Living traditions: An examination of the theoretical and philosophical tensions in Australian constitutionalism

By

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Abstract

The thesis is concerned with understanding the influence of constitutional philosophy on contemporary political practice. The thesis questions whether the Australian polity has an established account of what constitutes the underpinning philosophy of the Constitution and, more importantly, if this philosophical inheritance has any enduring impacts. The thesis refutes claims that Australian constitutionalism is devoid of political philosophy or underpinned by an innate utilitarianism, arguing that the Constitution has a rich and diverse philosophical heritage. More specifically, the thesis contends that Australian constitutionalism is predominantly shaped by two philosophical traditions that can be traced to the founders’ decision to combine elements of English and US constitutional thought. The first three chapters of the thesis discuss how these two traditions shaped the development of the Constitution, contributing to Australian understandings of critical constitutional concepts such as the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights. Furthermore, by tracing the philosophical origins of the Constitution, the thesis shows that the two predominant influences on the development of Australian government are often at theoretical tension. Having established the Constitution’s rich and diverse philosophical heritage, the thesis then attempts to understand if the theoretical tensions in Australian constitutionalism manifest in contemporary political practice.

The thesis demonstrates the significance of Australia’s theoretically rich constitutionalism by examining three case studies. The case studies are designed to show that the theoretical tensions are significant because, on occasion, disagreements over the philosophical foundations of the Constitution underpin political events, contributing to both the debate and the final resolution or outcome. The first case study examines the Whitlam dismissal to show how Sir John Kerr utilised the contested nature of the separation of powers to advance an innovative idea of the executive and its relationship to the federal elements of the Constitution. The second case study examines the transcript of proceedings recorded throughout the 1998 Constitutional Convention to show how challenges resolving theoretical tensions in Australian constitutionalism underpinned the debate, defining the development of the proposed constitutional model that was put to electors in 1999. The second case study finds that philosophical tensions regarding the final proposed model were reconciled with a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. The final case
study examines the failure of the Gillard Government’s Malaysia Solution to show that theoretical tensions in Australian constitutionalism can be used opportunistically as a political tool to alter or impede the development of complex public policy such as offshore processing. Thus, the thesis demonstrates that philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism.

The findings from the thesis are significant because they provide a basis for further examination of both the ideas that informed Australian constitutionalism and how these powerful traditions continue to shape and underpin contemporary political practice. The thesis provides a platform for research seeking to further investigate the complex theoretical nature of the current Constitution, as well as offering compelling practical reasons for the Australian polity to develop a more profound or meaningful consensus regarding the philosophical foundations of government.
Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Carl Olive
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Chapter One: Introduction

Research questions and approach

Australian constitutional thought has been predominantly characterised by two scholarly approaches. For much of Australia’s history scholars have claimed that the operation of government is pragmatic and predominantly shaped by the prevailing political dynamic, rather than overarching philosophical conceptions derived from political theory (Weller & Wanna 2003: 64; Emy and Hughes 1988: 39). Authors such as Bryce (1921), Metin (1955), Pringle (1958), McQueen (1973; 1980), Loveday (1979), Burgmann (1985) and Sharman (1990) all discuss the relative lack of philosophical reflection on Australian democracy, contending that government is fundamentally non-theoretical. In more recent times this approach has subsided, being replaced by a developing consensus that the Constitution is a unique hybrid arrangement, which combines elements of English and US constitutionalism. Authors such as Patapan (2000), Aroney (2009), Thompson (1980; 2001) and Galligan (1995) have all recognised that the Constitution has extensive philosophical links to both English and US constitutional thought. Importantly, however, beyond an agreement that the Constitution is a unique hybrid arrangement, Australian constitutional thought has not considered the significance of the theoretical tensions that underpin Australian democracy. There remains an opportunity to establish in more detail the philosophical foundations of the Constitution and how they continue to impact on contemporary political practice. Specifically, the thesis will advance Australian constitutional thought by showing that the Constitution’s hybrid philosophical foundations have resulted in a system of government that does not endorse a singular set of constitutional principles. The hybrid nature of the Constitution has resulted in a system of government underpinned by philosophical and theoretical tensions. Significantly, the thesis shows how these theoretical tensions are utilised in contemporary political discourse to alter or determine the course of political events.

The analysis in the first half of the thesis is concerned with understanding the philosophical foundations of Australian constitutionalism. Given that the Constitution is a hybrid arrangement, the thesis questions whether the Australian polity has an established account of what constitutes the underpinning philosophy of government. Does Australian constitutionalism articulate an agreed set of principles that guide the direction and limitations of government? This question is important because it is a key finding of the thesis that Australian government does not have an established or coherent underpinning philosophical narrative. The thesis argues that the separation of powers, the foundations of national
sovereignty and the best mechanism to secure individual rights remain contested. The founders’ decision to combine the conventions of parliamentary responsible government with republican institutions such as the Senate, the High Court, federalism and popular sovereignty has resulted in a system of government that has a complex philosophical heritage, which predominantly derives from either English or US constitutional thought.

Having established that critical tenets of Australian democracy are contested, the remainder of the thesis seeks to understand how this constitutional inheritance influences contemporary political practice. The thesis questions whether the Constitution’s contested philosophical foundations have any impact on the operation of government. If the Australian polity has no agreed account of the philosophical foundations of the Constitution, then how do institutions and political actors respond when faced with decisions that involve contested concepts such as individual rights, national sovereignty, or the separation of powers? The thesis will argue that contrary to the existing scholarship on the pragmatic or anti-theoretical nature of Australian politics, competing philosophical conceptions of the Constitution are regularly employed in political discourse. It is a key finding of the thesis that Australia’s constitutional traditions often provide the foundation for the political discourse that defines the operation of government. To a certain extent, political actors rely on established understandings of government to support policy arguments and defend the actions of particular institutions. This is significant because, at different times, the contested nature of the Constitution has resulted in political actors and institutions adopting contending positions on important political or constitutional issues. Moreover, the thesis shows that, on occasion, disagreements over the philosophical foundations of the Constitution underpin political events, contributing to both the debate and the final resolution or outcome. In particular, the thesis shows that philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism. Thus, the thesis outlines specific ramifications resulting from Australia’s contested constitutional foundations.

The central premise of the thesis is that the Australian Constitution is a hybrid arrangement, which includes institutions that can be traced to either English or US constitutional thought. It is important to understand that the central claim regarding the hybrid nature of the Constitution is supported by, and borne out of, an examination of Australian constitutionalism. To begin to assess whether the Australian polity has an established or coherent account of what constitutes the underpinning philosophy of the Constitution, the thesis examines the work of scholars who have linked Australian government to constitutional or political philosophy. By examining the recurring themes and ideas that have characterised the scholarship, the thesis identifies a ‘pragmatic’ approach to
the study of government, which has resulted in the development of constitutional literature that does not focus on identifying the underpinning values of Australian democracy or the Constitution. Scholarship that does discuss the philosophical foundations of government predominantly draws on a single tradition such as republicanism or utilitarianism, without discussing the complex nature of Australia’s constitutional system. Furthermore, much of the scholarship discussing the philosophical foundations of government does not extend to the political ramifications of Australia’s hybrid constitutional arrangement. There is significant scope to draw links between the philosophical provenance of the Constitution and contemporary political and policy outcomes. This would extend the scholarship toward a greater awareness of the ongoing practical implications that result from the unresolved theoretical tensions at the centre of Australia’s complex constitutional system.

It must be stated that English and US constitutionalism are not the only philosophical influences on the Constitution. The operation of Australian government relies on a unique institutional arrangement that has a diverse philosophical heritage. In deliberating the form and structure of the Australian Constitution the framers drew on an eclectic range of philosophical sources. Authors and thinkers such as Bryce, Dicey, Madison, Montesquieu, Burgess, Freeman and Mill all contributed to development of Australian constitutionalism (Aroney 2009: 67-100). It is not the purpose of the thesis to identify the full range of philosophical sources that contributed to the development of the Constitution. Furthermore, the thesis does not seek to provide a categorical history of the development of Australian constitutionalism. Rather, to conform to the growing consensus that the Constitution is a hybrid arrangement, the thesis identifies constitutional traditions that can be traced from contemporary politics, through the Australian founding, to their philosophical foundations in English and US constitutional thought. The discussion takes particular account of the philosophical explanation of each tradition and how these understandings have developed over time. For example, as a living tradition responsible government can be considered as it was established by the English colonies in the 1850s, how it evolved to be embedded in the Constitution, and how it is understood today. This temporal and historical approach allows the thesis to discern the core philosophical beliefs that have underpinned each tradition from their inception to contemporary political debates. This process begins with an assessment of constitutional traditions adopted throughout the colonial period.

The thesis delineates the philosophical provenance of institutions adopted throughout the colonial period to establish the influence of English constitutional thought on the form and structure of Australian government. The colonial period is an important starting point because the Constitution is characterised by institutions that were introduced by English
colonial rule in the 1800s. Australia’s constitutional system has extensive philosophical and theoretical links to English constitutional thought. English conceptions of responsible government, parliamentary sovereignty, representative democracy, constitutional monarchy and utilitarianism all persist as a powerful orthodoxy in Australian constitutionalism. Through Australia’s colonial inheritance, English institutions contributed to the Australian founders’ understanding of the ideal form of political arrangements. In particular, the founders adopted many of the nineteenth-century British conventions and understandings of parliamentary democracy, which can be traced to philosophers and constitutional theorists such as Blackstone, Bentham, Mill and Dicey. These philosophers developed a liberal utilitarianism that is central to the operation of Australia’s Westminster parliamentary system. At the centre of the Constitution’s Westminster inheritance is a belief that the institutions of parliamentary responsible government can be trusted to secure the conditions which support liberty and social progress. Institutional traditions such as responsible government, representative democracy and the Crown protect individual freedoms, while ensuring government retains the necessary political power to achieve important and continual reform. This understanding of government is evident in Australia’s constitutional framework.

In adopting the institutions of parliamentary responsible government, the founders imbued the Australian executive with a liberal utilitarianism that prioritises the flexibility of unwritten convention. The Constitution attaches many formal functions to the Governor-General as the representative of the Monarch, while not delineating the role of the Prime Minister and Cabinet. The Prime Minister and Cabinet are absent from the Constitution and are accountable to the Parliament through the conventions of responsible government. This understanding of government ensures that Ministers have the capacity to respond to political problems as they arise and are not limited by broad declarations of individual right. The Westminster system provides a series of constitutional safeguards that secure individual liberties without limiting the collective power of government. These safeguards are the result of significant constitutional evolution, which is made possible through the incremental development of uncodified conventions. Ultimately, the English constitutional ideas adopted throughout the colonial period are integral to understanding Australian approaches to individual rights, the separation of powers and the foundations of national sovereignty. Furthermore, tracing the philosophical foundations of institutions that derive from the colonial period is an important first step in understanding the theoretical tensions at the centre of Australia’s constitutional system. The second step in gaining an appreciation of the hybrid nature of Australia’s constitutional arrangement requires consideration of the institutions adopted by the founders at Federation.
Having established the Constitution’s colonial inheritance, the thesis seeks to understand the philosophical provenance of Australian institutions that can be traced to US constitutional thought. The discussion predominantly focusses on constitutional traditions that were adopted at Federation. Federation is a critical period in Australian constitutionalism because it represents a significant departure from the prevailing colonial systems of parliamentary responsible government. Confronted with the challenges of uniting the existing colonies, the founders established a ‘Federal Commonwealth’ reliant on institutional traditions that have a philosophical heritage in US constitutional thought. Specifically, Australia’s constitutional framework is characterised by a written constitution that delineates a division of sovereign responsibility between state and federal elements of government.

Chapter One of the Australian Constitution outlines a bicameral legislature that includes a Senate with the capacity to check the power of the executive, and Chapter Three codifies a High Court with the powers of judicial review. Through the adoption of these institutions at a national referendum held in 1898-99, US constitutional traditions such as federalism, judicial review, a Senate and popular sovereignty were embedded into the Australian polity. It is a central aim of the thesis to understand the philosophical nature of these constitutional traditions in light of the pre-existing colonial influences. The discussion takes particular account of the philosophical explanation of each institution to argue that Australia’s federal and republican traditions are, at times, difficult to theoretically reconcile with the Constitution’s Westminster, colonial inheritance. US constitutional thought provides significantly different accounts of critical issues such as the foundations of national sovereignty, individual rights and the separation of powers.

The American founders, influenced by philosophers such as Locke, Montesquieu, Hume and Machiavelli, re-defined the republican model, establishing a powerful constitutional orthodoxy that is distinct from the Westminster parliamentary system. Institutions with a US constitutional heritage are designed with the assumption that government cannot be trusted to protect individual liberties. A distrust of human nature and a belief in God-given natural rights authorises an institutional arrangement that seeks to limit and define constitutional power in a written document subject to judicial review. In this way, Australia’s federal and republican institutions do not conform to the philosophical ideas of flexibility and progress that underpin parliamentary responsible government. Australia’s constitutional framework contains institutions that conceptualise the purpose and function of government in specifically different ways. For example, the undefined nature of the reserve powers and the conventions of responsible government are difficult to theoretically reconcile with Australia’s federal traditions, which are premised on ideas of defined, limited and
codified power. Thus, by tracing the theoretical foundations of the Constitution, the thesis establishes that English and US constitutionalism provided the Australian polity with institutions that are not always philosophically consistent. The thesis finds that the Constitution has two significant philosophical influences, resulting in a system of government underpinned by unresolved theoretical tensions.

By tracing and comparing the shifts and developments in received tradition, the thesis discerns that Australia’s constitutional system does not imply or endorse a singular set of constitutional principles. Rather, the thesis shows that that the guiding principles of Australian democracy are unclearly defined and contested. The thesis identifies three ongoing and unresolved debates that characterise both Australian constitutional thought and the operation of Australian government. Firstly, at the centre of Australia’s constitutional system is a dispute regarding the separation of powers. This debate is predominantly the result of the Constitution’s combination of federal bicameralism with a parliamentary executive that relies on the traditions of responsible government. The second unresolved debate in Australian constitutionalism concerns the foundations of national sovereignty. The Australian Constitution simultaneously derives legitimacy from the Monarch and as a document confirmed by popular referendum. The third unresolved debate in Australian constitutionalism concerns the foundations of individual rights. The gradual adoption and implementation of UN Declarations has created challenges defining the exact philosophical or theoretical nature of individual rights in Australian government. More specifically, the executive’s ratification of human rights treaties has provided a significant challenge to the utilitarian orthodoxy that underpins parliamentary responsible government, resulting in a constitutional system that does not have an agreed account of the philosophical foundations of individual rights. Thus, the thesis shows that Australian government has no universally accepted philosophical foundation. At the centre of Australian government are two distinct philosophical conceptions of the separation of powers, national sovereignty and individual rights.

Establishing the theoretical tensions at the centre of Australian constitutionalism is the first major aim of the thesis. The second task of the thesis is to investigate whether there are any practical ramifications deriving from the Constitution’s contested philosophical foundations. Having established the Constitution’s rich and diverse philosophical heritage,

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1 The thesis acknowledges that the Parliament and the High Court have confirmed the sovereignty of the Australian people. Furthermore, Brian Galligan (1995) makes clear that Australia’s system of government is in formal terms a constitutional monarchy but in efficient terms a federal republic. In many respects, the republic debate should be understood as an opportunity to update the Constitution to reflect Australia’s status as a sovereign nation.
the thesis then attempts to see if the theoretical tensions in Australian constitutionalism manifest in contemporary political practice. The thesis demonstrates the significance of Australia’s theoretically rich constitutionalism by examining three case studies. The case studies are designed to show that theoretical tensions are significant because they have resulted in or contributed to political innovation, conservatism and opportunism. By drawing on a case study approach, the thesis is able to examine the ways that institutions and political actors utilise the language of traditions as a device to justify political and judicial decisions. Thus, the case studies allow for a deeper appreciation of how the Constitution’s contested philosophical foundations influence the operation of government.

The case studies are designed to explore the important role of constitutional philosophy in contemporary political discourse. By examining how political actors use the language of traditions, the thesis is able to draw conclusions regarding the political ramifications of Australia’s contested constitutional foundations. The first case study examines the Whitlam dismissal to show how Sir John Kerr utilised the contested nature of the separation of powers to advance and innovate ideas of executive power and its relationship to the federal elements of the Constitution. The discussion examines the philosophical arguments employed by Whitlam, Fraser and Kerr throughout the 1975 constitutional crisis. This approach is designed to show how each of the major proponents of the crisis utilised contending philosophical conceptions of the separation of powers to justify partisan and political decisions. Significantly, the thesis finds that the uncertainty surrounding the separation of powers and the archaic formulation of the vice-regal office in a federal constitutional framework allowed Kerr to redefine the meaning of responsible government, reinvigorate the reserve powers and re-constitute the role of Governor-General.

The second case study utilises the transcript of proceedings recorded at Old Parliament House throughout the 1998 Constitutional Convention to show how challenges resolving theoretical tensions in Australian constitutionalism underpinned the debate, defining the development of the proposed constitutional model that was put to electors in 1999. The second case study finds that philosophical tensions regarding the final proposed model were reconciled with a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. Many of the delegates struggled to reconcile ideas of parliamentary sovereignty with a directly elected president, choosing to reject republican ideas in preference for minimal change to the current Constitution. This is important because it resulted in a final proposed model that would establish Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy. The Australian
Republican Movement (ARM) developed and supported a republican constitutional arrangement that would have confirmed the sovereignty of the Australian Parliament. It is important to recognise that the second case study is designed to show that the Constitution’s contested philosophical foundations have been used for more than advancing an innovative interpretation of Australian constitutionalism. The first two case studies show how theoretical tensions have been utilised for political innovation, while also outlining how theoretical tensions in Australian constitutionalism have resulted in political conservatism.

The final case study outlines how the Constitution’s contested philosophical foundations have been utilised opportunistically as a political tool or instrument. The case study investigates the philosophical arguments that underpinned the Gillard Governments failed attempts to legislate the Malaysia Solution to show that the Constitution’s contested philosophical foundations impact on more than constitutional debates and issues. The two traditions approach can be used to better understand the development of complex public policy such as offshore processing. By analysing the philosophical arguments employed in the High Court and in the Parliament, the thesis finds that the Gillard government’s inability to legislate offshore processing policy was, to a certain extent, the result of political actors and institutions exploiting theoretical tensions that exist within Australia’s constitutional system. In the High Court and in the Parliament, political actors exploited the contested nature of individual rights and the separation of powers to justify the decision to undermine executive authority and overturn more than one hundred years of bipartisanship on the executive’s capacity to develop and implement migration policy.

By examining the use of constitutional traditions in contemporary political and institutional discourse, the thesis reveals that the Constitution’s contested philosophical foundations have had specific political ramifications. Each of the case studies find that Australia’s constitutional traditions often provide the foundation for the political discourse that defines the operation of government. To a certain extent, political actors rely on established understandings of government to support policy arguments and defend the actions of particular institutions. This is significant because, at different times, the contested nature of the Constitution has resulted in political actors and institutions adopting contending positions on important political or constitutional issues. Moreover, the thesis shows that, on occasion, disagreements over the philosophical foundations of the Constitution underpin political events, contributing to both the debate and the final resolution or outcome. It is critical to recognise that the thesis acknowledges and understands the important role of partisan politics in Australian government. The discussion does not dispute that partisan actors regularly determine the course of political events. Rather, a central theme of the thesis, identified in
each of the case studies, is that politicians and institutions utilise constitutional traditions to justify partisan or political decisions. Importantly, the thesis shows that the capacity to draw on contending philosophical conceptions of Australian government to justify decision-making is not limited to the political process. The High Court also draws on contending philosophical conceptions of government to justify judicial decisions.

The thesis finds that at different times since Federation the High Court has employed contending conceptions of individual rights, national sovereignty and the separation of powers, occasionally synthesising traditions to develop a uniquely Australian understanding. Significantly, the thesis reveals that High Court decisions regarding the contested elements of Constitution have not ended debates regarding the philosophical foundations of government. While the separation of powers has been regularly considered by the Court, debates regarding the operation of a parliamentary executive within a federal constitutional framework continue to feature in contemporary political debates. In a similar way, parliamentary legislation and High Court decisions confirming the sovereignty of the people have not ended the republic debate. The Court’s decision to confirm Australian sovereignty preceded the public momentum to formally excise the Queen from the Constitution. The republic debate is largely about updating the Constitution to reflect developments in Australian constitutionalism.

Finally, High Court attempts to embed international human rights treaties into Australian law have been countered by powerful ideas of utilitarianism and parliament sovereignty, which continue to be utilised by both major political parties to justify policies such as offshore processing. Thus, the thesis contends that the High Court has not resolved disputes regarding the philosophical foundations of government. Rather, the High Court’s role as constitutional adjudicator has served to confirm and strengthen the philosophical tensions at the heart of Australian government.

By considering the recurring and unresolved philosophical tensions that underpin the Constitution, the thesis uncovers that the High Court, the Parliament and political actors have been constantly redefining Australia’s constitutional traditions to meet contemporary circumstances or conform to political expedience. This has resulted in an ongoing negotiation over the core values of Australia’s constitutional system, which can be discerned in legislative, judicial and constitutional debates. The discussion in the thesis is predominantly concerned with showing how this ongoing debate or contest over foundational ideas is a central feature of Australian constitutionalism. Thus, the thesis is significant because it sheds new light on the fundamental characteristics of the Constitution and how they are impacting on contemporary political practice.
Significance of the project

The findings of the thesis have both practical and theoretical significance. For students of Australian constitutionalism, the thesis has theoretical significance because it moves Australian constitutional thought away from the belief that the operation of government is devoid of philosophical context. Each of the case studies outline how political crisis, constitutional reform and policy development is animated and underpinned by the philosophical traditions that inform the Constitution. The most immediate ramification of this is to allow and foster a return to the study of the philosophical traditions that animate Australian constitutionalism. More importantly, by outlining the diversity of the philosophical traditions that inform the Constitution, the thesis reveals there is no simple philosophical narrative underpinning government. The Constitution has a diverse and multi-faceted philosophical heritage that manifests in a variety of ways. As such, scholars examining the influence of single philosophical traditions, such as republicanism or utilitarianism, should acknowledge the complexity and diversity of Australian constitutionalism. Claims regarding the predominance of single traditions are in many ways contributing to the broader debate on the contested aspects of Australia’s constitutional inheritance.

Given the Constitution’s rich and diverse philosophical heritage, the two traditions approach can be used as a mechanism to understand the theoretical debates that underpin the democratic process. English and US constitutionalism provide more than a simple system of heuristic classification. As outlined and evidenced in the case studies, the two traditions approach provides an entry point to examine a range of complex constitutional issues. The three case studies identified in the thesis provide a small sample of the many constitutional and policy debates that might be better understood in light of the philosophical traditions that inform Australian constitutionalism. Thus, the thesis provides a platform for research seeking to further investigate the complex theoretical nature of the current Constitution. Furthermore, by outlining the theoretical tensions that underpin the Constitution, the thesis provides compelling reasons to further develop the philosophical study of specific institutions such as the Judiciary, the Parliament or federalism. Thus far, Australian constitutional thought has not fully examined the philosophical changes that are taking place within institutions and, similarly, the theoretical compatibility of institutions such as the executive and the High Court or the executive and the Senate. These studies could ultimately recommend changes to institutions or provide evidence for more far-reaching reform such as a reassessment of federalism or the separation of the executive from the Parliament. Similarly, the findings of the thesis provide a foundation to compare philosophical developments in Australian
constitutionalism with the changes in democratic institutions taking place in other nations influenced by English and US constitutionalism. Moreover, the conclusions drawn from this research will aid in the assessment and evaluation of new constitutions being drafted on principles originally deriving from English or US constitutional thought.

It is important to recognise that the contests regarding the philosophical foundations of Australian constitutionalism are not confined to academic debates. The thesis has practical significance for policy-makers because the research uncovers a crucial link between constitutional philosophy and contemporary political practice. Philosophical reflection on the Constitution animates key theoretical debates that continue to impact on the political process. Most immediately, the Constitution’s rich and diverse philosophical foundations have ensured that political actors do not have an agreed narrative that influences, guides or limits the development of public-policy. Rather, the thesis shows that political actors and institutions can utilise contending philosophical narratives to undermine and challenge executive authority. While the discussion on the 1975 constitutional crisis outlines potential challenges for the executive, the primary discussion on policy development is conducted in the analysis of the Gillard Governments failed attempts to legislate the Malaysia Solution. The failure of the Malaysia Solution shows how the increasing prominence of rights-based liberalism poses unique challenges for executive government. The executive must reconcile Australia’s international human rights obligations with a constitutional heritage that largely rejects broad declarations of individual liberty. Federal institutions such as the Senate and the High Court exacerbate these challenges by exerting constitutional power in defence of human rights. The increased acceptance of human rights is used to challenge the orthodox method of executive government, providing a constitutional mechanism for political actors to block legislation or challenge executive authority in the High Court. Thus, through comparative analysis of political dilemmas, the thesis detects critical debates that impact on the executive’s ability to pass legislation. To this extent, the thesis brings new insight into the nature of executive power in Australian government.

The thesis finds that Australian constitutionalism does not have an agreed account of the purpose and function of executive power. The competing philosophical traditions that influenced the development of the Constitution understand the role and function of executive power in a crucially different manner. By assessing the Constitution’s hybrid philosophical foundations, the thesis shows that concepts of parliamentary sovereignty, or one element of government having greater power and authority over another, are difficult to theoretically reconcile with a federal model that ensures each element of government has limited and defined jurisdiction. This theoretical tension is a central feature of each case study. For
example, Chapter Five shows that a lack of clarity regarding the philosophical foundations of executive allowed Kerr to innovate understandings of Australian constitutionalism, reinvigorating the reserve powers. Chapter Six finds that the republic debate and, more importantly, the designing of the republican constitutional model is predominantly about determining the philosophical foundations of the executive. Finally, Chapter Seven finds that debates regarding individual rights and the separation of powers would be advanced by a more coherent national understanding or consensus regarding the extent and limits of executive authority. Thus, the research provides compelling practical reasons for the Australian polity to develop a more profound or meaningful consensus regarding the philosophical foundations of government.

Finally, the thesis is significant because it provides fertile ground for both public and academic debate regarding whether the Constitution’s contested philosophical foundations should be addressed. The research provides a platform to defend and protect the current hybrid philosophical nature of Australian constitutionalism. Being able to adopt diverse liberal traditions to justify political and judicial decisions provides the Australian polity with the flexibility to redefine central aspects of the Constitution to meet unforeseen future circumstances. The High Court’s response to Australia’s gradual transition to sovereign independence is an example of this flexibility identified throughout the discussion in the thesis. Conversely, the ability to discern in contemporary policy debates the unsettled philosophical nature of Australian democracy makes possible a self-awareness that is essential for change and development. There may be an opportunity for the Australian polity to come to a more thoughtful consensus with respect to critical constitutional issues such as: determining the foundations of national sovereignty, developing a robust conception of the separation of powers (particularly in relation to the Senate’s constitutional power); and defining the nature of individual rights and their important role in shaping executive power. Ultimately, the thesis does not contend that the contested aspects of the Constitution should be addressed or that the hybrid nature of government is either a benefit or a hindrance to policy-makers, leaving these questions for future scholarship and debate. Rather, the thesis shows that since Federation political actors and institutions have been combining and synthesising diverse philosophical traditions, producing a unique brand of Australian constitutionalism.

Methods and methodology
The scholarly study of constitutional theory is central to the discipline of political science. Constitutions provide the formal, legal structures of a polity, defining the limits of political
and institutional power. Political science has, therefore, been traditionally concerned with the historical evolution of constitutions and the ideas embedded in them (Eckstein 1963: 10; Greenleaf 1983: 7). Rhodes, Wanna and Weller (2009: 33) argue that ‘constitutional law, constitutional history, and the study of institutions form the ‘traditional’ approach to political science.’ This traditional approach to the study of constitutions has a distinctive rationale, which can be traced to the political philosophers that first grappled with issues of government. Underpinning the traditional approach is a belief that constitutions and their associated institutional traditions comprise the ideas that shape citizens, politicians, administrators, and judges. Constitutions are more than a set of proposed laws; they represent foundational norms that shape and define public policy (Schmitt 2008). The thesis draws on this traditional approach to the extent that it links theoretical understandings of constitutionalism with political outcomes. The discussion is underpinned by the assumption that every constitution embodies certain substantive principles and traditions, which guide the operation of government. The thesis does not claim that constitutional philosophy is the only impact on government or the policy-making process. Rather, constitutional philosophy has meaning because society and culture are at least, in part, composed of beliefs and traditions. Exploring these traditions can shed light on the constitutional framework that underpins government.

To assess the beliefs and traditions that inform political practice, the thesis draws on an interpretive approach to political science. Interpretive methods assume that knowledge and reality are a social construction (Crotty 1998). In this view, political science and the subjects it studies are located within particular linguistic, historical, and philosophical traditions (Bevir & Kedar 2008). Critical to an interpretive framework is the concept that political actors and institutions do not act in isolation from the ideological conditions of their environment. Institutions have a socially constructed purpose that defines their role and function (Bevir & Kedar 2008). This socially constructed purpose is, to a certain extent, shaped by the philosophical traditions that inform the institution. In this way, political outcomes and institutional philosophy cannot be categorically separated. Institutional traditions inform political practice by providing the accepted philosophical narrative that guides policy-makers and the policy-making process (Rhodes, Wanna & Weller 2009). It must be recognised that as a social construction institutional philosophy is continually evolving. An interpretive approach encourages examination of the ways in which society creates, sustains and modifies institutions. It encourages recognition that institutional norms do not fix the actions of individuals or society. Society and political actors develop policy against the background of long standing political and constitutional traditions (Rhodes,
These constitutional traditions are linked to extensive theoretical canons, which form the philosophical foundations of modern democratic society. Thus, the thesis draws on an interpretative approach to explore how the Australian polity has adopted and adapted the philosophical traditions at the centre of the Constitution.

The analysis in the thesis is built around the concept of received traditions and their relationship to government practices. The concept of tradition represents more than random beliefs and actions that successive individuals have held in common. A tradition is as a set of understandings or orthodoxies that individuals receive during socialisation (Rhodes, Wanna and Weller 2009: 27). Constitutional traditions are a set of inherited beliefs informing the operation of institutions. These beliefs and institutional traditions are living constructions that are constantly re-negotiated and re-employed to meet contemporary circumstances or conform to political expedience. Through this process traditions become the product of individual and social agency over time (Rhodes, Wanna & Weller 2009). It is important to remember that the thesis is not concerned with former political traditions that no longer impact on government or shape political discourse. The thesis delineates and discusses the living traditions that continue to animate and underpin the political process. As such, it is not important for the thesis to comprehensively outline all the traditions that have impacted on Australian government. Nor is it relevant to discuss all the intricacies and arguments within each constitutional tradition. Within English and US constitutional thought there are many broad families of ideas that are expressed with divergences in emphasis, both within and between each tradition. As a living tradition, Australian constitutionalism continues to express these foundational ideas in many ways and forms. Thus, it is important to note that the traditions identified and discussed throughout the thesis continue to inform both the formal interpretations of Australian constitutionalism and the political discourse that defines the operation of government.

The thesis is, in part, an historical analysis of the gradual evolution and development of Australian constitutionalism. The discussion focuses on constitutional traditions that can be traced from contemporary politics, through the Australian constitutional founding, to their philosophical foundations in English and US constitutional thought. The thesis asks what impacts these traditions have had and continue to have on the beliefs and practices of Australian government. In particular, the investigation is interested in how these living traditions have developed over time and adjusted to changes in political and social circumstances. There is emphasis on the ways in which historical understandings of constitutional traditions continue to construct and shape current political beliefs. This temporal and chronological approach contrasts traditional historical methods. Pierson (2004:
4) argues that in contemporary political science, ‘the past serves primarily as a source of empirical material, rather than as a spur to serious investigations of how politics happens over time.’ For Pierson (2004: 4) the adoption of a historical approach ‘has generally failed to exploit its greatest potential contribution to the more systematic understanding of social processes.’ Examining temporal processes allows political scientists to identify patterns or traditions of behaviour that may have relevance for contemporary circumstances. Frequently recurring social processes observed over a significant period of time can provide insight into the contemporary policymaking environment (Pierson 2004: 6). Drawing on broad historical patterns and trajectories provides an opportunity to understand the ways in which individuals modify their inherited beliefs when confronted with political challenges. Institutions and traditions such as Australian constitutionalism can be studied through the beliefs and actions of individuals located within the historical evolution of traditions. In this way, a temporal, historical approach provides a mechanism for accessing philosophical meaning embedded in political practice.

The thesis draws on a temporal and historical approach to consider recurring constitutional dilemmas in Australian government. This is important because beliefs about the nature of Australian constitutionalism are not captured in a well-ordered set of party-based traditions. Rather, Australia’s constitutional traditions are maintained by political actors and policy-makers who often share differing party affiliations and partisan preferences. As such, the distinctive nature of Australia’s constitutional traditions becomes more apparent through analysis of the recurring dilemmas that have characterised the operation of government. According to Rhodes, Wanna & Weller (2009: 29), dilemmas are able to bring about changes in beliefs, traditions, and practices. Dilemmas push individuals to reconsider the intellectual traditions that inform their beliefs. Because individuals confront dilemmas in an environment of diverse traditions, there arises a political contest over what constitutes the most appropriate response (Rhodes, Wanna & Weller 2009: 29). These contests result in tensions between contending political or constitutional traditions, occasionally leading to a reform of government. In this way, shifts and developments in tradition are understood as the contingent product of a contest of meaning in action (Rhodes, Wanna & Weller 2009: 30). Government is a complex and continuous process of interpretation, conflict and practice that produces developments in received traditions. To understand the ramifications of Australia’s contested constitutional foundations, the thesis identifies the different ways in which political actors and institutions respond when confronted with recurring political and constitutional dilemmas. For example, the thesis discusses the way political actors perceive the separation of powers at Federation, throughout the 1975 constitutional crisis and at the 1998
Constitutional Convention. Through analysis of recurring constitutional dilemmas, the thesis detects critical junctures and debates that have defined the development of Australian constitutional thought. Thus, the thesis agrees with Rhodes, Wanna and Weller (2009) and Pierson (2004) that a historical and temporal perspective is an effective mechanism to explore and analyse the constitutional traditions that underpin political practice.

To delineate the links between constitutional philosophy and contemporary politics, the thesis relies on the artefacts of political practice. Yanow and Schwartz-Shea (2006) assert that ‘Humans inscribe meaning and communicate beliefs in the context of their political, social cultural, organisational and communal lives, in, on, and through a wide range of artefact types.’ Philosophical meaning, values and beliefs are transmitted through artefacts of human creation such as language and written texts (Yanow 2000: 17). For students of Australian constitutionalism, underlying philosophical meaning can be discerned in the artefacts of political practice. The artefacts of political practice are symbols representing deeper philosophical meaning and intent (Yanow 2000: 17). As such, the thesis concentrates on primary documents and the authoritative voices of political actors rather than secondary analytical observations. The thesis draws on a range of primary documents including: High Court transcripts, parliamentary records and debates, constitutional transcripts (including transcripts from the 1998 Constitutional Convention and the Federation debates), policy documents, speeches, autobiographical accounts, and other primary source documents associated with constitutionalism such as the Federalist Papers. The central mode of accessing and generating data is through analysis of political discourse. In particular, the research attends to data of three related categories: language, spoken or written; acts and interactions between actors or institutions; and the artefacts developed in these acts and interactions. Locating the influence of traditions in language and institutional discourse allows the research to draw conclusions regarding the substantive influence that political traditions have on the operation of government.

Having established the philosophical foundations of Australian institutions that can be traced to English or US constitutional thought, the thesis provides an interpretive, qualitative examination of three significant events in Australian politics. These events serve as case studies to investigate the continuing influence of Australia’s complex and contested constitutional foundations. Yin (1994: 13) defines the case study as ‘an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly defined.’ The case study allows for an investigation to retain the holistic and meaningful characteristics of real-life events critical to political analysis and is useful in situations where consideration of contextual
conditions is pivotal (Yin 1994: 13). Importantly, a qualitative case study provides a method for researchers to study complex phenomena that may not be well understood through experimental or survey research (Baxter 2008: 544). As such, the thesis adopts a case study approach to provide detailed qualitative accounts of historical events where recurring constitutional dilemmas have dominated a political debate, contributing to the final resolution or outcome. By utilising three case studies, the thesis ensures that the Constitution’s contested philosophical foundations are not explored through a singular lens. Rather, the thesis adopts a variety of lenses, allowing for multiple facets of the phenomenon to be revealed. In this way, the thesis seeks to widen the scope of analysis to engage with the philosophical dilemmas that underpin the operation of government and the Constitution. Engaging with and questioning the philosophical foundations of Australian democracy allows the thesis to investigate three constitutional debates that are central to the legislative and judicial process.

Overview of structure and key arguments
The thesis is an investigation into the important role of constitutional and political philosophy in Australian government. The thesis has two significant arguments, which underpin and shape the structure of the thesis. Chapter Two, Three and Four are concerned with establishing the philosophical foundations of Australian constitutionalism. Each of the first three chapters argues that Australian constitutionalism does not have an established or agreed underpinning philosophical narrative. Rather, the thesis contends that the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights remain contested and, more importantly, characterised by theoretical and philosophical tensions. Having established the contested nature of Australian constitutionalism, the thesis seeks to understand how this constitutional inheritance influences contemporary political practice. The thesis argues that contrary to the existing scholarship on the pragmatic or anti-theoretical nature of Australian politics, competing philosophical conceptions of the Constitution are regularly employed in political discourse. Chapter Five, Six and Seven argue that the Constitution’s contested philosophical foundations have been utilised by political actors and institutions to determine the course of political events. More specifically, the thesis contends that theoretical tensions embedded in the Constitution have resulted in or contributed to political innovation, conservatism and opportunism. To explain in more detail the arguments and key findings of the thesis, the remainder of the Introduction will delineate the specific structure and approach of each chapter.
Chapter Two situates the thesis within the context of relevant and specific scholarship. The discussion focuses on scholars who have linked Australian government to constitutional or political philosophy. Chapter Two contends that Australian constitutionalism has not comprehensively considered the practical and philosophical implications associated with the Constitution’s contested philosophical foundations. There remains significant scope to understand the philosophical provenance of the Constitution and how it continues to impact on contemporary political practice. The chapter begins with an assessment of the extensive literature that claims Australian government has no philosophical foundation. Discussing these claims is important because it reveals that for much of Australia’s history scholars have been preoccupied with debating whether government has a philosophical foundation. The standard approach has been to argue that Australian government is pragmatic and shaped by statements of intent rather than expressions of philosophical belief. The chapter accounts for this ‘pragmatic’ approach to the study of Australian politics by drawing links to authors that claim Australian government is fundamentally utilitarian. The chapter uncovers that arguments regarding the utilitarian nature of Australian democracy display a degree of similarity to those authors who identify pragmatism as a central principle of government. In this way, a minor theme of the chapter is that Australia’s utilitarian traditions have fostered and harboured a pragmatic approach to the study of government. The second section of the chapter discusses scholars that have linked Australian government to a single constitutional or political philosophy. Scholars such as Collins (1985), Warden (1993) McKenna (1996), and Sawer (2003) identify political and constitutional traditions that have shaped democracy in Australia. These scholars are important because they represent a transition in the scholarship toward more philosophical understandings of government. The final section of Chapter Two discusses the scholarship that categorises Australian government as a unique combination of English and US constitutionalism. Authors such as Bryce (1921), Thompson (1980), Rydon (1985), Galligan (1995), Patapan (2000a) and Aroney (2009) have begun to explore the complex philosophical nature of Australia’s constitutional system. The key finding of Chapter Two is that beyond a consensus regarding the hybrid nature of the Constitution, Australian constitutional thought has not considered the significance of the theoretical tensions that underpin Australian democracy. While recognising the Australian political system as a unique combination of English and US constitutionalism has become an accepted theme of the literature, there are few texts that extensively examine the philosophical traditions that inform the operation of the Constitution.

