INTRODUCTION: AUSTRALIA AS A FEDERAL COMMONWEALTH

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established . . .
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> Commonwealth of Australia Constitution Act 1900, preamble

The preamble to the Australian Constitution declares that the Commonwealth of Australia is a 'Federal Commonwealth'.[1] What did the framers of the Constitution mean by this, and why did they choose to create such an entity? It was certainly incumbent upon them to choose an expression that would capture the essential meaning and nature of the new polity they wished to see created. And so the framers said that this polity would be formed 'under the Crown' and 'under the Constitution' to be enacted by the Parliament of the United Kingdom. But they named it the 'Commonwealth of Australia', and they designated it a 'Federal Commonwealth'.[2]

Speaking abstractly, the framers of the Constitution might just as easily have created a polity that called for a somewhat different description – perhaps, for example, as a representative democracy or a constitutional monarchy. Indeed it is clear that the Constitution was constructed upon representative, democratic, constitutional and monarchical foundations, so that labels such as these would not necessarily have been out of place. The principles of representative government, responsible government and the rule of law are certainly fundamental features of the commonwealth that the framers wished to create.

[1] Strictly speaking, the preamble is part of the Commonwealth of Australia Constitution Act 1900 (UK), which in s. 9 sets out the Constitution of the Commonwealth of Australia, itself consisting of 128 sections.

[2] See also Commonwealth of Australia Constitution Act 1900, s. 3 (see select provisions).

The framers plainly chose to construct a representative legislature, whose office-holders would be chosen by the people.[3] After all, the legitimacy of the Constitution rested, chiefly, on the agreement of the people of Australia to unite in a federal commonwealth.[4] Just as clearly, although the executive power of the commonwealth would be vested in the Queen and exercisable by the governor-general, the financial powers given to the Federal Parliament meant that a system of responsible government was likely to emerge, under which the governor-general would exercise executive power on the advice of ministers having the support of the Parliament.[5] Moreover, the literary structure of the Constitution itself, in particular the treatment of the legislature, the executive and the judiciary in separate chapters, suggested that a modified separation of powers was also intended.[6]

However, the institutions created under the Australian Constitution – legislative, executive and judicial – are just as clearly federal institutions. The bicameral Parliament, partly federal in its structure, has only limited 'federal' powers, the judiciary has a limited 'federal' jurisdiction, and the power vested in the executive is expressed to be 'the executive power of the Commonwealth'.[7] Moreover, the Constitution is structured so as to treat separately of the states,[8] and does not explicitly prescribe the proper relationship between the various branches of the state governments.[9] Indeed, the Constitution presupposes the existence of the states, treating them as autonomous, self-governing bodies politic that are, as James Bryce put it, 'more essential to the existence of the Commonwealth than it is to theirs'.[10] Thus, the Constitution does not establish institutions for the states or confer powers upon them – it rather assumes their existence and confirms that they will continue, subject only to the specific measures adopted under the Constitution.[11]

[3] Commonwealth Constitution, ss. 7, 24. [4] Constitution Act, preamble.
[5] Commonwealth Constitution, ss. 61, 64, 81, 83.
[6] Commonwealth Constitution, chs. I, II and III. On the separation of powers, see *R* v. *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, but compare *Victorian Stevedoring & General Contracting Co. Pty Ltd* v. *Dignan* (1931) 46 CLR 73.
[7] Commonwealth Constitution, ss. 51, 52, 61, 73–6.
[8] Commonwealth Constitution, ch. V.
[9] But in respect of state courts exercising federal jurisdiction, see *Kable* v. *Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[10] James Bryce, *The American Commonwealth*, 2 vols. (2nd edn, London: Macmillan, 1889), I, 12.
[11] Commonwealth Constitution, ss. 106, 107.

