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## ***NATIONALISM AND FEDERALISM IN AUSTRALIA***

**Winston McMinn**

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**I**N his autobiography, Robert Garran praises Edmund Barton's efforts in promoting the idea of federation. He recalls that it was in the early 1890s at a meeting at Ashfield in Sydney's inner west that Barton, then Attorney-General of New South Wales, said: "For the first time in history, we have a nation for a continent, and a continent for a nation."<sup>1</sup> In *Nationalism and Federalism in Australia* Winston McMinn examines Barton's words by posing three questions. First, what did Barton mean when he referred to a nation? Second, how did the idea of an Australian nation come to clothe itself in the idea of a federation? And third, what did Barton's conception of a nation have in common with contemporary notions of an Australian nation?<sup>2</sup> At the end of the book I was left with the distinct feeling that these questions remained unanswered. An important reason for this is that the author, while exploring the legal and political history of Australia, does not adequately identify the notions of 'nation' or of 'nationalism' which are central to his book. This may be because the ideas of nationhood and nationalism are inherently difficult to articulate, although it is also because McMinn makes little attempt to do so.

At the beginning of the book McMinn states:

A nation is really ... a tribe writ large. A tribe is essentially a unit of social organisation based on a perception of an origin and heritage which are both common and unique.<sup>3</sup>

At the time of white settlement in Australia, the European nation state was seen as the natural unit of world order. However, in tracking Australia's development over the next two hundred years one needs to recognise that at the same time as there have been developments in Australia, leading,

one would assume, to a greater sense of cohesiveness and national identity, there have been enormous changes in, put generally, global political culture. None of this is news but it seems to me that if one is seriously pursuing the idea of nationalism in Australia since its convict days, it is necessary to address in some detail the changing concepts of nationalism over the period. Without this, one is chasing an inevitably elusive concept, coming close to a theory that explains Australia's position only to find that, as a result of broader historical forces, the notion that one is attempting to explain has changed. Australia was settled by Europeans in the age of colonial expansion. The colonies federated whilst still firmly loyal to the Empire. Gradually Australia achieved legal and cultural independence from the mother country while the world was convulsed by two world wars and now, as an independent nation, it exists in an economically and culturally globalised world. Naturally the idea of 'a nation' is in some ways much less significant than it was one or two hundred years ago. According to McMinn, among the forces influencing the contemporary shape of nationalism in Australia are multiculturalism, the increasing development of Aboriginal identity after *Mabo*<sup>4</sup> and the global cultural domination of the United States. At the end of the book he says:

the very idea of a common heritage and a unique culture on which nationalism depends have been submerged ... the common attitude of Australians to their country ... bears very little resemblance to the Australian nationalism which seemed to be gradually developing during the nineteenth century, which contributed to federation, and which seemed to flower during the Great War.<sup>5</sup>

At this level of generality such conclusions do not add much to our understanding of Australian identity or development as a nation. After almost one hundred years of federation, years which have coincided with the hundred years of fastest change ever experienced by western societies, such a conclusion is, to say the least, unsurprising. Thus, in terms of its examination of nationalism and, to a lesser extent, federalism, the book is clearly ambulatory rather than definitive. Nevertheless, in the course of tracing the development of the Australian nation McMinn pursues two significant ideas. First, the strong 'centrifugal forces' still at work amongst the colonies at the time of federation and second, the analogy of the rise of Commonwealth power to a Greek tragedy.

The principal thesis in the first half of the book is that there was little sense of an Australian nation until well after federation. The federal movement

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was not, as historical myth would have one believe, a popular movement but rather a "determined minority push which is more common and more effective than a majority wish".<sup>6</sup> The coming together of the Australian colonies in a federation was not inspired by a great national idea but was rather an affair dominated by colonial politicians protecting, and where possible advancing, the interests of their colonies.

McMinn focuses on the forces keeping the colonies separate, the 'centrifugal forces', and shows that the journey towards nationhood was a hesitant one. Prior to the 1880s the principal bond between people in the Australian colonies was not a national consciousness, but a racial one: the rejection of Aboriginal people and Chinese immigrants - Englishmen versus non-Englishmen. The absence of any unifying consciousness was, in part, due to physical factors. Unlike the United States, where at the time of federation one could cross from Delaware to Maryland by crossing a road,<sup>7</sup> the Australian colonies in the late nineteenth century were still very much physically isolated. So long as this continued it was quite understandable that colonists would see themselves more tied to the mother country than to each other. But as the number of native born in the colonies increased, so a proto-nationalist sentiment developed. There were actually those who looked forward to self-government. This evolution towards a common rather than colonial identity came gradually. By the 1880s it was only threats from outside that drove the colonies towards collective action in the form of the Federal Council of Australasia and even these were not such as to produce any dire need for joint action. The spur for the formation of the Council was the threat of annexation of New Guinea by Germany and a proposal by the French Government to increase transportation to its pacific colonies. At this stage the Crown colonies of Fiji and New Zealand were involved along with the Australian colonies. The principal factor binding them together was their status as British colonies.