To begin to understand the contested philosophical foundations of the Constitution, Chapter Three examines institutional traditions that were adopted throughout the colonial
period. Chapter Three contends that the Constitution has extensive philosophical and theoretical links to English constitutional thought. English conceptions of responsible government, parliamentary sovereignty, representative democracy, constitutional monarchy and utilitarianism all persist as a powerful orthodoxy in Australian constitutionalism. The first section of Chapter Three investigates the common law tradition, which can be traced to the philosophical and legal theories of Sir Edward Coke, Sir William Blackstone and Edmund Burke. The common law tradition is important for its influence on the subsequent development of English constitutional thought and for understanding Australian concepts of the separation of powers, the best mechanism to secure individual rights and the foundations of national sovereignty. The second section of Chapter Three discusses the Constitution’s monarchic foundations. Concepts of constitutional monarchy underpin critical elements of the Constitution and continue to contribute to debates regarding the foundations of national sovereignty, the reserve powers and the operation of the Australian executive. Interpretations of the monarchy and its role in government can be traced back to the implementation of the common law by colonial governments in 1828 and to English constitutional lawyers such as Blackstone and Bagehot. The third section of the chapter discusses Australia’s gradual adoption of representative democracy. Australian conceptions of representative democracy can be traced to the influence of the Chartist movement, which has its philosophical provenance in the political theory of Jeremy Bentham. At the centre of Bentham’s utilitarian critique of the common law is a set of proposals for representative democracy that underpin the legitimacy and sovereignty of the Australian Parliament. The fourth section of the chapter traces the adoption of responsible government. The philosophical provenance of responsible government is captured in the work of J. S. Mill. Mill provides important theoretical explanations of responsible government and is critical to the work of A.V. Dicey and James Bryce who were referenced by the founders throughout the Federation debates. The final section of Chapter Three discusses parliamentary sovereignty. The founders’ understanding of parliamentary sovereignty, significantly influenced by the work of A.V. Dicey, remains central to contemporary debates regarding executive authority, individual rights and the separation of powers.

Chapter Four establishes the contested and hybrid philosophical foundations of the Constitution by discussing the adoption of institutional traditions that have a philosophical heritage in US constitutionalism. Chapter Four argues that Australia’s constitutional system has extensive philosophical and theoretical links to US constitutional thought. The chapter contends that concepts of popular sovereignty, federalism, judicial review, a senate and natural or human rights persist as a powerful orthodoxy in Australian constitutionalism. The
first section of the chapter investigates the popular nature of the Australian founding and its subsequent impact on the operation of government. Understandings of popular sovereignty can be traced to US constitutionalism and its theoretical origins in the social contract theory of John Locke. Concepts of popular sovereignty have influenced the High Court’s approach to jurisprudence and contributed to debates regarding Australia’s transition to a republic. The second section of the chapter discusses the institutions of federalism. In designing the Constitution, the founders embraced and reworked the US federal model, adopting a written constitution, a High Court with the powers of judicial review, a Senate representing State interests and a federal system containing two tiers of government. These institutions have a rich philosophical heritage that includes Locke, Montesquieu, Hume and the American founders. The continuing influence of these philosophical ideas is discernible in High Court jurisprudence and in debates regarding the Senate’s constitutional power to reject supply. The final section of the chapter explores philosophical understandings of human rights and their increasing prominence in Australian constitutionalism. The section traces ideas of natural or human rights to the social contract tradition inaugurated by Thomas Hobbes and developed by John Locke and Immanuel Kant. The section argues that despite the founders’ rejection of entrenched liberties, the rights-based liberal tradition has become an important element of Australian constitutionalism. The chapter concludes by identifying key philosophical and theoretical inconsistencies in Australia’s constitutional system. By analysing the findings of Chapter Three and Chapter Four, the discussion establishes that the development and operation of Australian government has been influenced by contending philosophical conceptions of important constitutional issues such as the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights. Furthermore, by tracing the philosophical origins of the Constitution, the thesis shows that the two predominant philosophical influences on the development of Australian constitutionalism are often at theoretical tension.

Chapter Five is the first of three case studies, which discuss the political ramifications of the theoretical tensions in Australian constitutionalism. Chapter Five argues that each of the major proponents of the 1975 constitutional crisis relied on the contested nature of the separation of powers to justify partisan and political decisions. More importantly, the chapter contends that Sir John Kerr utilised theoretical tensions embedded in the Constitution to advance an innovative interpretation of Australian constitutionalism. The first section of the chapter discusses Malcolm Fraser’s understanding of federal bicameralism and its operation within Australian government. Fraser’s arguments in support of the Senate’s deferral of supply largely relied on the Constitution’s federal traditions. Fraser believed that the idea of a
federal commonwealth is fundamental to the Constitution and to the operation of the
separation of powers. The second section of the chapter assesses Whitlam’s defence of
responsible government. Throughout the crisis, Whitlam consistently invoked traditional
concepts of responsible government, insisting that the House of Representatives retains
authority over supply. The final section of the chapter examines Sir Johns Kerr’s innovative
interpretation of Australia’s constitutional system. To terminate the Prime Minister’s
commission, Kerr argued that when a government is denied supply by the Senate it must
advise an election or resign. This understanding of Australia’s institutional framework alters
fundamental conventions of responsible government to correspond with the Constitution’s
legal requirement that Bills, including appropriation measures, must be passed by both
Houses. Kerr reinterprets the principles of responsible government to account for Australia’s
federal, bicameral parliament. Kerr then disregards the conventional relationship between the
Governor-General and the Prime Minister as his chief adviser, relying on vice-regal
intervention to end the political deadlock over supply. Kerr’s understanding of government
enhances the role of the Governor-General to include a personal prerogative that can be
exercised while the Prime Minister retains the support of the Lower House. The Governor-
General’s discretion and understanding of the Constitution becomes paramount in deciding
who governs, rather than the confidence of the House of Representatives. Ultimately, the
uncertainty surrounding the separation of powers allowed Kerr to redefine the meaning of
responsible government, reinvigorate the reserve powers and re-constitute the role of
Governor-General.

Chapter Six analyses the arguments employed throughout the 1998 Constitutional
Convention show how challenges resolving theoretical tensions in Australian
constitutionalism underpinned the debate, defining the development of the proposed
constitutional model that was put to electors in 1999. Chapter Six argues that philosophical
tensions regarding the final proposed model were reconciled with a conservative approach to
constitutional reform. To outline how challenges resolving theoretical tensions in Australian
constitutionalism characterised the Convention, the chapter assesses three debates that
underpinned the development of the BAPM. Each of these debates was characterised by
tensions between modern republican and Westminster constitutional theory. The first section
of the article assesses the primary debate regarding whether Australia should officially alter
the Constitution and become a republic. Examination of the arguments employed by
delegates reveals tensions between two philosophical conceptions of national sovereignty.
Monarchists defended the role of the Crown in protecting the sovereignty of the Australian
parliament. This contrasts with those delegates who sought to remove the Monarch and
officially recognise that government derives its legitimacy from the Australian people. The second section of the article addresses the debate regarding the method that would be used to appoint the head of state. At the centre of the debate regarding the mode of appointment are philosophical tensions between delegates who supported parliamentary appointment and those who advocated a directly elected president. Significantly, the Convention did not endorse direct election, preferring a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. Many of the delegates struggled to reconcile ideas of parliamentary sovereignty with a directly elected president, choosing to reject republican ideas in preference for minimal change to the current Constitution. This is important because it resulted in a final prosed model that would establish an Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy. The final section discusses the debate regarding codification of presidential powers. The decision to endorse parliamentary appointment was accompanied by debate regarding the Constitution’s current description of the executive and whether the conventions of the reserve powers should be codified. The debate was characterised by tensions between Westminster understandings of constitutional convention and republican ideas of defined, limited and codified power. To reconcile these tensions, the BAPM partially codifies the conventions of responsible government without delineating the reserve powers. The final decision on codification shows how conservative concerns for the for the Constitution’s Westminster traditions were utilised by delegates to limit and constrain the development of the BAPM.

The final case study, Chapter Seven, examines the Gillard Government’s failure to legislate and implement the Malaysia Solution. The chapter argues that a contest or dispute over individual rights and the separation of powers was utilised as a political tool to challenge the orthodox method of executive government, overturning more than 100 years of bipartisanship on untrammelled parliamentary sovereignty in migration matters. The first section of the chapter situates the Malaysia Solution in the context of Australia’s historical approach to migration policy, linking the government’s arguments to concepts of parliamentary sovereignty, ministerial accountability and utilitarianism. Throughout the legislative process and in the High Court the Gillard Government used historical precedent to argue that the conventions of responsible government have traditionally provided the prime minister sufficient authority to implement migration policy deemed to be in the national interest. The second section of the chapter assesses the High Court’s decision in M70/2011 v. Minister for Immigration and Citizenship (2011) 244 CLR 144 (M70). The longstanding acceptance of parliamentary sovereignty in migration matters was challenged in M70, where
the court heard contending arguments regarding the appropriate restraints on executive power. After an expedited hearing before the Full Bench, a majority of the Court held invalid the Minister’s declaration on the basis it did not comply with legislative protections designed to uphold the Convention Relating to the Status of Refugees 1951 (Refugee Convention). The section contends that in determining whether the Minister’s declaration was a “jurisdictional fact”, the Court adopted a federal understanding of the judiciary’s role in Australian government, which prefers the dominance of the written Constitution and a strong separation of powers. The Court privileged its own role in statutory determination over the conventions and traditions of responsible government. The final section of the article considers the Senate’s decision to reject the Migration Legislation Amendment (The Bali Process) Bill 2012 (Cth). Following the High Court’s decision in M70 the Gillard Government sought to amend the Migration Act 1958 (Cth) to restore executive power to the Parliament. Relying on concepts of human rights and a strong separation of powers, the Greens and the Coalition utilised the Senate to reject the government’s amendments. A majority of the Senate preferred to limit the capacity of the executive on the basis of human rights, directly rejecting the government’s defence of parliamentary sovereignty and ministerial accountability. To highlight and confirm that constitutional traditions can be used opportunistically to support policy decisions, the chapter concludes by reflecting on the Abbott government’s decision to immediately reinstate parliamentary sovereignty in offshore processing policy.

The concluding chapter summarises the major arguments advanced in the thesis and revisits the central questions that underpinned the development of the research. To understand the significance of the thesis, the Conclusion is divided into three sections. The first section revisits the central questions of the research to outline the key findings of each chapter. The discussion draws on the themes of the thesis to show that at the centre of Australian government is an ongoing negotiation over the core values of the Constitution, which can be discerned in legislative, judicial, and constitutional debates. This ongoing debate or contest over foundational ideas is a central feature of Australian constitutionalism. The second section of the Conclusion considers the practical and theoretical implications of the research. The discussion considers whether there are any substantive benefits deriving from the Constitution’s contested philosophical foundations, as well as providing some practical reasons for the Australian polity to develop a more meaningful consensus regarding the philosophical foundations of government. The final section of the Conclusion discusses some of possibilities for future research that may be undertaken as result of the findings in the thesis. The discussion outlines how the findings of the thesis provide an opportunity for scholars and policy-makers to re-engage with the philosophy that underpins the Constitution.
By drawing together the themes of the thesis, the final chapter seeks to reveal important insights into the philosophical nature of Australian constitutionalism and its influence on contemporary political practice.
Chapter Two: Australian constitutional thought

Chapter Two considers questions regarding whether the Australian polity has an established or coherent account of what constitutes the underpinning philosophy of the Constitution. More specifically, does Australia’s constitutional system articulate an agreed set of principles that guide the direction and limitations of government? Chapter Two begins to answer these questions by reviewing the scholarship that has already discussed the philosophical foundations of Australian government and the Constitution. The chapter shows that the philosophical foundations of government are contested and the subject of extensive academic debate. Australian constitutional thought does not have an established or agreed account of what constitutes the underpinning philosophy of government. For much of Australia’s history scholars chose not to develop significant philosophical reflections on the Constitution. In recent times, however, this approach has subsided, being replaced by the development of a rich constitutional literature. Scholars such as Craven (1986; 1992), Meale (1992), Irving (1997; 1999), Williams (1995), McKenna (1996) and Collins (1985) represent a transition in the scholarship toward more philosophical understandings of Australian government and the Constitution. This transition to a greater philosophical awareness has coincided with an enhanced appreciation of the hybrid nature of Australia’s constitutional system. It has become an accepted theme of the scholarship to categorise Australia’s political system as a unique combination of English and US constitutionalism. Authors such as Patapan (2000), Aroney (2009), Thompson (1980; 2001) and Galligan (1995) have discussed some of the philosophical and practical issues relating to Australia’s unique hybrid constitutional system. These advancements in Australian constitutional thought have created a number of opportunities for future research. Specifically, Chapter Two contends that Australian constitutionalism has not comprehensively considered the practical and philosophical implications associated with Australia’s hybrid institutional model. There remains significant scope to understand the philosophical provenance of the Constitution and how it continues to impact on contemporary political practice.

Scholarship engaging with the philosophical foundations of Australian government is extensive and includes a variety of methodologies that are linked to disciplines such as political science, history, sociology and law. For the purposes of the thesis, the chapter focuses on scholars who have linked Australian government to constitutional or political philosophy. The chapter analyses the development of Australian constitutional thought to identify recurring themes and ideas that have characterised the scholarship. This process
allows the chapter to situate the broader claims of the thesis within contemporary understandings of Australian constitutional thought. The first section of the chapter discusses authors who have identified an absence of philosophical thought within Australian politics. Authors such as Weller and Wanna (2003: 64), Emy and Hughes (1988: 39) and Sharman (1990) identify a ‘pragmatic’ approach to the study of Australian government. Discussing these claims is important because a pragmatic approach to the study of government has inhibited the development of a robust constitutional literature, which extensively examines the philosophical foundations of the Constitution. The second section of the chapter discusses the work of authors who have discussed Australian government in the context of a single philosophical or constitutional traditions. Prominent in this scholarship are authors such as Hancock ([1930]1961), Bryce (1921) and Collins (1985) who identify utility as Australia’s predominant political ideology. In some respects, arguments regarding the utilitarian nature of Australian democracy display a degree of similarity to those authors who identify pragmatism as a central principle of government. In this way, a minor theme of the chapter is that Australia’s utilitarian traditions have fostered and harboured a pragmatic approach to the study of government, concealing the Constitution’s rich and diverse philosophical traditions. For example, the chapter discerns that Australian republicanism is often equated to anti-establishment protest and not discussed in relation to institutions such as federalism, the High Court, the Senate and the Constitution, which have a rich modern republican philosophical heritage. The final section discusses the historical development of scholarship that acknowledges the complex nature of the Australian founding. In recent times, authors such as Galligan (1995), Wright (2000) Patapan (2000a) and Aroney (2009) have explored the complex philosophical nature of Australia’s constitutional system. Much of this scholarship identifies and acknowledges multiple philosophical traditions, which can ultimately be linked to English and US constitutional thought.

By examining the recurring themes and ideas that have characterised the scholarship, Chapter Two provides important insights into the current state of Australian constitutional thought. Importantly, there are few texts that delineate the constitutional or philosophical traditions that contribute to the Australian Constitution. A pragmatic approach to the study of government has resulted in the development of constitutional literature that does not focus on identifying the underpinning values of Australian democracy or the Constitution. Scholarship that does discuss the philosophical foundations of government predominantly draws on a single tradition such as republicanism or utilitarianism, without discussing the complex nature of Australia’s constitutional system. There remains significant opportunity to
investigate the philosophical provenance of the Constitution by examining the influence of English and US constitutional thought on the form and structure of Australian government. This would extend the scholarship toward a greater awareness of the theoretical tensions that derive from Australia’s complex constitutional system. Furthermore, much of the scholarship that draws on constitutional or political philosophy does not extend to the political ramifications of the Constitution’s contested philosophical foundations. To this extent, Chapter Two discerns that the thesis is the first major exploration of the political ramifications associated with having multiple constitutional traditions embedded in Australian government.

A pragmatic approach to the study of Australian constitutionalism

Criticism regarding a lack of theoretical or philosophical analysis has been a standard theme of the Australian political science literature. Since at least the 1890s various commentators have identified the relative absence of philosophical thought within Australian politics. In 1901, the French traveller Albert Metin set the tone of many later interpretations:

The poverty of the theoretical basis of both parties is astonishing to those used to the polemics of Europe. In short, 'theory' in one or other of its many guises, is lacking in both the study and practice of Australian politics (Metin 1955: 654).

Metin’s (1955) observations were repeated in 1921 by James Bryce. Bryce (1921) evaluates the character of Australian democracy, contending that the Australian people are fundamentally anti-intellectual and non-theoretical: ‘In Australia it is material interests that hold the field of discussion, and they are discussed as if they affected only Australia; and Australia only in the present generation’ (Bryce 1921: 163). Similar claims characterise the historical evolution of Australian constitutional thought. John Pringle (1958), Humphrey McQueen (1973; 1980), Peter Loveday (1979), Bill Brugger and Dean Jaensch (1985) and Verity Burgmann (1985) all discuss the relative lack of theoretical reflection upon Australian politics. The standard claim in this body of work is that Australian political analysis regularly disregards philosophical or political theories. Emy and Hughes (1988) assert that:

What has been missing is any compelling or generally well-known articulation of what kind of society exists here, what its principal ideals and values are — which may be thought to comprise a distinctively Australian Charter of association — and where it might be heading (Emy & Hughes 1988: 39).
For Emy and Hughes (1988) Australian constitutional thought does not include great social or political philosophers and does not contain significant philosophical reflections on the foundations of Australian democracy. This is distinct from many other constitutional democracies such as the US, which have developed a robust literature focusing on the core philosophical values of government.

Historically, the standard approach of introductory political science texts has been to survey the core elements of Australian democracy such as the Constitution, federalism, and cabinet government, often in isolation, with little or no reference to the philosophical provenance of each institution. Campbell Sharman (1990) identifies the tendency of introductory political texts to provide varied and dissimilar accounts of Australia’s political foundations:

> While primarily geared for teaching, student texts represent major attempts to give a coherent picture of the Australian system and, as such, provide one of the few forums for the presentation of synoptic views of Australian government. Examinations of these books disclose a deep malaise about the nature and justification of the institutional framework of limited government in this country, and of the view of constitutionalism that it entails (Sharman 1990: 1).

Sharman’s (1990) criticism is a response to what the author perceives as inadequate characterisations of the Australian system of government. Sharman (1990) argues Australian scholarship has paid insufficient attention to important theoretical concerns regarding the form and structure of the Australian Constitution. Sharman (1990: 4) suggests that the true nature of Australian democracy has been concealed as result of ‘a strong preference for a majoritarian style of politics and a corresponding resentment of institutions that thwart those who act in the name of a national majority.’ For Sharman (1990), a preference for majoritarian style politics has seen the development of literature that favours responsible government at the expense of other important institutional traditions. Sharman’s (1990) concerns regarding philosophical analysis in introductory texts is evident in a range of recent work. Authors such as Parkin (2002), Vromen et al. (2005), Ward and Stewart (2006) and Singleton et al. (2009) have provided authoritative and informative delineations of Australian government, which develop frameworks of analysis that do not utilise political or constitutional philosophy. Each author provides a comprehensive explanation of the Australian system of government without extensive analysis of the political traditions that inform the Constitution. The authors contribute to a scholarship that pragmatically assesses the impact of institutional design on policy development.
Authors such as Wanna and Weller (2003) have sought to understand the lack of philosophical engagement with the Constitution, identifying an underpinning pragmatic approach to Australian politics. Weller and Wanna (2003) believe that pragmatism is the dominant factor in Australian policy making and political analysis:

Australian traditions are determinedly pragmatic. Socio-political experiments are developed, usually, in the hope they will work and without philosophical underpinnings… People are judged primarily by what they do, even when they do seek to express their ambitions in broader terms. It is easier to find statements of intent rather than expressions of beliefs (Weller & Wanna 2003: 64).

For Weller and Wanna (2003), a pragmatic approach has resulted in the development of constitutional literature that does not focus on identifying the underpinning values of Australian democracy or Australian institutions. An analysis of the scholarship regarding Australian federalism confirms the pragmatic nature of the Australian political and constitutional scholarship. The literature on Australian federalism has been largely characterised by debate regarding specific political consequences and not through republican or federal philosophical frameworks. The work of Wheare (1963), Sawer (1969), Starr (1977), Parker (1977), Mathews (1980) and Parkin (2002) are indicative of a scholarship that does not discuss the philosophical foundations of Australian federalism. These authors predominantly discuss the various impacts that federalism has on policy development and the mechanisms that governments have utilised to ensure effective Commonwealth-State relations. The body of work is symptomatic of Australian constitutional scholarship that is predominantly shaped by assessments of specific policy agendas and the prevailing political dynamic, rather than overarching philosophical conceptions derived from political philosophy. More recently, Allan Fenna (2007) has begun to address the lack of philosophical analysis of federalism, moving away from frameworks that identify pragmatism as the critical determinant in policy making. Fenna’s (2007) work is synonymous with a broader trend in Australian constitutional thought, which has begun to link political and constitutional theory to policy outcomes.

In recent years, Australian constitutionalism has seen the emergence of a more theoretically informed literature. Craven (1986; 1992), Meale (1992) Melleuish (1995) Irving (1997; 1999) and Wanna and Weller (2003) have assessed the ideas and principles that inform Australian democracy. This body of literature seeks to locate Australian government within a larger political and philosophical context, examining issues regarding citizenship and democratic culture. For example, Melleuish (1995) develops an account of the intellectual
and cultural history of Australian political thought through a discussion of prominent intellectuals. Similarly, Helen Irving’s (1999) account of Australian Federation draws on a number of disciplines such as anthropology, literary criticism and cultural studies to assess the language and metaphors that defined late nineteenth century political discourse. Finally, Wanna and Weller (2003) assess the traditions of Australian government developing a framework that includes five principal traditions: settler-state developmentalism; civilising capitalism; the development of a social-liberal constitutional tradition; traditions of federalism; and the exclusiveness, inclusiveness of the state and society. Wanna and Weller (2003) analyse how political actors have operated within this plurality of traditions.

Importantly, authors such as Wanna and Weller (2003), Irving (1999) and Melleuish (1995) advance theoretical understandings of government, without explicitly linking Australian political thought to the underpinning ideology that accompanies the Constitution.

Responding to issues regarding a lack of philosophical engagement with the Australian Constitution, Patapan (2005) outlines an entrenched division between law and politics that has hindered a rigorous and sustained appreciation of the constitutional traditions that shape democracy in Australia. For Patapan (2005), the dominance of the common law in Australian constitutionalism has inhibited the development of a robust philosophical literature similar to the American tradition. Patapan (2005: 92) suggests that a lack of appreciation for the Australian founding is the result of ‘a fundamental tension in Australian constitutionalism between two of its constitutive traditions, that of the common law and liberal constitutionalism.’ For Patapan (2005), the ‘pragmatic’ nature of a dominant common law tradition discourages theoretical and abstract engagement with the philosophical provenance of the founding:

Australia has a forgotten founding because a dominant common law tradition has consistently displaced the liberal constitutionalism that sees the founding and the Constitution as politically fundamental or ‘constitutive.’ This common law depreciation of the people's founding has not only shaped the general understanding of Australia's origins, but also distorted Australian scholarship, separating the legal from the political, and limiting – if not silencing – the study of Australian constitutionalism (Patapan 2005: 92).

Patapan’s (2005) comments suggest that the dominance of the common law has had implications for the development of Australian legal and political scholarship. With some exceptions such as Lumb (1983) and Detmold (1985), legal scholarship has predominantly focused on judicial interpretation and the political science literature has been characterised by a ‘pragmatic’ approach (Patapan 2005: 104). By articulating the theoretical tensions between
two of Australia’s constitutional traditions, that of the common law and liberal constitutionalism, Patapan (2005) shows how understanding the philosophical foundations of government can shed new light on the nature of the Australian polity. Importantly, Patapan (2005) develops the concept of theoretical tensions to explain elements of Australian government.

By identifying a pragmatic approach to Australian constitutional thought, authors such as Bryce (1921), Emy and Hughes (1988), Sharman (1990), Weller and Wanna (2003) and Patapan (2005) raise important questions regarding the philosophical foundations of government. In particular, what institutional or cultural settings encouraged the belief that Australian government is ‘pragmatic’ and devoid of philosophical context? This question is underpinned by the broader consideration that an entrenched pragmatism may signal that Australian government has no philosophical foundation at all. As such, the next section of the chapter will focus on authors who have discussed single philosophical traditions that have contributed to understandings of Australian government. At the centre of this scholarship are authors who argue that the Australian polity is fundamentally utilitarian. Arguments regarding the utilitarian nature of Australian democracy display a degree of similarity to those authors who identify pragmatism as a central principle of government.

**Single philosophical perspectives**

Academic discussion regarding the underpinning philosophy of Australia’s constitutional structure is largely characterised by theoretical frameworks that examine the Australian polity in the context of a single philosophical perspective. Scholars have regularly utilised a single philosophical tradition to discuss and explain the Australian system of government. For example, in *The Founding of New Societies*, Louis Hartz (1964) argues that colonial societies are best understood as ‘fragments’ of European culture. The core thesis is that one fragment of the colonising nation’s political ideology is transmitted to the new society. This single fragment determines the course of ideological and political development. The underpinning political principles of colonial nations such as Australia are defined by the absence of various aspects of traditional European culture (Hartz 1964). Richard Rosecrance (1964) discusses the Hartzian framework in the Australian context. Rosecrance (1964) suggests that Australia is a ‘radical fragment’, the product of proletarian migrations from post-industrial Britain. In Australia, the Chartist agenda triumphed in the early nineteenth century resulting in the development of a working class utilitarian ethos. For Rosecrance (1964), this egalitarian ethos of the Australian working class is as pervasive as individualism in the United States
(Rosecrance 1964). The central argument is that the political development of new societies is largely determined by the cultural heritage transmitted from Europe by the first settlers. In this way, England transmitted to the Australian colony a utilitarian ethos, which has underpinned subsequent political and constitutional development. The Hartzian framework is important because it directs discussion away from the local environment as the primary determinant of colonial distinctiveness towards a nation’s cultural inheritance.

Utility stands at the centre of W. K. Hancock’s ([1930]1961) seminal representation of Australian society. Central to this conception is Hancock’s (1961) depiction of a nation without important intellectuals, a nation characterised by an ethos of pragmatism and unreceptive to abstract ideas. This egalitarian and anti-intellectual portrayal is developed through an assessment of the federal government’s commitment to fiscal protection and immigration restriction. For Hancock (1961), State willingness to implement and adopt these dual policies confirms the utilitarian nature of Australian democracy. Hancock (1961: 65) asserts that ‘Australian democracy has come to look upon the State as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number.’ Inherent in the Australian ethos is a view that the State represents collective power at the service of individualistic rights (Hancock 1961: 73). These include ‘the right to work, the right to fair and reasonable conditions of living, and the right to be happy’ (Hancock 1961: 73). Hancock (1961) believes that Australian utilitarianism is evident in the underpinning principles government. The State is elevated to be the guardian of individual rights and government is entrusted to attain progress. Hancock’s (1961) contribution draws attention to the important role of utility in Australian democracy, developing an image of the national character that successfully drawing links between policy development and underpinning political philosophy.

Following Hancock, J. D. B. Miller (1959) utilised an economic argument to discuss Australia’s utilitarian traditions. Miller’s (1959) central premise is that Australians regularly disregard philosophical or political theories, preferring to focus on specific policy proposals. This disregard for philosophical theories is underpinned by a national distrust in political leadership and political elites (Miller 1959: 8). In a later generation, Hugh Collins (1985) interprets Australian political ideology in terms of a uniform Benthamite utilitarianism, declaring that Australia has adopted the full array of Jeremy Bentham’s recommendations for a utilitarian society. Collins (1985) identifies the historical beginnings of Australia’s utilitarianism in the success of Chartism:
That Chartism should have succeeded so completely in Australia by the 1860s, while failing so bitterly in Britain, is doubly significant in any appreciation of the distinctiveness of Australia's political culture. For, as well as marking the point of departure of Australia's political culture from its British background, it also marks the essentially Benthamite character of this antipodean offshoot (Collins 1985: 148).

For Collins (1985: 148), the success and dominance of the Chartist agenda in the nineteenth century ensured that utility endured as the dominant Australian ideology. This construction is similar to the Hartzian framework and draws conclusions comparable to those offered by Hancock (1961). Collins envisages an Australia in which the nation’s political practices are shaped by a dominant utilitarian hegemony:

Indeed, so completely has this philosophy captured Australia's public mind that the sporadic appearance of different political ideas, whether of the left or of the right, is better understood as a reaction against this hegemony than as the motion of independent forces (Collins 1985: 152).

Collins (1985) does not conceive this entrenched utilitarianism as an explicit political ideology, adopted and expounded by various institutions and actors. Collins (1985) believes Australian utilitarianism is a uniform attitude of mind towards politics and government. Ultimately, Collins (1985), Miller (1959), Hancock (1961) and Hartz (1964) delineate an important aspect of Australia’s colonial inheritance. Considered in the context of claims that the Australian literature is pragmatic, the utilitarian thesis has reinforced the perspective of a practical nation devoid of philosophical traditions. While this characterisation is an important element of the literature, a strictly utilitarian understanding of the Australian polity overlooks a number of other philosophical traditions that have impacted on government.

Australia’s utilitarian scholarly tradition contrasts with a range of other academic contributions that examine the Australian polity in the context of a single philosophical perspective. Tim Rowse (1978) provides an account of liberalism as the dominant mode of discourse in Australia. The basic premise of Rowse's (1978) argument is that Australian intellectual life has been conducted largely within the matrix of liberal political and social thought. For Rowse (1978), the Australian 'system' maintains a capitalist hegemony that provides sufficient opportunity for both the development and complacency of competing ideological interests. Australian political actors have been constrained by the basic assumptions associated with the dominant liberal hegemony. This argument is framed as a response to Rowse’s (1978) concern that Australian political and historical thought has been overly preoccupied with developing an accurate account of the Australian 'national character.’ Rowse (1978: 3) suggests that this pursuit is characterised by commentators who
are fixated with portraying the Australian national identity as pragmatic and fundamentally anti-intellectual. Rowse (1978: 3) takes issue with an Australian intellectual history that is a ‘… withered appendix to the great practical achievements in politics and economic affairs.’ The author directly challenges the established Australian method of political analysis, developing a structural critique of the Australian system that rejects the standard discussion of historical events. In this structuralist form, specific events and history become contingent on the dominant liberal, hegemonic political discourse. In so doing, the work supports claims of ideological determinism, challenging those who identify a unique form of Australian democracy. The work is important for its critique of Hancock and for demonstrating the dominance of liberalism to the Australian political context.

Chavura and Melleuish (2015) also challenge the assumption that Benthamite utilitarianism is the only influence on Australian political thought. The authors begin by establishing that the Federation debates have been mostly ignored as a source for studying political ideas in Australia. This is remarkable because it was at the Federation debates that the political ideas ‘circulating throughout the colonies are crystallised as justifications for enduring Australian political institutions (Chavura & Melleuish 2015: 514). As such, the discussion focuses on ideology within the Federation debates and, in particular, the role of conservatism. Chavura and Melleuish (2015) show that ‘Burkean conservatism was a vibrant theoretical framework for approaching practical problems of constitution formation, and also informed individuals of diverse political shades with competing constitutional agendas.’ Importantly, Chavura and Melleuish (2015) discern that prominent founders such as Alfred Deakin relied on a conservative discourse that believed there were a ‘workable set of existing institutions which formed the best foundation for constructing a durable set of constitutional arrangements.’ This conservative instinct was not interested in abstract principles such as natural or human rights:

It works from prescription, from the idea that because the British have created institutions which embody freedom and work effectively, the principal objective of the British overseas should be to create institutions which are in spirit as close to the original as possible, and also to preserve those ways of acting which enable those institutions to work as they should (Chavura & Melleuish 2015: 526).

In this way, Chavura and Melleuish (2015) show the importance of English constitutional thought in shaping Australian government. Furthermore, by contesting claims of a dominant pragmatic or utilitarian tradition, Chavura and Melleuish (2015) invite historians and political scientists to reconsider the nature of Australian constitutional thought.
Marian Sawer (2003) highlights the importance of social liberalism to the Australian political context. Sawer (2003) asserts that the impact of social liberalism in Australia has been understated, particularly by Australian feminists who have not sufficiently recognised its impact on the development and implementation of a range of historical policies. In a response to utilitarian conceptions of Australian political life, Sawer (2003) suggests that ethical considerations founded in social liberalism, rather than pragmatism, defined early Australian policy. Sawer (2003) utilises an analysis of the political outcomes of the early nineteenth century to develop a uniquely Australian version of liberalism or of ‘liberal feminism’, suggesting that authors:

Tend to overlook the fact that liberalism is a living tradition, and that the late nineteenth century liberalism which inspired Australia’s institutions and the Australian women’s movement was very different from the seventeenth century liberalism of John Locke, the eighteenth century political economy of Adam Smith or the early nineteenth century *laissez-faire* liberalism which John Stuart Mill was working his way out of (Sawer 2003: 164).

This approach to Australian liberalism is supported through an analysis of specific policy outcomes such as the 1907 landmark Harvester judgement. Sawer (2003: 160) asserts that crucial to adequate understanding of the Harvester decision was the High Court’s belief that ‘market contracts must be subordinated to standards of fairness and equity derived from evolving conceptions of the rights of the citizen.’ Sawer (2003) utilises specific political outcomes to discuss evolving conceptions of individual rights and explore the nature of liberalism embedded in Australian practices. By drawing links between ‘idealist liberalism’ and the development of historical policy settings, Sawer (2003) provides a framework for establishing connections between constitutional philosophy and political outcomes.

Recognising the substantive influence that ideology has on the political process is central to the scholarship that explores Australia’s republican foundations. By identifying and tracing the origins of Australian republicanism, authors such as Warden (1993), Williams (1995), McKenna (1996) and Headon and Browning (1998) have challenged the orthodox understanding of the constitutional founding. In different ways, each author shows the pervasive influence that republican thought has had on the formation and structure of Australian government. Common to each discussion is the assertion that republicanism has generally been disregarded as a mechanism to understand Australian government in favour of explanations that prefer the Constitution’s Westminster inheritance. John Williams (1995) analyses the constitutional debates, providing an assessment of Andrew Inglis Clark’s contribution to the drafting of the Constitution. Williams (1995) identifies Clark as a critical
figure in the development of Australia’s republican heritage. For Williams (1995), the Constitution derives many of its republican features from Clark’s activities during the drafting process. Throughout the drafting process, Clark imbued the Constitution with his republican sympathies, in particular:

His commitment to the restraint of arbitrary and unaccountable government was characterised by his belief in the limitation of the Commonwealth government’s powers, federalism itself, the separation of powers, the rule of law and the supremacy of the High Court (Williams 1995: 179).

For Williams (1995: 150), Clark’s contribution ensures that ‘a strong republican stream runs through the Australian Constitution.’ Critical to the discussion is the author’s assessment that ‘the republican tradition has been generally neglected within Australian Constitutional history and jurisprudence’ (Williams 1995:150). This understanding of Australian republicanism is synonymous with the core argument of Headon and Browning’s (1998) compilation of edited works. Headon and Browning (1998) present an array of authors such as John Hirst, Stuart McIntyre and Helen Irving, who take an historical look at the founding through the Corowa and Bathurst people’s conventions. Underpinning the discussion is a belief that the Australian founding ‘was an act of citizenship, which was republican in nature, as it entailed a conscious act of political self-creation’ (Warden, cited in Headon & Browning 1998: 46). Through the Corowa and Bathurst people’s conventions, the constitutional debates and the subsequent referendum, the Australian people confirmed the republican nature of Australian government.

Discussion regarding Australian republicanism is not limited to analysis of the founding. Mark McKenna (1996) provides a comprehensive history of republican thought and activity in Australia. McKenna (1996) traces the contributions of republicanism from the decades prior to the adoption of responsible government in the Australian colonies to the period after 1975, when the issue of a republic became a prominent element of the Keating government’s political agenda. The author’s significant contribution is to confirm republicanism as an important part of Australia’s political and intellectual history. The work has parallels with James Warden’s (1993) contribution to the extent that each author believes that republicanism has been a consistent feature of mainstream political and constitutional discourse, which has remained largely unrecognised. Warden (1993: 83) advances the argument that ‘republicanism, both in its pre-modern and modern character, has always been a substantial but unrecognised part of the Australian political tradition.’ Republicanism has been misperceived because it has historically been construed as foreign and opposed to the dominant political culture:
While republicanism is already within the mainstreams of political discourse, its presence has not yet been identified. Instead, 'the republicans' have been seen as a political sect and set up in opposition to the dominant political culture of constitutional monarchy (Warden 1993: 83).

Warden (1993) draws attention to an important element of Australia’s constitutional and political history. For Warden (1993), Australia’s dominant Westminster traditions have concealed other important elements of Australia’s constitutional inheritance. Viewed collectively, the work of Warden (1993), Williams (1995), McKenna (1996) and Headon and Browning (1998) reveals that republicanism in Australian has often been equated to anti-establishment protest and not discussed in relation to Australian institutions such as federalism, The High Court, the Senate and the Constitution, which have a rich modern republican philosophical heritage.

