and its detailed application to particular cases, especially under new conditions not contemplated by the draftsman, necessarily involves amplification which is indistinguishable from alteration'.⁸⁸ He added:

Nor are courts and judges the only interpreters. Every public officer, every citizen, has daily to interpret the law for himself, and the common consent of the community over a long period of time can establish a practice and a tradition which may act as a gloss on the text of the Constitution and carry weight with its authentic interpreters.⁸⁹

Too often in the course of Australia's early national development, Garran thought, constitutional law had been approached with an 'ultra-legalistic attitude' and from 'too academic a point of view'.⁹⁰ With him, it was 'an article of faith ... that there is nothing in the Constitution or in its history that is incapable of comprehension by an attentive mind really interested in public affairs'.⁹¹

Addressing judicial exposition of the scope of Commonwealth and State legislative power, Garran noted that two formulations 'had been tried and found wanting, because when they were followed to the logical end they led off the track and threatened the federal principle'. The earlier of them, 'the non-interference formula of *D'Emden v Pedder*',⁹² did so by 'veering too much towards State rights'. The later of them, 'the "natural meaning and inconsistency" formula of the *Engineers' Case*',⁹³ did so by 'veering too much towards central power'. Garran remarked that the High Court and the Privy Council had since 'been exploring in all directions in search of a complete self-adjusting formula'. Their search had 'not been altogether successful'. He nevertheless discerned in that search 'a definite trend', which he evidently welcomed, 'away from the

⁸⁴ See, in particular, K N Llewellyn, 'The Constitution as an Institution' (1934) 34 *Columbia Law Review* 1. See also Matthew S R Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *American Journal of Comparative Law* 587; the Hon Justice W Sofronoff, 'Book Reviews: Role of the Solicitor-General' (2017) 91 *Australian Law Journal* 683.

⁸⁵ Garran, *Prosper the Commonwealth*, above n 7, ix.

⁸⁶ *Ibid* 167.

⁸⁷ See Sir Robert Garran, 'The Development of the Australian Constitution' (1924) 40 *Law Quarterly Review* 202, 203.

⁸⁸ Garran, *Prosper the Commonwealth*, above n 7, 167–8. See also Garran, 'The Development of the Australian Constitution', above n 87, 203.

⁸⁹ Garran, *Prosper the Commonwealth*, above n 7, 168. See also Garran, 'The Development of the Australian Constitution', above n 87, 203.

⁹⁰ Garran, *Prosper the Commonwealth*, above n 7, viii.

⁹¹ *Ibid* ix.

⁹² (1904) 1 CLR 91.

⁹³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

idea of finding a solution based on strict logical law, and towards the idea of taking into account political, social, and economic factors'.⁹⁴

'[F]ederalism', said Garran, is a '*compromise* form of government' and the word 'federal' is 'a political word, with economic and social content'. 'Logic and compromise', he said, 'do not go well in double harness'.⁹⁵ The federal system in Australia, like everything else in the world, had changed since federation and would inevitably continue to change with changing conditions. Commonwealth legislative power had widened and would likely continue to widen, he predicted, although he saw more centralisation of legislative power as consistent with more decentralisation of the administration of centrally formulated legislation.⁹⁶

In addressing judicial exposition of the separation of Commonwealth legislative, executive and judicial power, Garran echoed the observations of James Bryce,⁹⁷ whom Garran knew personally.⁹⁸ Garran noted that Blackstone's adoption of Montesquieu's description of the English constitution of the 18th century as preserving liberty by effecting a complete separation of the legislative, executive and judicial functions overlooked 'that even then, without the scratch of an official pen, there was growing up in England a constitutional practice based on close co-operation between parliament and executive which we now know as responsible government'.⁹⁹ When the framers of the *United States Constitution* 'took Montesquieu, backed as he was by the greatest English legal authority, for their spiritual guide', Garran noted, '[t]hey saw to it that, so far as was humanly possible, in their Constitution none of these three departments should be given any opportunity of conspiring with the others against liberty' and '[w]hen they "vested" the three powers in separate organs, they meant every word of it, exclusively and exhaustively'.¹⁰⁰

Garran contrasted the 'watchful Canadians next door' who astutely framed the *British North America Act 1867* (Imp) to accommodate responsible government. The Canadians, Garran noted, eschewed the language of 'vesting', except for what he described as the statement of 'existing fact', that executive power 'continues and is vested in the Queen'. They also made 'no mention at all of "legislative power" or "judicial power" — merely the creation of a parliament with an attempt to list its scope, and a power to establish courts and define their jurisdiction'.¹⁰¹

Of the framing of the *Australian Constitution*, Garran observed:

In 1891, when the first draft of the Australian Constitution took shape, with Griffith as its chief draftsman, the Canadian plan (apart from the list of federal subject-matters) was followed almost verbatim, with no mention of 'legislative power' or 'judicial power'. These words were introduced later in the 1897 Convention, but (as Griffith himself pointed out

⁹⁴ Garran, *Prosper the Commonwealth*, above n 7, 192.