As already mentioned, McMinn characterises the federal movement itself as largely dominated by colonial politicians pushing colonial interests. Although the rhetoric was nationalist, the hard bargaining in the development of a constitution was driven by colonial self-interest. He emphasises the continual suspicion by the New South Wales government, dominated by free traders, of federal proposals put forward or even supported by the strongly protectionist Victorian government.

However federation, when it was achieved, was only the first step in building a nation out of the colonies. As Alfred Deakin, then the Commonwealth Attorney-General, noted in 1901:

We continue to be a congeries of States rather than a Commonwealth. Our States are still jealous and suspicious of each other and, what is more, they are envious and covertly antagonistic to the Federal Government and Parliament ... All we have actually accomplished is to put our destinies in the hands of representatives and agree to be bound by the actions of a majority among them ... At present it is only a legal contract. We have remitted our problems to Parliament unresolved and our antipathies unweakened, imposing on the Government and the two Chambers the real task of nation-making.<sup>8</sup>

The second half of the book is devoted to the period after federation and examines chronologically the emergence of an independent Australian nation. In this the main theme is the process of centralisation of power in the Commonwealth. From being touted by advocates of federation as costing no more than a dog licence, the Commonwealth has developed as the dominant element in the federation. This McMinn explains with the useful analogy to Greek tragedy.

The essence of the idea of tragedy in the ancient world was that the end is inescapable because of something, seemingly unimportant, which existed from the beginning. So it was with the growth of federal power.<sup>9</sup>

The analogy is a good one because it draws attention to the failure of the founding fathers to realise the full implications of the document that they were creating. Inevitably, rather than being created as a living document, the Constitution was more the product of hard bargaining focussed on the big issues of the day. For example, the issues which were difficult at the time were the deadlock provisions for a joint sitting of both houses of federal parliament, the so-called Braddon clause guaranteeing the states the customs revenues for the first ten years of the federation and the location of the federal capital. It was only after the rejection by the voters of New South Wales of the proposed Constitution in 1898 that George Reid, then the New South Wales Premier, was able to force the other colonial leaders to compromise on these issues. Whilst the joint sitting provisions was tested during the Whitlam Government, none of these

provisions, which were so controversial then, have really been significant for the shape of the federation.

It is other provisions, to which less attention was paid by the orators at the conventions, that have had much greater significance for the shape and dynamics of the federal relationship. The principal provisions of the Constitution that have given the Commonwealth dominance are those that give it the power to control money. Deakin, again as the anonymous correspondent with the English newspaper the *Morning Post*, had written in 1902 that the Commonwealth government's control of the national purse would lead inevitably to its dominance in the federation. He wrote:

The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It has left them legally free, but financially bound to the chariot wheels of the Commonwealth.<sup>10</sup>

While Deakin may have been wise to this potential the other founding fathers were not. The taxation power, customs power and the power to make grants to the States on terms have, in combination with section 109, served to ensure Commonwealth dominance over the States. If there were any who believed the Commonwealth would cost no more than a dog licence they would soon have lost this impression. As McMinn puts it, "Some licence. Some dog!"<sup>11</sup>

Apart from the financial powers, the others that were to prove decisive in the rise of the Commonwealth were two areas, the rise of which has been a hallmark of the twentieth century - welfare and international treaties.

For example, the power in section 51(xxiii) of the Constitution to make laws with respect to invalid and old age pensions was the subject of one of the early financial showdowns which demonstrated the primacy of Commonwealth power. The Braddon clause had guaranteed the States three quarters of the revenue collected by the Commonwealth in the first ten years of its existence. In the face of its impending expiry in 1908 the second Deakin government, wishing to accumulate the necessary revenue from which to pay old age and invalid pensions, passed the *Surplus Revenue Act* 1908 (Cth) which provided that funds not otherwise appropriated would be retained in trust funds rather than being returned to the States. The Act was challenged unsuccessfully by the States who then were forced to accept a financial agreement which provided funds on a per capita basis.<sup>12</sup>