Tracing the historical development of Australian constitutional thought provides certain insights into the broader trends that have defined the scholarship. Firstly, the scholarship is characterised by a range of ideas and ideologies, which have at different times made important contributions to the Australian polity. For example, utilitarianism, republicanism, social liberalism and conservatism are all important for understanding the nature and structure of government. Recognising the contribution of these diverse traditions ensures that philosophical characterisation and discussion of the Constitution or the Australian polity must be cognisant of multiple constitutional traditions. Authors such as Collins (1985), Sawer (2003) and Warden (1993), who examine a single philosophical perspective, are contributing to a broader discussion regarding the multiple philosophical traditions that inform the operation of government. Secondly, assessing the historical development of the literature shows that many of Australia’s institutional traditions have philosophical foundations in English and US constitutional thought. It must be acknowledged that English and US constitutionalism do not account for all the philosophical impacts on the development of Australian government. For example, the founders investigated and utilised elements of the Canadian and Swiss constitutional systems (Aroney 2009). Despite the presence of these traditions, it has become an accepted theme of the scholarship to characterise Australian government as a unique combination of English and US constitutionalism. This characterisation has allowed the Australian literature to develop a more comprehensive and nuanced understanding of government.
Dual constitutional traditions

The first scholarship identifying Australian government and the Constitution as a unique hybrid arrangement was from the founders. Alfred Deakin’s (cited in La Nauze 2000) *The Federal Story: The Inner History of the Federal Cause 1880-1900* and Robert Garran’s (1897) *The Coming Commonwealth* provide critical explications of Australian government and the challenges faced throughout the Federation process. Each author explores the theoretical foundations of the Australian polity, delineating the specific elements of the Constitution that can be directly linked to the English and American models. These foundational texts are complemented by James Bryce’s (1922) *Modern Democracies*. Bryce (1922) surveys the structure and theoretical foundations of six states — France, Switzerland, Canada, Australia, New Zealand and the United States. Throughout the analysis on Australian government, Bryce (1921: 107 – 172) identifies constitutional traditions emanating from either the US or England. In this way, Bryce (1922) is among the first to recognise the complexity of the Australian experiment. Bryce (1921: 114) asserts that Australia is a ‘Crowned Republic … a community monarchical in its form, but republican in its spirit and operation, and indeed more democratic than many republics are.’ Given Bryce’s influence on the Australian founding and his authority as a constitutional expert, *Modern Democracies* must be regarded as an important foundational text of Australian constitutional thought. Considered together, the work of Deakin (cited in La Nauze 2000), Garran (1987) and Bryce (1922) offer a basis for claims regarding the Constitution’s hybrid nature philosophical foundations.

In recent times, a scholarship has developed that follows Bryce (1922) by identifying the Australian system of government as a unique combination of English and US constitutionalism. In her formative work, *The Washminster Mutation*, Elaine Thompson (1980) argues that characterising the Constitution as a Westminster model or prioritising responsible government as the organising theme of the Constitution does not adequately recognise the complexity of Australia’s institutional structure:

The objection is not to using either the terms 'Westminster model' or 'responsible government' as departure points in the analysis of the Australian political system. The objection is to their use in ways that imply they are the models of government best suited to describing the Australian system (Thompson 1980: 38).

For Thompson (1980), the concept of responsible government is inadequate and misleading as an analytic tool. It does not consider fundamental elements of the Constitution, eroding the capacity for effective analysis of the political system. Ultimately, Thompson’s (1980)
analysis is pivotal in the development of literature that identifies multiple constitutional traditions in Australian government.

In 1985, Joan Rydon identified some problems associated with combining British and American institutions in the Australian Constitution. The core thesis of Rydon’s (1985: 67) analysis is that ‘the hybrid nature of the Australian political system is beyond dispute.’ The Australia polity is characterised by a dual constitutional inheritance:

At both state and federal levels, inside and outside parliaments, Australians constantly refer to and defer to practices, traditions and conventions of Westminster. Yet many sections of the Australian Commonwealth Constitution (including many which determine the structure of the Commonwealth Parliament) closely follow the wording of the Constitution of the United States (Rydon 1985: 67).

For Rydon (1985), the hybrid nature of Australia’s constitutional arrangement has had specific ramifications. Rydon (1985:73) identifies issues relating to the operation of responsible government under a written constitution, and some of the problems that arise from a High Court ‘torn between the principles of federalism and parliamentary sovereignty.’ While the analyses is legal in nature and does not explicitly consider constitutional philosophy, Rydon (1985: 67) does link the discussion to contending conceptions of sovereignty: ‘Since British and American systems imply different notions of sovereignty and even of constitutionality, there were bound to be problems in combining elements of each.’ In this way, the author raises questions regarding the theoretical foundations of government, calling for a reclassification of Australia’s constitutional system.

In 1995, Brian Galligan utilised federal and republican traditions to challenge the orthodox understanding of Australian constitutionalism. Galligan’s (1995), A Federal Republic: Australia’s Constitutional System of Government, asserts that federalism, as opposed to responsible government, is the primary organising theme of the Constitution. Without denying the parliamentary and monarchic elements of Australian government, the work calls for a re-categorisation of the Australian system. For Galligan (1995), the Australian parliament is not a sovereign law-maker in the classic Westminster tradition. The parliament in Australia is the legislative branch of a federal system that is allocated powers through the Constitution:

In being federal the Constitution sets up two spheres of government, Commonwealth and State, and divides power between them. Clearly, as the legislative branches of such governments, which are controlled by the basic law of the Constitution, parliaments in Australia cannot be sovereign or supreme in a Westminster sense (Galligan 1995: 1).
Galligan (1995) argues that while the monarchic elements of the Constitution are important for the operation of the executive, they do not constitute the central theoretical tenets of Australian constitutionalism. For Galligan, the central tenets of the Constitution are federal and republican:

The Australian system of government is truly republican because the people are sovereign and all the institutions of government are subject to the rule of the Constitution with its checks and balances (Galligan 1995: 1).

Galligan (1995) links Australia’s federal constitutional structure and the popular nature of the founding to the republican traditions that underpin US constitutionalism. In doing so, Galligan (1995) provides legitimacy to analysis that draws on republican theory to understand the Constitution and the Australian polity. The book raises significant questions regarding the foundations of Australian sovereignty and is important for its critical analysis of orthodox understandings of the Constitution.

In important respects, Galligan’s (1995) work is concerned with issues of institutional design rather than the philosophical debates that underpinned the development of the Constitution. This is in contrast to Nicholas Aroney’s (2009), The Constitution of a Federal Commonwealth, which provides an extensive account of the philosophical and theoretical traditions informing Australian constitutional thought. While the two authors utilise a different methodological approach, they reach similar conclusions. The organising theme of Aroney’s (2009) work is that Australia’s federal traditions are critical to understanding the Constitution:

The central argument of the book is that the idea of a federal commonwealth is fundamental to the text, structure and meaning of the Constitution, and that the relationship between formation, representation and amendment is fundamental to this conception (Aroney 2009: 6).

Aroney (2009) utilises an examination of the Constitution and the constitutional debates to discuss the intent of the founders. Aroney (2009) draws on the Constitution’s designation that Australia will be a ‘Federal Commonwealth’, arguing that it was incumbent upon the framers ‘to choose an expression that would capture the essential meaning and nature of the new polity.’ In this way, Aroney (2009) discusses how the framers wrestled with the problem of integrating federal ideas with inherited British traditions of parliamentary responsible government. Taking careful account of the models and thinkers that were utilised throughout the development of the Constitution, Aroney (2009) reveals that founders of the Australian
Commonwealth were consciously aware of the philosophical provenance of federalism. Aroney (2009: 7) asserts that ‘a close reading of the debates has led me to the conviction that Australian Federation involved real theoretical discussion.’ In recognising the importance of political theory to the framers, Aroney (2009) provides a critical link between established theoretical doctrines such as federalism and the Australian founding. In doing so, Aroney (2009) demonstrates that Australian constitutionalism should be considered in the broader context of western political thought.

Haig Patapan’s (2000), Judging Democracy, is similar to the work of Aroney (2009) because it links elements of Australian government to their rich philosophical heritage in English and US constitutional thought. In particular, Patapan (2000) discusses the High Court’s important role in shaping and defining the underpinning constitutional principles of Australian government. A crucial theme of the book is that the High Court’s understanding of judicial review has undergone significant transition:

What has emerged from the investigation is a court that has openly and self-consciously redefined itself as more than an arbitrator of the boundaries of federalism, as a court that is prepared to adjudicate constitutive questions – matters that go to the very make-up of the regime (Patapan 2000: 178).

To reach this conclusion, each chapter considers a different theme of High Court jurisprudence in the context of the philosophical traditions that inform Australian constitutionalism. Patapan (2000) traces Australian constitutional thought to the contributions of philosophers such as De Tocqueville, Mill, Blackstone, Locke, Montesquieu and the American founders. This approach provides legitimacy to analysis that utilises High Court jurisprudence to discuss philosophical understandings of government. Importantly, Patapan (2000) advances the idea of philosophical tension in Australia’s constitutional arrangement. The book specifically links the development and transition of High Court jurisprudence to contending philosophical conceptions of the separation of powers, individual rights and judicial interpretation. For Patapan (2000), ‘The Court does not hold a comprehensive view or understanding of Australian democracy … Its decisions are a palimpsest of different constitutive ambitions.’ Patapan’s (2000) analysis is important because it shows how the High Court has been synthesising political and philosophical traditions to create a unique constitutionalism.

By discussing the philosophical themes that legitimise the Constitution, authors such as Patapan (2000) and Aroney (2009) are beginning to address the limitations of the existing scholarship. John Wright (2000), however, argues that there is a need for more scholarship
that is sensitive to historical context and the gradual development of ideas. Wright (2000) divides the existing literature into two categories, arguing that ‘the nature of the Australian Constitution is usually described as either monarchic and parliamentary, or republican and federal. For Wright (2000), these descriptions are indicative of either revisionist or institutional interpretations of the Australian Constitution. Authors such as Thompson (1980), Galligan (1995) and Bryce (1921), who utilise an institutional approach, focus on the structure and operation of the Constitution. Wright’s (2000: 354) concern is that while an institutional method offers an understanding of the structure of Constitution, it cannot establish the philosophical qualities of the Commonwealth. This is important because there are substantive philosophical themes that legitimise the Constitution and Australia’s political institutions. Wright (2000) does observe that most authors who adopt an institutional approach are not explicitly seeking to examine the substantive political ideas that underpin the Constitution. This is in contrast to authors who adopt a revisionist approach to Australian constitutional thought, which employs top-down philosophical reasoning. Wright (2000: 357) argues that academics employ top-down philosophical reasoning when they ‘begin by either loading up, or loading down concepts … and use them as ciphers for decoding the past.’ Wright (2000: 355) is particularly critical of the recent interest in republicanism, arguing that authors such as Williams (1995) and McKenna (1996) ‘have renewed the tendency of constitutional scholarship towards revisionism.’ The main contention is that each author ‘develops a pre-conceived theory that he imposes on both the federal Constitution and the key figures involved in its construction’ (Wright 2000: 356). By utilising a modern formulation of republicanism to describe the key principles of an historical document, the revisionist approach reveals very little about the fundamental nature of the Australian Constitution. Wright discusses the limitations in the literature to highlight the requirement for the development of scholarship that is sensitive to historical context and the gradual development of ideas.

Wright’s (2000) survey of the Australian constitutional literature specifically distinguishes Warden’s (1993), A Fettered Republic, from the arguments of Williams (1995) and McKenna (1996). Wright does not characterise Warden’s (1993) claims regarding Australian republicanism as revisionist because of the article’s historical approach:

Essentially, the important contribution of Warden’s analysis of the federal Constitution to the ongoing debate was that it avoided a reconstruction of republican political thought. Warden established republicanism as part of the Australian political tradition from the ground up (Wright 2000: 357).
This is important because Wright (2000) is ultimately calling for a study of nineteenth century Australian political thought and its impact on the development of Australia’s constitutional arrangement. For Wright (2000), there is a requirement to ground constitutional analysis within the history of ideas:

Both revisionism and institutionalism are inadequate to the recovery of the key political ideas behind the Constitution …What we urgently require is a comparative study of nineteenth century Australian political thought and its place within the historical discourse (Wright 2000: 362).

Wright’s (2000) discussion is important for conceptualising methods in Australian constitutional analysis and for identifying the need to assess political traditions in the context of their historical development. To a certain extent, authors such as Patapan (2000) and Aroney (2009) have responded to these concerns, providing analysis that seeks a greater awareness of philosophical developments in Australian constitutional thought. There remains significant scope, however, to answer calls for an enhanced understanding of the philosophical traditions that impacted on the development of the Constitution and their subsequent influence on the character of the Australian Commonwealth.

**Conclusion**

Australia’s unique and complex constitutional arrangement has been the subject of considerable scholarly debate. Assessing the progression and development of this debate is important because each element of the literature provides insights into the character of Australian constitutional thought. By tracing the development of Australian constitutional thought, Chapter Two has uncovered that the scholarship does not contain an established underpinning philosophical narrative of government or the Constitution. Rather, the analysis of Bryce (1922), Thompson (1980), Rydon (1985), Galligan (1995), Patapan (2000) and Aroney (2009) reveals that government is underpinned by multiple constitutional traditions, which can predominantly be traced to elements of English and US constitutional thought. Using differing theoretical and methodological frameworks, each of these authors have begun to establish substantive philosophical themes that underpin the Constitution and Australia’s political institutions. In particular, Patapan’s (2000) concept of contending philosophical conceptions in High Court jurisprudence is critical because it draws attention to some of the ramifications associated with Australia’s unsettled constitutional identity. Patapan’s (2000) discussion also provides a foundation for analysis that seeks to examine political philosophy in contemporary Australian politics. Aroney’s (2009) central thesis, that the founding did not
exist in an intellectual vacuum, is critical because it means Australian constitutionalism should be considered in the broader context of western political thought. To a certain extent, Aroney (2009) and Patapan (2000) are answering Wright’s (2000) call for philosophical analysis that is cognisant of historical context and the requirement to study the Constitution within the history of ideas. Considered collectively, these contributions have specific ramifications for the study of constitutional theory in political science. Creating a comprehensive picture of the philosophical foundations of Australian government requires a framework of analysis that recognises that Australian government is underpinned by multiple constitutional traditions, which are not always philosophically or theoretically compatible. Furthermore, this analysis should draw on a temporal and historical approach that is sensitive to the changing nature of political and constitutional ideas.

It is important to understand that the structure of the thesis seeks to address some of the existing limitations in Australian constitutional thought. Specifically, to conform to the growing consensus that Australia’s political and theoretical origins derive from a hybrid constitutional heritage, Chapter Three and Chapter Four are designed to explore the influence and adoption of traditions that derive specifically from English and US constitutionalism. A pragmatic approach to the study of government has resulted in the development of constitutional literature that does not focus on identifying the underpinning values of Australian democracy or the Constitution. Scholarship that does discuss the philosophical foundations of government predominantly draws on a single tradition such as republicanism or utilitarianism, without discussing the complex nature of Australia’s constitutional system. Furthermore, analysis of the recurring themes in Australian constitutional thought reveals that much of the scholarship is a debate regarding the philosophical foundations of government, which does not extend to the political ramifications of the Constitution’s contested philosophical foundations. There is significant scope to draw links between the philosophical provenance of the Constitution and contemporary political outcomes. As such, the final three chapters of the thesis are case studies, which seek to examine the influence of constitutional philosophy in contemporary political practice. In this way, the thesis will be the first to consider the political ramifications of the theoretical tensions that inform Australian constitutionalism. An awareness of the philosophical provenance of the Constitution provides an essential starting point for a theoretically informed discussion of modern Australian politics.
Chapter Three: The Colonial Inheritance

Chapter Three delineates the philosophical provenance of colonial institutions to establish the influence of English constitutional thought on the form and structure of the Constitution. The colonial period is an important starting point because the Constitution is characterised by institutions that were introduced by English colonial rule in the 1800s. The Constitution continues many of the institutional traditions that were operating in the colonies prior to Federation. Specifically, Chapter Three argues that English conceptions of the common law, responsible government, parliamentary sovereignty, representative democracy, constitutional monarchy and utilitarianism all persist as a powerful orthodoxy in Australian constitutionalism. The analysis in Chapter Three is integral to the thesis because the discussion begins to uncover the contested philosophical foundations of the Constitution. By analysing the adoption of Australian institutions that derive from English constitutional thought, the discussion provides a foundation for Chapter Four, which will outline the continuing influence of institutions that derive from US constitutionalism. The thesis undertakes this process to establish the theoretical tensions at the centre of the Constitution. Chapter Three and Chapter Four are designed to show that elements of Australia’s constitutional system are not always philosophically compatible. English and US constitutional traditions, particularly those adopted and implemented in Australia, have at their centre crucially different conceptions of the purpose and function of government.

It is critical to recognise that Australian institutions that can be traced to English constitutional thought are part of a rich and diverse philosophical tradition. English constitutional thought is a profoundly complex and multi-faceted tradition that is not always philosophically consistent. The gradual and incremental growth of English constitutional thought resulted in the development of an extensive philosophical and theoretical dialogue. Philosophers such as Mill, Dicey, Bentham and Blackstone influenced and responded to the state of English constitutionalism throughout the eighteenth and nineteenth centuries, debating and progressing theoretical understandings of institutions that characterise both the English and Australian systems of government. This fluid and organic ideological development has ensured that English constitutional thought takes many different institutional forms and can be difficult to comprehensively define. As such, the chapter does not seek to comprehensively discuss all the philosophers that contribute to English constitutional thought. Rather, the chapter identifies constitutional traditions that can be traced from contemporary politics, through the Australian founding, to their philosophical
foundations in English constitutional thought. The traditions and institutions that are discussed in Chapter Three were chosen because their underpinning theoretical explanations continue to inform contemporary understandings of Australian constitutionalism. The discussion takes particular account of the philosophical explanation of each tradition and how these understandings have developed over time. This temporal and historical approach confirms that English constitutional thought continues to provide the underpinning philosophical justification for the Constitution’s system of parliamentary responsible government.

The first section of the chapter investigates the common law tradition, which can be traced to the philosophical and legal theories of Sir Edward Coke, Sir William Blackstone and Edmund Burke. The common law tradition is important for its influence on the subsequent development of English constitutional thought and for understanding Australian concepts of the separation of powers, the best mechanism to secure individual rights and the foundations of national sovereignty. The second section of the chapter discusses the legal and philosophical foundations of the Governor-General. The Crown and concepts of constitutional monarchy underpin critical elements of the Constitution and continue to contribute to debates regarding the foundations of national sovereignty, the reserve powers, and the operation of the Australian Executive. Interpretations of the monarchy and its role in government can be traced back to the adoption of the common law in the Australia colonies in 1828 and to English constitutional lawyers such as Blackstone and Bagehot. The third section of the chapter discusses Australia’s gradual adoption of representative democracy. Australian conceptions of representative democracy can be traced to the influence of the Chartist movement, which has its philosophical provenance in the political theory of Jeremy Bentham. At the centre of Bentham’s utilitarian critique of the common law is a set of proposals for representative democracy that influenced the evolution of Australian government. Importantly, representative democracy has developed into a stabilising and civilising principle, which underpins the legitimacy and sovereignty of the Australian parliament. The fourth section of the chapter traces the adoption of responsible government into the Australia’s constitutional framework. The philosophical provenance of this institutional arrangement is encapsulated in the work of J. S. Mill. Mill provides important theoretical explanations of responsible government and is critical to A.V. Dicey and James Bryce who were referenced by the founders throughout the Federation debates. The final section of the chapter discusses Australian understandings of parliamentary sovereignty. The
founders’ decision to entrust the Australian Parliament with uncodified executive powers has profound implications for debates regarding individual rights and the separation of powers.

The key finding of Chapter Three is that Australian constitutionalism is still characterised by many of the nineteenth-century British conventions and understandings of parliamentary democracy, which can be traced to philosophers and constitutional lawyers such as Blackstone, Bentham, Mill and Dicey. These philosophers developed a powerful constitutional orthodoxy, which remains central to understanding Australian approaches to the separation of powers, national sovereignty and individual rights. In adopting the institutions of parliamentary responsible government, the founders imbued the Australian executive with a liberal utilitarianism that prioritises the flexibility of unwritten convention. Institutions such as the prime minister and cabinet are designed with the assumption that a democratically elected parliament can be trusted to promote the conditions which support liberty and social progress. Responsible government, representative democracy and the Crown provide constitutional safeguards, while ensuring government retains the necessary political power to achieve important and continual reform. In this way, the Westminster system provides a series of constitutional safeguards that secure individual liberties without limiting the collective power of government. Ministers have the capacity to respond to political problems as they arise and are not limited by broad declarations of individual right. These safeguards are the result of significant constitutional evolution, which is made possible through the incremental development of uncodified conventions. Thus, by examining the theoretical provenance of institutions adopted throughout the colonial period, the thesis discerns key philosophical assumptions regarding Australia’s constitutional system.

The common law
The first section of the chapter discusses the Australian common law and its rich philosophical heritage. Discussing the philosophical foundations of the common law and how it has impacted on the development of Australian constitutionalism is an important first step in understanding the theoretical tensions embedded in the Constitution. Despite being subsequently influenced by Jeremy Bentham and the utilitarian critique, a discussion of classic common law theory provides insight into the foundations of English constitutional thought, which provides a theoretical challenge to the constitution of the modern federal or republican state. Furthermore, the section shows how the philosophical heritage of the common law continues to contribute to Australian understandings of the separation of powers, the best mechanism to secure individual rights and the foundations of national
sovereignty. By drawing on a temporal and historical approach, the section discusses the philosophical origins of the common law, how the common law impacted on colonial constitutionalism, how it contributed to the development of the Australian Constitution and how the common law continues to shape contemporary approaches to judicial review. Furthermore, understanding the common law’s contribution to Australian constitutionalism is an important precursor for the next section, which discusses the philosophical and theoretical foundations of the Crown. Prior to Federation, the Sovereign was a key figure in the enforcement of the common law and the establishment of legal systems in the Colonies. In this way, the philosophical foundations of the Monarch are closely linked with the common law.

Australia’s common law tradition is premised on the concept that there is a single body of law representing centuries of refined experience and wisdom. This view of the common law has its philosophical provenance in the work of Sir Edward Coke. According to Coke’s (1606), *Institutes of the Laws of England*, there is a single body of law resulting from the development of gradual and incremental wisdom. The common law is an ancient charter originating in the customs of the people, a patrimony derived from immemorial traditions that are declared, interpreted and applied in the courts (Coke 1606: 125). Coke’s (1606) classic formulation of the common law is a defence against sovereign power questions the ability of individuals to reason and thereby discern natural law and natural rights. For Coke (1606), the artificial reason of the common law, incrementally developed over centuries, is superior to the natural reason of individuals:

… because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme (Coke 1606: 125).

Coke (1606) establishes the conventions and traditions of the common law as the ultimate constitutional foundation. This poses specific theoretical challenges for concepts of popular sovereignty, which rely on a social contract instituted by individuals exercising their consent to be governed (Patapan 2005). Coke’s (1606) theoretical contribution had a profound influence on the development of English constitutional thought. By providing the common law with a substantive philosophical foundation, Coke (1606) endowed the English constitution with legal legitimacy and authority.

Coke’s (1606) classic formulation of the common law was supported and elaborated by Sir William Blackstone. In his *Commentaries on the Law of England 1753*, Blackstone
discusses the gradual and incremental development of a single body of common law that allows judges to find and follow precedent without the exercise of discretion (Kadens 2009: 1558). For Blackstone (1753: 64, 177), judges are ‘grand depositories of the fundamental laws’, expressing the precedents and principles of a legal tradition developed over centuries. Blackstone draws on Coke’s (1606) principles of the common law to establish the basis for judicial independence and English conceptions of the separation of powers. Blackstone (1753: 177) argues that the Monarch is ‘the fountain of justice and general conservator of the peace of the kingdom.’ The Crown delegates this authority directly to the judicature by selecting magistrates to administer the common law. In this way, the judicature and the common law derive legitimacy from the Crown. Importantly, however, the delegation of power to the judicature is the outcome of ‘the long and uniform usage of many ages… which the Crown itself cannot now alter but by act of parliament’ (Blackstone 1753: 177). In the common law and the judiciary Blackstone (1753) perceives an independent arbitrator that protects individual liberty. The separation of judicial power preserves the liberty and property of subjects by allowing magistrates the independence to determine and apply the fundamental principles of the common law. Furthermore, the separation of judicial powers from the parliament and the ministerial executive protects the traditions and conventions of the common law, which is the ultimate constitutional foundation (Blackstone 1753: 177). Thus, it is important to contrast Blackstone’s (1753) discussion of the separation of powers with the federal and republican constitutional tradition. The common-law tradition questions the basis of modern liberal constitutionalism by challenging the efficacy of individual abstract reasoning, which is necessary for the consent associated with a social contract (Patapan 2005: 93). Importantly, Blackstone (1753) did not start with the Lockean conception of human nature that informed the constitutional structure outlined in the Federalist Papers. Blackstone relied on the traditions and conventions of the common law to protect liberty. The judicial separation of powers, operating under the protection of the Monarch, is sufficient to safeguard the artificial reason of the common law and therefore the protection of immemorial liberties.

The fundamental philosophical tenets of the classic common law are articulated in Edmunds Burke’s defence of the Ancient Constitution. In Reflections on the Revolution in France (1790), Edmund Burke contrasts the ancient rights and liberties of the English constitution, expressed in the myriad of cases that comprise the common law, against the alternative ‘fabrication’ of law in revolutionary France. Burke outlines that the English practice of establishing constitutional convention through an appeal to history has been
followed so regularly it constitutes a tradition of behaviour (Pocock 1960: 128). This tradition of behaviour has resulted in an ‘inheritance from our forefathers’ that is a ‘collected reason of the ages’ (Burke 1999: 82). Burke (1999: 82) asserts that ‘We have an inheritable Crown; an inheritable peerage; and a house of commons and a people inheriting privileges, franchises, and liberties, from a long line of ancestors.’ For Burke, the rights and liberties of the English constitution are embedded in tradition and enshrined in the various acts of parliament, in judicial decisions and in individual documents such as the Magna Carta (1215), the Petition of Right (1627) and the Declaration of Right (1689). Burke (1999) rejects natural rights and ideas of social contract as artificial innovations that are inconsistent with the prescriptive rights preserved in the English constitution. For Burke (1999: 81), the rights and liberties embedded in the common law ‘are the true, ancient and indubitable rights of the people of this kingdom.’ These ancient rights and liberties derive authority from their antiquity, not from nature or divinity. English constitutional thought is not founded on an abstract notion of God-given natural rights. The constitutional liberties found in the English system of government are an inheritance, resulting from a reverence for tradition and convention. Tradition and convention are paramount because society is complex. For Burke (1999), societies are unfathomably complicated, intangible and beyond the grasp of a single individual. Government requires ‘more experience than any person can gain in his whole life, however sagacious and observing he may be’ (Burke 1999: 99). Thus, long standing and established institutions are important. They capture the sorts of intangible wisdoms that individuals cannot. Established institutions such as the common law are an expression of organic social growth, evolving slowly and naturally, incorporating the wisdom of generations (Ward 2010: 220; Aly 2010: 9). This understanding of the common law and English constitutionalism has impacted on the operation and structure of the Australian polity.²

The formal reception of the English constitutional heritage came with the ascension of the Australian Courts Act 1828 (UK). Section 24 of the Act provides that all laws and statutes in force within the realm of England on 25th July 1828 should be applied in the administration of justice in the courts of New South Wales and Van Diemen’s Land (Windeyer 1962: 635). The Act embedded into the Australian Colonies English common and statute law, providing the foundations for Australia’s legal system (Castles 1963: 1). The adoption of the English common law entrenched into Australia a range of significant statutes,

² Chavura & Melleuish (2015) provide a comprehensive description of Burke’s influence on the Australian founding.
including the Magna Carta, the Bill of Rights 1688, the Habeas Corpus Act 1679, the Act of Settlement 1700 and other important concepts of tenure and estates in property that recognise the ultimate title of the Crown (Saunders 2011: 5). Through the adoption of the common law the Australian colonies tacitly recognised underlying philosophical ideas of English constitutionalism. The English common law provided the philosophical foundations for the Australian legal system. In particular, the adoption of the common law into the Australian colonies was a proclamation of the monarchic character of British rule and the authoritarian element in English law (Windeyer 1962: 639). Importantly, the legal foundations of colonial constitutionalism display no elements of a social contract. The documents that were publicly endorsed were royal letters patent. There was an assumption that the law of England was in force and that from this settlement royal power could be employed (Windeyer 1962: 639). In this way, Australia’s constitutional principles began to evolve in the earliest years of Britain’s colonial rule.

The introduction of the common law into the Australian colonies subsequently influenced the development of the Commonwealth Constitution. Australia’s common law traditions, adopted during the colonial period, defined the terms and concepts that were utilised throughout Federation. The Australian Constitution is indebted to the common law, using many of its terms and concepts including: the powers, privileges and immunities of the executive (section 61); the meaning of trial by jury (section 80); the office of the Speaker (section 35–37, 40); and the legal remedies of prohibition, mandamus and injunction (section 75) (Saunders 2003: 230; Zines 1999: 15). Significantly, the common law did more than simply define the terms and concepts that were used at Federation. Firstly, throughout the Federation debates the founders emphasised the importance of the common law and the rule of law in protecting individual liberties. Secondly, at the founding the common law provided the Constitution with significant legal authority. A long standing axiom of Australian government is that the Constitution obtains validity from being an enactment of the British Imperial Parliament which, in turn, owes its authority to the common law (Zines 2004: 34).

This understanding of the Constitution was the subject of a speech delivered by Sir Owen Dixon to the American Bar association in 1943. Dixon (1943: 139) argued that the Australian and English common law is a single unit, which continues to provide the

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3 For example, see Symon J Official Report of The National Australasian Convention Debates (Third Session), Sydney 1898, University of Sydney Library, NSW, p. 2859. In relation to threats against religious freedom Symon claimed, ‘under the operation of the common law any inhumanities and cruelties could be effectually stopped.’
Constitution with its legal authority and legitimacy. Dixon (1943) claimed that ‘it is a fact of legal history’ that the law of the British Commonwealth provides Australia with a constituent authority:

The authority of the instrument of government giving effect to the union was not original. It did not proceed from an extra-legal transaction or an unexamined source. It arose under the law, the law immemorially recognized (Dixon 1943: 140).

This understanding of Australia’s constitutional foundations is theoretically inconsistent with the US federal model. Dixon (1943) utilises the speech to outline the crucial differences between Australia’s common law founding and US constitutionalism: ‘In Australia we subscribe to a very different doctrine…We conceive a State as deriving from the law; not the law as deriving from a State.’ Dixon’s comments reveal that as constitutional foundation the common law has shaped understandings of government, providing a theoretical challenge to arguments that the Constitution is founded in popular consent (Zine 2004: 343; Patapan 2005: 101).

The orthodox or traditional view that the Constitution is a statute of the Parliament at Westminster has ensured that traditional ideas of the common law have remained a central feature of Australian constitutionalism and judicial interpretation. Australian parliamentary legislation has regularly reflected a willingness to support and preserve the continuity of the common law. Section 80 of the Judiciary Act 1903 (Cth) required Courts, in certain circumstances, to apply ‘the common law of England.’ Uniformity with the decisions of the English common law received great emphasis in the High Court until the 1960s (Zines 2004: 343). For the first time, in Parker v The Queen (1963) 111 CLR 610 the High Court held that it would not follow a decision of the House of Lords because it believed the decision was fundamentally wrong. Following the case, the orthodox approach of the High Court, accepted by the Privy Council, was that the common law was capable of developing differently in Australia, as well as other parts of the Commonwealth (Zines 2004: 343). Australia’s gradual transition to sovereign independence ultimately resulted in the Australia Acts 1986 (Cth.), which formally severed the ties between the High Court and the Privy Council.

Since the Australia Acts 1986 (Cth.), the High Court has regularly relied on the concept of a common law of Australia. For example, In Mabo v Queensland (No 2) (1992) 175 CLR 1 (Mabo) Justice Mason and Justice McHugh stated that ‘that the common law of this country recognises a form of native title.’ Similarly, a unanimous Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 directly cited Sir Owen Dixon to
demonstrate that, in contrast to the US, Australian jurisprudence is characterised by a single body of common law:

The common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations… We act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute (Lange v Australian Broadcasting Corporation 1997 189 CLR 563).

For the majority in Lange (1997) 189 CLR 563, ‘The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form one system of jurisprudence.’ Thus, concepts of a uniform common law, founded in English constitutional thought, continue to represent a significant philosophical and institutional contribution to Australian government.

**The Governor-General**

It is critical to recognise that as a result of colonisation the founders decided Australia would be a constitutional monarchy with significant ties to the British Crown. As such, the second section of the chapter seeks to understand the Constitution’s monarchic traditions. Discussing how understandings of the monarchy have impacted on the development of Australian constitutionalism is important because institutions such as the Crown, the reserve powers and the Governor-General form significant elements of the executive. Crucially, the founders decided to leave large elements of the executive uncodified, entrusting them to the gradual evolution of constitutional convention. The section will take particular account of this gradual evolution, focusing on Australia’s transition to sovereign independence. The discussion shows how the Constitution’s monarchic traditions contribute to debates regarding the appropriate limits of executive power, the protection of individual liberties and the foundations of national sovereignty. By examining the gradual evolution of the Constitution’s monarchic traditions, the section shows that English constitutional thought continues to inform Australian understandings of the Governor-General’s broad discretionary reserve power to protect the Constitution by forcing dissolution of parliament.

When the founders placed the Crown at the apex of Australia’s constitutional system they adopted a royal authority that predates electoral legitimisation. In 1753, Blackstone described the Monarch’s royal prerogative as a ‘special pre-eminence which the King hath over and above all other persons and out of the course of the common law in right of his regal dignity.’ Blackstone (1753) linked the Monarch’s sovereign authority to the ancient
foundations of the common law. This ancient common law interpretation of the royal prerogative was developed by Walter Bagehot in 1867. By the time Bagehot published The English Constitution, concepts of responsible government had developed to include specific conventions regarding the Monarch. Bagehot (1915: 141) asserted that the Crown has three specific rights – the right to be consulted, the right to encourage and the right to warn. For Bagehot, the genius of the English Constitution is that it allows for the evolution of the efficient part of the Constitution, cabinet government, while retaining the dignified form of monarchy that satisfies popular sentiment (Galligan 1995: 21). In this way, the English constitution is a ‘disguised republic’ because the people are ultimately sovereign through the prism of parliamentary democracy (Galligan 1995: 21). Parliamentary systems thus recognise that government must derive its legitimacy from the people, even if the mode of giving effect to that principle is different from republican notions.

Bagehot’s (1867) discussion of the monarchy was influential to the Australian founders and to the work of A.V. Dicey. Imbuing English constitutionalism with democratic principles, Dicey (1982) developed Bagehot’s conception of the monarchy by arguing that certain conventions, while not enforceable by a court of law, create a constitutional obligation for the Crown. This constitutional obligation requires the Crown ‘to secure the ultimate supremacy of the electorate as the true political sovereign of the state’ (Dicey 1982: 422). Dicey (1982) sought to instil a sense of obligation on the Crown to protect the democratic order that upholds the common law and the Parliament. In this way, the Crown becomes the major safeguard against ministerial dictatorship and arbitrary government, protecting and defending the rights of citizens. Dicey’s (1982) discussion regarding the Crown continues to inform Australian understandings of the Governor-General’s broad discretionary reserve power to protect the Constitution by forcing dissolution of parliament.

The continuing relevance of English constitutional scholars such as Dicey and Bagehot is, to a certain extent, the result of Australia’s gradual transition from British Colony to independent nation. The British Monarch was a key figure in the enforcement of law and the establishment of legal systems in colonial Australia. With the authority of the common law, the executive power of the colonies was exercised on sovereign authority, forming the basis for Australian relationships to the Crown (Windeyer 1962: 639). Importantly, this imperial history was known and understood by the Australian founders. The founders viewed themselves primarily and fundamentally as British subjects, subordinate to the Queen and

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4 The founders referred to Bagehot throughout the convention debates see, for example - Official Report of The National Australasian Convention Debates (Third Session), Sydney 1898, University of Sydney Library, NSW, pp. 1263, 3508, 3527.
loyal to the monarchy. During the 1898 Constitutional Convention held in Melbourne, Edmund Barton argued that the Constitution should not be encumbered with ideas of citizenship:

We are subjects in our constitutional relation to the empire, not citizens. ‘Citizens’ is an undefined term, and is not known to the Constitution. The word ‘subjects’ expresses the relation between citizens of the empire and the Crown (Constitutional Convention 1898: 2877).

For prominent founders such as Barton, Australia was part of the British Empire and subject to imperial sovereignty. As a result of this colonial inheritance the founders adopted many of the conventions and institutions associated with English constitutional thought. Section 61 of the Australian Constitution recognises the ancient principle of English government that executive power is vested in the Crown. The Monarch provides the sovereign authority for administration of the Commonwealth, retaining significant constitutional and prerogative powers. Section 2 of the Constitution provides that the Governor-General shall be Her Majesty's representative and shall have and may exercise, ‘such powers and functions of the Queen as her Majesty may be pleased to assign him.’ As the Monarch’s representative, the Governor-General has the power to appoint and dismiss a prime minister and to summon, prorogue and dissolve parliament (Saunders 2011: 22). Australian constitutional law permits the Governor-General to decide on a double dissolution of the House of Representatives and the Senate, recommend financial bills to Parliament, assent to bills or recommend amendments and appoint ministers (Saunders 2011: 22). In practice, the founders understood that the Governor-General’s functions would be understood in accordance with the conventions of responsible government.