⁹⁵ *Ibid* 202 (emphasis in original).

⁹⁶ *Ibid* 205.

⁹⁷ See James Bryce, *The American Commonwealth* (Macmillan, 1st ed, 1888) vol 1, 372–81. See Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43 *Federal Law Review* 177, 188–9.

⁹⁸ Garran, *Prosper the Commonwealth*, above n 7, 237.

⁹⁹ *Ibid* 192.

¹⁰⁰ *Ibid* 193.

¹⁰¹ *Ibid* 193–4.

in *Baxter v Ah Way*) as a draftsman's neat arrangement, without any hint of further significance.¹⁰²

Garran went on to observe that, '[i]n the working of the Australian Constitution, it was many years before the strict separation of powers came to the fore',¹⁰³ through a process of judicial interpretation which began with the *Wheat Case* in 1915¹⁰⁴ and which culminated in his lifetime with the *Boilermakers' Case* in 1956.¹⁰⁵

Garran's own view was that the American-style doctrine of separation of powers was 'incompatible with the system of responsible government contemplated by the Constitution, and cannot be read into it'. He thought that 'for the independence of the judiciary under the Australian Constitution we need look no further than British tradition, backed up by the judges' security of tenure' and that 'the synthesis of social science with the law' which he saw then to be taking place was 'diminishing the isolation of jurisprudence'.¹⁰⁶

Garran was prescient. But, of course, he was not omniscient. He did not advert to the uniquely Australian entrenchment, by s 75(v) of the *Constitution*, of the original jurisdiction of the High Court in respect of matters in which constitutional writs or injunctions are sought against officers of the Commonwealth. He did not foretell the significance which that provision would come to have in our contemporary constitutional outlook. Whether he would have approved of developments in the High Court's ch III jurisprudence in the last 25 years, I cannot say. He would certainly have understood them, and he would have respected the process by which they have occurred. Garran's ideas were never so fixed that he thought he should fix them for others, much less for other generations. Rigidity was not in his nature. When the *Constitution* was still in its first 25 years, soon after the *Engineers' Case*, he had written:

Nothing is immune from the touches of time – not even a judgment of the final Court of Appeal; and the work which they began must be carried on from generation to generation. The judicial development of the Constitution is a continuous process, which has only just begun, and which will never end.¹⁰⁷

Addressing the judicial interpretation of s 92 of the *Constitution* in the pre-*Cole v Whitfield*¹⁰⁸ era in which he found himself, Garran expressed disappointment mixed with frustration. He said that he 'yield[ed] to no one in admiration of the achievements of the High Court and the Privy Council, but s 92 [was] not one of their successes – and unlike doctors, they cannot bury their failures'.¹⁰⁹ The words of s 92, said Garran, were:

the words of politicians ... on a political subject which politicians understood very well, and on which they were able to express themselves very clearly. They said that once the uniform ring-tariff had been drawn around the Australian Commonwealth, trade among the States must be absolutely free. They said that and meant it. ... Mainly, of course, they needed assurance that no form of interstate duty would be imposed. That was already provided for by Section 90 [so far as the States were concerned] ... But there was no express provision against border duties being imposed by the Federal Parliament. Besides, there

¹⁰² Ibid 194. See *Baxter v Ah Way* (1909) 8 CLR 626, 634 (Griffith CJ).

¹⁰³ Garran, *Prosper the Commonwealth*, above n 7, 194.

¹⁰⁴ *New South Wales v Commonwealth* (1915) 20 CLR 54.

¹⁰⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁰⁶ Garran, *Prosper the Commonwealth*, above n 7, 194–5.

¹⁰⁷ Garran, 'The Development of the Australian Constitution', above n 87, 217.

¹⁰⁸ (1988) 165 CLR 360.