In this connection, it is to be recalled that it was not simply the 'Australian people' who agreed to unite into a federal commonwealth, but the people of the several colonies.[12] It followed for those who drafted the Constitution that the legislative powers of the Commonwealth must be vested in a Federal Parliament, the people of the states being separately and equally represented in one house, the Senate, which would share the legislative power of the Commonwealth with a House of Representatives that represented the people of the Commonwealth.[13] For similar reasons, the framers also thought that the amendment of the Constitution must ultimately rest in the combined hands of a majority of the peoples of the States and the people of the Commonwealth, voting at referendums.[14]

In these, and other more particular ways, all fundamental to the Constitution, the Australian framers decided to create a 'federal commonwealth'. However, until recently, remarkably little has been written about what the framers meant by this, or about what the idea of a federal commonwealth might mean to us today.[15]

The idea of a federal commonwealth

John Quick and Robert Garran gave the idea of a 'federal commonwealth' an extended analysis in their 1901 classic, *The Annotated Constitution of the Australian Commonwealth.*[16] The term 'federal', they observed, qualifies not only the conception of the Australian Commonwealth as a federal commonwealth, but also its principal governing institutions – the legislature, the executive and the judiciary. This led them to conclude that '[t]he Federal idea ... pervades and largely dominates the structure of the newly-created community, its Parliamentary, executive and judiciary departments'.[17]

[12] Constitution Act, preamble. [13] Commonwealth Constitution, ss. 1, 7, 24.
[14] Commonwealth Constitution, s. 128.
[15] Three studies that have considered Australian federalism in more or less theoretical terms are Michael J. Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Sydney: Law Book Co., 1985); Andrew Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990); and Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge: Cambridge University Press, 1995).
[16] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus and Robertson, 1901; reprinted Sydney: Legal Books, 1976), 292–4, 332–42.
[17] *Ibid.*, 332.

Although it is one purpose of this book to subject Quick and Garran's exposition of the federal idea to an extended critique,[18] it must be acknowledged at the outset that their analysis has hardly been surpassed since it was first published. The particular strength of the analysis was its sensitivity to the various opinions about federalism which shaped understandings at the time. With analytical clarity Quick and Garran identified the 'several distinct and separate meanings' that the term 'federal' had then acquired and thoroughly explained how they had been variously incorporated into the Constitution.[19]

The 'primary and fundamental' meaning of federalism, Quick and Garran explained, is the idea of a federal compact between states. Here, they said, the focus is on the *fœdus*, treaty or covenant by which several independent states agree to form a common political system while retaining their separate identities. On this account, federalism is in essence something brought about by a compacting agreement between states. The preamble to the Constitution, when reciting the agreement of the peoples of the colonies to form a federal commonwealth, alludes clearly to this sense of federalism. Certainly, the preamble appeals to the people, but it just as clearly appeals to the peoples of each colony.[20]

The second sense of federalism to which Quick and Garran referred concerns the nature of the new state created by such a union. The reference here was not to the bond of union between the federating states, but to the new state created by that bond: a federal state, which is itself a union of constituent states.[21] The expression 'federal commonwealth', they observed, is used in the Australian Constitution in this sense. It is also the sense in which the expression 'federal state' was used by James Bryce, Edward Freeman and A. V. Dicey – key influences on Australian federalism to be examined in a subsequent chapter.[22] For the moment, however, it is vital to appreciate that the reference here is to the composite entity as a whole: a polity in which the incorporation of states into state is taken to be of the very essence of its nature.

[18] See, in particular, ch. 4.
[19] Quick and Garran, *Annotated Constitution*, 332–42.
[20] See chs. 1 and 2, below.
[21] The Constitution Act, s. 6 defines 'the States' as constituent 'parts of the Commonwealth'. Quick and Garran, *Annotated Constitution*, 336–7, pointed out that the states 'are welded into the very structure and essence of the Commonwealth'; 'they are inseparable from it and as enduring and indestructible as the Commonwealth itself'; and they form 'the buttress and support of the entire constitutional fabric'.
[22] See ch. 3.