The founders’ decision to adopt English constitutional conventions and not specifically codify elements of executive government is significant because overtime the role of the executive and the functions of the Monarch have evolved (Saunders 2011: 23). The conventions relating to the Governor-General, the prime minister and the reserve powers adapted to meet the demands of Australia’s gradual transition to sovereign independence. At Federation, it was accepted that the Parliament at Westminster was sovereign and that the Queen would take advice regarding Australian government from English ministers (Selway 2003: 502). Over the course of the first four decades after Federation it came to be accepted that the Australian government would advise the Monarch and that the Governor-General was responsible to Australian Ministers (Galligan 1980b: 264). The effective independence of the federal government was confirmed by the Statute of Westminster 1931 (UK). Section 4 of the
Statute provides that the English parliament would not legislate for a dominion without specific consent. The adoption of the Statute of Westminster 1931 (UK) affirmed the diplomatic licence accorded to the dominions at the 1923 Imperial Conference and granted Australia the official authority to pass domestic laws that may be contrary to those of the United Kingdom (Gare 1999: 251). Importantly, these developments secured Australian independence by eliminating the capacity of the English Parliament to intervene in Commonwealth affairs, while ensuring the institutions of the Monarch and the Governor-General remained. Subsequent Commonwealth legislation captured the symbolism of this arrangement by confirming the Monarch as an Australian institution (Saunders 2011: 23). In 1953 and in 1973, the Commonwealth Parliament adopted legislation officially altering the style and title of the Monarch to King or Queen of Australia (Kirby 2000: 516). In this way, the Crown continues to provide the Commonwealth and the Constitution with significant sovereign authority.

The gradual evolution of Australia’s monarchic traditions has been the subject of considerable scholarly debate. Much of this debate centres on the scope and extent of vice-regal authority. As a consequence of Australia’s progression from colony to independent nation the executive power of the Commonwealth came to include all of the prerogatives of the Crown. Many of the Monarch’s former functions have transitioned to the prime minister such as: declarations of war; diplomatic, statutory, and judicial appointments; and the adoption and ratification of international agreements (Weller & Wanna 2009: 47). The few powers that remain with the Crown and the Governor-General are reserve powers that must be used with personal discretion. Because of the reliance of the Australian Constitution on convention, the reserve powers are not stated in the Constitution. This means that the exact nature and scope of the reserve powers are difficult to comprehensively define. The gradual evolution of Australian independence has ensured that the Governor-General must act on the advice of the prime minister in all but a very limited number of circumstances. The use of reserve or discretionary powers is usually confined to circumstances when the ministry does not have the confidence of the Lower House or to refuse dissolution and appoint a new prime minister (Saunders 2011: 161). Saunders (2011: 161) asserts that the reserve powers recognise ‘a role for the Governor-General as constitutional guardian, albeit one that is limited to the effectuation of responsible government.’ It is critical to recognise that as the reserve powers predate democratic values they are exempt from legal sanctions.

5 See Royal Style and Titles Act 1953 (Cth) and Royal Style and Titles Act 1973 (Cth).
Constitutional conventions are not rules of law and are not enforceable in the courts
(Saunders 2011: 161). Their operation is reliant on constitutional conventions and theories
that predate the writing of the Australian Constitution. This understanding of
constitutionalism is difficult to theoretically reconcile with theories and traditions that are
premised on ideas of defined, limited and codified power.

By tracing Australia’s gradual transition to sovereign independence, the discussion
reveals how traditionally English concepts of constitutional monarchy continue to persist as a
powerful orthodoxy in Australian constitutionalism. The Crown remains at the apex of
Australia’s constitutional system, ensuring that monarchical institutions such as the reserve
powers and the Governor-General are central to the operation of government. Furthermore,
the section shows that the nature of executive power is better understood with reference to the
development of Australia’s monarchical traditions. The undefined nature of executive power is
the result of significant constitutional evolution, which begins prior to the drafting of the
Constitution. Australia’s monarchical traditions retain many of the traditional English
characteristics such as a royal or reserve power to dissolve parliament. In conjunction with
the common law, the Crown provides an important bulwark against tyranny without
specifically limiting or defining the power of executive government. This is crucial because it
is a common feature of all the Australian traditions that derive from English constitutional
thought. English constitutionalism is a series of institutional traditions that provide for the
protection of individual liberties without limiting the collective power of government. The
Australian capacity to adopt these English traditions is further evident in the rapid acceptance
of representative democracy.

**Representative democracy and the Benthamite critique**
The third section of the chapter seeks to understand the philosophical foundations of
representative democracy. The gradual adoption of representative democracy into Australia’s
constitutional arrangement can be traced to the influence of the Chartist movement, which
has its philosophical provenance in the political theory of Jeremy Bentham. Bentham’s
political theory sought to repair the philosophical foundations of the common law through the
development of a science for legislation and jurisprudence founded on the concept of utility.
At the centre of Bentham’s utilitarian framework is a belief in representative democracy that
continues to underpin Australia’s constitutional system. In particular, the section shows that
representative democracy has developed into a stabilising and civilising principle of the
Australian polity, which underpins the legitimacy and sovereignty of the Parliament.
Representative democracy provides a foundation for the protection of rights that relies on the
democratic nature of institutions rather than on rights instruments that limit the collective power of government (Saunders 2011: 110). In the Australian context, representative democracy seeks to guard against the abuse of power through an institutional arrangement that includes universal suffrage, a secret ballot, payment for members of parliament, proportioned constituencies and regular elections (Saunders 2011: 109–145). In this way, representative democracy provides an important theoretical justification for ideas of parliamentary sovereignty and for Australia’s orthodox or traditional approach to the protection of rights.

Throughout Australia’s colonial period, classical common law as expressed by Coke (1606), Blackstone (1753) and Burke (1790) contended with a utilitarian tradition that rejected the efficacy of the English legal system. Bentham (1843a) assigned very little value to tradition or custom, asserting that the common law was ‘unintelligible’, ‘perplexing’ and ‘deficient.’ In reference to Coke’s Institutes, Bentham states that the greater part of it ‘is a piece of cobweb work, spun out of fantastic conceits and verbal analogies, rather than a mass of substantial justice cast in the mould of reason’ (Bentham 1843a: 386). While conservatives were celebrating the collective wisdom embedded in convention and tradition, Bentham’s plea was for a legal and legislative system founded on the rational principle of utility. For Bentham (1843a: 121), the sovereign masters of pain and pleasure provide the motives for human action, ‘governing us in all we do, in all we say, in all think.’ Thus, the right and proper end of government, of moral precepts, of legislative enactments and of the common law is their tendency to promote the greatest possible happiness of the greatest possible number (Bentham 1843a: 121). Utility becomes the guiding principle of government, serving as both the goal and standard of political activity. Bentham’s utilitarian project rejects the efficacy of the classic common law and prioritises majority happiness to provide a framework for political and legal reform.

Bentham’s suggestions for utilitarian reform were frustrated by the British government. Bentham (1843a) was convinced that nothing worthwhile could be achieved through the existing political structure. Rather than promoting the general interest, the established political and legal class were naturally inclined to promote their own particular or ‘sinister interest’ (Schofield 2009: 93–100). Bentham’s (1843a: 438) theory of sinister interest asserts that rulers are motivated by a desire to promote their own particular interest at the expense of the community, undermining and creating resistance to important government reform. For Bentham, securing utilitarian reform and challenging sinister interest requires a government underpinned by the institutions of representative democracy:
The only species of government which has or can have for its object and effect the greatest happiness of the greatest number, is, as has been seen, a democracy: and the only species of democracy which can have place in a community numerous enough to defend itself against aggression at the hands of external adversaries, is a representative democracy (Bentham 1843b: 97).

Bentham (1843a) argues that achieving intelligent and responsible government requires a form of representative democracy that includes universal suffrage, the secret ballot, frequent elections, a free press, ministerial responsibility, equal electoral districts, payment for members of parliament and accountability in the judicial system (Schofield 2009: 12–13; Rosen 1994: 44). For Bentham (1843b), these detailed provisions balance the requirement for open, accountable institutions while ensuring that government retains the necessary political powers to achieve important reform. Bentham’s utilitarian proposals for achieving open and accountable representative democracy influenced the evolution of Australia’s institutional arrangement.

Throughout the nineteenth century, Bentham’s utilitarian thesis for representative democracy was implemented and adopted in the Australian colonies. The gradual adoption of representative democracy can be traced to the influence of the first free English migrants to arrive in Australia. Between 1836 and 1850, 75,000 English migrants received assisted passage to the Australian colonies. Many of these settlers brought with them the ideals of the English Chartist movement, which has its philosophical provenance in the political theory of Bentham (Wright 2001: 116). The Chartists’ demands were synonymous with Bentham’s proposals for representative democracy and provided the foundation for democratic reform in the Australian colonies. Keith Hancock (1930: 54–55), directly attributes the utilitarian nature of the Australian polity to the success the chartist agenda, which was advocated and implemented by the arrival of free English migrants. Hancock (1930: 45) argues the first free migrants to New South Wales were integral to the character of colonial political reforms. The new migrant majority ‘vehemently resented the attempt of fortunate first-comers to establish themselves as gentry in Australia’ (Hancock 1930: 45). As the emigrants became politically active, they developed a powerful constituency that eventually overwhelmed the existing convict, military, and squatting interests (Wright 2001: 116). Gradually, free English settlers took control of colonial governments, instilling the democratic values of the Benthamite Chartist agenda (Wright 2001: 116). Hancock (1930: 71) asserts that as a result: ‘Within ten years of the discovery of gold, practically the whole political programme of the Chartists is realised in the Australian colonies.’ Similarly, Hugh Collins (1985: 150) argues that
influential migrants such as Henry Parkes transported the political ideologies of their youth to their new situation in the Australian colonies. Consequently, Benthamite concerns relating to how ministers of state could be made practically accountable informed the practice of Australian government from an early period (Collins 1985: 153). The success of the democratic reform movement throughout the nineteenth century, instigated by English migrants, ensured Bentham’s utilitarian proposals for achieving open and accountable representative democracy informed the foundations of Australian government.

By the close of the nineteenth century, institutional traditions such as universal suffrage, proportioned constituencies and the secret ballot were integral to conceptions of colonial democracy. The first Australian elections to use the secret ballot were held in Victoria in 1856 and New South Wales formally adopted parliamentary representation with the passing of the 1858 Electoral Reform Bill (Brent 2006: 39; Hirst 2002: 42–63). With some qualifications, the Electoral Reform Bill extended the suffrage to all males aged 21 and over who were resident natural-born or naturalised British subjects. The Bill also adopted the principle of representation on a population basis establishing proportional constituencies. Payment for members of parliament was made permanent in Victoria in 1883 and universal franchise was established in South Australia in 1894. As a result, representative democracy became the standard of legitimate government in colonial Australia (Wright 2001: 117). As such, when the Australian founders were debating the form and structure of the Constitution, they interpreted the central thesis of parliamentary responsible government in terms of the established traditions of representative democracy (Wright 2001: 119). Just as the democratic devices of universal suffrage, proportioned constituencies and the secret ballot informed colonial governments, representative democracy is a source of legitimacy for the Commonwealth Parliament. Members of the House of Representatives are elected at least every three years from single member divisions determined on a population basis, and Section 48 of the Constitution stipulates that members of parliament receive a financial allowance. In this way, representative democracy provides an important justification for the supremacy of the legislature in the exercise of its law-making function (Saunders 2011: 110).

Two years after Federation, the newly established Australian Parliament passed the Commonwealth Franchise Act 1902 (Cth), which enabled women to vote and stand in federal elections. By 1906, the remaining states and territories had all granted women's suffrage for Lower House elections (McMinn 1979: 63). In 1967, Australia officially adopted universal suffrage.

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6 Aboriginal women remained excluded until the 1967 referendum.
adult suffrage, amending the Constitution by referendum to ensure that Aboriginal Australians could vote.

Through the gradual and incremental adoption of institutional traditions such as universal adult suffrage, the secret ballot, payment for members of parliament, proportioned constituencies and regular elections, Bentham’s utilitarian prescription for representative democracy has remained a powerful orthodoxy in Australian constitutionalism. Significantly, however, the utilitarian thesis that underpins the Constitution’s system of parliamentary responsible government is not directly derived from Bentham’s political theory. Benthamite utilitarianism was modified by J.S. Mill, who developed and advanced the theoretical foundations of English constitutional thought throughout the latter half of the 19th Century. Mill’s liberal utilitarian thesis, which adapted Bentham’s political theory to accommodate ideas of social and human progress, was a significant influence on the work of A.V. Dicey and James Bryce (Patapan 1997a; Wright 2001). This is relevant because Bryce and Dicey were critical to the founders’ conception of English constitutionalism, being cited throughout the Federation debates (Patapan 1997b; La Nauze 2000). Thus, Bentham’s political theory is significant for both its influence on the Chartist movement and as a critical philosophical foundation for the forms of English constitutionalism that were present at the founding.

**Responsible government**

As a result of English colonisation, Australia’s constitutional framework includes a system of responsible government that operates on unwritten and longstanding conventions. Discussing the philosophical foundations of responsible government is important for establishing the theoretical tensions at the centre of the Constitution. The conventions and traditions of responsible government are founded on an understanding of human nature that is significantly different to Australian traditions that derive from US constitutionalism. The section will take particular account of John Stuart Mill’s constitutional theory and how it contributes to contemporary understandings of Australia’s system of responsible government. Mill provides an account of the underpinning philosophical tenets of responsible government, developing the theoretical foundations for longstanding parliamentary traditions such as the prime minister and cabinet, the ministry and the conventions of the House of Representatives. At the centre of Mill’s liberal utilitarianism is a belief that the institutions of responsible government can be trusted to secure the conditions which support liberty and social progress. Importantly, Mill’s understanding of English constitutional thought informed the founders, who entrusted the operation of the executive to the conventions of responsible government.
By not codifying the conventions of responsible government the founders imbued Australian democracy with a liberal utilitarianism that does not seek to limit the power of government. The Australian executive is designed with a deliberate flexibility that allows government significant authority to deal with political problems as they arise. This flexibility is made possible because the conventions of responsible government are underpinned by ideas of representative democracy, which ensure that executive power is conducted by officers who enjoy the trust and confidence of the Australian people.

Throughout Australia’s colonial period, understandings of responsible government were advanced by John Stuart Mill. Mill’s work is characterised by his various attempts to modify Benthamite utilitarianism to accommodate his commitment to social and human progress. In *On Liberty* (1879), Mill divorces himself from a natural rights position, outlining a form of progressive utilitarianism:

> It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being (Mill 1879: 11).

The defence of liberty is situated in a utilitarian framework and is an extension of Mill’s wider belief that the exercise of liberty has a positive, cultivating effect on citizens and is essential to the progress of society (Petrash 2006: 75). Mill (1879: 230) elucidates his purpose by invoking Wilhelm Von Humboldt in the epigraph of *On Liberty*: ‘The grand leading principle, toward which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.’ The inclusion of Von Humboldt reveals Mill’s deep commitment to the possibilities of human progress. Abraham Harris (1956: 163) asserts that: ‘Mill shared the romantic assumption of the eighteenth century enlightenment; that progress, except for occasional deviations, was upward.’ Significantly, Mill’s commitment to social progress is founded on a fundamentally different premise to the US constitutional system, which conceptualises liberty as an end in itself. Mill does not believe that government should be limited by concepts of natural rights or contractual arrangements that protect individual liberty. Mill’s constitutional theory is characterised by a trust in the progressive will of parliament that believes government, as far as possible, it to have unrestricted authority, unimpeded by constitutional limitations (Mill 1977: 55). A belief in human progress requires a constitutional framework which is flexible and able to respond to the ever-changing requirements of a progressive society.
In *Considerations on Representative Government* (1859), Mill (1977) develops and defends the institutions of English constitutional thought, which he believes provide the political conditions most conducive to securing liberty and human progress. In particular, Mill (1977) discusses the benefits of a constitutional arrangement underpinned by the conventions and traditions of responsible government. Mill (1977) believes that the institutional arrangement most conducive to securing progress is a form of government that includes an executive, ministry and cabinet drawn from the parliament. The executive sits within the parliament and ministers are responsible for the successful operation of government (Mill 1977: 165–175). Linking concepts of progress and education, Mill supports a strong, flexible executive that has the power to immediately dissolve the House and appeal to the people. Mill (1977: 170) believes that the ‘liberty’ and ‘discretion’ to call on the people will prevent political impasse and strengthen the capacity of the executive. Mill (1977) asserts that this institutional function simultaneously strengthens democracy and provides a mechanism to subvert political deadlock. Through the conventions of responsible government the prime minister remains accountable to the people, while also having the authority and flexibility to implement its political agenda. Mill’s (1977: 165–175) discussion regarding the ideal form of political arrangements also includes: ministerial accountability, an independent public service, the traditions of prime minister and cabinet, and judicial independence. Although not codified in the Constitution, each of these institutional traditions continues to operate within Australian government. Influenced by their experience of responsible government throughout the colonial period, the founders choose to adopt the traditions and conventions of responsible government.

In 1850, the British parliament passed the *Australian Constitutions Act 1850* (UK), providing authority to the Legislative Councils of New South Wales, Tasmania, South Australia and Victoria to establish bicameral legislatures and fashion their own constitutions (Castles 1963; Windeyer 1962; Lumb 1983). The colonies immediately sought to implement and replicate administrative systems founded in English conceptions of responsible government. By 1861, all the Australian colonies, except Western Australia, possessed legislatures that contained an executive, which required the continuing support of the democratically elected members of the Lower House (Hirst 2002: 41). All of the colonial Constitutions vest formal executive power in the Queen or her vice regal representative, without delineating the specific conventions of responsible government. For example, the NSW Constitution does not mention the premier or cabinet. The conventions of responsible government are indirectly embedded into Section 37, which provides that in certain
circumstances the Governor will act on advice of the executive council (Ward 1987: 7). In South Australia and Victoria responsible government is intimated with the provision that officers of the Crown must secure a parliamentary seat within three months of appointment to the cabinet (Ward 1987: 7). This English constitutional inheritance, the initial model for the colonies, was subsequently utilised in the development of Commonwealth Constitution.

Adopting Mill’s constitutional theory, the founders believed that the institutional arrangement most conducive to securing progress is a form of parliamentary democracy that includes the traditions and conventions of responsible government. Prominent founders such as Alfred Deakin and Sir Samuel Griffith were aware that human progress requires a constitutional framework that does not bind future generations. In a speech to the House of Representatives in 1902, Deakin stated that the provisions in the Constitution were embodied in general language because it was designed to remain in force for many years and ‘to apply under circumstances probably differing most widely from the expectations now cherished by any of us’ (Hansard 1902: 10967). Deakin believed that ‘the organs of government’ should enable ‘the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation’ (Hansard 1902: 10967). This is important because the ‘the nation lives, grows and expands. Its circumstances change, its needs alter and its problems present themselves with new faces’ (Hansard 1902: 10967). Deakin’s comments reveal that it was the founders’ intention to develop an arrangement that provided flexibility and could be redefined according to changing circumstances. The founders believed that an institutional structure that provided flexibility would allow the Australian people to respond to political problems as they arose. This understanding of government displays a significant trust in the Australian people and in the institutions of government. The founders’ predisposition to trust future generations was evident throughout the Federation debates. At the 1891 constitutional convention in Sydney, Sir Samuel Griffith argued that the Australian people could be trusted to adapt the institutions of government to reflect changing circumstances:

What I maintain is this: The Genius of the English people has shown itself for the last 200 years to be capable of moulding the Constitution, so as to suit it to the exigencies of the times. Who can tell what the exigencies of the future will be? Are we to suppose, that the people of Australia do not possess sufficient inventive or adaptive faculty to adjust their arrangements to the exigencies of the time (Convention Debates 1891: 706).

In the same speech, Griffith goes on to explicitly state that strict codification of the conventions of responsible government would ensure the Constitution was ‘incapable of expansion and adaptation’ (Convention Debates 1891: 706). The conventions ‘ought to be
omitted because they would import a rigidity into the Constitution which would render it impracticable’ (Convention Debates 1891: 706). The founders were satisfied that the successful operation of the executive could be entrusted to the conventions and traditions of parliamentary responsible government. For the founders, the parliament represented the primary means of addressing political problems. As far as possible it should be unrestricted from constitutional limitations. Ultimately, defining conventions would limit the power of the executive and undermine the capacity of the Constitution to gradually evolve with developments in social and human progress.

As a result of the founders’ determination to adopt responsible government, the operation of the Australian executive continues to be underpinned by constitutional conventions. Institutions such as the prime minister and cabinet are not in the Constitution and the rules governing the exercise of responsible government are not specified. The conventions of responsible government are implied in Chapter Two of the Constitution, which stipulates that ‘There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth’ (s62). Responsible government is further intimated by the condition that ministers cannot hold office for a longer period than three months unless they become senators or members of the House of Representatives (s64). Brian Galligan asserts that:

It is obvious that the meaning of responsible government cannot be established from the Constitutional text, nor can disputes regarding its operating procedures be resolved by appeal to Constitutional law that derives from that text (Galligan 1980: 4).

Galligan (1980) recognises that understanding Australia’s constitutional structure requires acknowledgement of the conventions and traditions associated with responsible government. Despite not being mentioned in the Constitution, Australian government is underpinned by a powerful prime minister commanding a majority in the House of Representatives. The Governor-General, as the Queens representative, acts on the advice of ministers and, in turn, ministers to take collective and individual responsibility for the effective operation of government (Rhodes, Wanna & Weller 2009). A government that loses the confidence of the Lower House must either seek re-election or surrender to a group of Ministers that the House is willing to support (Saunders 2011: 148). This constitutional framework entails a significant degree of trust in the institutions of parliament and a belief that constitutional convention is the best mechanism to secure social progress. In this way, Australian government continues to exhibit a form of liberal utilitarianism that has its philosophical foundations in Bentham
and its primary expression in the work of Mill. Mill’s philosophical discussion of responsible
government remains a powerful orthodoxy in Australian constitutionalism. Furthermore,
Mill’s liberal utilitarianism is a key philosophical tenet in A.V. Dicey’s discussion of English
constitutionalism, which has shaped Australian approaches to individual rights and the
separation of powers.

**Parliamentary sovereignty**
The final section of the chapter discusses the influence of A.V. Dicey on Australian
constitutional thought. The section argues that Dicey’s conception of parliamentary
sovereignty remains a powerful orthodoxy in Australian constitutionalism. Assessing the
philosophical foundations of parliamentary sovereignty is important for understanding
Australian conceptions of individual rights and the separation of powers. The section takes
particular account of Dicey’s constitutional theory for three reasons. Firstly, Dicey’s 1885,
*Introduction to the Law of the Constitution* was the culmination of English constitutional
thought at the time of the founding. Dicey (1982) directly draws on, and responds to,
Bentham, Mill and Blackstone, providing a theoretical explanation of each of the English
institutions associated with Australia’s system of parliamentary responsible government.
Secondly, Dicey (1982) was utilised by the Australian founders to understand the nature of
responsible government at the time of the founding. This directly links the theoretical
discussion at the Federation debates with English constitutional thought and its rich
philosophical heritage. Finally, Dicey’s conception of parliamentary sovereignty is crucial in
understanding Australia’s orthodox or traditional method of securing individual liberties,
which rejects broad declarations of innate or natural rights.

Dicey’s political and legal contribution is an extension of Bentham’s attempts to bring a
more scientific approach to English jurisprudence and legislation. Drawing on Bentham’s
utilitarian critique, Dicey sought to repair and reform the theoretical basis of the English
common law, in effect supplanting Blackstone’s *Commentaries* which he considered no
longer relevant (Patapan 1997c: 261). Dicey’s work was also significantly influenced by J.S.
Mill. Mill’s liberal utilitarianism and, in particular, Mill’s belief that the institutions of
parliamentary responsible government could be trusted to secure human progress underpin

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7 Dicey was referred to throughout the convention debates, especially by the South Australian delegates. See
generally, *Official Record of the Debates of the Australasian Federal Convention 1891*, pp. 193, 194, 323; and
*Official Record of the Debates 1897a*, pp. 523, 1489; and 1897b p. 503, p. 505; *Official Record of the Debates of
the Australasian Federal Convention 1898* pp. 2719, 2785.
Dicey’s legal theory. Dicey’s (1982) central argument is that the judiciary is a necessary part of the English tradition of individual rights and liberty. The judiciary must be protected from the passions of the political process to ensure that liberty and progress remain secure. Dicey’s (1982) project seeks to entrench the judiciary within the English constitutional system, securing rational and progressive law reform. To achieve this, Dicey (1982) discusses three guiding principles of the English Constitution: the legislative sovereignty of parliament; the rule of ordinary or common law; and the dependence of conventions on the law of the Constitution. Thus, Dicey (1982) elaborates the relationship between the parliament and the judiciary, clarifying the role and function of each institution within the responsible government tradition. In this way, Dicey strengthens the legal basis of the common law, while also establishing important philosophical foundations for the Australian Parliament.

For Dicey (1982: 100), parliamentary sovereignty or the legislative supremacy of parliament ‘is the very keystone of the law of the Constitution.’ In Dicey’s analysis:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has under the English Constitution the right to make or unmake any law whatever, and, further, that no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament (Dicey 1982: 20).

Dicey (1982) endorses the legislative supremacy of parliament, confirming the institutions significant place within English constitutional thought. Dicey (1982) understands, however, that parliament is sovereign only to the extent that laws are enforced by the courts. The parliament must express its will in the form of legislation, and legislation can only be interpreted by the judiciary:

Powers, however extraordinary, which are conferred or sanctioned by the statute, are never really unlimited, for they are confined by the words of the Act itself and, what is more, by the interpretation put upon the statutes by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put on it by judges of the land (Dicey 1982: 243).

Dicey (1982) believes that the dispassionate application of the common law allows the courts to remain free from the political process, providing an important check to the discretionary powers of the executive. This institutional arrangement protects the independence of the

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judiciary by allowing the courts to focus on legal matters as opposed to political questions, creating a distinct separation between law and politics. Thus, Dicey’s *Law of the Constitution* is critical to understanding the separation of powers, particularly in a constitutional system that includes a parliamentary executive. Furthermore, by protecting the judiciary from the impulses of a progressive parliament, Dicey outlines a constitutional mechanism that relies on the democratic nature of institutions rather than on rights instruments that limit the collective power of government.

Dicey (1982) believes the common law and the legislative supremacy of parliament provides a comprehensive set of remedies that secure individual liberties. According to Dicey (1982: 154), individual liberties are ‘… not a special privilege but the outcome of the ordinary law of the land enforced by the courts.’ Dicey (1982: 155) argues that the rule of law in England provides a much greater security for individual liberty than any written or declared rights. Specific provisions are inadequate because they create different classes of rights and move away from the idea of legislation as a science (Dicey 1982: 155). Moreover, constitutions that contain broad declarations of individual liberties give insufficient attention to the development of ‘remedies’ that enforce and secure rights (Dicey 1982: 151). For Dicey, individual rights are developed over time and are ultimately guaranteed by remedies enforced by the Courts:

There runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation… In its bearing upon constitutional law, it means that the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen (Dicey 1982: 152).

For Dicey (1982), the rule of the law secures the rights of the individual and ensures human progress by creating specific solutions to protect liberty rather than declaring broad natural rights. Dicey’s (1982) understanding of parliamentary responsible government and its method of rights protection is a key conceptual element in the Australian constitutional heritage.

Dicey’s (1982) discussion of responsible government informs the structure and operation of the Australian polity, providing the theoretical justifications for the federal government’s orthodox approach to securing individual rights. The Australian institutional arrangement does not include a Bill of Rights and there are very few express rights codified in the Australian Constitution. These constitutional rights include: the requirement of
acquisition of property on just terms (s51); the requirement of trial by jury for indictable offences (s80); freedom of religion (s116); and limits on state discrimination based on residence (s117). The founders of the Australian Commonwealth justified the absence of constitutionally entrenched rights on the basis that individual liberties are adequately protected by the traditional combination of representative democracy, responsible government and independent courts administering the common law (Saunders 2011: 40).

The founders’ understanding of the best mechanism to secure individual rights has exerted a persistent influence over the operation of the Australian polity. In 1967, Sir Robert Menzies asserted:

In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition (Menzies 1967: 54).

Menzies’ (1967) regard for the institutions of responsible government is synonymous with the sentiments expressed by former Prime Minister John Howard. In the 2009 Menzies lecture, Howard sought to refute the adoption of an Australian Bill of Rights on ‘orthodox democratic grounds’, arguing that ‘the great guarantees of Australian democracy are a robust parliamentary system and an independent and incorruptible judiciary.’ For Howard (2009), establishing entrenched rights confuses the separation between law and politics, transferring power to an unelected and unaccountable judiciary. Howard (2009) argues that a Bill of Rights politicises the judiciary and undermines the democratic accountability of Parliament. Entrenching certain rights questions the motives of parliament and fails to understand the efficacy of the common law. Following Dicey and the Australian founders, prime ministers such as Menzies (1967) and Howard (2009) have argued that the institutions of parliamentary responsible government adequately secure individual rights. Provided responsible government and representative democracy are secure, parliamentary supremacy and the rule of law ensure the safety of traditional freedoms. In this way, Dicey’s conception of parliamentary sovereignty remains a powerful orthodoxy in Australian constitutionalism.

Dicey’s political theory continues to provide a significant philosophical justification for the supremacy of the parliament in Australian democracy. This is important because the traditions and institutions of parliamentary responsible government secure individual liberties in a manner significantly different from rights-based constitutionalism. By incorporating the traditions of parliamentary responsible government, the Australian Constitution protects individual liberties through parliamentary legislation, the organic development of the
common law and the conventions of responsible government. The lack of a formal, rigid Bill of Rights provides the Australian executive with a degree of flexibility that allows policies to be assessed in terms of their impact upon the interests of the majority. This ensures government retains the necessary political power to achieve important and continual utilitarian reforms.

Conclusion
Through the colonial inheritance, Australian government has powerful philosophical and theoretical links to English constitutional thought. English institutional traditions such as responsible government, parliamentary sovereignty, representative democracy, the common law, the Crown all persist as a powerful orthodoxy in Australian constitutionalism. These institutional traditions are underpinned by a liberal utilitarianism that discusses human nature in organic terms, encouraging the natural growth of individual attributes. This view of human nature is characterised by a commitment to progress that assigns an ambitious role to government. The Australian institutions that derive from English constitutional thought are designed with the assumption that a democratically elected parliament can be trusted to promote the conditions which support liberty and social progress. In this way, the Australian executive and the conventions of responsible government are designed with a deliberate flexibility that allows government significant authority to deal with political problems as they arise. The conventions of responsible government ensure that the executive has the latitude to grow and adapt to changing circumstances. The consequences of this institutional arrangement are evident in Australia’s gradual transition toward sovereign independence. The Australian executive has adapted and gradually evolved, altering conventions to reflect contemporary political and social necessities. Furthermore, the English constitutional ideas adopted at the founding remain integral to understanding Australian approaches to individual rights, the separation of powers and the foundations of national sovereignty. Institutional traditions such as the Crown, the common law and responsible government do not seek to limit political authority through a system of checks and balances. Rather, Australian traditions of parliamentary responsible government provide a series of constitutional safeguards that secure individual liberties without limiting the collective power of government. These safeguards are the result of significant constitutional evolution, which has developed to include ideas of a sovereign parliament operated by a powerful prime minister commanding a majority in the House of Representatives.
Understanding the philosophical provenance of institutions that derive from the colonial period is an important first step in recognising the theoretical tensions at the centre of Australian constitutionalism. English constitutional thought was not the only influence on Australian Federation or the development of the Australian Constitution. The Constitution includes institutions and institutional traditions that do not conform to the liberal utilitarianism that underpins parliamentary responsible government. Australia was divided into six separate territories governed by powerful colonial administrations unwilling to cede sovereign authority to a national regime. This required that the founders investigate and utilise federal and republican institutions that have a philosophical heritage distinct from English constitutional thought. At different times, theorists such as Burke, Bentham and Mill directly questioned the efficacy of the rights-based liberal tradition, preferring convention and utility to guide the development of society. Similarly, Dicey and Bryce elaborated the differences between federal systems of government and Westminster parliamentary democracy. Despite these philosophical and theoretical differences, the Australian founders chose to develop a system of government that embraces important elements of both English and US constitutionalism. As such, the following chapter will discuss Australian institutional traditions that can be traced to US constitutional thought.
Chapter Four: Federation and the American Influence

Having delineated the colonial inheritance in Chapter Three, the thesis establishes the contested philosophical foundations of the Constitution by discussing Australian traditions that can be traced to US constitutionalism. Chapter Four argues that Australia’s constitutional system has extensive philosophical and theoretical links to US constitutional thought. The chapter contends that concepts of popular sovereignty, federalism, judicial review, a senate, a written and rigid constitution and rights-based liberalism all persist as a powerful orthodoxy in Australian constitutionalism. The chapter predominantly focuses on constitutional traditions that were adopted at Federation. Federation is a critical period in Australian constitutionalism because it represents a significant departure from the prevailing colonial systems of parliamentary responsible government. Prior to Federation Australia was divided into six separate colonies governed by powerful administrations. These colonial governments were unwilling to cede sovereign authority to a national regime. This precondition of Federation resulted in the adoption of federal and republican institutions that derive from US constitutionalism. It is the central task of Chapter Four to understand the philosophical nature of the Constitution’s federal and republican traditions in light of the pre-existing colonial influences. By delineating the philosophical provenance of institutions that derive from US constitutionalism, the chapter establishes the theoretical tensions at the centre of Australia’s constitutional system. Outlining these theoretical tensions is an important precursor for the remainder of the thesis, which will investigate the political ramifications associated with the Constitution’s hybrid philosophical inheritance.

US constitutional thought is a complex and multi-faceted tradition that has many theoretical influences, including philosophers such as Hobbes, Locke, Montesquieu, Hume and the American founders. While many of these philosophers are important for understanding the democratic institutions that were adopted at the Australian founding, the discussion does not seek to outline the entire modern republican tradition or to discuss every theoretical difference between English and US constitutionalism. Rather, the chapter identifies constitutional traditions that can be traced from contemporary politics, through the Australian founding, to their philosophical foundations in US constitutional thought. The traditions and institutions that are discussed in Chapter Four were chosen because their underpinning theoretical explanations continue to inform contemporary understandings of Australian constitutionalism. The discussion takes particular account of the philosophical explanation of each tradition and how these understandings have developed over time. This
temporal and historical approach allows the discussion to establish the philosophical and theoretical tensions at the centre of the Constitution, while also outlining specific examples where the hybrid nature of the Constitution has had practical implications for the operation of government. Thus, Chapter Four does more than establish the philosophical foundations of Australian institutions that derive from US constitutionalism. By examining the Constitution’s federal and republican traditions, Chapter Four identifies key philosophical and theoretical inconsistencies, which continue to impact on political practice.

The first section of the chapter will investigate the popular nature of the Australian founding and its subsequent impact on the operation of government. Understandings of popular sovereignty can be traced to US constitutionalism and its theoretical origins in the social contract theory of John Locke. Understanding Locke’s political theory is important because concepts of popular consent provide a theoretical challenge to ideas of the legislative supremacy of parliament. Concepts of popular sovereignty have influenced the High Court’s approach to jurisprudence and contributed to debates regarding the foundations of national sovereignty. The second section of the chapter discusses the institutions of Australian federalism. In designing the Australian Constitution, the founders embraced and reworked the US federal model, adopting a written constitution, a High Court with the powers of judicial review, a Senate and a federal system containing two tiers of government. These institutions have a philosophical heritage that includes Locke, Montesquieu, Hume and the American founders. These philosophers and constitutional scholars redefined the republican model, establishing a powerful constitutional orthodoxy, which continues to inform Australian constitutionalism. At different times since Federation, the High Court has drawn on US constitutional thought to interpret the contours of Australian federalism. The final section of the chapter explores philosophical understandings of human rights and their increasing prominence in Australian constitutionalism. The section traces ideas of natural or human rights to the social contract tradition inaugurated by Thomas Hobbes and developed by John Locke and Immanuel Kant. The section argues that despite the founders’ rejection of entrenched liberties, the rights-based liberal tradition has become an important element of Australian constitutionalism. The gradual adoption and implementation of UN Declarations has created challenges defining the exact philosophical nature of individual rights in Australian government.

By examining the philosophical heritage of Australian institutions that derive from US constitutionalism, the thesis discerns that the Constitution has two significant philosophical influences. Australia’s constitutional system has extensive philosophical links
with both English and US constitutional thought. This is significant because the Constitution’s federal and republican institutions are founded on an understanding of human nature that is crucially different to the conventions of parliamentary responsible government. Institutions with a US constitutional heritage are designed with a distrust of human nature that requires institutional precaution against the accumulation of political power. This understanding of government provides the foundation for a constitutional system that defines and limits political power in a written document subject to judicial review. In this way, Australia’s federal and republican institutions do not conform to the philosophical ideas of flexibility and progress that underpin parliamentary responsible government. In particular, concepts of parliamentary sovereignty, or one element of government having greater power and authority over another, are difficult to reconcile with a federal model that ensures each element of government has limited and defined jurisdiction. This theoretical tension is only part of a more complex constitutional picture. In creating a hybrid constitutional model the founders did not clearly delineate crucial elements of Australian government, specifically deciding to allow future generations the flexibility to decide. This decision has ensured that key tenets of Australian constitutionalism such as the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights remain contested. The Constitution is a unique hybrid arrangement, which does not contain an agreed account of what constitutes the underpinning philosophy of government.

**Popular sovereignty and the foundations of Australian democracy**

The first section of the chapter discusses Australian traditions of popular sovereignty. The section argues that concepts of popular consent contribute significantly to Australian understandings of executive authority, political legitimacy and to debates regarding the foundations of national sovereignty. It is important to understand that Federation was the result of a prolonged popular movement that resulted in the Australian people adopting the terms of the Constitution at a formal referendum. Crucially, both the Parliament and the High Court have also confirmed that Australian sovereignty derives from the people.⁹ To better understand how popular sovereignty continues to contribute to contemporary understandings of Australian constitutionalism the section will outline the philosophical ideas of John Locke, how the Australian founding embraced these ideas, and how theoretical understandings of popular sovereignty have impacted on the High Court’s approach to judicial review. The

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⁹ See, for example, *Australia Act 1986* (Cth); *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104.
discussion takes particular account of John Locke’s political theory for two reasons. Firstly, Locke is central to the forms of US constitutionalism that directly influenced the Australian founders. Secondly, discussing the philosophical foundations of popular sovereignty is important for establishing the theoretical tensions at the centre of the Constitution. By examining the political theory of Locke, the discussion discerns that concepts of popular consent provide a theoretical challenge to ideas of the legislative supremacy of parliament. This is significant because the Constitution simultaneously derives legitimacy from the conventions of parliamentary responsible government, including the common law, and as a document confirmed by popular referendum. The political ramifications of this constitutional structure can be discerned in contemporary High Court jurisprudence.