¹⁰⁹ Garran, *Prosper the Commonwealth*, above n 7, 413.

are many other ways than duties by which freedom of trade among the States may be hampered; for instance, by direct prohibition, by pretended quarantine or health laws really directed to freedom of trade, and by other devices that might be thought of.¹¹⁰

'For twenty years', said Garran, 'no one seemed to have any doubt about the general intent of the section', which he described as 'an absolute prohibition directed to [the] Commonwealth and to States against the re-erection of any form of barrier to interstate trade'. 'Then', he said, 'came the startling decision in *McArthur's Case*'.¹¹¹ Judicial interpretation of the section, in his lifetime, went downhill after that.

Garran would have been pleased with the reformulated approach taken to s 92 of the Constitution in 1988 in *Cole v Whitfield*.¹¹² The High Court's explanation in that case of the purpose and operation of s 92 was almost verbatim as Garran had described it. And Garran would have been especially pleased with the High Court's description of that approach involving a belated acknowledgment of the implications of the long-accepted perception that 'although the decision [whether an impugned law infringes s 92] was one for a court of law the problems were likely to be largely political, social or economic'.¹¹³

Addressing the methodology of constitutional law more generally, Garran wrote in his memoir that he had no quarrel with the principle of 'the rule of law'. His concern was that constitutional adjudication needed to incorporate a view of the law which was 'less syllogistic' and 'more socio-legal' than 'British lawyers' of his day were used to.¹¹⁴ He found constitutional wisdom in something his wife Hilda once said when, driving together near Canberra, he had overtaken a flock of ibis marching unperturbed down the middle of the road. Quoting Ovid,¹¹⁵ to Garran's delight, Hilda had said 'Medio tutissimus ibis' – 'The middle of the road will be your safest path'.¹¹⁶ What was necessary, said Garran, was to 'keep in the middle of the road, and hold fast to the idea that constitutional law is not pure logic, it is logic plus politics'. 'However shocking [that] thought is', he said, 'we cannot get away from it'.¹¹⁷

Anticipating the contemporary approach to constitutional interpretation ushered in with *Cole v Whitfield*, Garran said that it followed 'that we must overhaul some of our rules of constitutional interpretation':

There is a rule that we must look at the mischief to be cured and how it is intended to cure it, but there are other rules that discourage looking outside the text in search of a meaning. Therefore, the court often shuts its eyes to the best means of ascertaining mischief and remedy. I do not think this takes me as far as the modern American 'realist' idea of rationalized hunch behind the smooth logical form of common law judgment, but, taken together with an extension of the historical method in a certain type of federal question in constitutional law, it does seem to lean that way in that particular field.¹¹⁸

110 Ibid 185.

111 Ibid, referring to *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.

112 (1988) 165 CLR 360.

113 (1988) 165 CLR 360, 408 (the Court), quoting *Freightlines & Construction Holding Ltd v New South Wales* (1967) 116 CLR 1, 5.

114 Garran, *Prosper the Commonwealth*, above n 7, 205.

115 *Metamorphoses*, Book II, 137.

116 Garran, *Prosper the Commonwealth*, above n 7, 203.

117 Ibid 415.

118 Ibid.

In the concluding words of his memoir, which were evidently written at the very end of his life, Garran identified the contemporary task for constructive lawyers as being to tread a middle path both statesmanlike and practical.¹¹⁹

V CONCLUSION

No description of Garran would be complete without reference to his love of poetry, his gift for languages, and his quiet religious faith. There is a particularly poetic passage in the King James translation of the biblical Book of Joel of which Garran was fond. The passage says that 'it shall come to pass' that 'your old men shall dream dreams, your young men shall see visions'.¹²⁰ Garran recorded in his memoir that he had always doubted, even as a young man, whether the translators had quite caught its meaning. 'Dreams', he then said, 'are surely more appropriate to early and visions to late life – when experience is added to intuition'.¹²¹

The young Robert Garran did have a vision. In the concluding words of *The Coming Commonwealth*, he wrote in 1897:

But though the Constitution is much, it must not be supposed that it is everything. It is, in itself, merely the means to an end; merely the dead mechanical framework of national unity. The life and soul of the union must be breathed into it by the people themselves. When a Constitution has been framed and adopted, the work of Australian union will have been begun, not finished. The nation will be a nation, not of clauses and sub-clauses, but of men and women; and the destiny of Australia will rest with the Australian people rather than with the Australian Constitution. The work now in hand – the making of a Constitution – is great and important; but it is the beginning, not the end.¹²²

120 years later, we are fulfilling Garran's vision; we are living his dream.

119 Ibid 417.

120 Joel 2:28.

121 Garran, *Prosper the Commonwealth*, above n 7, x.

122 Garran, *The Coming Commonwealth*, above n 2020, 185.