The third and fourth conceptions identified by Quick and Garran concern the system of governments adopted within a federal system, rather than the underlying polities. Their reference in this respect was not to the state and states which form the federation, but to the governing apparatus adopted therein. The idea is one of a dual system of governments, in which there is a federal government that exercises particular powers over the entire territory and several state governments that exercise their powers over separate, smaller territories. The third sense of 'federal' discerned by Quick and Garran concerns this dual system of governments; the fourth sense of the term refers to the federal government in particular.

Quick and Garran noted that this focus on systems of government, and not the underlying state(s), derived from the theory of federalism promulgated by John Burgess – another important but neglected figure in the story of Australian federalism.[23] Theoretically committed to a unitary conception of the state, Burgess insisted that there could be no such thing as a federal state. A state by its essential nature can only be unitary in character, he claimed. A state may certainly happen to utilise a dual system of government, employing 'two separate and largely independent governmental organisations in the work of government',[24] and dividing its sovereign powers between them. But the fundamental nature of the underlying state, he thought, consisted in its unitary character. Such a theory is clearly contrary to the idea of a federal commonwealth in the second sense referred to above.

Quick and Garran were deeply influenced by Burgess's approach to federalism, believing that it accorded with 'the more modern scope of the word'.[25] However, they could not point to any place in the Constitution in which the term 'federal' was used in this sense of a dual system of government within a unitary state. Certainly, the Australian Constitution frequently uses 'federal' to denote the governing institutions of the Commonwealth, but nowhere is the term federal used to refer specifically to Burgess's idea of a dual system of government in the particular sense in which he meant it.

This is not simply a matter of semantics. The implications are far reaching. In the first two senses of 'federal' just discussed, Quick and Garran identified the conception of federalism that shaped the views of

[23] See ch. 3. [24] Quick and Garran, *Annotated Constitution*, 334.
[25] *Ibid.*, 335; similarly at 341–2.

the overwhelming majority of the framers of the Australian Constitution. Not only was the 'federal commonwealth' of Australia plainly founded on the agreement of the peoples of the colonies, but this fact shaped the institutions of government that were actually adopted under the Constitution. Quick and Garran asserted that the fourth sense of federal, as descriptive of the organs of the 'central' or 'general' government, while used throughout the Constitution, 'has no important bearing on federal history or theory'.[26] However, on the contrary, the structure and composition of Australian institutions of government (fourth sense) were deeply shaped by the fact that they were to be the governing institutions of a federal commonwealth (second sense) which emerged from the agreement of the peoples of the states (first sense). Restated in the terminology used in this book, the formation of the Constitution deeply shaped the representative institutions, configuration of powers, and amending formulas adopted under the Constitution.

The argument

The central argument of this book is that the idea of a federal commonwealth is essential to the text, structure and meaning of the Australian Constitution, and that the relationship between formation, representation and amendment is fundamental to this conception. As Brian Galligan has argued, federalism – not parliamentary responsible government – is the primary organising theme of the Constitution.[27] And, as Galligan has further pointed out, a careful consideration of the federal convention debates of the 1890s is a powerful aid to understanding the Constitution that emerged.[28] In those debates federalism was the non-negotiable presupposition, not responsible government. Responsible government had to be accommodated within federalism, and not vice versa.[29]

The claim that a study of the formation of the Australian Constitution is essential to an understanding of its federal design very obviously calls for a close examination of the process by which the Constitution came into being. This process was a highly complicated one, multifaceted, elaborately interwoven and inherently susceptible to a wide variety of interpretations. Among these interpretations, an approach which seeks to

[26] *Ibid.*, 334. [27] Galligan, *Federal Republic*, 7, 38.
[28] *Ibid.*, 7, noting decisions of the High Court of Australia to this effect. [29] See chs. 7 and 8.

draw out the fundamental ideas at stake cannot afford to ignore three important dimensions of the process: the philosophical, the institutional and the deliberative. The argument advanced in this book takes account of each of these three.