John Locke’s political philosophy is central to the forms of US constitutionalism that directly influenced the Australian founders. To absolve political ties with the British Crown and justify the founding of a new republic, the Declaration of Independence delineates a set of philosophical principles that predominantly derive from the social contract tradition developed by Hobbes and advanced by Locke (Zuckert 1994: 18; Laslett 2010: 15). It is from Locke’s (2010) political theory that US politics takes its core principles of government by consent and the ultimate sovereignty of the people. The American founders developed an institutional framework premised on the belief that the authority of government is created and sustained by consent. In Federalist Paper No. 22 Hamilton states:

> The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority (Madison, Jay & Hamilton 2001: 144).

Hamilton’s (2001: 144) assertion reiterates the core sentiments of the Declaration of Independence, which establishes that ‘governments are instituted among men, deriving their just powers from the consent of the governed.’ While there were many other philosophical influences on the US Constitution, Locke filled a very definite function for the American founders at a critical moment in history (Zuckert 1994: 18; Laslett 2010: 15). The very concept of a constitutive legal enactment that entrenches the authority of the people is an innovation founded in Locke’s political theory.

Locke’s (2010), The Two Treatises of Government, provides a narrative of how political right and authority come into being and continue to operate over time. Locke’s (2010) develops a doctrine of natural political virtue, defined, checked and safeguarded by the concept of consent. Despite natural law creating order and regulating human interactions
within the state of nature, difficulties arise in the pursuit of the preservation of property, driving humankind to seek civil society (Locke 2010: 350). According to Locke (2010: 351), natural law determines the origin, acquisition and appropriation of property. Importantly, however, the enjoyment of property in the state of nature is ‘unsafe’, ‘insecure’ and ‘full of danger’; it is very uncertain, and constantly exposed to the invasion of others (Locke 2010: 334, 340, 350, 352). Thus, people are willing to quit the state of nature and enter into political society:

... for the mutual Preservation of their Lives, Liberties and estates Men unite into Societies, that they may have the united strength of the whole Society to secure and defend their Properties, and may have standing Rules to bound it, by which every one may know what is his (Locke 1960: 350).

The inconveniences that individuals are exposed to by the irregular and uncertain exercise of power drives people to take sanctuary under the established laws of government, therein guaranteeing the preservation of their property (Locke 2010: 350). From this voluntary union of men into organised society, Locke derives his doctrine of government by consent. Locke (2010) states the organisation of society in practical terms: Man is forced by his original condition to establish civil government; society and civil government is a human device constituted by consent to alleviate the concerns of the state of nature and secure natural rights (Lasslett 2010; Simon 1951; Gough 1950). In Locke’s conception, government is instituted by a fiduciary arrangement whereby the associated individuals transfer executive power to a smaller body of persons for the effective performance of society (Gough 1950: 136). Individuals give up the freedom associated with the state of nature to gain impartial, just protection of property whilst retaining the right to life and liberty.

Locke justifies a liberal constitutionalism characterised by a fiduciary relationship that exists between citizens and the State. This fiduciary arrangement is possible through Locke’s (2010: 305) insistence that the purpose and function of law is to enlarge and protect freedom. For Locke (2010: 305), the law and the legislature is representative of the people, the laws of society reflect the wishes of individuals. Laws are not considered duties but ideals individuals have freely imposed upon themselves. Choosing law and government over tyranny and chaos provides individuals with freedom. This is a critical matter of judgement that all societies must undertake. Individuals must be prepared to relinquish the state of nature to guarantee the freedom provided by the protection of civil society (Locke 2010: 284; Laslett 2010: 112). Law ensures individual freedom in the political arena ‘… for law in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest
This view of the law affirms that tradition and convention do not designate rulers or institute government; individuals collectively consent to the establishment of civil society, voluntarily and purposefully, for specific ends. Locke’s understanding of popular sovereignty informed the practice of Australian government from its inception.

Australia is one of the few countries to achieve a Federation by negotiation and popular referenda. The popular movement towards Federation was embodied in the 1893 Corowa Convention. At the convention, Sir John Quick proposed that:

> 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 a bill or measure it be submitted by some process of referendum to the verdict of each colony (Quick cited in McIntyre 1998: 3).

Quick, who was later elected as a delegate to the final constitutional convention, foreshadowed the popular nature of Australian Federation. On the 3rd and 4th of June 1898, Australia held an unsuccessful referendum for the adoption of the Constitution. In 1899, after the Bill was amended to appease the concerns of New South Wales, it was again put to electors, receiving an endorsement from every State except Western Australia (Patapan 2009: 7). Sir Ninian Stephen asserts:

> What was distinctly unusual about the birth of Australia as a nation was that it involved referendums of the people of Australia. Their approval of the Constitution was critical, an instance of direct democracy quite foreign to the traditional pattern of representative democracy long familiar in Britain and from there transplanted to Britain’s colonies in Australia and elsewhere throughout the globe (Stephen 1998: 2).

Stephen (1998: 2) highlights that in the popular election of delegates for the Federation debates and in the final endorsement by the people through formal referenda, the Australian founding derived the consent of the people. This consent is confirmed in the Constitution where the first words are: ‘Whereas the People… have agreed to unite in one indissoluble Federal Commonwealth.’ Consistent with the intention of the Preamble, Section 128 ensures that the Constitution can only be amended by the Australian people at formal referendum. Through these important provisions the founders embedded into Australian constitutionalism concepts of popular sovereignty, which can be traced through the American founding to the political philosophy of John Locke.

The Constitution’s popular foundations are particularly significant when considered in light of Australia’s system of parliamentary responsible government. The formal authority of
the Parliament is evident in the Constitution’s dependence on a Westminster style executive that derives legitimacy from the conventions of responsible government, including the common law and the Crown. It is also evident, however, that the method by which the Constitution was drafted and accepted, as well as its provisions, have embedded traditions of popular sovereignty into Australia’s constitutional system. Australia’s constitutional system contains both a sovereign parliament and a Constitution that entrenches the authority of the Australian people (Patapan 2005: 96). This tension between a colonial understanding of constitutionalism, where the parliament is sovereign, and a constitutional system that derives its legitimacy from the Australian people has been addressed by both the Commonwealth Parliament and the High Court.

The end of British imperial legal sovereignty was officially confirmed by the Commonwealth Parliament with the passing of the Australia Acts 1986 (Cth). The Acts formally recognised ‘the status of the Commonwealth of Australia as a sovereign, independent and federal nation.’ Significantly, the legislation engendered a shift in the High Court’s understanding of the Constitution. As Justice Mason asserted in Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106: ‘The Australia Acts marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.’ This position was supported in 1994 by Justice Dean:

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people (Theophanous v. Herald Weekly 1994 182 CLR 104).

The Court’s decision to confirm popular sovereignty is not controversial when considered in light of Walter Bagehot’s (1867) proclamation that the English Constitution is a ‘disguised republic’. In Bagehot’s (1867) view, parliamentary systems recognise that government must derive its legitimacy from the people, even if the mode of giving effect to that principle is different from republican concepts of popular sovereignty. Thus, Brian Galligan (1995: 21) argued that ‘Australia’s system of government is in formal terms a constitutional monarchy but in efficient terms a federal republic.’ For Galligan (1995) Australia’s is a federal republic even though it contains a Westminster style sovereign parliament, which is presided over by the Crown. Significantly, however, despite the Australia Acts 1986 (Cth) and the High Court’s decision that the people are sovereign through the prism of parliamentary democracy, the Australian polity continues to have challenges reconciling theoretical and philosophical
tensions between a colonial or traditional Westminster understanding of parliamentary sovereignty and republican ideas of the popular will of the people.

Challenges regarding the foundations of national sovereignty have impacted on High Court jurisprudence. The High Court’s understanding of popular sovereignty provided the foundation for recognising that the Constitution contains an implied freedom of political discourse (Winterton 1998: 4). In a series of decisions, the High Court revoked Commonwealth and State legislation on the basis that it limited freedom of political discussion central to the system of representative democracy outlined in the Constitution (Patapan 1996: 229). The judgments reveal the High Court’s acceptance of an implied rights jurisprudence that relies on the sovereignty of the people as a justification for a more extensive judicial activism (Patapan 1996: 230). Importantly, implying rights from popular sovereignty is a concept founded in Locke’s political theory, which represents a significant shift in the Court’s philosophical understanding of rights (Wright 1998: 170; Winterton 1998: 11). The Court’s recognition of popular sovereignty infers that the Australian executive exercises powers subject to the people’s consent. This position is less deferential to a sovereign parliament and more concerned with protecting individual rights such as freedom of political communication. Thus, applied as an interpretive norm of the Constitution, popular sovereignty raises philosophical questions regarding the role and function of the High Court, particularly in constitutional interpretation. The Court becomes an institution which belongs to the people, exercising and protecting their sovereign authority. These developments in High Court jurisprudence have not ended debates regarding the philosophical or theoretical nature of national sovereignty.

Despite the emergence of the High Court’s implied rights jurisprudence, debates regarding the foundations of national sovereignty have persisted. Discussing the contested nature of Australian sovereignty and its ongoing role in the republic debate, Justice Kirby outlined the theoretical inconsistencies that remain at the centre of the Constitution:

I have elsewhere tried to point out that the Australian Constitution can be viewed as reflecting a struggle, which is still ongoing, between British and United States elements captured in its text. These may be portrayed as the struggle between the popular, democratic features emphasised in some parts of the Constitution (the democratic House, the Senate directly elected by the people and the referendum procedure in s. 128) and the stable, unchanging elements of government reflected elsewhere in the text (Kirby 1997).

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Kirby (1997) believes that ideas of popular consent ‘are locked in battle with the centralising tendencies of the Constitution which reflect the deep-seated monarchical viewpoint of the founders.’ Kirby (1997) argues that while the Constitution continues to embrace a monarchical form of government that favours centralised power in an elected parliament, the foundations of Australian sovereignty will remain a subject of normative ambiguity. Ultimately, Australian sovereignty does not rest on a single, agreed set of normative principles. The debate regarding Australian sovereignty is indicative of the philosophical tensions between Westminster understandings of parliamentary responsible government and a federal constitutional model that cannot be amended without the consent of the people. These tensions over the foundations of national sovereignty are only part of a more complex constitutional picture. Through formal recognition in the Constitution and by referendum, the Australian people embraced a federal system of government that includes a Senate and a High Court. These federal institutions can be traced to US constitutional thought, which conceptualises important concepts such as the separation of powers in a significantly different manner to the Westminster parliamentary tradition.

**Australian federalism and modern republican thought**

The second section of the chapter discusses the institutions of Australian federalism and their rich modern republican philosophical heritage, which includes philosophers and political thinkers such as Montesquieu and the American founders. The section argues that the philosophical foundations of US federalism remain a powerful orthodoxy in Australian constitutionalism. To better understand how the philosophical foundations of US federalism contribute to contemporary understandings of Australian constitutionalism the discussion takes particular account of the philosophy that informs the *Federalist Papers* and how this political theory continues to underpin the operation of Australian government. The section outlines how the Australian founders adapted and reworked the US federal model, adopting a written Constitution, a High Court with the powers of judicial review, a Senate representing State interests, and a federal constitutional system containing two tiers of government. Importantly, the discussion discerns that the institutions of federalism have a philosophical heritage that conceptualises the separation of powers in a significantly different manner to the political theory that informs the Australian executive. The Constitution’s federal institutions derive from a rights-based, liberal constitutionalism that distrusts human nature. A distrust of human nature authorises an institutional arrangement that seeks to limit and define constitutional power in a written document subject to judicial review. Federal institutions
such as the Senate and the High Court are designed to deliberately check the accumulation of political power. In this way, Australia’s federal institutions do not conform to the philosophical ideas of flexibility and progress that underpin the executive elements of the Constitution.

To assess how the founders sought to reconcile the colonial inheritance with federal and republican ideas, the section takes particular account of the Federation debates. The discussion seeks to understand the influence that US constitutionalism had on the formation of the Constitution, particularly in light of the decision to retain a parliamentary executive. The discussion discerns that the founders specifically decided not to codify or explain the contours of the separation of powers, preferring to empower the High Court to adjudicate constitutional matters. Ultimately, the founders recognised the requirement for responsible government because of its pre-established presence in the existing colonies and also acknowledged the necessity of federal bicameralism because the States demanded it as a condition of Federation. The ongoing ramifications of this decision can be discerned in Australian High Court jurisprudence. Since Federation, the High Court has had to consider two critical questions relating to the separation of powers. Firstly, the High Court has had to determine the nature of the separation of powers at the federal level, particularly the extent to which the Constitution endorses a strong tripartite separation between the executive, the legislative, and the judiciary. The second question characterising Australian constitutional thought is the nature of the division of powers between sovereign state governments and a Westminster style executive underpinned by ideas of parliamentary sovereignty. The discussion argues that both of these constitutional debates have been underpinned by theoretical tensions relating to Constitution’s hybrid philosophical inheritance. The second section of the chapter shows that the High Court has had to reconcile contending interpretations of the separation of powers, which can be attributed to the theoretical inconsistencies at the centre of the Constitution. Furthermore, the founders’ decision to develop a hybrid constitutional arrangement has ensured that the exact nature of the separation of powers in Australian government is ambiguous and difficult to comprehensively define.

The American founding
When the founders adopted the institutions of federalism they linked Australian government to US constitutionalism and its modern republican philosophical heritage. This is important because underpinning US constitutional thought is a concept of human nature that resulted in
the development of institutions that conceptualise the purpose and function of government in a significantly different manner than the liberal utilitarianism of Bentham, Mill and Dicey. US constitutional thought is characterised by a distrust of human nature that openly questions the ability of individuals to dedicate themselves to the common good. In *Federalist Paper No. 51*, James Madison states:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself (Madison, Jay, & Hamilton 2001: 273).

Madison’s assertion is a diagnosis of the challenges faced by modern republicanism and is synonymous with a distrustful view of human nature. This distrust is founded in Machiavelli and expounded and elaborated by Hume. Machiavellian ‘realism’ determines ‘… that it is necessary to whoever disposes a republic and orders laws in it to presuppose that all men are bad (Machiavelli 1996: 15). In Hume’s (1994: 113) exposition it is ‘… a just political maxim, that every man must be supposed a knave.’ A distrustful view of human nature was also central to the political theory of Montesquieu. Montesquieu’s, *The Spirit of the Laws* (1748), saw man as exhibiting a general tendency towards evil, a tendency that manifests in selfishness, pride, envy, and the seeking of power (Vile 1998: 56; Stark 1960: 45). In the realm of politics this is of the greatest consequence: ‘Constant experience shows us that every man invested with power is apt to abuse it; and to carry his authority as far as it will go’ (Montesquieu 1777: 211). To counter this human tendency toward the abuse of power Montesquieu elaborated an institutional framework that was central to the American founders understanding of constitutionalism.

At the centre of US constitutionalism is a tripartite separation of powers, which has intellectual foundations in the political theory of Montesquieu. Montesquieu (1777: 213) develops the trinity of legislative, executive, and judicial functions that characterise modern republican thought. Montesquieu’s (1777) delineation of the diffusion of political and institutional power was viewed by the founders as central to securing liberty and the natural rights of citizens (Bergman 1990; Claus 2005; Douglass 2012; Rahe 2012). When advocating a separation of powers in *Federalist Paper No. 47*, James Madison asserts that:

> The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind (Madison, Jay, & Hamilton 2001: 256).
Montesquieu (1777) confirmed the framers distrustful view of human nature, elaborating an institutional framework that guarded against tyranny. For Montesquieu and the American founders’ liberty can only be secure if the legislative, executive and judiciary powers are distinct (Montesquieu 1777: 213). Madison states that: ‘The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny’ (Madison, Jay, & Hamilton 2001: 256). The founders sought to limit political power and protect the liberty of the people by instituting a modern republic underpinned by Montesquieu’s tripartite separation of powers. Importantly, this tripartite institutional division at the national level was also underpinned by a fourth check to the accumulation of political power. For both practical and philosophical reasons the American framers sought to divide sovereign power between two tiers of government.

Confronted with the challenges of uniting the existing American colonies, the framers of the US Constitution developed an institutional structure that divided sovereign responsibility between state and federal elements of government. This framework ensured that each level of administration would retain autonomy and independence whilst sharing the obligations of government. In *Federalist Paper No. 9*, Alexander Hamilton states that:

> The proposed constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive, and very important, portions of the sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government (Madison, Jay, & Hamilton 2001: 87).

By dividing sovereign responsibilities between state and federal administrations, the founders developed a constitutional system that delegates the people’s authority to a two tiered unitary government (Greene 1994: 50). The federal and state governments outlined in the US Constitution are different agents and trustees of the people, instituted and designated with specific and different powers (Madison, Jay, & Hamilton 2001: 92). By conceiving the sovereign people as capable of delegating their authority to different sets of subordinate governments, the US framers confirmed the popular nature of the Constitution and protected the autonomy and rights of the existing colonies.

To secure the federal nature of the Constitution, the American founders ensured that each State was afforded equal representation in the federal legislature. Equal State representation in the federal legislature is an important element of the US constitutional model. Article 1 of the original US Constitution establishes a bi-cameral legislature, with the
States as the interest represented in the upper chamber. Two Senators from each State are elected to six year terms regardless of their size or population. This is distinct from the House of Representatives, which is comprised of members elected from proportioned constituencies. This federal, bicameral structure is designed to allow each State an equal share in government. James Madison wrote in *Federalist Paper No. 39*:

> The House of Representatives will derive its powers from the people of America ... The Senate, on the other hand, will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate (Madison, Jay, & Hamilton 2001: 212).

The framers deliberately constituted the federal legislature to preserve and recognise the sovereignty of the individual states. Legislation cannot be passed without ‘the concurrence, first, of a majority of the people, and then, of a majority of the States’ (Madison, Jay, & Hamilton 2001: 212). According to the founders, this has the advantages of providing an impediment against improper acts of legislation:

> It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient (Madison, Jay, & Hamilton 2001: 212).

The form and structure of the Senate simultaneously offers a solution to the difficulties associated with securing federalism, while also providing a constitutional check to the accumulation of political power. State representation in the Senate links important elements of republican thought with a federal system of government.

The US framers recognised that a complex constitutional framework would require an institutional mechanism to adjudicate the Constitution. Beginning with Montesquieu's premise that liberty depends upon a separation of powers, the framers reached the conclusion that a functioning government can only be maintained through an independent, life-tenured judiciary (Madison, Jay, & Hamilton 2001: 382). It was considered essential in a federal system to have an impartial and disinterested umpire to negotiate the disputes that would inevitably arise (Madison, Jay, & Hamilton 2001: 390). Furthermore, the founders believed that the US Constitution is a social contract representing the will of the American people. This is important because it has ramifications for the operation of the Court, particularly in regard to the executive and the legislature. Hamilton establishes the concept of judicial review in *Federalist Paper No. 78*:
A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental (Madison, Jay, & Hamilton 2001: 92).

For Hamilton (2001: 92), it is the responsibility of the Supreme Court to protect the people by restraining the legislature from acting inconsistently with the Constitution. Hamilton (2001: 383) argues that an independent and life-tenured judiciary forms a ‘citadel of the public justice and the public security.’ Hamilton (2001: 384) is clear in asserting that this does not mean that the judiciary is superior to the legislature, only that the will of the people expressed in the Constitution is superior to both. It is important to recognise that the judiciary’s role in defending popular sovereignty and adjudicating disputes between the elements of government is made possible by the rigid structure of US constitutionalism. The US Constitution is a rational construct that takes the form of a written document. It is not a product of constitutional evolution, developed organically through centuries of tradition. US constitutionalism expressly codifies the framework for government in a foundational document that can be adjudicated.

Ultimately, analysing the philosophical foundations of US constitutional thought reveals that Australia’s federal institutions are premised on an understanding of government that is significantly different from the Westminster parliamentary tradition. The institutions of Australian federalism have a philosophical heritage that conceptualises important concepts such as the separation of powers and the limits of executive authority in ways that are distinct from parliamentary responsible government. Underpinned by Montesquieu’s philosophical doctrine, the US Constitution is built on a distrust of human nature that seeks to protect the liberty of the people by dispersing political power. Article 1 of the US Constitution establishes a bicameral legislature, with States substituted for aristocracy as the interest represented in the upper chamber. Reinforcing this separation of constitutional power is an independent judiciary established to adjudicate constitutional disputes (US Constitution 1787). This tripartite institutional division at the national level is underpinned by a fourth check to the accumulation of power. For both practical and philosophical reasons, the US Constitution decentralises political authority along territorial lines, creating a division of sovereign responsibility between state and federal elements of government. To be successfully executed, federal laws must be passed by both houses of a democratically elected bicameral legislature and conform to a life-tenured judiciary’s exposition of the
Constitution (US Constitution 1787). In this way, Australia’s federal traditions do not conform to the philosophical ideas of flexibility and progress that underpin parliamentary responsible government. Institutions such as the Senate and the High Court are linked with a constitutional tradition premised on ideas of defined, limited and codified power. To explore how US constitutional thought contributes to Australian constitutionalism the discussion now turns to an examination of the Federation debates. The discussion investigates how the founders adapted and reworked the US federal model, particularly in light of the decision to retain a parliamentary executive.

**Australian federalism**

The adoption of a federal institutional framework was a precondition of the 1891 and 1897-98 Australian constitutional conventions. The preliminary Melbourne conference of 1890 resolved to support a National Australasian Convention ‘empowered to consider and report on an adequate scheme for a Federal Constitution’ (Deakin 1890: 24). Henry Parkes (1891: 77) introduced resolutions at the commencement of the 1891 convention ‘to establish and secure an enduring foundation for the structure of a Federal Government.’ The founders were seeking to institute a new sphere of national governance, while preserving the sovereignty of the existing colonies. The colonies had enjoyed the benefits of local self-government since the 1850s and did not wish to forfeit their sovereignty to a consolidated national administration. Sir Samuel Griffith argued the ‘essential’ and ‘preliminary’ condition of Federation was that:

> The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary for the establishment of a general government to do for them collectively what they cannot do individually for themselves (Griffith 1891: 88).

Griffith’s (1891) comments affirm that Federation was contingent on the colonies continuing to exist as autonomous states. It was in this context that the founders investigated and debated constitutional models that would preserve the sovereignty of the colonies. Prominent authors such as James Bryce, A. V. Dicey, Edward Freeman, and John Burgess undertook extensive studies of Federations, which were used throughout the constitutional conventions (Aroney 2009). When the Australian founders discussed federalism, however, it was the US constitutional system that they had pre-eminently in mind (Aroney 2009: 70). Sir Owen Dixon (1965: 44) stated that: ‘The American Constitution was for the framers an incomparable model which both fascinated them and damped the smouldering fires of their
originality.’ In seeking to ameliorate the concerns of uniting the existing colonies into a nation, the Australian founders turned to the US federal model.

The US influence on Australia’s institutional structure is evident through an examination of Andrew Inglis Clark’s contribution to the 1891 constitutional convention. Prior to the convention, Clark distributed a draft bill that formed the basis of the final Constitution. 91 sections of Clark’s draft constitution were utilised in similar or reworked form (Neasey 1969: 8; Buss 2009: 724). While Clark followed the British North America Acts to preserve the existing status of the colonies as dependencies of the British Empire, it was the US Constitution that provided the basis for the document:

I have followed very closely the Constitution of the United States, with such alterations and additions as the local circumstances of the Colonies and the political history of the United States seemed to indicate to me as being desirable (Clark, cited in Neasey 1969: 8).

Clark was a federalist who had a comprehensive understanding of US history and was acutely aware of the philosophical provenance of the American founding (Williams 1995; Buss 2009). Clark supported a Bill of Rights, an independent and strong judiciary, federalism and a US tripartite separation of powers (Williams 1995: 196). In a candid assessment of Clark, Alfred Deakin (1963: 36) remarked: ‘A persevering student, his sympathies were republican, centring especially upon the United States, a country to which in spirit he belonged, whose constitution he reverenced and whose great men he idolised.’ Acknowledging these republican sympathies is important because Clark was fundamental in establishing the foundations of Australia’s institutional structure. In particular, Clark’s framework for the composition of the Federal Parliament and the structure of Constitution remain significant contributions to Australian government (Aroney 2009: 187). Crucially, Clark’s involvement represents a departure from the British constitutionalism of the colonial period toward an American-inspired federal model of government.

In designing the Australian Constitution, the founders embraced and reworked the US federal model. The Commonwealth of Australia Constitution Act 1900 (UK) delineates an institutional structure that decentralises political authority along territorial lines, dividing sovereign responsibility between state and federal elements of government. The Preamble to the Constitution establishes a ‘Federal Commonwealth’ and Section One specifies ‘the legislative power of the Commonwealth is vested in a Federal Parliament.’ The federal character of the Constitution is affirmed in s.106 and s.107, which guarantee the continuation of the States with their own constitutions and powers. Chapter Five of the Constitution
ensures that State legislative powers and laws would ‘continue in force’ until specifically altered or repealed. In this way, the Australian Constitution is structured on the basis that the original states were pre-existent, independent bodies, whose respective constitutions, territorial integrity and legislative powers would remain unchanged (Aroney 2009: 362). Significantly, to secure the federal nature of the Constitution the founders also instituted a bicameral parliament with the Upper House representing State interests. This decision is particularly important when considered in light of Australia’s uncodified parliamentary executive, which includes institutions such as the prime minister and cabinet.

Discussion regarding the Senate and its compatibility with the colonial traditions of parliamentary responsible government was prominent throughout the Australian constitutional conventions. A majority of the delegates anticipated that the Senate would represent the rights and interests of the States, arguing that it must have powers equal to those of the House of Representatives (Aroney 2009: 187–245). Those who objected were concerned that a powerful Senate would inhibit the workings of responsible government and would allow representatives of a minority of Australians to veto the agenda of the executive (Aroney 2009: 193). Delegates seeking to limit the power of the Senate focused on ensuring the Lower House maintain control of government finance in the form of appropriation, taxation and loan bills. The approach was to restrict the powers of the Senate over financial measures, specifically regarding their initiation, amendment and rejection (Galligan 1980a: 2). The debate culminated in a constitutional structure that ensures each State, regardless of population, has an equal number of senators. The Senate’s legislative powers are equal to those of the House of Representatives except that it cannot introduce or amend proposed laws that authorise expenditure for the ordinary annual services of the government or that impose taxation (Galligan 1980a: 5). The Senate can, however, request that the House of Representatives make amendments to financial legislation and it can refuse to pass any bill (Galligan 1980a: 5). As George Barton argued, this institutional arrangement represents a compromise between the British and American approaches:

The plan adopted in the draft Bill has the sanction of both the English and American systems. On the one hand, it follows the English practice by saying that the Senate may reject a money bill, but may not amend it. On the other hand, it follows the American

11 Note George Burnett Barton (1836 – 1901), lawyer, journalist and historian, is the elder brother of Sir Edmund Barton (first Prime Minister of Australia). During the 1891 convention George Barton edited the ‘Draft Bill to Constitute the Commonwealth of Australia … with notes as will enable readers to make themselves acquainted with its provisions without much difficulty.’ The draft bill was ultimately adopted by the convention, see – Barton, G 2000, The draft bill to constitute the Commonwealth of Australia, University of Sydney Library, NSW.
practice by saying that where the Senate may not amend a money bill, it may return it to the Lower House requesting the omission or amendment of any items or provisions (Barton 2000: 35).

Ultimately, the founders recognised the requirement for responsible government because of its pre-established presence in the existing colonies and acknowledged the necessity of federal bicameralism because the States demanded it as a condition of Federation. The founders’ decision to combine a federal Senate with a parliamentary executive has ensured that the Constitution is an amalgam of political traditions, which include differing conceptions of the separation of powers. How these different traditions operate in practice is significantly influenced by the High Court. The founders did not explicitly codify or explain the contours of the separation of powers, instead empowering the High Court to adjudicate constitutional matters.

The framers understood that the federal nature of Australian democracy would require a High Court to resolve disputes between the Commonwealth and the States, particularly regarding the scope of their respective powers. Discussion regarding a federal supreme court was a feature of the 1897–98 constitutional conventions. In Adelaide, Edmund Barton introduced resolutions calling for ‘A Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation’ (Convention Debates 1897: 89). For the founders, adoption of a High Court was a logical and essential consequence of federalism. In The Coming Commonwealth 1897, Robert Garran argues that the ‘essential characteristics’ of federal government are:

1. The supremacy of the Federal Constitution.
2. The distribution, by the Constitution, of the powers of the Nation and the States respectively.
3. The existence of some judicial or other body empowered to act as ‘guardian’ or ‘interpreter’ of the Constitution (Garran 1897: 24).

Garran’s (1897: 24) understanding of federalism is synonymous with the form and structure of the Australian Constitution. Section 52 of the Constitution confers specific and limited powers on the Commonwealth, Chapter Three establishes a High Court empowered to adjudicate federal disputes and s.71 confirms that ‘the judicial power of the Commonwealth shall be vested in a Federal Supreme Court.’ Having divided sovereign responsibility between state and federal elements of government, the framers believed that it was necessary to institute an independent supreme court vested with the powers of judicial review. In a similar manner to the US Supreme Court, the Australian High Court is the creation of a
federal constitution that gives effect to a separation of legislative, executive and judicial powers (McHugh 1997: 2). The existence of an independent supreme court ensures that the executive must conform to a life tenured jury’s exposition of the Constitution and its understanding of the separation of powers (McHugh 1997: 2). Thus, the terms and overall structure of the Constitution appear to adopt and secure a tripartite separation of powers similar to the US federal model: Chapter One vests the legislative power of the Commonwealth in a Federal Parliament; Chapter Two establishes Executive Government; and Chapter Three outlines the Judicature. Importantly, however, the Constitution also requires that ministers of state are to be members of the House of Representatives or the Senate. In effect, this provision is designed to entrench responsible government in the Constitution. The decision to include a parliamentary executive based on constitutional convention is difficult to theoretically reconcile with a federal and republican understanding of a distinct separation of powers. Concepts of parliamentary sovereignty or one element of government having greater power and authority over another are difficult to reconcile with a federal model that ensures each element of government has limited and defined jurisdiction. The ongoing ramifications of this decision can be discerned in Australian High Court jurisprudence. Since Federation the High Court has developed an understanding of the separation of powers, which includes important elements of both English and US constitutional thought

US constitutional thought dominated the High Court’s early approach to judicial review. Early High Court judgements are replete with references to the decisions of the US Supreme Court. In 1904, the Court asserted:

When … we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation (D’Emden v. Pedder 1904 1 CLR 91).

In the first decade after Federation, the High Court utilised US constitutionalism to discern a distinct division of sovereign responsibility between the Commonwealth and the States. The Court held that the Commonwealth and the States were entitled to exercise legislative and executive powers in absolute freedom, subject only to the restrictions imposed by the provisions of the Constitution (Sackville 1969: 16; Parkinson 2002: 26). This doctrine of the ‘immunity of instrumentalities’ was an axiom of US federalism that was utilised by the Australian High Court to specifically limit the Commonwealth Parliament to the terms of the
Constitution (Parkinson 2002: 26). Implicit in the doctrine is an understanding of Commonwealth power that reflects Australia’s federal compact, which limits the powers of government based upon a defined and codified division of sovereign responsibility. The early Court’s acceptance and use of US federal ideas was not limited to determining the division of powers between the state and federal elements of government. Throughout the first two decades of Federation, the Court affirmed that the Constitution’s exclusive vesting of federal judicial power in Chapter Three operates as a strict legal limitation upon the powers of the Commonwealth (Wheeler 1997: 32; Patapan 1999: 396).\(^\text{12}\) Fundamental to this federal understanding of the Constitution is that the validity of all legislation and executive action is judged by the courts (Wheler 1997: 249). The Court’s preference for a federal understanding of the Constitution provides an important backdrop for subsequent developments in constitutional interpretation.

The preference for a predominantly federal understanding of the separation of powers remained a prominent feature of Australian constitutional interpretation until the High Court’s decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers’ case*). The *Engineers’ case* is significant because it represents a shift in the High Court’s approach to judicial review toward an English common law interpretation of the Constitution. This common law interpretation is underpinned by a trust in parliamentary sovereignty and the traditions of responsible government. More specifically, the courts approach to federalism, characterised in the ‘immunity of instrumentalities’ doctrine, was replaced by a tendency to centralise power in the Commonwealth Parliament (Patapan 2000b: 254). The major political ramification of the *Engineers’ case* relates to the way it redefined the federal balance in Australia. A common law interpretation of the Constitution, underpinned by concepts of parliamentary sovereignty, resulted in an expansive interpretation of Commonwealth powers (Patapan 2000b: 254). The US constitutional distrust of government was rejected, allowing for the development of a judicial doctrine that trusts the Parliament to meet the demands of a growing and changing society. With respect to the interpretation of a written constitution, the High Court declared in the *Engineers’ case* that:

> The extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the courts ... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia... it is certainly

\(^{12}\) See Huddart, Parker and Co Proprietary Ltd v Moorehead (1909) 8 CLR 330; New South Wales v Commonwealth (the Inter-State Commission case) (1915) 20 CLR 54; Waterside Workers’ Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434.
This understanding of government does not view the Constitution as a constitutive enactment by the people that limits government to secure inalienable rights. Rather, responsible government and the rule of the common law are the foundations of liberty. The decision in the Engineers’ case is synonymous with the orthodox view of Australian constitutionalism, which does not require a strict separation of powers.

The orthodox or traditional view of the separation of powers was developed and expressed by the High Court in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (*Boilermakers case*). In the *Boilermakers case*, the Court held that the Parliament could not validly confer both judicial and arbitral powers upon the Commonwealth Court of Conciliation and Arbitration (Patapan 1999: 398). The majority rejected a strict separation of powers doctrine by relying on the Constitution’s Westminster tradition:

> The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of separation of powers (*R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 275).

The majority believed that the character of the separation of powers ‘is determined according to traditional British conceptions’ (1956 94 CLR 276). This traditional Westminster understanding of the separation of powers prefers the legislative supremacy of parliament and does not require a clear and distinct separation between the legislative and the executive. Significantly, however, the majority in the *Boilermaker’s case* also acknowledged the Court’s important role as an adjudicator of a federal constitution (1956 94 CLR 276). The High Court believed that Australia’s federal system of government relies on an understanding of the Court as the guardian and protector of the Constitution (Patapan 1999: 399). As such, the aim and object of the separation of powers is to preserve the independent and impartial nature of the judiciary (1956 94 CLR 271). Thus, the *Boilermakers case* effectively repudiated the theory of separation of powers as developed by the American founders, producing an Australian conception that combines elements of both English and US constitutional thought. The extent to which this political vision accurately reflects the current realities of Australian constitutionalism remains contested.
Recent High Court decisions that have limited the Parliament on the basis of implied constitutional rights have developed understandings of the separation of powers. There is an emerging consensus that the High Court is developing a jurisprudence that emphasises the importance of the separation of powers in protecting individual liberty (Brown 1992; Winterton 1994; Zines 1994, 1997; Parker 1994; Hope 1996; Wheeler 1997, 1999). In this federal understanding of Australian constitutionalism, the judiciary provides an important check to executive authority. According to the majority in Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 (Wilson), the separation of powers is designed to provide checks and balances, which disperse power and thereby protect the liberty of the individual:

Government is in its nature divisible into law-making, executive action and judicial decision… it is necessary for the protection of the individual liberty of the citizen that these three functions should be to some extent dispersed rather than concentrated in one set of hands (Wilson v Minister for Aboriginal and Torres Strait Islander Affairs 1996 189 CLR 11.13

Thus, the majority in Wilson adopts a view of separation of powers consistent with The Federalist. In this federal understanding of the Constitution, Chapter Three promotes the independent and impartial exercise of judicial power by directing constitutional authority away from the legislative and executive branches to a Federal Supreme Court (s 71), whose judges cannot be arbitrarily removed from office (s 72). The independent and impartial exercise of the judicial functions is seen as an important check to both the legislative and executive elements of government, which operates to promote the supremacy of law over arbitrary power, particularly when individual rights are concerned. This enhanced concern for individual liberty may represent a shift away from the orthodox or traditional method of interpreting the separation of powers toward a federal vision of institutional checks and balances.

Ultimately, the founders’ decision to develop a hybrid constitutional arrangement has ensured that the exact nature of the separation of powers in Australian government is ambiguous and difficult to comprehensively define. Australia’s constitutional system simultaneously includes of a system of responsible government that trusts the parliament to secure social progress and federal institutions designed to limit the accumulation of political

13 The majority decision specifically quotes the Federalist Papers, acknowledging Montesquieu’s influence on the American founding. The Court’s decision also notes the influence of Blackstone in shaping Montesquieu’s understanding of the separation of powers. To this extent, it is clear that a strong role for the judiciary in protecting individual liberty has antecedence in English constitutionalism. The crucial point of departure for US constitutional thought is the concept of checks and balances, designed to specifically limit executive authority.
power. The theoretical challenges of combining the institutions of federalism with the traditions and conventions of parliamentary responsible government can be discerned in the Federation debates. In particular, it is unclear from an examination of the Federation debates how the founders intended the Senate and the High Court to operate in relation to a powerful prime minister underpinned by the traditions of parliamentary sovereignty. The lack of clarity regarding the philosophical foundations of the Constitution resulted in the High Court having to reconcile contending interpretations of the separation of powers, which can be traced to the theoretical inconsistencies at the centre of the Constitution. At different times since Federation, the High Court has drawn on elements of both English and US constitutional thought to develop a unique understanding of the separation of powers. It is critical to recognise that the philosophical and theoretical challenges associated with determining the nature of the separation of powers in Australian constitutionalism are exacerbated when ideas of human rights are involved.

**Human rights**

The final section of the chapter explores philosophical understandings of human rights and their increasing prominence in Australian constitutionalism. The section argues that despite the founders’ rejection of entrenched liberties, the rights-based liberal tradition contributes to the operation of Australian government. In particular, the section will discuss the philosophical foundations of human rights, how human rights have been adopted into Australian constitutionalism and how human rights are reshaping the nature of executive power. Understanding the philosophical foundations of human rights is important because rights-based liberalism provides a theoretical challenge to Australian traditions of parliamentary responsible government, which are underpinned by a liberal utilitarianism that trusts the parliament and the common law to protect individual liberties. Ideas of natural or human rights can be traced to the social contract tradition inaugurated by Thomas Hobbes and developed by John Locke and Immanuel Kant. Locke and Kant provide the philosophical foundations for contemporary understandings of human rights. Unlike the utilitarianism of Bentham, Mill and Dicey, human rights are not authorised by long-standing custom or grounded on legal prescription. Ideas of human rights are underpinned by Locke’s belief that individuals are born free, equal and independent. Accordingly, governments are constrained by rights. Policies and their execution must be consistent with securing and preserving fundamental freedoms. This understanding of rights underpins the US
constitutional system and is critical to the United Nations (UN) declarations of human rights that are impacting on Australian government.