Similarly, the external affairs power, which has been so influential in the development of Commonwealth power in recent years, was approved with little or no debate at the conventions. It was, according to McMinn, accepted as meaning no more than "relations with Downing Street".<sup>13</sup> At the 1891 Convention there was little debate on the external affairs power and none relating to its potential scope. The bill that was adopted at the end of the Convention did, however, include a power for the Commonwealth to legislate with respect to "External Affairs and Treaties". At the Adelaide Convention in 1897 a provision giving the Commonwealth power to legislate in identical terms was adopted without debate.<sup>14</sup> Similarly, there was very little debate when "and treaties" was dropped from the clause, leaving it merely "External affairs".<sup>15</sup> This was almost certainly done because the delegates were correctly of the view that upon federation the sole treaty-making power would remain with the Imperial Government.<sup>16</sup> Yet this power, adopted with little debate and relatively little controversy, has become, potentially at least, one of the greatest constitutional weapons in the Commonwealth's battle for power with the States. Certainly, in the post-*Tasmanian Dam Case*<sup>17</sup> era there appear to be few constitutional limits on the power of the Commonwealth to legislate so long as it is doing so for the purposes of implementing an international treaty.<sup>18</sup> With the growth of international law the implications for the shape of the federation are obvious.

It may be that it is only because of these unseen 'faults' in the Constitution that the document has been as durable as it has. The *Engineers*<sup>19</sup> approach to constitutional interpretation has allowed a principled and gradual expansion of Commonwealth powers. Without the ability to judicially recognise the increasing power of the Commonwealth, the pressure for a major overhaul would certainly have been greater than has been the case. Certainly the 'sleepers' in the Constitution have made possible the expansion of Commonwealth powers so as to make the document workable in modern times. This has been achieved without the necessity to do violence to its language to perhaps the extent necessary in the United States.<sup>20</sup> One can hardly imagine a modern nation operating today as a successful international entity while remaining strictly governed by the nineteenth century assumptions of the drafters of its Constitution.

For one whose travels through Australian legal and constitutional history have been relatively limited the book was certainly entertaining reading. In some technical respects, however, I found the book frustrating. The lack of any form of footnotes, as in McMinn's earlier work *A Constitutional History of Australia*, is excruciating. For those who want to

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go further than the detail provided in the text but do not want to undertake a major course of study in Australian history the absence of footnotes is a major failing. In this respect I did wonder at exactly which type of reader the book is aimed. It certainly offers a more accessible overview of the period than La Nauze's *The Making of the Australian Constitution*<sup>21</sup> or *A Constitutional History of Australia*. While perhaps not as useful as these previous books as a reference work, *Nationalism and Federalism in Australia* certainly gives a more up-to-date perspective on the issues involved. It is perhaps in this that the value of the book lies.

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1 Garran, *Prosper the Commonwealth* (Angus & Robertson, Sydney 1958) p101.  
2 McMinn, *Nationalism and Federalism in Australia* (Oxford University Press,  
Melbourne 1994) p2.  
3 At p4.  
4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.  
5 McMinn, *Nationalism and Federalism in Australia* p298.  
6 At p163.  
7 At p30  
8 Else-Mitchell, "The Establishment in 1885 of the Federal Council of  
Australasia" (1985) 59 *ALJ* 666 at 668, quoted from Deakin, *Federated  
Australia; Selections from Letters to the Morning Post, 1900-1910* (Melbourne  
Uni Press, Melbourne 1968) p61.  
9 McMinn, *Nationalism and Federalism in Australia* p197.  
10 McMinn, *A Constitutional History of Australia* (Oxford University Press,  
Melbourne, 1979) p134; McMinn, *Nationalism and Federalism in Australia*  
p210.  
11 McMinn, *Nationalism and Federalism in Australia* p180.  
12 *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179.  
13 McMinn, *Nationalism and Federalism in Australia* p213.  
14 *Official Record of the Debates of the Australasian Federal Convention Vol III,  
Adelaide, 1897* (Legal Books, Sydney 1986) pp760, 794.  
15 *Official Record of the Debates of the Australasian Federal Convention Vol IV,  
Pt 1 (Third Session), Melbourne, 1898* (Legal Books, Sydney 1986) p30.  
16 For example, see Quick & Garran, *The Annotated Constitution of the Australian  
Commonwealth* (Angus & Robertson, Sydney 1901) p768.  
17 *Commonwealth v Tasmania* (1983) 158 CLR 1.  
18 For example, see *Industrial Relations Act 1988* (Cth) Pts VIA-VIB.  
19 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR  
129.  
20 See Mason, "The Australian Constitution 1901-1988" 62 *ALJ* 752 at 752.  
21 La Nauze, *The Making of the Australian Constitution* (Melbourne University  
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