The philosophical context of Australian federation is not easy to identify. In the first place, the contending ideas and sources are more diverse than has generally been recognised.[30] And in appraising the relative importance and weight of particular writings, difficult questions of judgement and historical sensitivity are inevitably involved. Still, such a task is integral to identifying the philosophical influences and thus obtaining a clear view of the making and meaning of the Constitution.

Some will say that the attempt to uncover the philosophical basis of Australian federation is misconceived. It has sometimes been asserted that other forces – especially the economic and the political – were the key factors.[31] However, a close reading of the documents and the debates has led me to the conviction that Australian federation involved real theoretical discussion, and was not merely a smokescreen for a deeper controversy between social groups concerned to advance their own material interests.[32] Economic and political interests were certainly involved, but the terms of debate and the outcome (the text of the Constitution) cannot be understood without an appreciation of the philosophical arguments invoked. Competing philosophical ideas cast a powerful explanatory light on the debate and outcome, as it is hoped the

[30] James Warden's study, *Federal Theory and the Formation of the Australian Constitution* (unpublished doctoral thesis, Australian National University, 1990), for example, does not address the views of Edward Freeman and John Burgess.

[31] E.g. Leslie F. Crisp, *Australian National Government* (5th edn., Melbourne: Longman Chesire, 1967), 14–20; R. S. Parker, 'Australian Federation: the Influence of Economic Interests and Political Pressures' (1949) 4(13) *Historical Studies, Australia and New Zealand* 1; Ronald Norris, *The Emergent Commonwealth: Australian Federation: Expectations and Fulfilment 1889–1910* (Melbourne: Melbourne University Press, 1975); Peter Botsman, *The Great Constitutional Swindle: A Citizen's View of the Australian Constitution* (Sydney: Pluto Press, 2000). But compare, e.g. Geoffrey Blainey, 'The Role of Economic Interests in Australian Federation' (1950) 4(15) *Historical Studies, Australia and New Zealand* 235; A. W. Martin, 'Economic Influences in the "New Federation Movement"' (1953) 6(21) *Historical Studies, Australia and New Zealand* 64; Jed Martin, *Australia, New Zealand and Federation, 1883–1901* (London: Menzies Centre for Australian Studies, 2001).

[32] See further Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge: Cambridge University Press, 1997), 214–15; John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford: Oxford University Press, 2000), 265–71; Bob Birrell, *Federation: The Secret Story* (Sydney: Duffy & Snellgrove, 2001), ch. 5.

pages that follow serve to demonstrate. Indeed, as will be seen, understanding the Australian Constitution in terms of the federal commonwealth idea enables us to understand how the document can simultaneously be understood as the product of both philosophical speculation and pragmatic bargaining.

In chapters 1–4, I seek to reconstruct the philosophical context of Australian federation. Chapter 1 lays a foundation by critically analysing the three leading conceptual frameworks that have been proposed for the analysis of federal systems and by introducing the particular interpretive framework that will be advanced in this book. Chapter 2 then works out the analytical implications of the conceptual framework sketched in chapter 1, drawing on several features of the American, Canadian and Swiss Constitutions, and suggesting how conceptions about the formation of federal constitutions in each of these countries appear to have influenced the representative institutions and configurations of power adopted therein, and how all of these affected, and were in turn shaped by, the amending process. Chapter 3 then turns from constitutional texts to philosophy, considering again the American, Canadian and Swiss Constitutions as centrally important models, but touching also upon the influence of the leagues of the ancient Greek city-states, the Holy Roman empire, the Dutch United Provinces and the later German empire. In particular, chapter 3 focuses upon the various contending interpretations of these systems, and considers those interpretations in the context of more abstract ideas about the nature of federalism circulating throughout the English-speaking world in the late nineteenth century. Chapter 4 concludes the consideration of conceptual frameworks and theoretical ideas by examining how these models and theories were appropriated by leading Australian figures, and how the Australians used these ideas when formulating specific arguments about the kind of federal system that should be adopted by the Australian colonies. In this way, chapters 1–4 are intended to uncover the conceptions and theories which shaped the discussions and debates that ensued during the composition and ratification of the Australian Constitution.