Having considered the philosophical foundations of rights-based liberalism, the discussion then analyses the influence of human rights on Australia’s constitutional framework. The discussion outlines how the executive and the High Court have embedded human rights into Australian constitutionalism. The discussion discerns that the executive’s ratification of human rights treaties has resulted in a constitutional system that does not have an agreed account of the philosophical foundations of individual rights. The philosophical nature of individual rights in Australian government is increasingly contested. Australian understandings of the best mechanism to secure individual rights have two significant influences. Through the colonial inheritance, the founders imbued Australia’s parliamentary system with a liberal utilitarianism that affords the prime minister and cabinet significant authority to deal with political problems as they arise. Despite the historical dominance of this tradition, the High Court is drawing on concepts of human rights to reshape the common law and renegotiate the nature of executive power. In doing so, the Court is moving from a utilitarian vision of liberalism to a philosophical perspective of rights that has intellectual foundations in US constitutional thought.

**The rights-based liberal tradition**

In a significant departure from the English constitutional tradition, the *Declaration of Independence* draws on the natural rights doctrine of John Locke to establish the philosophical foundations of US constitutionalism. Drawing on Locke’s political theory, the US founders embraced and developed a constitutional system founded on a social contract that has at its centre a belief in the God-given natural rights of citizens (Zuckert 1994: 11). The Declaration appeals to rights that are bestowed by the Creator, by God or nature:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness (Declaration of Independence 1776).

These rights are completely independent of any organised political life, they are transcendent principles that precede, and therefore, guide and limit government (Locke 2010: 304). This understanding of rights differs in important ways from the utilitarian tradition that underpins English constitutionalism. Natural rights are not contingent upon the laws, customs, or beliefs of any particular culture, ‘inalienable rights’ and ‘self-evident truths’ determine the character,
extent and end of government (Zuckert 1994; Laslett 2010). Accordingly, a constitutional system founded on natural rights understands the purpose of institutions in ways that are different from a utilitarianism that looks to progress and convention as the basis for legal and political action (Patapan 1997d: 343). The US constitutional system ensures that political power and authority must conform to a set of principles that exist prior to the establishment of civil society. Federal institutions such as the Supreme Court, the Senate and the US Constitution are designed to limit and diffuse political power, protecting the natural rights of citizens (Zuckert 1994; Laslett 2010). In this way, Locke’s natural rights doctrine is central to the forms of US constitutionalism that directly influenced the Australian founders. Furthermore, Locke’s (2010) theoretical doctrine, expressed in the Declaration of Independence and embodied in US constitutionalism, is an important element of the rights-based liberal tradition, which informs contemporary understandings of human rights.

Locke’s natural rights political framework, embodied in the institutions of US constitutionalism, is an important element in the rights-based liberal tradition that is extended and altered by Immanuel Kant. In the Metaphysics of Morals (1886), Kant outlines a philosophical doctrine founded in ideas of innate right and social contract. For Kant (1996), political legitimacy is based upon the consent of the governed. Consent to the social contract is not, however, founded in considerations of rational self-interest, or upon a natural right to the preservation of property (Banes1989: 433). For Kant (1996), the fundamental problem with the state of nature is that each person’s innate right to external freedom cannot be guaranteed without a common authority. As such, Kant (1996) holds that innate and inviolable rights create a moral obligation for individuals to establish government and leave the state of nature (Ebels-Duggan 2012: 896). In a departure from Locke and Hobbes, Kant (1889) derives his doctrine of right from the a priori idea of reason. As a rational being, law-making has to accommodate the two aspects of man, homo phenomenon and homo noumenon. In the phenomenal aspect humans are subject to the empirical causality of nature. In the noumenal aspect humans are to be regarded as purely intelligible because they have the faculties of understanding and reason (Patapan 1997c: 503). The noumenal sense acknowledges concepts of free will, individual reason and the possibilities of human freedom. In this way, Kant preserves the natural world while developing concepts of human morality and dignity (Patapan 1997c: 503). This is important because the existence of a shared human morality ensures that freedom is an original right belonging to every man by virtue of his humanity (Kant 1996: 30). Kant’s theory of moral obligation is central to the articulation of contemporary human rights.
Contemporary rights-based liberalism is embodied in the *Universal Declaration of Human Rights 1948*. The *Declaration*, adopted on 10 December 1948, delineates a ‘common standard of achievement for all peoples and all nations.’ At the centre of the *Declaration* is a concern for human dignity ‘and of the equal and inalienable rights of all members of the human family.’ Article 1 of the *Declaration* states:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (*Universal Declaration of Human Rights 1948*).

The *Declaration* establishes a broad set of inalienable human rights, which exist by virtue of humanity’s ability to reason. Following Kant’s philosophical doctrine, universal human rights are derived from humanity’s capacity to understand ideas of morality and dignity. Human rights guarantee the freedoms necessary for individuals to live with dignity and pride (Deigh 2013: 24). Accordingly, governments are constrained by human rights. Policies and their execution must be consistent with securing and preserving fundamental freedoms. In this way, UN conventions such as the *Universal Declaration of Human Rights* elevate the status of certain liberties in a manner similar to the US constitutional system. UN conventions seek to place limits on the conduct and operation of government, ensuring political authority must conform to a predetermined set of innate individual rights. It is important to recognise that human rights have a philosophical heritage distinct from the forms of English constitutional thought that entered into Australia throughout the colonial period. Unlike human or natural rights, the liberties of English constitutionalism are embedded in tradition and enshrined in the various acts of parliament and in the judicial decisions of the common law. The English constitutional tradition rejects abstract notions of God-given natural rights and ideas of social contract as artificial innovations that are inconsistent with the progressive and gradual evolution of society. Thus, human rights and parliamentary responsible government have a distinctly different philosophical heritage. This is significant because Australian constitutionalism has been influenced by both human rights and by traditionally English concepts of the best mechanism to secure individual liberties.

**Human rights in Australia**

English conceptions of responsible government and the common law have dominated Australian understandings of the best mechanism to secure individual rights. The Australian founders deliberately declined to adopt a Bill of Rights, explicitly preferring English mechanisms. Australia’s willingness to trust the Parliament and the institutions of

The prominence and importance of human rights treaties in Australian government has been enhanced by the High Court’s interpretation of Section 51 (xxix) of the Constitution, the external affairs power. Since 1982, there has been a series of cases confirming that the external affairs power will support domestic legislation giving effect to Australia’s international commitments (Kirby 1993; Patapan 1996). In Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, the High Court upheld the challenged sections of the Racial Discrimination Act 1975 (Cth.) as a valid exercise of Section 51(xxix) on the grounds that the Act was designed to enforce Australia’s commitment to The International Convention on the Elimination of All Forms of Racial Discrimination (1963) (Galligan 1990: 359). The Court’s interpretation of the external affairs power in Koowarta (1982) 153 CLR 168 has subsequently become an axiom of Australian constitutionalism, which has been utilised in environmental and human rights cases. Ultimately, the Court’s application of the external affairs power combined with the Federal Government’s ratification of UN declarations has embedded international human rights into Australian constitutionalism.

The emergence of rights-based liberalism in Australia is exemplified in the High Court’s use of human rights to reshape the common law. The Federal Government’s

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ratification of international human rights agreements has compelled the High Court to adopt a more extensive and profound role in judicial interpretation. In *Mabo* (1992) 175 CLR 1, Justice Brennan held that it was appropriate for the High Court to make reference to international human rights jurisprudence when developing the common law:

> The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration (*Mabo v Queensland No.2* 1992 175 CLR 42).

The executive’s active role in the formulation and promotion of the international human rights regime has forced the High Court to consider the adequacy of the common law in protecting individual liberties. Significantly, the Court’s decision in *Mabo* (1992) 175 CLR 1 altered the common law to accord with Australia’s international human rights obligations (Kirby 1993: 384; Patapan 1996: 235). To the extent that the High Court is utilising human rights to reshape the common law, it is embracing a rights-based liberal tradition that understands government and institutions in ways that are distinct from the utilitarian orthodoxy underpinning Australia’s constitutional framework. The incorporation of rights-based liberalism into the Australian polity provides a challenge to the authority of the Parliament by directly questioning the efficacy of the current constitutional model.

Discussing the emergence of human rights in Australian government Justice Kirby stated:

> The fear which is expressed is that the vehicle of international treaties (and the establishment of international legal norms) may become a mechanism for completely dismantling the distribution of powers established by the domestic Constitution (Kirby 1993: 370).

Kirby’s comments reveal the contested nature of individual rights in Australian constitutionalism. The introduction of human rights has undermined the longstanding consensus that the Parliament and the conventions of responsible government are the best mechanism to secure individual rights.

The gradual adoption and implementation of UN Declarations has created challenges defining the exact philosophical or theoretical nature of individual rights in Australian government. The executive’s ratification of human rights treaties has resulted in a constitutional system that does not have an agreed account of the philosophical foundations of individual rights. The contested nature of individual rights is particularly important when considered in light of Australia’s hybrid constitutional framework. Australian understandings
of the best mechanism to secure individual rights have two significant influences. Australia’s federal and republican institutions such as the Senate and the High Court are linked with a philosophical tradition that deliberately limits political power to protect individual liberty. Conversely, Australia’s parliamentary system is a series of constitutional mechanisms that protect individual rights without limiting the collective authority of government. The presence of these competing constitutional traditions raises questions regarding the way institutions should operate when individual rights are involved. For example, should the Senate and High Court limit executive authority on the basis of human rights or seek to uphold the traditions and conventions of parliamentary sovereignty? These questions are, in part, the focus of Chapter Seven, which will assess the philosophical arguments that characterise offshore processing policy.

**Conclusion**

The form and structure of the Australian Constitution has two significant influences. Written and negotiated after 130 years of English colonisation, the Constitution embraces the traditions of Westminster parliamentary democracy. To preserve the sovereignty of colonial governments, the Constitution also establishes a Federal Commonwealth with institutions that derive from the US republican tradition. Australian government has powerful philosophical and theoretical links to US constitutional thought. Australian institutional traditions such as federalism, judicial review, popular sovereignty and a senate all derive from the US federal model. These federal and republican institutions were initially designed with the assumption that government cannot be trusted to protect individual liberties. A distrust of human nature and a belief in God-given natural rights authorises an institutional framework that limits and defines constitutional power in a written document subject to judicial review. This is important because it means that Australia’s constitutional framework has been influenced by institutional and philosophical traditions that conceptualise the purpose of government in specifically different ways. Australia’s federal constitutional framework has a philosophical and theoretical heritage that does not conform to the liberal utilitarianism that underpins the executive and its associated traditions of parliamentary responsible government. Significantly, the founders did not seek to reconcile the theoretical inconsistencies at the centre of the Constitution, preferring to provide future generations with the capacity to adapt the institutions of government to reflect changing circumstances. This decision has ensured that the underpinning philosophy of Australia’s constitutional system is ambiguous and difficult to comprehensively define. The Constitution is a unique hybrid arrangement, which
does not contain an agreed account of what constitutes the underpinning philosophy of government.

By tracing and comparing the shifts and developments in received tradition, the thesis has uncovered recurring philosophical and theoretical tensions that impact on the political process. While there are many elements of the Constitution that are difficult to theoretically reconcile, the thesis identifies three ongoing and unresolved debates that characterise the operation of Australian government. The first unresolved debate in Australian constitutionalism concerns the foundations of national sovereignty. The Australian Constitution simultaneously operates a system of parliamentary sovereignty and is a document confirmed by popular referendum. While the High Court and the Parliament have officially confirmed the sovereignty of the people, Westminster traditions such as parliamentary sovereignty, the Crown, the common law and the traditions of responsible government persist as a powerful orthodoxy in Australian constitutionalism. The second unresolved debate in Australian constitutionalism concerns the separation of powers, particularly at the national or federal level. This debate is predominantly the result of the Constitution’s combination of federal bicameralism with a parliamentary executive that relies on the traditions of responsible government. The uncodified conventions of the prime minister and cabinet, ministerial responsibility and the reserve powers are difficult to theoretically reconcile with a written, federal constitutional framework. The third unresolved debate in Australian constitutionalism concerns the foundations of individual rights. The gradual adoption and implementation of UN Declarations has created challenges defining the exact philosophical or theoretical nature of individual rights in Australian government. The executive’s ratification of human rights treaties has resulted in a constitutional system that does not have an agreed account of the philosophical foundations of individual rights. Thus, the thesis shows that critical tenets of Australian constitutionalism are contested. Australian government has no universally accepted philosophical foundation. At the centre of Australian government are two distinct philosophical conceptions of the separation of powers, national sovereignty and individual rights. Furthermore, by tracing the philosophical origins of the Constitution, the thesis shows that the two predominant philosophical influences on the development of Australian constitutionalism are often at theoretical tension.

Having established that critical tenets of Australian democracy are contested, the remainder of the thesis seeks to understand how this constitutional inheritance influences contemporary political practice. The thesis questions whether the Constitution’s contested philosophical foundations have any impact on the operation of government. If the Australian
polity has no agreed account of the philosophical foundations of the Constitution, then how do institutions and political actors respond when faced with decisions that involve contested concepts such as individual rights, national sovereignty, or the separation of powers? The remaining three chapters of the thesis are case studies, which are designed to show that the theoretical tensions in Australian constitutionalism are an important element of contemporary political practice. Each of the case studies argues that contrary to the existing scholarship on the pragmatic or anti-theoretical nature of Australian politics, competing philosophical conceptions of the Constitution are regularly employed in political discourse. The thesis shows that the contested nature of the separation of powers, national sovereignty and individual rights have been utilised by political actors and institutions to determine the course of political events. More specifically, the thesis argues that philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism.
Chapter Five: The 1975 Constitutional Crisis

Thus far, the thesis has delineated two major philosophical influences on the form and structure of the Australian Constitution, outlining the theoretical tensions that underpin the operation of government. In particular, The first three chapters of the thesis identify that critical tenets of Australian constitutionalism remain contested. These findings are important because they raise questions regarding the political ramifications of Australia’s hybrid and contested constitutional arrangement. Specifically, do the Constitution’s contested philosophical foundations have any impact on the operation of government? If the Australian polity has no agreed account of the philosophical foundations of the Constitution, then how do institutions and political actors respond when faced with decisions that involve contested concepts such as individual rights, national sovereignty, or the separation of powers? To address these questions each of the remaining chapters is a case study, which examines a specific political event that has been underpinned by tensions relating to the hybrid nature of the Constitution. The thesis adopts a case study approach to demonstrate three different and distinct ways that the Constitution’s contested philosophical heritage has impacted on political practice. The thesis shows that theoretical and philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism. In this way, the thesis outlines how theoretical tensions have advanced and limited developments in Australian constitutionalism, while also discussing the ways that institutions and political actors utilise the language of traditions as a device to justify political and judicial decisions. Thus, the case studies allow for a deeper appreciation of how the Constitution’s contested philosophical foundations influence the operation of government.

The case studies are designed to explore the important role of constitutional philosophy in contemporary political discourse. By examining how political actors use the language of traditions, the thesis is able to draw conclusions regarding the political ramifications of the Constitution’s contested philosophical foundations. The first case study examines the philosophical arguments employed by Whitlam, Fraser and Kerr throughout the 1975 constitutional crisis. On 11 November 1975, Sir John Kerr invoked Section 64 of the Australian Constitution to terminate the commission of his ministers. In making his decision, the Governor-General referred to the failure of Prime Minister Gough Whitlam to advise an election of the House of Representatives or a double dissolution. The decision was the culmination of a constitutional crisis precipitated by the Senate’s persistent deferral of Appropriations Bills (No.1 and 2) 1975-76. In an unprecedented exercise of prerogative
power, the Governor-General dismissed Whitlam, appointed Liberal leader Malcolm Fraser as caretaker Prime Minister and dissolved Parliament. In the hours between Whitlam’s dismissal and the dissolution of Parliament, the House of Representatives carried several motions expressing confidence in Mr Whitlam and calling for his reinstatement. Chapter Five argues that each of the major proponents of the 1975 constitutional crisis relied on the contested nature of the separation of powers to justify partisan and political decisions.

Chapter Five outlines how a lack of clarity regarding the operation of responsible government within a federal constitutional framework allowed the development of an innovative and novel interpretation of Australian constitutionalism. This innovative understanding of Australian constitutionalism was utilised by partisan political actors, High Court Justices and the Governor-General to dismiss the Whitlam government.

The first section of the chapter discusses Malcolm Fraser’s understanding of federal bicameralism and its operation within Australian government. Fraser disputed the predominance of the House of Representatives in legislative matters, arguing that the executive is accountable to both Houses of Parliament. Fraser believed that the idea of a federal commonwealth is fundamental to the Constitution and to the operation of the separation of powers. The second section of the chapter assesses Whitlam’s defence of responsible government. Throughout the crisis, Whitlam consistently invoked traditional concepts of responsible government, insisting that the House of Representatives retains authority over supply. The final section of the chapter examines Sir Johns Kerr’s innovative interpretation of Australia’s constitutional system. To terminate the Prime Minister’s commission, Kerr argued that when a government is denied supply by the Senate it must advise an election or resign. This understanding of Australia’s institutional framework alters fundamental conventions of responsible government to correspond with the Constitution’s legal requirement that Bills, including appropriation measures, must be passed by both Houses. Kerr reinterprets the principles of responsible government to account for Australia’s federal, bicameral parliament. Kerr then disregards the conventional relationship between the Governor-General and the Prime Minister as his chief adviser, relying on vice-regal intervention to end the political deadlock over supply. Kerr’s understanding of government enhances the role of the Governor-General to include a personal prerogative that can be exercised while the Prime Minister retains the support of the Lower House. The Governor-General’s discretion and understanding of the Constitution becomes paramount in deciding who governs, rather than the confidence of the House of Representatives. Ultimately, the uncertainty surrounding the separation of powers allowed Kerr to redefine the meaning of...
responsible government, reinvigorate the reserve powers and re-constitute the role of Governor-General.

While many authors record that fundamental disagreement regarding the Constitution contributed to the events of 1975, there has not been a focus on the philosophical arguments that were employed throughout the debate. Authors such as Galligan (1980a; 1980b) and Aroney (2009) link the events of 1975 to the Federation debates and, in particular, discussion regarding the Senate’s constitutional powers. Cooper and Williams (1997) compile an array of contributions from Maurice Byers, Harry Gibbs, Cheryl Kernot, Helen Irving and Leslie Zines, which discuss the 1975 constitutional crisis to highlight issues relating to constitutional change. Others such as Howard and Saunders (1977), Cooray (1979) and Sawer (1997) have discussed the dismissal from a legal standpoint, particularly in regard to s.53 of the Constitution and the reserve powers. Jenny Hocking’s (2013) recent contribution is the most contemporary example of the many historical accounts that detail the events surrounding the dismissal. Chapter Five builds on the work of these authors to the extent that the discussion identifies the constitutional anomalies that precipitated the crisis. The work differs from the existing literature because it utilises analysis of Hansard, legislation, High Court transcripts, media releases, speeches and autobiographical accounts to identify the theoretical and philosophical arguments that were employed by Whitlam, Fraser and Kerr. By drawing on primary documents and the authoritative voices of political actors rather than secondary analytical observations, the chapter is able to show how Kerr used the contested nature of Australian constitutionalism to advance innovative understandings of the separation of powers and executive authority. Finally, it is critical to acknowledge that the crisis of deadlock between the Houses of Parliament and its resolution can be explained in terms of political expediency. The 1975 constitutional crisis was partly the result of extreme bipartisan politics and strong personalities willing to engage in political brinkmanship. While political expediency remains a constant factor in the political process, it is the purpose of Chapter Five to reflect on the important role of constitutional theory. In many respects, the 1975 constitutional crisis and the ongoing debate regarding its implications are indicative of the theoretical and philosophical tensions that underpin the Constitution.

**Fraser and federal bicameralism**

Invoking a number of scandals and ministerial resignations, Fraser utilised the federal structure of Australian government to check executive power and force the Prime Minister to an election. On the 15 October 1975, Fraser outlined the Opposition’s intention to utilise a
Senate majority to defer a vote on the Government’s appropriation bills. Addressing the media, Fraser (1975) stated: ‘We must use the power vested in us by the Constitution and delay the passage of the Government’s money bills through the Senate, until the Parliament goes to the people.’ The first section of the chapter argues that Fraser’s understanding of the Senate’s constitutional powers was informed by Australia’s federal traditions. In a series of speeches delivered in the House of Representatives, Fraser outlined and defended the role of the Senate and its integral place within Australia’s Federation. In these speeches, Fraser referenced the High Court’s judgement in *Victoria v Commonwealth and Connor* (1975) 134 CLR 84, which largely supports a federal understanding of the Constitution. Underpinning Fraser’s reliance on federal institutions such as the Constitution, the Senate and the High Court, is the influence of State Premiers on the Opposition’s majority in the Senate. Fraser’s capacity to defer supply was provided when State Premiers altered the balance of power in the Senate by asserting a constitutional power developed to protect the federal nature of Australian government. In this way, Fraser’s strategy to defer supply was contingent on institutions and constitutional traditions adopted to meet the challenges of Federation.

Furthermore, by understanding how Fraser utilised the Constitution’s federal traditions, the section shows how political actors can draw on powerful philosophical conceptions to justify politically expedient decisions. Constitutional traditions remain an integral element of the political process because they can be used opportunistically as a political tool to support or undermine the development of public policy.

On 6 November 1975, the Fraser Opposition presented to the House of Representatives a motion seeking to censure the government and its ministers. The motion characterises the Whitlam Government as a grave threat to the Australian Constitution resulting from the Prime Minister’s failure to call an election (*Hansard* 1975a: 2913). Defending the censure motion, Fraser maintained that when a government has been denied supply it must resign or advise an election. Failure to call an election represented an attack on the constitutional powers of the Senate (*Hansard* 1975b: 2913). In a speech to the House of Representatives, Fraser argued that the Prime Minister’s stated intention to govern without the Senate’s approval for appropriation failed to perceive the nature of Australia’s federal compact:

> There has been a refusal by the Prime Minister to recognise the constitutional right and position of the Senate; a refusal to recognise that Australia is a Federation and despite the best efforts of this Government will remain a Federation (*Hansard* 1975b: 2914).
Fraser delivered a defence of Australia’s federal traditions, attacking Whitlam for misinterpreting the foundations of Australian government. In the House on 30 October 1975, Fraser argued that it was the Prime Minister’s intention to undermine the Senate’s constitutional power, which was a central precondition of Federation:

His [Whitlam] avowed aim is to strip the Senate of the vital protective powers which were the keystone of the Commonwealth Constitution and which remain the one fundamental safeguard of the States and of the people against total entrenched power (Hansard 1975c: 2698).

Fraser believed that the Constitution delineates a strong an independent Senate designed to protect State interest in the federal parliament, providing an important democratic check to encroaching power (Hansard 1975b: 2913, 2915). This understanding of the Senate’s constitutional authority is synonymous with the US federal model. Reflecting on the 20th anniversary of the dismissal, Fraser (1997) elaborated upon the theoretical foundations of the Australian Senate:

Unlike the former Canadian upper house, the Australian Senate is not appointed; it is not a part hereditary, part appointed house like the House of Lords. It is a house much more akin to the United States Senate, on which it is significantly modelled in terms of the powers that it possesses under the Australian Constitution (Fraser 1997: 166).

Fraser supported his decision to defer supply by directly outlining the theoretical provenance of the Senate and its foundations in US constitutional thought. Importantly, a federal understanding of defined and limited constitutional power was utilised by Fraser to argue that the Senate’s decision to block supply was legal.

Throughout the crisis, Fraser maintained that the deferral of supply was a legal application of the Senate’s constitutional powers. In a speech defending the Senate’s capacity to reject the government’s legislative agenda, Fraser asserted that ‘except for the introduction and amendment of money bills the Senate has equal power with the House of Representatives’ (Hansard 1975b: 2700). On both 30 of October and 11 November, Fraser utilised question time in the House of Representatives to quote at length the High Court’s judgement in Victoria v Commonwealth and Connor (1975) 134 CLR 84. In that case, Justice Gibbs expressly stated that the Senate had constitutional authority to reject appropriation Bills, despite not having the capacity to amend them:

Under the Constitution the Senate does not occupy a subordinate place in the exercise of legislative power. It is an essential part of the Parliament in which the legislative power
of the Commonwealth is vested. It is expressly provided by s. 53 of the Constitution that, except as provided in that section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws (Victoria v Commonwealth and Connor 1975 134 CLR 81).

In his judgment, Justice Gibbs argued when s. 53 is considered in conjunction with s. 1 and s. 58 ‘there is no doubt’ that the Senate may reject any proposed law, even one which it cannot amend (1975 134 CLR 81). In the same case, Justice Stephen supported an overtly federal understanding of the Senate’s constitutional powers. In his summary, Justice Stephen asserts that ‘the Senate’s powers … reflect the federal character of our polity’ (1975 134 CLR 81). Discussing Australia’s ‘federal compact’, Stephen cites Edmund Barton’s judgement in Osborne v Commonwealth (1911) 12 CLR 321, arguing that the Senate was designed ‘to be a house of greater power than any ordinary second chamber and intended to protect the States from aggression’ (1975 134 CLR 81). The Court’s understanding of the Senate’s constitutional powers reaffirms the strength of Australia’s federal traditions, providing a degree of legitimacy to the Fraser Opposition’s deferral of supply. Fraser utilised the Court’s judgement in Victoria v Commonwealth and Connor (1975) 134 CLR 84 to argue that the executive is responsible to both houses of parliament (Hansard 1975c: 2700). Fraser believed that ‘The Constitution specifically gives to the Senate the powers and the concomitant responsibility to bring a government to the judgment of the people’ (Hansard 1975c: 2699). For Fraser, the Senate not only has the power to refuse or to fail to pass a money bill, it has the constitutional authority to hold the government to account.

It is critical to recognise that Fraser’s strategy to defer supply was contingent on more than just arguments referring to Australia’s federal constitutional inheritance. The Opposition’s majority control of the Senate was a result of Australia’s federal constitutional framework. More specifically, Fraser’s capacity to defer supply was provided when State Premiers altered the balance of power in the Senate by asserting a constitutional power developed to protect the federal nature of Australian government. To gain control of the Senate and block Whitlam’s agenda, State liberal premiers broke with convention and exerted a dormant federal constitutional power (Hocking 2013: 230). In accordance with Australia’s federal traditions, the founders provided State governments with the constitutional authority to fill casual Senate vacancies. In 1975, this constitutional power was exercised to the detriment of the Whitlam government’s numbers in the Senate. On 27 February 1975, New South Wales Premier Tom Lewis appointed to the Senate, Cleaver Bunton – a person with no political affiliations – to replace recently appointed High Court Justice Lionel Murphy. On 3 September 1975, Queensland Premier Joh Bjelke-Petersen personally selected Albert Field to
replace deceased Labor Senator Bert Miliner (Hocking 2013: 230). These political appointments were critical to Fraser’s capacity to defer supply, ensuring that the Whitlam government would not control a majority in the Senate. On 16 October 1975, an Opposition motion to defer the budget was carried by a single vote: 29–28 (Hocking 2013: 229). To a certain extent, the deferral of supply was facilitated by State premiers willing to assert a constitutional power developed to protect the federal nature of the Commonwealth Parliament. In 1975, the Fraser Opposition, assisted by State premiers, utilised the federal elements of Australia’s constitutional structure to frustrate the legislative agenda of the Whitlam government.

At the centre of the constitutional issues relating to the Senate’s deferral of supply is a dispute regarding the nature of Australia’s institutions. Fraser disputed the predominance of the House of Representatives in legislative measures, arguing that the executive is accountable to both Houses of Parliament (Hansard 1975c: 2700). Fraser believed that the idea of a federal commonwealth is fundamental to the Constitution and to the operation of the Senate. This is important because Fraser’s view of Australia’s constitutional framework is at tension with Whitlam’s understanding of responsible government and its operation within a federal system. Fraser presupposes the primacy of Australia’s federal inheritance to the detriment of the Constitution’s parliamentary traditions and their foundations in responsible government. Fraser’s understanding of Australia’s institutional arrangement imposes a consistency on the Constitution which does not exist. As well as federal bicameralism, Australia’s constitutional arrangement also contains a powerful prime minister controlling a majority in the House of Representatives. The successful operation of Australia’s parliamentary executive is reliant on conventions and traditions that provide the prime minister a degree of flexibility and the capacity to respond to political problems as they arise. In 1975, Prime Minister Whitlam argued that the Senate’s deferral of supply contravened these principles of responsible government, threatening important foundations of Australian democracy.

**Whitlam and the conventions of parliamentary responsible government**

The potential for political deadlock inherent in a bicameral legislature was fully realised during the Whitlam government. During Whitlam’s three years as Prime Minister, there were two double dissolution elections (Galligan 1980b: 254). In 1974, Whitlam requested an election after important legislation had been blocked and supply threatened by the Senate. In 1975, the Senate rejected twenty-one pieces of legislation, deferred a vote on supply and
forced an election (Hocking 2013). The second section of the chapter argues that the Whitlam Government's response to the Senate’s deferral of supply was founded on the principles of parliamentary responsible government. The section shows that Whitlam believed traditions such as the prime minister and cabinet, ministerial responsibility and the conventions of responsible government take primacy over the written, federal elements of the Constitution. Specifically, Whitlam argued that the ideal form of government includes a prime minister that is responsible to the Lower House, the executive is accountable to the people through the traditions of responsible government and a prime minister controlling a majority in the House of Representatives cannot be forced to an election. Whitlam argued that the Senate’s persistent deferral of supply was an inappropriate exercise of power, contrary to the conventions of the executive and 75 years of parliamentary tradition. For Whitlam, the Senate’s actions represented a fundamental attack on concepts of responsible government, threatening to undermine the relationship between the prime minister and the Australian people. In a similar manner to Fraser, Whitlam utilised powerful philosophical conceptions of Australia’s constitutional system to justify politically expedient decisions.

Attempting to reconcile responsible government with Australia's federal framework, Whitlam argued that the successful operation of parliament is reliant on a convention that overrules the Senate’s constitutional authority. In the Age on 16 October 1975, Whitlam outlined the government’s position:

I state again the basic rule of our parliamentary system: Governments are made and unmade in the House of Representatives—in the people’s House. The Senate cannot, does not, and must never determine who the Government shall be (Whitlam 1975a: 1).

This position supports the primacy of the House of Representatives in Australian democracy at the expense of the Constitution’s federal elements. In a speech at a public meeting in Port Augusta on 2 November 1975, Whitlam argued for a constitutional convention establishing the authority of the House of Representatives over supply.

It has never happened before in Australia’s history. There have been many occasions … when the Government has not had a majority in the Senate. There were many occasions when Holt, and Menzies before him and Gorton after him, did not have a majority in the Senate. But nevertheless the Senate always passed the Government’s money bills (Whitlam 1975b: 3).

Whitlam (2005: 24) asserted that on 139 occasions appropriation bills have passed both houses of parliament, despite the government not having a majority of Senators. Whitlam’s
arguments for the primacy of the Lower House are founded on a belief in the traditions and conventions of responsible government. Where the Fraser Opposition focused on the bicameral nature of the Australian parliament, the Whitlam government argued that the principles of responsible government ensure the supremacy of the House of Representatives. Whitlam (2005: 87) was ‘determined to uphold the ancient and fundamental principle’ that the constitutional advisers of the Crown would determine supply. Seeking to establish the authority of the House of Representatives over supply, Whitlam (2005: 87) defended the parliamentary tradition that the ministry is formed in, and responsible to, the Lower House. This argument presupposes the primacy of responsible government at the expense of federal institutions and is indicative of Whitlam’s use of traditions that can be traced to the Constitution’s Westminster inheritance.

Defending the House of Representatives as the popular chamber, Whitlam contends that the executive is accountable to the people through the traditions of responsible government. In a speech in the House of Representatives on 16 October 1975, Whitlam forcefully argued for the supremacy of the Lower House in constitutional matters, seeking to establish the authority of the executive over supply. Whitlam invoked Quick and Garran (1901) as the essential constitutional guide:

The House of Representatives is not only the national chamber: it is the democratic chamber; it is the grand depository and embodiment of the liberal principles of government which pervade the entire constitutional fabric. It is the chamber in which the progressive instincts and popular aspirations of people will be most likely to make themselves first felt (Hansard 1975d: 2202).

Whitlam held that a majority in the House of Representatives provided a direct mandate from the Australian people to implement the government’s legislative agenda, including the budget measures (Hansard 1975d: 2201). While the Labor ministry retained the confidence of the Lower House, the government was entitled to implement the policies that had been supported at both the 1972 and 1974 federal elections (Whitlam 2005: 23). Whitlam (2005: 23) states that as the leader of government: ‘I placed the strongest interpretation on the meaning of the mandate given at an election by the majority of the people.’ Whitlam (2005) admits that the Senate’s constitutional power to reject supply exists, however, claims that its exercise is extraneous because the government retains the confidence of the Australian people, represented by a continuing majority in the House of Representatives. This view implicitly rejects the codified federal elements of Australia’s Constitution by asserting the dominance of
Whitlam believed that constitutional convention ensures that the Government cannot be forced to an election by the Opposition or the Senate.

Whitlam viewed the deferral of supply as an erroneous exercise of the Senate’s constitutional powers, contrary to the conventions and traditions of responsible government. On 19 October 1975, Whitlam reiterated the government’s position:

It is not the Senate’s function to decide who shall be the Government of Australia. There can’t be an election for the House of Representatives unless the Government advises the Governor-General to issue the writs. As long as I have a majority in the House of Representatives I will not advise the Governor-General to issue writs for a House of Representatives election at the behest of the Senate (Whitlam, cited in Hocking 2013: 242).

Whitlam’s understanding of Australian constitutionalism and its operation in regards the conventions of responsible government does not accord with the events of 1975. After Whitlam had been dismissed by the Governor-General and the budget passed in the Senate, Fraser announced in the House of Representatives that he had been appointed Prime Minister and that he intended to call an election. Following the announcement, Fraser lost five motions in the House of Representatives, including a motion of no confidence. The House censured Fraser as Prime Minister and requested that the speaker advise the Governor-General to call on Whitlam to form government (Hocking 2013: 310-312). Kerr did not take advice from the Speaker, instead signing a proclamation dissolving both Houses of the twenty-ninth Parliament. The proclamation was countersigned by Malcolm Fraser, Prime Minister (Hocking 2013: 312). Whitlam argued that remaining in office without the confidence of the Lower House was an assault on the traditions of Australian government. In a radio broadcast on the 16 November 1975 Whitlam asserted:

He [Fraser] should have returned to Government House at once, tendered his resignation to the Governor-General and advised him to call the leader of the party that commanded the support of the Parliament. This is the course that honour and precedent and history have sanctioned (Whitlam1975c: 2).

Whitlam (1975c: 1) never believed that the Governor-General would act against the advice of his ministers and appoint the leader of the Opposition, who did not command a governing majority in the House of Representatives. According to Whitlam (1975c: 2), Kerr and Fraser were acting contrary to established parliamentary practice that had operated in Australia since responsible government was introduced into the colonies in the 1850s. In this way, Whitlam
believed that the Senate’s deferral of supply threatened important foundations of Australian democracy and should be resolved to ensure the authority of the prime minister.

Whitlam argued that as the Prime Minister he was obliged to defend the continuing and unencumbered authority of the executive. In an interview with Kerry O’Brien on *Four Corners*, Whitlam stated that:

If I don’t stand firm on the principle that money bills are the responsibility of the Government, that Governments are made or unmade in the House of Representatives, then every subsequent Government will be under threat by a Senate in which it does not have a majority, twice a year (Whitlam 1975d: 3).

Whitlam argued that theoretical inconsistencies in the Constitution must be reconciled to ensure that future governments could always secure supply. In the House of Representatives on 21 October 1975, Whitlam asserted that the executive must have the authority to govern: ‘It is a principle of fundamental importance for all future governments and Prime Ministers’ (*Hansard* 1975e: 2306). Whitlam contended that to concede the government’s authority over supply ‘would be to establish a spurious right, a non-existent power to the Senate for all time’ (*Hansard* 1975e: 2306). Whitlam intended to use the crisis to defeat the Senate and resolve constitutional tensions that had existed since Federation:

> It is not only a matter of upholding past conventions which go to the very foundation of parliamentary democracy; it is a matter of establishing the principle beyond all doubt for the future, for all time (*Hansard* 1975e: 2305).

Underpinning the crisis is fundamental disagreement over the basic principles of responsible government and their application in a federal system of government. Aware of the constitutional anomalies that precipitated the crisis, Whitlam sought to counter the overtly federal understandings of Australian government implicit in any success by Fraser. Kelly (1997: 131) asserts that it was Whitlam’s intention to ensure that theoretical inconsistencies in Australia’s institutional framework would finally be resolved ‘with victory of the Representatives over the Senate and responsible government over federalism.’ Kelly recognises the constitutional tensions that underpin the crisis, outlining Whitlam’s preference for the traditions of responsible government.

Whitlam’s reliance on the institutions and conventions of responsible government is at tension with Australia’s federal traditions. On 10 November 1975, Sir Garfield Barwick, Chief Justice of the High Court, tendered advice regarding the Governor-General’s constitutional authority. Barwick’s advice draws on Australia’s federal traditions to develop a
reserve power of the Governor-General. For Barwick (1975), ‘The Constitution of Australia is a federal Constitution which embodies the principle of ministerial responsibility.’ The parliament consists of two popularly elected houses ‘each with the same legislative power, with the one exception that the Senate may not originate nor amend a money Bill.’ Barwick (1975) asserts that there are two relevant constitutional consequences that result from this institutional arrangement. The Senate has the constitutional power to reject any Bill including budget measures and a prime minister who cannot ensure supply to the Crown must either advise a general election or resign. Failure to fulfil these obligations provides the Governor-General adequate grounds to withdraw the commission of the prime minister and ‘invite the Leader of the Opposition, if he can undertake to secure supply, to form a caretaker government pending a general election’ (Barwick 1975). Drawing on the Constitution and the bicameral nature of the parliament, Barwick (1975) develops conditions sanctioning the dismissal of a prime minister. Barwick’s doctrine draws on the federal elements of Australia’s institutional arrangement to assert that the government is responsible to both houses of parliament. Whitlam (2005: 21) is highly critical of Barwick, arguing that the doctrine is ‘a prescription for permanent instability and for the paralysis of responsible government.’ The requirement that government control both houses ‘overturns the fundamental principle of responsible government: That governments are made and unmade in the Lower House’ (Whitlam 2005: 21). Whitlam’s position is supported by Sawyer (1977) who argues that the Chief Justice ‘confuses the law and the convention of the Constitution as to produce a fallacious statement of the relevant convention.’ Regardless of the veracity of each claim, the significantly different accounts are indicative of tensions that result from the Constitution’s contested and hybrid philosophical foundations. At the centre of the debate are two different understanding of parliamentary responsible government and its operation in regards a federal constitutional framework.

The conventions of responsible government are absent from the Constitution, ensuring that the operation of the executive is reliant on written and unwritten elements. Consequently, disputes regarding the operating procedures of the Parliament and its relationship to the executive cannot be resolved by appealing directly to the Constitution. The theoretical confusion regarding the nature of responsible government and its combination with legislative bicameralism helps to sustain the partisanship associated with 1975. The indefinite character and hybrid nature of Australian democracy creates tensions within the operation of government. Politicians such as Whitlam and Fraser can utilise contending interpretations of the separation of powers, referencing constitutional traditions that have
diverse purposes. Significantly, the practical problems associated with reconciling the Constitution’s contested philosophical foundations manifested in the Governor-General’s response to the crisis. Australia’s ambiguous constitutional framework does not preclude vice-regal action, leaving the Governor-General undefined prerogative powers. In 1975, Sir John Kerr utilised the archaic formulation of the vice-regal regal office to redefine the nature of responsible government to accord with the Constitution’s federal traditions.

Sir John Kerr and the Constitution

The final section of the chapter discusses Sir John Kerr’s response to the supply crisis. The section argues that Kerr’s complex justification for the dismissal utilises the Constitution’s federal traditions to reinterpret and redefine the conventions of responsible government. The section shows how theoretical tensions embedded in the Constitution allowed Sir John Kerr to develop an innovative and novel interpretation of Australia’s constitutional system. In a statement released by the Governor-General on 11 November 1975 Kerr asserted:

> Because of the federal nature of our Constitution and because of its provisions the Senate undoubtedly has constitutional power to refuse or defer supply to the Government. Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign. If he refuses to do this I have the authority and indeed the duty under the Constitution to withdraw his commission as Prime Minister (Kerr 1978: 360).

Kerr reinterprets the principles of responsible government to account for Australia’s federal, bicameral parliament and then disregards the conventional relationship between the Governor-General and the Prime Minister as his chief adviser, relying on vice-regal intervention to end the political deadlock over supply. Kerr’s understanding of government enhances the role of the Governor-General to include a personal prerogative that can be exercised while the Prime Minister retains the support of the Lower House. The Governor-General’s discretion and understanding of the Constitution becomes paramount in deciding who governs, rather than the confidence of the House of Representatives. In this way, the uncertainty surrounding the separation of powers and the archaic formulation of the vice-regal office in a federal constitutional framework allowed Kerr to redefine the meaning of responsible government, reinvigorate the reserve powers and re-constitute the role of Governor-General.

Kerr largely accepted Fraser’s interpretation of Australian government arguing that the deferral of supply was a legal application of the Senate’s constitutional powers. Kerr (1978:}
312) stated that ‘At all times I acted upon the assumption that the Senate has the power to refuse or refrain from granting supply.’ To justify his position, Kerr (1978) draws on the Constitution and the theoretical provenance of Australia’s bicameral legislature. Kerr (1978) argues that s.1 of the Constitution vests the legislative power of the Commonwealth in the Queen, a Senate and a House of Representatives and s.58 ensures that proposed laws, presented to the Governor-General for the Queen’s assent, must first be passed by both Houses. For Kerr (1978: 316), the Senate is a popularly elected chamber founded on the federal concepts of dual representation. The Senate ‘was designed to provide representation by States, not by electorates, and was given by s.53 equal powers of the House with respect to proposed laws’ (Kerr 1978: 362). Kerr (1978: 316) argues that ‘The Senate, constituted as it is and with the powers given to it, has always been regarded as part of the federal bargain.’

The Senate was designed to be a powerful house of review, significantly different from the House of Lords in England:

The Senate’s position, in relation to supply and generally, is totally different from that of the House of Lords. The philosophy of the Parliament Act of the United Kingdom cannot be found in the Australian Constitution (Kerr 1978: 316).

In a similar manner to Fraser, Kerr (1978) referenced Australia’s federal traditions to justify the Senate’s legal power to defer supply. This is important because Kerr’s response to the supply crisis is, in part, an attempt to reconcile the Senate’s constitutional power with Australia’s parliamentary traditions of responsible government. Kerr establishes the Senate’s constitutional authority to reject appropriation measures, asserting that the Australian executive is accountable to both Houses of Parliament.

To terminate the Prime Minister’s commission, Kerr argued that when a government is denied supply by the Senate it must advise an election or resign. This understanding of Australia’s institutional framework alters fundamental conventions of responsible government to correspond with the Constitution’s legal requirement that Bills, including appropriation measures, must be passed by both Houses. For Kerr (1978), the government must have the confidence of the Senate, expressed by the passing of supply:

Although the confidence of the Senate is not necessary for the survival of government, and its rejection of ordinary legislation will not bring down a government, its failure to grant supply can produce that result by making government impossible. There is a sense in which the government must retain the confidence of the Senate to be able to continue in government (Kerr 1978: 215).
Kerr extends the principles of responsible government, from its traditional meaning of responsibility to the popularly elected Lower House, to account for Australia’s federal, bicameral parliament. There is a disagreement between Whitlam and Kerr over the principles of responsible government that apply in Australia’s hybrid constitutional structure, where a responsible government executive must negotiate with a federal parliament. For Whitlam (1979: 75), the Senate’s refusal to pass the budget was ‘a gross violation of the roles of the respective Houses of the Parliament.’ Whitlam claims that the conventional elements of the Constitution have precedence over the codified. Kerr (1978: 312) takes the opposite view, invoking Menzies, who wrote in a statement on 21 October 1975: ‘It would be absurd to suppose that the draftsmen of the Constitution conferred these powers on the Senate with a mental reservation that they never be exercised.’ Ultimately, Kerr rejected conventions establishing the executive’s untrammelled authority over supply, prioritising the codified, federal elements of the Constitution.

Kerr believed that Australian principles of responsible government are subject to the law of Constitution. In the Governor-General’s detailed statement of decisions justifying Whitlam’s dismissal, Kerr prioritises the Constitution’s federal traditions:

> The Constitution must prevail over any convention because, in determining the question of how far the conventions of responsible government have been grafted on to the federal compact the Constitution itself must in the end control the situation (Kerr 1978: 362).

For Kerr, the written federal elements of the Constitution supersede Australian traditions of responsible government. This conviction has important ramifications for Kerr’s perception of government, particularly institutions and institutional traditions that are not delineated in the Constitution. In the Australian context, conventions of responsible government contribute to understandings of the executive, the parliament, the ministry and the electoral process. Diminishing these traditions undermines a complete appreciation of the institutions that define Australian government. This is important because a preference for the federal elements of the Constitution allowed Kerr to directly refute Whitlam’s arguments and develop the grounds for dismissal. Kerr (1978: 360) believed that ‘the only solution consistent with the Constitution’ is to terminate Whitlam’s commission as Prime Minister. For Kerr, the Constitution sanctions the Senate’s deferral of supply and provides recourse for use of the reserve powers:
It is not possible to say that the power of dismissal is non-existent, whatever a Prime Minister or Government does, merely because that minister or government retains the confidence of the Lower House (Kerr 1978: 222).

This understanding of government enhances the role of the Governor-General to include a personal prerogative that can be exercised while the Prime Minister retains the support of the Lower House. The Governor-General’s discretion and understanding of the Constitution becomes paramount in deciding who governs, rather than the confidence of the House of Representatives. By rejecting longstanding constitutional convention, Kerr develops a novel interpretation of Australian constitutionalism. This novel interpretation of royal authority is largely sanctioned by ambiguities resulting from the Constitution’s contested philosophical foundations.

Kerr’s capacity to utilise the reserve powers is largely the result of constitutional ambiguities regarding the role and function of the Australian executive and its operation in a federal constitutional framework. It is critical to remember that the traditions and conventions of the Australian executive are largely uncodified. The authority of the Governor-General is predominantly derived from the Constitution’s links to the Crown. The executive section of the Constitution delineates monarchical rule through a vice-regal representative, vesting executive power in the Queen and her representative, the Governor-General. Chapter Two of the Constitution stipulates that members of a Federal Executive Council ‘shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.’ In effect, the Constitution establishes a Governor-General operating under the conventions of responsible government, which define the relationship between the Parliament and the Crown (Galligan 1980b: 264). Significantly, examination of the 1975 constitutional crisis reveals that the relationship between the Governor-General and the prime minister is complicated by the federal nature of the Constitution. Australia’s federal constitutional inheritance ensures that the duties of vice-regal office are determined by both the written and conventional elements of the Constitution. Vice-regal actions must satisfy the dual constitutional criteria of law and convention. Galligan (1980b: 266) asserts that a reading of the Constitution ‘would allow the Governor-General almost unlimited and capricious power, but the conventions of responsible government bind him to the will of those who control the popular House of Parliament.’ According to Galligan (1980b: 266), ‘If the Governor-General can do almost anything according to law, he can do virtually nothing according to convention.’ Despite the tension and ambiguity surrounding the reserve powers and their use within a federal constitutional framework, Kerr accepted that the Governor-
General has broad discretionary prerogative power. Defending his actions in 1975, Kerr states:

Mr Whitlam moved outside the proper principles and asserted a power to remain in government without going to the people, even though the parliament would not grant him supply. In such circumstances the Governor-General can use his admitted powers of dismissal, which is not a mere notional legal power but a real power, a reserve power of the Crown (Kerr 1978: 222).

Kerr’s actions are ultimately sanctioned by ambiguities in the Constitution and the flexible nature of the conventions of responsible government.

Throughout the crisis, the Governor-General sought advice from the shadow Attorney-General against the advice of the Prime Minister. This was an exercise of unilateral vice-regal power contrary to the conventions of responsible government. On 17 October, the Governor-General received a statement from Opposition Shadow Attorney-General and former Solicitor-General, Robert Ellicott (Hocking 2013: 243). Ellicott’s advice urged the Governor-General to disregard long-standing conventions of responsible government. Ellicott (cited in Kelly 1976: 277) rejected the conventional role of the Governor-General, disregarding the central requirement that Kerr must act on the advice of his ministers: ‘The Prime Minister is treating the Governor-General as a mere automaton with no public will of his own, sitting at Yarralumla waiting to do his bidding.’ The advice presents the Governor-General as an individual with broad discretionary powers asserting that if the Government cannot secure supply ‘it would be within the Governor-General’s power and his duty to dismiss his Ministers and appoint others’ (Ellicott cited in Kelly 1976: 277). Hocking (2013: 243) argues that Ellicott’s advice transforms the role of the Governor-General ‘from that of a vice-regal figurehead who acts on the advice of his elected ministers into an active political player with the broadest personal prerogative.’ On 6 November 1975, the Attorney-General, Kep Enderby, presented Kerr with the Commonwealth’s response to Ellicott’s statement. In a joint opinion developed by the Attorney-General and the Solicitor-General, Maurice Byers, the government asserted that: ‘We have found ourselves … firmly of the opinion that Mr Ellicott’s expressed views are wrong.’ The government’s advice rejected Ellicott’s contention that the Governor-General could dismiss ministers commanding the support of the House of Representatives, disputing the constitutional validity of the reserve powers (Freudenberg 2009: 386; Hocking 2013: 272). Despite Enderby’s advice, Kerr rejected the Commonwealth’s position. Hocking asserts that during a conversation with Sir Anthony
Mason, the Governor-General outlined a preference for the advice tendered by the shadow Attorney-General:

From his own record of their conversations over this time, Kerr had not even received the advice of his legal advisers when he declared to Mason that he would ignore it anyway, in favour of the advice of the shadow Attorney-General, Robert Ellicott: ‘a joint opinion of the Law Officers to the contrary would certainly not deter me if the moment arrives for action’, he told Mason (Hocking 2013: 281)

Kerr’s willingness to receive advice from Ellicott is difficult to reconcile with Australian conventions of responsible government, which determine that the Governor-General must act in accordance with the advice of his ministers. According to Hocking (2013: 297), ‘Whitlam never doubted that the Governor-General would act only on the advice of the Prime Minister and that, in the face of prime ministerial advice, there was no room for independent vice-regal action.’ Hocking (2013: 297) asserts that this understanding of the Governor-General’s conventional role in relation to an elected government ‘was the basis for all Whitlam’s actions during that time, articulated repeatedly and unambiguously at every opportunity during the political stalemate.’ There is fundamental disagreement between Whitlam and Kerr over the basic principles of responsible government that apply within Australia’s federal system of government. Importantly, Kerr’s willingness to seek external advice contrary to the traditions of responsible government was not limited to the shadow Attorney-General.

Kerr subverted the traditions and conventions of responsible government by appealing to members of the High Court, who advised on the disposition of Constitution outside of their official capacity. Sir Garfield Barwick’s public advice to the Governor-General, which asserted the government is responsible to both houses of parliament, was privately supported by Sir Anthony Mason. According to Hocking (2013), Mason advised the Governor-General throughout the crisis, agreed with his decision to dismiss the government and assisted in drafting public statements. Hocking (2013: 279) details the pivotal nature of Mason’s involvement:

From their earliest discussions, months before there was even any Supply crisis in the Senate, Kerr records that it was Mason who met, talked with, planned for and counselled him, guiding him through his deliberations and advising him on the action he should take. Of equal significance from Kerr’s detailed record is his depiction of Mason as providing a necessary bridge between Kerr and the Chief Justice Sir Garfield Barwick (Hocking 2013: 279).
In 1975, the Governor-General, advised by several High Court justices, reinterpreted and reinvigorated the reserve powers to protect the federal nature of Australian government. The involvement of two High Court justices is remarkable because an examination of Kerr’s doctrine in the context of Australia’s constitutional traditions indicates that his theory of government is a novel invention. Kerr’s understanding of government synthesises elements of the Constitution’s contested philosophical foundations, undermining central principles of both responsible government and federalism. Mason and Barwick supported Kerr’s novel interpretation of the Constitution, which was unsanctioned by previous political practice and has been widely contested by constitutional authorities.

**Conclusion**

Chapter Five has examined a political event precipitated by theoretical tensions embedded in Australia’s constitutional arrangement. By assessing the philosophical and theoretical arguments underpinning the Whitlam dismissal, the chapter shows that the partisan contests of 1975 are characterised by contending conceptions of the separation of powers, which can be traced back to the influence of English and US constitutionalism on the form and structure of Australian government. Throughout the crisis, Fraser utilised the Constitution’s federal traditions to justify the decision to defer supply. In contrast, Whitlam argued that the Senate’s persistent deferral of supply was an inappropriate exercise of power, contrary to the conventions of parliamentary responsible government. Thus, the chapter outlines how Whitlam and Fraser utilised contending conceptions of Australian constitutionalism to justify partisan political decisions. In this way, constitutional traditions remain an integral element of contemporary political practice because they can be used opportunistically as a political tool to support or undermine the development of public policy. More importantly, by assessing the philosophical arguments that underpin the 1975 constitutional crisis, the chapter reveals that Sir John Kerr developed an innovative and novel interpretation of Australian constitutionalism, which synthesises the conventions of responsible government to conform with the written, federal elements of the Constitution. Theoretical tensions regarding the separation of powers and ambiguities surrounding the nature of executive authority allowed Kerr to redefine the meaning of responsible government, reinvigorate the reserve powers and re-constitute the role of Governor-General. In this way, Chapter Five shows how theoretical and philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation. The following chapter builds on this analysis by examining the 1998 constitutional convention on Australia’s potential transition to a republic. Chapter Six is designed to show that the Constitution’s contested philosophical foundations have been used
for more than advancing a novel interpretation of government. Chapter Six shows that philosophical tensions in Australian constitutionalism have also resulted in political conservatism.
Chapter Six: The 1998 Constitutional Convention

Thus far, the thesis has delineated the Constitution’s contested philosophical foundations, outlining that there are two major philosophical influences on the form and structure of Australian government. The first three chapters of the thesis identify that critical tenets of Australian constitutionalism remain contested. These findings raise questions regarding the role of constitutional theory in the political process. Do the Constitution’s contested philosophical foundations have any impact on the operation of government and, more importantly, how do institutions and political actors respond when faced with decisions that involve contested concepts such as individual rights, national sovereignty, or the separation of powers? To address these questions, the thesis assesses three political events that have been characterised by tensions relating to the hybrid nature of the Constitution. The thesis adopts a case study approach to demonstrate three different and distinct ways that the Constitution’s contested philosophical heritage has impacted on political practice. The first case study, Chapter Five, shows how Sir John Kerr advanced an innovative and novel interpretation of Australian constitutionalism. The second case study, Chapter Six, is designed to show that the Constitution’s contested philosophical foundations have been used for more than advancing a novel interpretation of government. Chapter Six shows that philosophical tensions in Australian constitutionalism have also resulted in political conservatism.

Chapter Six utilises the transcript of proceedings recorded throughout the 1998 Constitutional Convention to identify the theoretical arguments that underpinned the development of the republican constitutional model, which was put to electors in 1999. On Saturday 6 November 1999 two referendum questions were submitted to Australian electors. The first concerned an additional Preamble to the Constitution. The other sought to establish the Commonwealth of Australia as a republic with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament. Both proposals were overwhelmingly defeated, with every State rejecting the proposed Bipartisan Appointment of the President Model (BAPM). The BAPM put to electors was the result of a two-week Constitutional Convention held at Old Parliament House in February 1998. The Constitutional Convention comprised 152 delegates from all of the States and Territories. The Prime Minister, John Howard, appointed 76 delegates including senior federal parliamentarians, the state premiers, opposition leaders, prominent academics, indigenous elders, local councillors and former senior military officers. The
remaining 76 delegates were elected by voluntary postal vote and predominantly aligned with community organisations such as the Australian Republican Movement (ARM) and Australians for a Constitutional monarchy (ACM). Throughout the Convention, all 152 delegates were afforded the opportunity to speak on wide ranging issues such as the foundations of national sovereignty, the form and structure of the Australian executive and the appropriate restraints on executive power. To understand how difficulties reconciling theoretical tensions in Australian constitutionalism contributed to the final recommendations of the Convention, the chapter assesses three debates that underpinned the development of the BAPM. Each of these debates was characterised by tensions between modern republican and Westminster constitutional theory.

The first section of the chapter assesses the primary debate regarding whether Australia should officially alter the Constitution and become a republic. Examination of the arguments employed by delegates reveals tensions between two distinct philosophical conceptions of national sovereignty. Monarchists defended the role of the Crown in protecting the sovereignty of the Australian parliament. This is in contrast with those delegates who sought to remove the Monarch and officially recognise that government derives its legitimacy from the Australian people. The primary debate regarding whether Australia should officially alter the Constitution and become a republic is important because the philosophical and theoretical tensions between parliamentary and popular sovereignty at the core of the republic debate were not resolved. While a majority of the Convention supported the proposition that Australia should become a republic, all of the potential constitutional models sought to protect responsible government by including a prime minister and cabinet controlling a majority in the House of Representatives. The decision to include a parliamentary executive ensured that the subsequent debates regarding constitutional reform were also dominated by tensions between Westminster and republican constitutional theory.

The second section of the article addresses the debate regarding the method that would be used to appoint the head of state. At the centre of the debate regarding the mode of appointment are philosophical tensions between delegates who supported parliamentary appointment and those who advocated a directly elected president. Significantly, the Convention did not endorse direct election, preferring a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. Many of the delegates struggled to reconcile ideas of parliamentary sovereignty with a directly elected president, choosing to reject republican ideas in preference for minimal change to the current Constitution. This is important because
it resulted in a final model that would establish Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy.

The final section discusses the debate regarding codification of presidential powers. The decision to endorse parliamentary appointment was accompanied by debate regarding the Constitution’s current description of the executive and whether the conventions of the reserve powers should be codified. The debate was characterised by tensions between Westminster understandings of constitutional convention and republican ideas of defined, limited and codified power. To reconcile these tensions, the BAPM partially codifies the conventions of responsible government without delineating the reserve powers. Ultimately, a preference by a majority of delegates for the traditions and conventions of responsible government resulted in a conservative approach to constitutional reform. Following the Convention’s decision to endorse the republic, each of the major constitutional debates was resolved in favour of retaining the central elements of parliamentary responsible government. As with the original Constitution, the final proposed model sought to synthesise central elements of Westminster and republican constitutional theory.

Chapter Six utilises the transcript of proceedings recorded throughout the 1998 Constitutional Convention to examine the philosophical arguments that defined the development of the BAPM. This approach differs in important ways from the existing literature. Much of the literature that examines the 1998 Constitutional Convention is not concerned with the philosophical arguments of the delegates. For example, authors such as Irving (1999), Craven (1998), Turnbull (1999; 1994) and McAllister (2001) assess elements of the Convention to better understand the referendum results. Other authors such as Higley and Case (2000) and Holmes (2013) reference the Convention to discuss the politics of the public debate. Aroney (1999), Ward (2000) and Winterton (1998) utilise the Convention to consider the specific constitutional changes required for Australia to become a republic. Warhurst and Mackerras (2002) examine the debates to understand the nature and content of contemporary constitutional politics. Finally, Patmore (2009) provides a comprehensive discussion of republican and constitutional issues, examining the practicalities of future constitutional change. The analysis in Chapter Six builds on the work of these authors to the extent that the discussion identifies some of the challenges associated with future constitutional reform. The chapter differs from the existing literature because it is designed to explore the important role of constitutional philosophy in contemporary political discourse.
Contemporary constitutional politics continues to be shaped by the same philosophical and theoretical traditions that informed the development of the original Constitution.

It is critical to acknowledge that the 1998 Constitutional Convention is characterised by delegates referencing various elements of the Constitution’s complex and hybrid philosophical inheritance, without fully appreciating the complexity of Australian constitutionalism or the nuances of the Westminster system. It is worth revisiting Brian Galligan’s (1995: 21) assertion that ‘Australia’s system of government is in formal terms a constitutional monarchy but in efficient terms a federal republic.’ As discussed in previous chapters, Australian constitutional thought and, in particular, the High Court recognises that while the parliament is sovereign in practice, the Constitution and Australian democracy derive their legitimacy from the people. Furthermore, Adam Tomkins (2005) argues that despite its outwardly monarchic form, the Westminster system is profoundly shaped by the values and practices of republicanism. It is not the purpose of the chapter to ignore the subtleties of Australian constitutionalism or present the republic debate as a simple choice between Westminster and republican constitutional theory. Rather, the chapter shows that the hybrid nature of the Constitution can be used by political actors to create simplistic or reductionist arguments that result in two choices. While examining primary documents such as the transcript of proceeding presents an opportunity to access philosophical meaning embedded in political practice, the chapter is limited to the views and opinions expressed by the delegates. A considerable number of delegates at the Convention, both republicans and monarchists, appear not to understand that in many respects Australia is already a republic and that the debate should be concerned with updating the Constitution to reflect contemporary developments.

The foundations of national sovereignty
The first section of the chapter analyses the debate regarding the primary question of whether Australia should officially alter the Constitution and become a republic. The section argues that the debate was characterised by tensions between republican ideas of popular sovereignty and traditional Westminster understandings of parliamentary sovereignty. Members of the ACM and prominent Monarchists such as Howard were broadly united in support of parliamentary sovereignty, the Crown, the common law and the traditions of responsible government. Monarchists such as Sir David Smith defended the important role of the Crown in protecting parliamentary sovereignty, arguing that alternative republican models risked the stable constitutional order provided by convention and tradition. This view was in contrast to
the ARM and republicans such as Kim Beazley and Malcolm Turnbull who were broadly united on the need for the Constitution to recognise that government derives its legitimacy from the Australian people. Examining the theoretical arguments that underpinned the debate regarding Australia’s potential transition to a republic is an important for understanding the Convention’s final recommendations. In particular, the first section of the article shows that contending conceptions of national sovereignty dominated the debate, inhibiting the Convention’s capacity to generate a significant consensus. While a majority of the Convention supported the proposition that Australia should become a republic, many delegates sought to protect the sovereignty of the parliament. These concerns for parliamentary sovereignty resulted in the Convention considering four potential constitutional models, which all included a parliamentary executive. The decision to retain the traditions of responsible government ensured that the subsequent debates were also dominated by tensions between Westminster and republican constitutional theory.

To understand how tensions between two distinct conceptions of national sovereignty defined the development of the final proposed model, the discussion begins with an assessment of the arguments of republican delegates. Republicans were broadly united on the need for the Constitution to recognise that Australian government derives its legitimacy from the people. Throughout the Convention, republicans argued that the Constitution inadequately reflects that Australia is already a self-governing independent republic underpinned by concepts of popular sovereignty (Constitutional Convention 1998: 5, 8, 42, 221). On the first morning, Turnbull outlined the position of the ARM asserting that the Constitution is no longer relevant because ‘It still provides that our great Commonwealth is presided over by the Crown of the United Kingdom.’ Turnbull and members of the ARM were primarily concerned with excising the Monarch from the Constitution and ensuring that the head of state is ‘an Australian citizen representing Australian values living in Australia chosen by and answerable to Australians’ (Constitutional Convention 1998: 5). Republicans were united in the belief that the heredity principle underpinning the British monarchy necessarily contradicts the values inherent to democracy (Constitutional Convention 1998: 42, 221). Ted Mack argued that Australian democracy has moved away from concepts of imperial sovereignty where subjects are loyal to a Monarch:

In a democracy it is our leaders who should bear exclusive allegiance to the people. The people are sovereign, not the Monarch and not the parliament. That is the definition of a republic and that is what should be entrenched in our Constitution (Constitutional Convention 1998: 42).
Mack believed that the British Crown cannot represent the unity and aspirations of the people because a monarchical form of government is undemocratic and inappropriate for an independent country such as Australia (Constitutional Convention 1998: 42). This view was shared by prominent republicans such as Turnbull and Beazley who asserted that ideas of constitutional monarchy are undemocratic and a cultural anachronism inappropriate for a modern democracy (Constitutional Convention 1998: 5, 8). These anti-monarchic, anti-hereditary sentiments are the expression of republican concepts founded in popular sovereignty.

Republican arguments that seek to replace the Monarch with an Australian citizen can be traced to concepts of popular sovereignty. The term ‘republic’ has ancient origins, however, Brian Galligan (1995: 10) argues its contemporary definition ‘is rule not by a Monarch in his or her own right but by the people through a Constitution that controls all the parts of government.’ Republics require that the people consent to be governed by the rule of law and not by a Monarch. This was the core argument consistently repeated by republican delegates at the Convention. For example, Misha Schubert, the only delegate to have been elected on a youth ticket, asserted that:

Australians want a republic to affirm their sovereignty … In a genuine republic, power comes from the people, not from the Crown, the parliament or the retired ranks of those who once held office (Constitutional Convention 1998: 39).

Similarly, Professor O’Brien argued the Australian people should provide the legal and philosophical basis of government. Addressing the primary question of the republic on the second day, O’Brien asserted that the Constitution must designate the Australian people as the true source of sovereign authority:

We must say that all legislative and executive power resides in the people and that, by the constitutional grant of the people, those powers shall be exercised through particular institutions such as the head of state (Constitutional Convention 1998: 107).

In the same speech, O’Brien warned of the significant challenges associated with shifting constitutional, executive, and legal authority from the Crown to the people. In particular, O’Brien believed the formal transition to a republic would redefine the philosophical foundations of Australian government:

As with the American colonies of Britain in 1776 … the transition from a constitutional monarchy to a republic involves nothing less than the extinguishment of all authority
under the Crown as the foundation of government and the reconstitution of all legislative, executive, judicial and bureaucratic institutions under a new authority (Constitutional Convention 1998: 106).

For O’Brien, the shift to a republic would require that institutions such as the Prime Minister and Cabinet, the Parliament, the Governor-General and the conventions of responsible government be reconsidered or reconciled to accommodate popular sovereignty. O’Brien’s comments do not perceive the full complexity of Australia’s current constitutional system. The Queen of Australia is the official head of state; however, the Parliament operates the sovereign authority of the Australian Commonwealth on behalf of, and for, the Australian people. In this arrangement, the Governor-General, the Queen’s representative, enacts laws and governs the country on the advice of ministers who are accountable to the Australian people through the conventions of responsible government (Saunders 2011: 22). In this way, Australia is a ‘disguised republic’ or a ‘crowned republic’, which enacts republican ideas of popular consent through the prism of parliamentary democracy.\(^\text{15}\) It is important to understand that this was a key argument of the ACM, expressed throughout the Convention. Prominent Monarchists such as Howard and Smith consistently asserted that the Australian people already provide the Constitution with sovereign authority (Constitutional Convention 1998: 2, 68). Significantly, however, defenders of the Monarchy believed that completely removing the Crown from the Constitution would threaten the central premise of responsible government that the prime minister is accountable to the people through the Parliament.

Monarchists believed that replacing the traditions of the Crown with ideas of popular consent would undermine the sovereignty of the Australian Parliament. In his opening address to the Convention, Prime Minister Howard outlined the central argument of delegates opposed to Australian becoming republic, stating that the best form of modern government

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\text{…is basically the Westminster system of parliamentary government which has prevailed in Australia, with effective executive power being exercised by the cabinet headed by the Prime Minister, who are all drawn from and responsible to a democratically elected parliament (Constitutional Convention 1998: 3).}
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Howard implored the Convention to retain parliamentary sovereignty and protect Australia’s Westminster traditions. Monarchists such as Howard defended the traditions of the Crown because of their important role in maintaining parliamentary sovereignty. Howard stated that

\(^\text{15}\) Walter Bagehot (1867) and James Bryce (1921) have at different times identified the republican ideals that underpin Westminster traditions.
removing the Crown from the Constitution would undermine parliamentary sovereignty by risking the stable constitutional order provided by the traditions of the Monarchy (Constitutional Convention 1998: 3). For Howard, a fundamental characteristic of Australia’s parliamentary system is that that ‘the person discharging the formal functions must be so politically neutral both in reality and perception that he or she can act as the ultimate defender of the constitutional integrity of the nation’ (Constitutional Convention 1998: 3). Howard’s preference for parliamentary sovereignty and Australia’s Westminster traditions was supported by other prominent monarchists. Delegates such as Queensland Premier Rob Borbidge, Lloyd Waddy QC and Deputy Prime Minister Tim Fischer argued that incorporating popular sovereignty into Australia’s current system of government would inevitably produce an inferior constitutional model (Constitutional Convention 1998: 13, 49, 248). These delegates directly defended the Crown, arguing that removal of the Monarch would ‘strike at the very basis of our present constitutional principles’ (Constitutional Convention 1998: 12). Members of the ACM argued throughout the Convention that the Crown was fundamental to the operation of the Constitution:

The concept of constitutional monarchy is not, as the republicans seem to think, an irrelevant ornament perched at the top of our constitutional structure; the concept of constitutional monarchy lies at the very heart of our present Constitution (Constitutional Convention 1998: 55).

At the centre of the debate regarding the primary question of Australia becoming a republic are two different conceptions of the legal and philosophical basis for government. While republicans argue for popular consent, monarchists believe that the Crown and the traditions of responsible government ‘exquisitely protect the rights of the citizen against an abuse of executive power’ (Constitutional Convention 1998: 129). For Reverend Hepworth, the monarchy is the defender of the Constitution and guardian of individual rights:

At least since the glorious revolution, which I remind our republican friends was quite some time ago, the Crown has been the custodian of the rights of the people against elected and executive government, which is likely always to overstep the mark in grabbing power (Constitutional Convention 1998: 129).

For monarchists such as Hepworth, centuries of constitutional evolution have ensured that the Crown has a significant role in maintaining a stable democratic government. Without the Crown, executive power in Australia would no longer be constrained by the long-established conventions of parliamentary responsible government. While this view may be anachronistic,
it is a reflection of the philosophical tensions that developed between ideas of the popular will of the people and the important role of the Crown.

A critical element of the monarchists approach was to argue that responsible government cannot effectively operate without the Crown. For monarchists, the Crown is an essential element of Australian constitutionalism, which is the collective wisdom of generations. Councillor Julian Leeser argued that conventions dictating the relationship between the Crown and the government have been evolving ‘from the time of the Magna Carta in 1215 to the Australia Acts’ (Constitutional Convention 1998: 125). Brigadier Alf Garland warned that the authority of the Governor-General is derived from convention and limited by Australia’s links to the Crown. Garland asserted that as the Queen’s representative in Australia the Governor-General is bound by convention, particularly in regard to the relationship with the prime minister (Constitutional Convention 1998: 59, 60). For Garland, an Australian head of state would no longer be acting as a surrogate of the Monarch, constrained by the long-established conventions of parliamentary responsible government (Constitutional Convention 1998: 60). The president would be unshackled from tradition, acting on a perceived mandate from the people:

The theoretical and reserve powers held by Governors-General and governors are quite extensive. The key to the limitation on their powers is the convention binding them through the Crown…These same powers bestowed on republican President would be disastrous because a President could not be bound by those conventions (Constitutional Convention 1998: 61).

Garland relied on Australia’s Westminster traditions and the conventions of the Crown to undermine the argument for Australia becoming a republic. Monarchists such as Garland, Howard, Leeser and Hepworth utilised the Constitution’s Westminster traditions to defend the sovereignty of the parliament and dispute arguments regarding the need to remove the Monarch from the Constitution.

Ultimately, the monarchist defence of the Crown and the Constitution’s Westminster traditions did not convince the majority of delegates at the Convention. On the final morning of the Convention, Eric Lockett, an elected delegate representing Tasmania sought leave from the chair to move: ‘That this convention supports, in principle, Australia becoming a republic.’ The final result of the vote was 89 in favour of the republic; 52 against with 11 abstentions (Constitutional Convention 1998: 946). A clear majority of delegates chose to endorse the transition to an Australian head of state. By choosing to endorse the republic, the delegates ensured that the role and function of the Monarch in Australian constitutionalism
would need to be replaced and redefined. The Convention’s support for an Australian head of state required that delegates develop and debate alternate constitutional models. This process entailed addressing critical questions regarding the powers and appointment of the head of state and the specific changes to the Constitution. The remainder of the chapter shows that these deliberations are better understood in light of the primary debate regarding whether Australia should become a republic. The philosophical and theoretical tensions between parliamentary and popular sovereignty at the core of the republic debate were not resolved. While a majority of the Convention supported the proposition that Australia should become a republic, all of the potential constitutional models sought to protect the sovereignty of the parliament by including a Prime Minister and Cabinet controlling a majority in the House of Representatives. The decision to include a parliamentary executive accountable to the people through the traditions of responsible government ensured that the subsequent debates regarding constitutional reform were also dominated by tensions between Westminster and republican constitutional theory. Importantly, the defence of Australia’s Westminster traditions was taken up by the ARM, splitting the republican movement between those seeking to protect parliamentary supremacy and those seeking direct election of the president and full codification of the reserve powers.

**Mode of appointment**

A crucial task of the Convention was to debate and develop the proposed constitutional model that would be put to electors. The Convention’s support for a continuation of parliamentary traditions such as the prime minister and cabinet ensured that the debate centred on the method that would be utilised to appoint the head of state. At the centre of the debate regarding the mode of appointment are philosophical tensions that can be traced to Westminster and republican constitutional theory. In particular, the second section of the chapter argues that the debate regarding the mode of appointment was characterised by theoretical tensions between a Westminster understanding of parliamentary sovereignty, which supports the supremacy of the prime minister, and a republican understanding of popular sovereignty that believes the head of state should be directly chosen by the people. To understand the philosophical and theoretical arguments that were employed by the delegates, the discussion analyses each of the four proposed models that were considered by the Convention. The section also assesses the main concerns of prominent monarchists such as Rob Borbidge and Jeff Kennett. The section shows that the Convention preferred a conservative approach to constitutional reform, which favoured a continuation of
parliamentary sovereignty and the conventions of responsible government. Many of the delegates struggled to reconcile ideas of parliamentary sovereignty with a directly elected president, choosing to reject republican ideas in preference for minimal change to the current Constitution. This is important because it resulted in a final proposed model that would establish Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy.

On the penultimate day of the Convention delegates formally decided the proposed constitutional model that would be put to the Australian electors at referendum. Four constitutional models were introduced to the Convention as a formal motion. Model A and Model B both involved direct election of the head of state. Delineating the specific terms of Model A, Dr Geoffrey Gallop stated: ‘The election of the head of state shall be by the people of Australia voting directly by secret ballot with preferential voting by means of a single transferable vote’ (Constitutional Convention 1998: 827). Similarly, in support of Model B, Bill Hayden asserted: The head of state should be elected by a national poll’ (Constitutional Convention 1998: 833). The direct election models were supported by prominent republicans such as Ted Mack, Peter Beattie, Clem Jones, Reverend Tim Costello, Senator Christine Milne and Professor O’Brien. Drawing on republican concepts of popular sovereignty, each of these delegates advocated the constitutional entrenchment of the people’s right to nominate candidates for the office of president, contest direct elections and cast a ballot in an open contest (Constitutional Convention 1998: 42, 110, 119, 183, 296). These sentiments are the expression of republican concepts, which provide that individuals are free, equal and independent. Reverend Costello discussed the philosophical foundations of republicanism, linking direct election with ideals of civic participation and equality:

A republic is a compact of engaged citizens who believe that they are equals and believe that participation in self-government and ownership of their future are the highest virtues of free peoples’ (Constitutional Convention 1998: 184).

For Costello, the right of citizens to participate, nominate and contest elections is sacrosanct and must be enshrined in the Constitution (Constitutional Convention 1998: 184). This view was shared by Professor O’Brien who argued that republican virtues of civic participation and equality should be expressed through the formal codification of a directly elected president who represents the people and defends the Constitution (Constitutional Convention 1998: 297). Much of the drive for an elected president came from a sense that popular sovereignty would be diluted if the people cannot directly choose the head of state.
Supporters of direct election criticised parliamentary appointment models as undemocratic and an insult to the popular will and rights of Australian citizens. For delegates supporting direct election, parliamentary appointment entrenches executive power amongst an elite political class, alienating ordinary citizens from participating in the democratic process (Constitutional Convention 1998: 102). O’Brien asserts that parliamentary appointment will ensure that the head of state will be ‘yet another establishmentarian elitist as remote from the people in lifestyle as a far distant Monarch’ (Constitutional Convention 1998: 297). Delegates that supported and voted for direct election were aware that an elected president would limit and constrain the prime minister and the parliament.