Federal theory accords an important place to the institutional process by which federal systems come into being. According to Quick and Garran, the notion of a compact between states is the 'primary and fundamental' idea. But in so far as the idea of federalism patently involves a compacting agreement, the notion also suggests that, ideally, the

constituent states are independent and autonomous parties to such an agreement. By the same reasoning, agreement between parties also implies specific terms of union, and to arrive at these terms, discussion is essential. However, effective discussion requires rules to control debate and define how decisions will be made. The notion of a federal compact implies that several autonomous states will agree to a decision-making procedure through which the terms of union are discussed and finally agreed. A study of the making and meaning of the Australian Constitution must take careful account of this formative process.

Federal theory is fundamentally historical and empirical in orientation, and this is so for several reasons. First of all, the 'ideal' conditions just described do not necessarily obtain in the real world. Particular political communities may be little more than subordinate administrative divisions of a unitary state; they may be self-governing colonies (as were the Australian colonies prior to federation); or they may be fully autonomous nation-states. The nature and terms of a more or less 'federal union' of such communities will be shaped fundamentally by their initial constitutional status. And this is but another way of saying that the formative basis of a 'federal system' – understood now in institutional terms – will have a profound influence on the kind of system that emerges from the federating process.

The historically contingent circumstances in which a federal arrangement comes into being imply that the terms of the federal compact will themselves depend on contingencies. Especially in so far as the peoples of the constituent states freely agree to terms of union, it is essential to the classical idea of federation that the terms of union will vary from one federal system to another, depending on the particular institutional conditions under which it is formed and the aspirations and interests which motivate those who conduct the negotiations.

In order to understand the drafting of the Australian Constitution it is therefore necessary to examine not only the philosophical context within which the federation took shape, but also the institutional conditions under which the debate was conducted. It is this question which is addressed in chapters 5 and 6. These chapters investigate the legal preconditions and institutional arrangements that were the context in which the Constitution came into being. The investigation involves an inquiry into the roles played by the governing institutions of the Australian colonies and the structure of the federal conventions at which the terms

of the Constitution were debated and agreed, as well as the popular referendums at which the Constitution was approved by the voters of the colonies and the process by which the imperial Parliament enacted the Constitution into law.

The final aspect of an inquiry into the making and meaning of the Australian Constitution must concern the actual debates and drafting undertaken within the institutional and philosophical contexts just described. The idea of a union of states achieved through agreement requires specific terms, arrived at through negotiation. In chapters 7–11 I therefore examine the course of deliberation through which the Constitution was drafted. I do this through a close analysis of the formal records of debate within the federal conventions, the colonial legislatures and the imperial Parliament, and a survey of the wider public debate. In these chapters I focus, in particular, upon the drafting of the Australian Constitution through the course of the federal conventions of 1891 and 1897–8, read in the context of the institutional framework identified in chapters 5 and 6 and the theoretical context identified chapters 1–4. The objective here is to demonstrate the influence of the philosophical, institutional and deliberative dimensions of the formation of the Constitution on the federal structures embodied in it.

More specifically, chapters 7 and 8 examine the debate about the representative structures embodied in the Constitution: in particular, the House of Representatives, the Senate and the executive government. The first of these chapters focuses on the debate about the fundamental principles of federal representation that should govern the roles, composition and powers of these institutions. The second focuses on how these principles were embodied in the specific terms of the Constitution related to these institutions.

Chapters 9 and 10 then turn to the continuing functions and powers of the states *vis-à-vis* the new functions and powers conferred on the Commonwealth. These chapters are especially concerned with the scope of, and the relationship between, these two sets of polities, governments and powers. Conventionally referred to as the 'division of powers' between the Commonwealth and the states, I argue that such a conception does not do justice to the specific way in which the competences of the Commonwealth and the states are in fact structured. It is better, I suggest, to conceive of it as a 'configuration', 'distribution' or 'allocation' of power, rather than as a 'division'.