Supporters of direct election sought to entrench the authority of the Australian people by advocating a directly elected president acting as an important check to the prime minister’s authority. Senator Christine Milne believed that direct election would provide a constitutional mechanism allowing the head of state to remain independent from the legislature. For Milne, the dominant and extensive powers of the prime minister must be balanced, particularly in the absence of the Crown (Constitutional Convention 1998: 209, 210). Milne quoted Harry Evans, the longest-serving clerk of the Australian Senate:

I think it’s highly desirable to have somebody with another source of political legitimacy and a separate source of political power. The whole idea of constitutional government and the whole idea of republican government is that you don’t allow one person or one body of persons to become the sole repository of power (Constitutional Convention 1998: 209).

Milne and other republicans such as Evans elaborated an understanding of the separation of powers synonymous with US constitutional thought. Ted Mack argued that the Australian Constitution already replicates the US republican model, establishing a tripartite separation of powers ‘with the checks and balances fundamental to a democracy—the executive government, the legislature and the judiciary’ (Constitutional Convention 1998: 44). For Mack, the separation of powers outlined in the Constitution ‘was compromised at the start by the grafting on of the monarchy’ (Constitutional Convention 1998: 44). Mack implored the Convention to consider utilising the transition to a republic as an opportunity to address tensions in Australian government by moving to separate the executive from the Parliament. This would imbue the Australian system of government with alternative notions of participation and reconcile the philosophical tensions embedded in the Constitution. Mack believed that ‘The separation of powers can be restored, and the accountability of the three arms improved by the people directly electing the Governor-General as both head of state and
head of government’ (Constitutional Convention 1998: 44). Direct election would ensure that
governments would be responsible to the people and ‘the House of Representatives could
pursue its fundamental role of legislating and being a check on executive government’
(Constitutional Convention 1998: 44). It is critical to recognise that by endorsing the direct
election of the president, Model A and Model B provide a direct challenge to concepts of
parliamentary sovereignty. Supporters of direct election were proposing a significant
philosophical shift in the foundations of Australian government, toward a US republican
model of constitutional checks and balances. This resulted in monarchists and republican
minimalists defending Australian traditions of parliamentary responsible government.

Despite being opposed to replacing the Crown, members of the ACM and other
monarchists contributed to, and voted on, the proposed constitutional models. Victorian
Premier Jeff Kennett outlined the key argument of monarchists opposing direct election: ‘The
Australian version of the Westminster system has served our nation … extremely well and
should not and need not be abandoned for Australia to become a republic’ (Constitutional
Convention 1998: 690). Kennett was particularly concerned for the political and
constitutional safeguards provided by an appointed Governor-General and how they could be
preserved in the transition to a republic. In particular, Kennett defended the prime minister’s
right to select the Governor-General, warning a directly elected president would radically
alter the foundations of Australian government. Replacing the Crown with an elected head of
state would create a potential political rival, undermining the prime minister’s capacity to
govern (Constitutional Convention 1998: 690). Monarchists such as Howard, Kennett,
Borbidge and Smith were united in the belief that a partisan electoral process would not
produce a neutral head of state, which is required as a constitutional safeguard fundamental to
the operation of a Westminster system (Constitutional Convention 1998: 3, 49, 68, 690). A
direct national vote would provide the president a significant political mandate that could be
used inappropriately and to the detriment of effective government. Smith asserted that he has
‘known Governors-General who have been deterred from acting or speaking in a particular
way simply because they knew they had been appointed and not elected’ (Constitutional
Convention 1998: 68). For Smith, prime ministerial appointment of the Governor-General
ensures an impartiality that acts as a restraint, encouraging a democratic resolution to
constitutional crisis. The monarchist defence of the Constitution’s Westminster traditions
highlights the difficulties associated with reconciling a republican style president with a
parliamentary democracy. While monarchists exploited theoretical tensions between
Westminster and republican constitutional theory to undermine the transition to a republic,
other delegates seeking to protect parliamentary supremacy developed models that required a minimum of constitutional change.

Model C was developed and presented to the Convention by former Victorian Governor Richard McGarvie. The McGarvie Model sought to implement an Australian republic by replacing the Queen with a council of former Governors and Governors-General. The McGarvie model would ensure that the head of state has the same powers as the present Governor-General and is appointed or dismissed on the prime minister’s advice (Constitutional Convention 1998: 898). The model seeks to replicate the Westminster system by ensuring the prime minister retains the capacity to nominate and remove the head of state. The prime minister would remain bound by the unwritten conventions of responsible government and accountable to the people through the parliament (Constitutional Convention 1998: 898). Central to the McGarvie model is that presidential appointment and removal are conducted through the medium of parliamentary democracy. Professor Craven supported the McGarvie model throughout the Convention, believing that the mode of appointment must reflect the central tenets of a Westminster parliamentary system

…that removal and appointment of the Head of State occurs by prime ministerial initiative, mediated through parliamentary democracy…through the House of Representatives, to the electorate. That is the essence of the existing arrangement, and that essence must be maintained in any model (Constitutional Convention 1998: 598).

McGarvie and other delegates supporting minimal change believed that Australia’s parliamentary system could not be adapted to include republican ideas of popular sovereignty or of a directly elected president acting as a defender of the Constitution. There was a fundamental disagreement between republicans who preferred the continuation of parliamentary democracy and those republicans seeking popular endorsement of the president. This disagreement had a profound influence on the final outcome of the Convention. Discussing the possibility of developing a consensus regarding the proposed model, Professor Craven stated:

In relation to consensus, we have to face certain facts…There is no possibility of consensus for a directly elected president in this chamber. We all know it. There is no consensus or possibility of consensus for the maintenance of the status quo. The greatest chance of consensus is either the McGarvie model or, if not McGarvie, then the McGarvie principle that appointment and removal should be via the medium of parliamentary democracy.
This robust defence of responsible government ensured that the final proposed model would endorse the transition to a republic, while maintaining a significant role for the parliament and the prime minister. The final proposed model would have to be a hybrid arrangement, comprising elements of both Westminster and republican constitutional theory.

Model D, the Bipartisan Appointment of the President Model (BAPM), was preferred by the Convention, receiving 59 of the 151 votes (Constitutional Convention 1998: 873). Moving the motion to formally adopt Model D, Turnbull outlined the key elements of the BAPM relating to the appointment of the President (Constitutional Convention 1998: 846). A committee established by the Federal Parliament invites and considers nominations from State and Territory Parliaments, local government and the public, providing a report to the Prime Minister. Following consideration of the report, the Prime Minister presents a single nomination for the office of President, seconded by the Leader of the Opposition, for approval by a two-thirds majority of a joint sitting of both houses of the Commonwealth Parliament (Constitutional Convention 1998: 846). The BAPM was a compromise between McGarvie minimalists, Monarchists and the ARM, which provides the prime minister significant discretion in the appointment and removal of the president. Delegates supporting the BAPM argued that parliamentary appointment reaffirms the best characteristics of Australia’s Westminster traditions, while allowing the nation to transition to a republic (Constitutional 1998: 966-971). Defending the model, Beazley, Turnbull and Brumby all emphasised the importance of retaining Australia’s system of Westminster democracy, reminding the Convention that the parliament and the prime minister remain accountable to the people through the traditions of responsible government (Constitutional Convention 1998: 846, 969, 974). Supporters of parliamentary appointment believed that the BAPM would entrench existing Westminster traditions into the Constitution, formalising the authority of the prime minister (Constitutional Convention 1998: 966-971). For direct election republicans, the BAPM represented a compromise that favoured the Constitution’s Westminster constitutional inheritance. Reverend John Hepworth argued that the BAPM would ‘shift the sovereignty of this nation from the Crown to the Parliament.’ The BAPM ensured that the Australian people would only be sovereign through the prism of parliamentary democracy. David Muir (1998: 976) asserted that the BAPM presented ‘A crisis of conscience for those who believe in the sovereignty of the people and electing the president.’ Many delegates grappled with the realisation that the BAPM would establish an Australian republic, while strengthening parliamentary sovereignty.
The BAPM synthesises ideas of republicanism with the traditions of responsible government. The Convention sought to excise the Monarch from the Constitution and adopt an Australian head of state, ensuring that sovereignty would no longer reside with Crown. The delegates did not endorse direct election, however, entrusting the Parliament and the prime minister with the duty of selecting Australia’s head of state. The section shows that the Convention preferred a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. A majority of the delegates choose to reject republican ideas of a directly elected president in preference for minimal change to the current Constitution. This is important because it resulted in a final prosed model that would establish Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy. The full extent of the compromise becomes apparent through an analysis of the Convention’s final recommendations regarding the codification of presidential powers. The decision to endorse parliamentary appointment was accompanied by debate regarding the Constitution’s current description of the executive and whether the conventions of the reserve powers should be codified. To reconcile tensions between Westminster understandings of constitutional convention and republican ideas of defined, codified and limited power, the BAPM partially codified the traditions of responsible government without delineating the reserve powers. The final decision on codification of presidential powers confirms that conservative concerns for the Constitution’s Westminster traditions directly influenced the development of the BAPM.

Codification of presidential powers
Throughout day two of the Convention, delegates delivered speeches on questions relating to the codification of presidential powers. Delegates broke into working groups to develop resolutions outlining the specific constitutional changes that would be required to effect a transition to a republic. The acceptance of parliamentary supremacy and the conventions of responsible government ensured that debate centred on issues relating to the codification of the reserve powers. At the centre of the debate regarding the codification of presidential powers are philosophical tensions that can be traced to Westminster and republican constitutional theory. In particular, the final section of the chapter argues that the debate regarding codification of presidential powers was characterised by philosophical tensions between Westminster understandings of constitutional convention and republican ideas of defined, codified and limited political power. To understand how these philosophical tensions
shaped and defined the final proposed model, the section analyses the arguments for and against codification. Supporters of codification utilised republican constitutional theory to argue that the conventions of the reserve powers should be codified. This is in contrast to delegates who believed that codification is inconsistent with the core values of Australia’s system of parliamentary responsible government, which includes the flexibility of longstanding constitutional conventions. To demonstrate the full extent of the theoretical challenges that defined the debate, the discussion also assesses how the 1975 constitutional crisis was used by delegates to support or refute specific claims. This approach is designed to show how theoretical tensions between Westminster and republican constitutional forced the ARM to develop a compromise constitutional arrangement. Specifically, to ameliorate the concerns over codification the ARM supported a model that would partially codify the conventions of responsible government, while leaving the reserve powers undefined. Despite initial support for full codification, the ARM chose not to define and limit presidential power. The ARM developed a compromise recommendation that the reserve powers be incorporated into the Constitution by reference only. The final decision on codification shows how concerns for the for the Constitution’s Westminster traditions were utilised by delegates to limit and constrain the development of the BAPM.

To understand how philosophical tensions limited and defined the final proposed model, the discussion begins with an assessment of the arguments for codification. Drawing on republican concepts of defined and limited power, supporters of codification argued that the Australian Constitution should present an accurate and accessible description of the executive. This would provide the people with a constitutional protection against the use of arbitrary and undefined political power. Turnbull asserted that:

The ARM has always been an advocate of codification … because we believe it is important that our Constitution provide a more meaningful description of the way our country is governed (Constitutional Convention 1998: 117).

This view was supported by republicans such as Councillor Paul Tully who argued that the president’s powers must be codified because the current Constitution does not adequately define executive power. Tully asserted that the Constitution provides significant uncertainty regarding the operation of the executive, conferring a wide array of powers on the Governor-General:

Taken literally, he or she is not only the Commander-in-Chief of the Defence Force of Australia but also has the power to appoint and dismiss ministers at will, to appoint
For Tully, this undefined power would pose significant challenges for a republican president unrestrained by the traditions and conventions of responsible government. Many republican delegates believed that without the Monarch, the head of state would require specific constitutional restraints on the exercise of power. Supporters of full codification such as Tully, Beattie, Kelly and Evans argued that executive power must be limited and defined through the codification of existing arrangements (Constitutional Convention 1998: 99, 96, 104). Codifying existing arrangements would limit the power of the president, clearly define the role of the prime minister and provide certainty for the Australian people (Constitutional Convention 1998: 111). Calls to define and limit executive power are synonymous with a republican approach to constitutional design, which seeks to deliberately check the accumulation of political power through a written and rigid constitution (Zuckert 1994). At the centre of the debate regarding codification were republican attempts to provide greater constitutional safeguards against the abuse of undefined executive power.

For many republican delegates, codification of the reserve powers would ensure that the president and prime minister are subject to the law of the Constitution, providing an important check to political power. With the assistance of Gareth Evans, Working Group Seven developed a resolution calling for ‘full codification of the powers of the head of state in order to eliminate to the maximum practicable extent uncertainty and ambiguity about their meaning’ (Constitutional Convention 1998: 96). The resolution was designed to eliminate the possibility of the president exercising discretionary power. Speaking in support of the resolution, Evans argued that the reserve powers should be codified ‘to make it clear that the head of state retains no independent personal discretion’ (Constitutional Convention 1998: 104). Republican delegates argued that the individual discretion associated with Westminster traditions such as the royal prerogative and the reserve powers create philosophical problems for a republican constitution. For Dr Gallop, ‘republics require the rule of law, in which there is no room for the caprice of the autocrat’ (Constitutional Convention 1998: 109). The president of a republic must conform to the rules of government, which are delineated in the Constitution:

In other words, under a system in which there is reserve power, the potentiality always exists for the application of those powers in ways that reflect the prejudices of those individuals rather than the laws of the society. I believe that we ought now to move
towards a system that goes away from that essentially pre-modern, essentially Monarchical view of the world (Constitutional Convention 1998: 110).

Gallop argued that the Australian Constitution should establish specific mechanisms to limit and define the role of president. This would subject executive decisions to judicial review and provide the president with a specific and important role in upholding the principles of Australian democracy (Constitutional Convention 1998: 110). This republican approach to constitutional design is at tension with Australian traditions of parliamentary responsible government, which are underpinned by the incremental growth of constitutional convention. For critics of codification, defining the reserve powers and the traditions of responsible government would unacceptably involve the High Court in political disputes, undermining the flexibility of the Constitution.

Delegates opposing codification argued that the conventions of parliamentary responsible government would be undermined by judicial review. Reverend Hepworth believed that over time the process of judicial review alters the basic operation and interpretation of conventions. Hepworth asserted that:

The legal practice that arises out of codification leads to understandings of the Constitution completely beyond and often quite different from those which the drafters imagined (Constitutional Convention 1998: 92).

For Hepworth, codification will ultimately lead to a complete distortion of the current conventions. This view was shared by delegates from Working Group One who also believed that submitting long-standing constitutional conventions to judicial review would politicise the High Court. According to Professor Greg Craven, Working Group One reached a strong consensus regarding the need to retain the unwritten traditions of responsible government. Craven states that ‘the working group was strongly of the view that conventions should not be enforced through the Courts’ (Constitutional Convention 1998: 84). Full codification of the reserve powers ‘would involve judges in high politics, to which they are unsuited, and would attract an odium that should not be imposed upon them.’ Craven believed that the chief protection of the constitutional system in relation to the powers of the head of state was not an ‘illusory codification’ but the operation of parliamentary conventions, which are ‘a good deal more sophisticated and compelling than some of its critics would give credit to’ (Constitutional Convention 1998: 84). Craven and other members of Working Group One such as McGarvie believed that codification is inconsistent with the core values of Australia’s system of responsible government (Constitutional Convention 1998: 84, 142). There was a
fundamental disagreement between republicans who preferred the limitation of executive power through codification and those delegates who maintained that judicial review would undermine the traditions of parliamentary responsible government. For these delegates, unwritten conventions are important because they allow for future constitutional development and the capacity to adapt to changing circumstances.

Underpinning arguments against codification were concerns for the flexibility of the Constitution’s current executive arrangements. Many delegates believed that codification would create an inflexible constitutional arrangement that cannot adequately respond to changing circumstances. Councillor Leeser asserted that codification will ‘put future generations into a straightjacket … Matters become inflexible and we bind future generations’ (Constitutional Convention 1998: 126). This view was supported by Winterton who maintained that codified laws may be inappropriate or damaging in future circumstances. For Winterton, codification is not desirable because ‘the future cannot be adequately predicted’ (Constitutional Convention 1998: 89). Unforeseen circumstances will arise and the head of state will require some flexibility to ensure a democratic resolution to crises. Reporting for Working Group Two, Julie Bishop defended the need for flexible and un-codified reserve powers:

As the reserve powers are exercised on extraordinary and rare occasions, the conventions are likewise extraordinary and rare and therefore need to be flexible, with the capacity to respond adaptively to unpredictable situations (Constitutional Convention 1998: 87).

For Bishop, flexibility and discretion allow for unforeseen political circumstances and the natural evolution of constitutional principles. Arguments defending the flexibility of constitutional convention can be linked to Australia’s Westminster traditions, which allow for the gradual and incremental growth of constitutional convention. This incremental growth allows the Constitution to reflect developments in society. Winterton, Craven, Lesser and McGarvie all argued that the flexibility of the Westminster system allowed the Australian executive to develop from being a dependent colonial administration to the government of an independent nation (Constitutional Convention 1998: 84, 89, 126, 143). For these delegates, Australia’s transition to sovereign nation occurred without the need for formal constitutional change, reflecting the benefits of constitutional convention. Ultimately, the uncodified conventions of the executive are difficult to reconcile with institutions that derive from federal and republican constitutional traditions, which include a written and rigid constitution adjudicated by a High Court vested with the powers of judicial review. In particular, the
Constitution’s unique combination of federal bicameralism and a responsible government executive ensured that the debate involved addressing difficult issues arising from the Senate’s power to block supply. This is important because it ensured that the partisan arguments surrounding the 1975 constitutional crisis contributed to the debate on codification.

Many delegates drew on the events of the 1975 to support or refute arguments for codification. Turnbull outlined the difficulties associated with defining the reserve powers, particularly in light of the dismissal:

At the moment there is an undoubted power invested in the Governor-General and indeed, state governors to dismiss a Prime Minister or Premier for a serious breach of the law. When I say it is an undoubted power, I mean that everyone agrees it exists; but there is absolutely no agreement as to the circumstances in which it should be exercised (Constitutional Convention 1998: 117).

The ambiguity associated with the reserve powers and the acrimony over the dismissal led many delegates to argue against codification. Delegates from Working Group One believed that codification would unnecessarily involve the partisan contests of 1975 (Constitutional Convention 1998: 83). This argument was predominantly elaborated by delegates seeking to protect the conventions of parliamentary responsible government. Conversely, republicans believing in full codification argued that the partisan obstacles could be surmounted and the Constitution could be rewritten to provide a clear mechanism to resolve political deadlock. Supporters of codification such as Bob Carr, Gareth Evans and Peter Beattie argued that the transition to a republic should be used to permanently resolve the dispute by removing the Senate’s capacity to defer or reject supply (Constitutional Convention 1998, 105, 112). Other delegates such as Withers and Turnbull believed that removing the Senate’s power would be unachievable because it would be ‘strenuously opposed’ by the Australian people (Constitutional Convention 1998: 118, 167). As with the original constitutional conventions held in the 1890s, the debate was characterised by the philosophical tensions associated with amalgamating federal bicameralism and responsible government. These tensions were exacerbated by the possibility of a directly elected president. To reconcile the significant tensions that developed throughout the debate on codification of the president’s powers, the ARM proposed a compromise constitutional arrangement, which would ensure the conventions of responsible government would be partially codified.

Throughout the Convention the ARM reached a compromise between republicans seeking full codification and those advocating the traditions of responsible government. The
BAPM preferred by the Convention proposed that powers exercised in accordance with ministerial advice should be codified and that the reserve powers should remain undefined (Constitutional Convention 1998: 846). In the communiqué presented to the Prime Minister on the final day of the Convention, delegates recommended that the reserve powers be incorporated by reference. A specific constitutional provision should state that the reserve powers and the conventions relating to their exercise continue to exist. Delegates supporting the BAPM believed that the ordinary powers of the Governor-General could be codified, but the reserve powers could not. Supporting the model, Turnbull stated:

The partial codification model would have the virtue of improving the comprehensibility and meaning of the Constitution by stating the non-controversial, non-contentious principles of our system of government and also by preserving the flexibility of the conventions’ (Constitutional Convention 1998: 117).

Delegates avoided consideration of the many difficult theoretical questions that arise in relation to codification of the reserve powers. This approach is synonymous with the original Constitution, which also codifies certain elements of the executive section, entrusting others to the conventions of responsible government. The partial codification method ensures that excise of the reserve powers would not be subject to judicial review and that there would be no specific mechanism to resolve a political deadlock over supply. Thus, the final outcome recommended by the Convention and supported by the ARM is a compromise between republican and monarchist delegates, which does not address the theoretical and philosophical tensions at the centre of the Constitution. Rather, the development of the BAPM was limited and defined by a conservative approach to constitutional reform, which sought to continue the traditions and conventions of parliamentary responsible government.

**Conclusion**

Chapter Six has considered the philosophical and theoretical arguments that underpinned the development of the BAPM. By assessing the arguments employed by the delegates throughout the 1998 Constitutional Convention, the chapter reveals a contest between ideas of parliamentary sovereignty, which derive legitimacy from the Crown, and republican concepts of popular sovereignty that believe government authority can only be sanctioned by the Australian people. The chapter shows that despite the High Court and the Parliament declaring that Australian sovereignty resides with the people, theoretical tensions regarding the foundations of national sovereignty continue to underpin the republic debate. More specifically, the debate at the Convention was largely framed as a simplistic or reductionist
choice between republican and Westminster constitutional concepts. Ultimately, a conservative approach to constitutional change determined the nature of the debate, defining the final recommendations of the Convention. The case study finds that a majority of the delegates choose to reject republican ideas of a directly elected president in preference for minimal change to the current Constitution.

Following the Convention’s decision to endorse the republic, each of the major constitutional debates was resolved in favour of retaining the central elements of parliamentary responsible government. Specifically, to reconcile popular sovereignty with the Constitution’s Westminster traditions, the Convention endorsed an Australian head of state selected by the prime minister and chosen by the Parliament. This hybrid arrangement would have resulted in the Australian people being sovereign through the prism of parliamentary democracy. The BAPM would establish an Australian republic, while strengthening parliamentary sovereignty. The decision to reject direct election was accompanied by a compromise on the powers of the president. The final decision on codification was a compromise between delegates seeking to limit executive authority through codification and those delegates who supported a continuation of the unwritten traditions of responsible government. On the final day of the convention, Peter Costello noted the philosophically inconsistent nature of the BAPM: I do not believe this is an optimal model. I think it is a hybrid on a hybrid. Nobody would have designed this a priori … It is a compromise (Constitutional Convention 1998: 975). Sir David Smith reiterated Costello’s sentiment: ‘The Turnbull model diminishes the nation by offering us a hybrid head of state under a hybrid Constitution (Constitutional Convention 1998: 886). These comments are important because they confirm that the Convention was constrained by the complex and hybrid nature of the existing Constitution. Theoretical difficulties reconciling the traditions of responsible government with modern republican constitutional theory shaped the discourse at the Convention, defining the final outcome.

The first two case studies have outlined specific and practical ramifications resulting from the Constitution’s contested philosophical foundations. Chapter Five shows how the contested nature of the separation of powers was utilised to advance an innovative and novel interpretation of Australian constitutionalism. Chapter Six was chosen to show that the Constitution’s contested philosophical foundations have been used for more than advancing a novel interpretation of government. Chapter Six shows that theoretical tensions in Australian constitutionalism have also resulted in political conservatism. The final case study investigates the philosophical arguments that underpinned the Gillard Governments failed
attempts to legislate the Malaysia Solution. By analysing the philosophical arguments employed in the High Court and in the Parliament, the thesis finds that the Gillard Government’s inability to legislate offshore processing policy was, to a certain extent, the result of political actors and institutions exploiting theoretical tensions that exist within Australia’s constitutional system. In this way, the thesis outlines how the Constitution’s contested philosophical foundations have advanced and constrained developments in Australian constitutionalism, while also discussing the ways that institutions and political actors utilise the language of traditions as a political tool to influence the development of complex public policy such as offshore processing.
Chapter Seven: The Malaysia Solution

To answer questions regarding the role of constitutional theory in contemporary political practice, the thesis assesses three political events that have been characterised by tensions relating to the hybrid and contested nature of Australian constitutionalism. The thesis adopts a case study approach to demonstrate three different and distinct ways that the Constitution’s contested philosophical heritage has impacted on political practice. The first case study, Chapter Five, shows how the contested nature of the separation of powers was utilised to advance an innovative and novel interpretation of Australian constitutionalism. Chapter Six was chosen to show that the Constitution’s contested philosophical foundations have been used for more than advancing a novel interpretation of government. Chapter Six shows that philosophical tensions in Australian constitutionalism have also resulted in political conservatism. Chapter Seven builds on this analysis by showing that philosophical tensions in Australian constitutionalism have been used opportunistically as a political tool to alter or impede the development of public policy. In this way, the thesis shows that the hybrid nature of the Constitution impacts on more than constitutional debates and issues. The two traditions approach can be used to better understand the development of complex public policy such as offshore processing.

The final case study, Chapter Seven, is an examination of the Gillard government’s failure to legislate and implement the Malaysia Solution. On 25 July 2011, Prime Minister Julia Gillard announced the government’s intention to transfer 800 asylum-seekers to Malaysia in exchange for the resettlement of 4,000 people who had already been processed and determined to be refugees. The Malaysia Solution is an unusual event in Australian constitutionalism because the executive was unable to enact its offshore processing policy. The High Court rejected the Minister’s capacity to make a declarative judgement in good faith and the Senate obstructed the government’s attempts to re-establish untrammelled executive authority in migration matters. The chapter traces the legislative and judicial process chronologically to identify the philosophical arguments that were utilised to defend the executive’s capacity to implement offshore processing and, similarly, to investigate the language that was employed to undermine the Gillard Government’s agenda. The chapter argues that the legislative and judicial process was characterised by two contending conceptions of individual rights and the separation of powers. Government arguments in support of parliamentary sovereignty and ministerial accountability were directly confronted with a liberal democratic understanding of the Constitution, which understands the separation
of powers as a device for limiting governmental power and protecting individual liberty. The chapter shows that underpinning the failure of the Malaysia Solution was a dispute regarding the operation of a parliamentary executive within a federal constitutional framework, particularly when individual rights are involved. Understanding this debate is important because a contest or dispute over individual rights and the separation of powers was utilised as a political tool to challenge the orthodox method of executive government, overturning more than 100 years of bipartisanship on untrammelled parliamentary sovereignty in migration matters.

The first section of the article situates the Malaysia Solution in the context of Australia’s historical approach to migration policy, linking the government’s arguments to concepts of parliamentary sovereignty, ministerial accountability and utilitarianism. Throughout the legislative process and in the High Court the Gillard Government used historical precedent to argue that the conventions of responsible government have traditionally provided the prime minister sufficient authority to implement migration policy deemed to be in the national interest. The second section of the article assesses the High Court’s decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*M70*). The longstanding acceptance of parliamentary sovereignty in migration matters was challenged in *M70*, where the court heard contending arguments regarding the appropriate restraints on executive power. After an expedited hearing before the Full Bench, a majority of the Court held invalid the Minister’s declaration on the basis it did not comply with legislative protections designed to uphold the *Convention Relating to the Status of Refugees 1951*(Refugee Convention). It is important to recognise that the chapter acknowledges ideas of legal formalism, and understands that the Court was making a statutory determination. Rather, the chapter contends that in determining whether the Minister’s declaration was a ‘jurisdictional fact’, the Court adopted an understanding of the judiciary’s role in Australian government, which prefers the dominance of the written Constitution and a strong separation of powers. The Court privileged its own role in statutory determination over the conventions and traditions of responsible government. The final section of the article considers the Senate’s decision to reject the *Migration Legislation*

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16 The chapter draws on Elizabeth Fisher’s (2015: 972) definition of legal formalism as a style of legal reasoning that gives authority to the “idea that Courts determine legal boundaries by deploying formal, conceptual, and logical analysis.” In this view, statutes provide rigid frameworks that mark the boundaries of administrative power.

17 The chapter sits within the emerging consensus that members of the High Court have recast the Constitution’s exclusive vesting of federal judicial power in Chapter III as a strict legal limitation upon the powers of the Commonwealth. Fundamental to this understanding of the Constitution is that the validity of all legislation and executive action is judged by the courts (Wheeler 1997: 249; Parker 1994: 341; Winterton 1994).
Amendment (The Bali Process) Bill 2012 (Cth). Following the High Court’s decision in M70 the Gillard Government sought to amend the Migration Act 1958 (Cth). Relying on concepts of human rights and a strong separation of powers, the Greens and the Coalition utilised the Senate to reject the government’s amendments. A majority of the Senate preferred to limit the capacity of the executive on the basis of human rights, directly rejecting the government’s defence of parliamentary sovereignty and ministerial accountability. To confirm that the Constitution’s contested philosophical foundations can be used opportunistically as a political tool, the chapter concludes by reflecting on the Abbott government’s decision to immediately reinstate parliamentary sovereignty in offshore processing policy.

Chapter Seven utilises analysis of Hansard, legislation, High Court transcripts, media releases and speeches to identify the theoretical and philosophical arguments underpinning the failure of the Malaysia Solution. This approach differs in important ways from the existing literature. Much of the literature that examines the Malaysia Solution is concerned with legal interpretations of M70 and its implications for refugee law (Brigden 2012; McAdam & Wood 2012). This work is complemented by authors who address the ramifications of the Court’s decision in M70 for the reception, processing and protection of asylum seekers and refugees (Davies 2013; Foster 2012). A limited number of scholars have begun to assess the ramifications of the failed Malaysia Solution for Australian constitutionalism. For example, Anthony Pastore has raised concerns that the Court’s decision in M70 has serious implications for political accountability and democratic legitimacy. The article builds on the work of these authors to the extent that the discussion assesses the challenges associated with the incorporation of human rights into Australia’s domestic legal regime. The work differs from the existing literature because it is concerned with the constitutional traditions that inform Australian government. As such, it is critical to acknowledge that the failure of the Malaysia Solution can be explained in terms of political expediency. Tony Abbott and Scott Morrison have acknowledged that political expediency was central to the Coalition’s blocking of the Gillard Government’s proposed changes to the Migration Act.18 While political expediency remains a constant factor in the political process, it is the purpose of Chapter Six to reflect on the importance of constitutional theory in contemporary political discourse. The discussion analyses the way institutions and political actors draw on competing constitutional traditions to explain policy and judicial decisions.

18 See, for example, Mark Kenny, “Scott Morrison says he followed Tony Abbott’s orders on Malaysia solution” Sydney Morning Herald, 18 August 2016.
The Malaysia Solution and the traditions of parliamentary responsible government

The first section of the article discusses the Malaysia Solution in the context of the historical development of offshore processing and refugee policy. The Gillard Government’s arguments in support of the Malaysia Solution can be situated within Australia’s longstanding and bipartisan approach to migration policy, which has been to provide the parliament with untrammelled constitutional power. Both the Federal Court and the High Court have, at different times, confirmed that the conventions of responsible government provide the prime minister significant authority to implement migration policy. The section contends that the operation of this orthodox approach to migration policy has been sanctioned by Australia’s Westminster traditions, which include parliamentary sovereignty, ministerial accountability and a utilitarianism that believes rights are statutory and under the protection of parliament.

In this traditional or orthodox understanding of the Constitution, a parliamentary majority in the House of Representatives allows the prime minister to develop policies that are deemed to be in the national interest. Parliament is not a threat to liberty; rather, individual rights are secured by means of responsible government (Patapan 1997: 500; Collins 1985: 47). It is the purpose of the discussion to outline how both the Gillard and Howard governments relied on this traditional or orthodox approach to migration policy.

Tracing the historical, legal and political development of offshore processing and refugee policy provides insight into the philosophical arguments that underpin the Malaysia Solution. Historically, the Constitution’s Westminster traditions have provided the executive with significant latitude in migration matters and wide powers have been confirmed by the High Court (Vrachnas et al. 2011:16). The High Court has traditionally given executive powers in migration a broad interpretation. In a 1906 judgment, Sir Samuel Griffith asserted that the Commonwealth has an ‘inherent general power’ to direct migration and ‘make laws for the peace, order, and good government of Australia’ (1906 4 CLR 395). Griffith believed that in migration matters the government should have untrammelled constitutional powers

…including the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it (Robtelmes v Brenan 1906 4 CLR 395).

In supporting the sovereignty of the Parliament, Griffith developed the traditional or orthodox interpretation of executive power in migration matters, which places very few limitations on

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19 See Robtelmes v Brenan (1906) 4 CLR 395; Ruddock v Vadarlis (2001) 110 FCA 491.
the prime minister and cabinet. This orthodox view is supported by other developments in High Court jurisprudence such as the *Engineers’ Case*, where the Court held that “the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts” (1920 28 CLR 129). Significantly, however, ideas of untrammelled parliamentary power in migration have been confronted with a right-based liberal tradition that has emerged in Australian politics subsequent to Federation.

The Federal Government’s endorsement of international human rights treaties has limited parliamentary sovereignty in migration matters. As a signatory to the *Refugee Convention*, Australia assumed specific international legal obligations relating to the processing of refugees. Founded on Article 14 of the *Universal Declaration of Human Rights* (1948), the *Refugee Convention* recognises the right of individuals to seek asylum from persecution (UNHCR 2010: 1). Article 1 of the Convention endorses a single definition of the term ‘refugee’ and outlines the basic minimum standards for the treatment of individuals seeking asylum (UNHCR 2010: 2). The purpose of the *Refugee Convention* is to define fundamental principles of international refugee law, while not expressly dictating the process or manner in which asylum is granted. Australia’s constitutional and legal arrangements ensure that international conventions do not form part of domestic law unless specifically enacted by Commonwealth legislation (Vrachnas et al. 2011: 182; Pastore 2013: 622). The *Migration Act 1958* (Cth.) implements Australia’s obligations under the *Refugee Convention*, embedding international legal obligations into law. Section 36 (2) of the *Migration Act* specifically delineates the criterion for the provision of a protection visa with reference to the *Refugee Convention*. The section refers to Article 1A (2) of the *Refugee Convention* to determine Australia’s international obligations (Nygh 2000: 2; Migration Act 1958: 58). Crucially, the decision to embed UN declarations into Australian migration law did not prohibit the Howard government from developing a system of offshore processing, which allows refugees seeking asylum in Australia to be transferred to detention centres located in remote pacific nations.

In 2001, John Howard sought a mandate from the Australian people to fundamentally alter Australia’s approach to migration and refugee policy. At the centre of Howard’s 2001 re-election campaign was a commitment that refugees arriving in Australia by boat would not be allowed to enter the country (Marr & Wilkinson 2003). The government negotiated bilateral arrangements with Nauru and Papua New Guinea to ensure refugees would be processed offshore (Marr & Wilkinson 2003:134-144). While critics of the government
rejected the ‘Pacific Solution’ on the basis it did not conform to Australia’s human rights commitments, the Howard government maintained that the Parliament and the executive should have the capacity to implement offshore processing (Hansard 2001: 30360). In doing so, Howard invoked traditions of parliamentary sovereignty and a liberal utilitarianism that rejects broad declarations of rights. Responding to criticism regarding the legality of offshore processing, Howard declared that the Parliament has a ‘fundamental sovereignty to decide who comes to this country and the circumstances in which they will come’ (Howard 2001). Howard argued throughout the 2001 election campaign that the executive should not be limited by the international human rights agenda. For Howard, issues of migration and border protection are ‘surely a matter for the democratically elected government’ (Howard cited Marr & Wilkinson 2003: 193). This understanding of parliamentary sovereignty in migration matters is synonymous with Howard’s broader view regarding the best mechanism to secure individual liberties. Discussing the protection of individual liberties in 2009, Howard rejected limitations on the parliament’s capacity to implement policies in the national interest:

> the best guarantee of human rights in the future is to be found in our system of responsible government, where Ministers sit in Parliament, can be questioned, and give answers, and the government itself may be turned out if parliament feels that it is doing things which violate the proper rights of individuals (Howard 2009).

In the same speech, Howard refuted the philosophical basis of human rights by drawing on ideas of utilitarianism:

> To those who believe that it is possible to establish a list of absolute rights I might remind them of Jeremy Bentham’s famous remark that such a proposition was rhetorical nonsense – nonsense upon stilts (Howard 2009).

Howard’s preference for the traditions and conventions of parliamentary responsible government is reflected in the legislative framework that the government relied on to support the operation of offshore processing.

To ensure that the relevant minister would have significant flexibility and capacity to implement the Pacific Solution, the Howard government utilised the Parliament to amend the Migration Act. Following the diversion of asylum seekers on the Tampa to Nauru and the ‘children overboard’ affair, the Australian government passed the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth.); and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth.) The amendments were designed to provide the government considerable discretion in relation to the treatment of
refugees arriving by boat. Rather than determining the refugee status of the asylum seekers in Australia, the government could transfer individuals to another country (McAdam and Purcell 2008: 100). A key component of the legislative changes related to new ministerial powers outlined in s.198 A. Section 198A (3) provided the Minister the power to declare, in writing, that a specified country will “meet relevant human rights standards” (Foster & Pobjoy 2011: 583). The Howard Government amendments were central to the Pacific Solution, allowing the lawful transfer of refugees to countries such as Nauru, which in 2001 was not a signatory to the Refugee Convention.20 The Howard Government believed human rights could be assured through ministerial accountability and cabinet government.

The Commonwealth power to detain refugees was challenged in the Federal Court. On September 18, 2001, three judges of the Australian Federal Court issued a two-to-one decision allowing the expulsion of 433 Afghan asylum seekers from Australian territorial waters. The decision in Ruddock v. Vadarlis (2001 110 FCR 491) is significant because it confirmed the Parliament’s untrammelled power in migration matters, providing a significant legal foundation for Howard’s offshore processing regime (Dorsey & Whitney 2002: 253). The Court was asked to consider whether the ‘Commonwealth Executive possessed any power independent of statute to prevent the entry of aliens and, if so, whether such power had been displaced by the detailed provisions of the Migration Act’ (Kerr 2009: 160). The Court ultimately accepted that s. 61 of the Constitution provides the Commonwealth with the executive power to dispel aliens from entry into Australia, and to detain them throughout the process. Citing Griffith’s 1906 judgment in Robtelmes v Brennan (1906) 4 CLR 395, Justice French stated that the executive had an inherent ‘sovereign power’, which had not been displaced or altered by the terms of the Migration Act (2001 110 FCR 491). The Court developed a non-statutory executive or prerogative authority in migration matters, deriving from the terms of the Constitution (Kerr 2009: 164). The decision provided the Howard government with the widest possible discretion and flexibility to develop offshore processing regimes. While the Pacific Solution has been the subject of considerable academic and public examination, the validity of the ministerial declarations made pursuant to section 198A were never challenged in the High Court. The Howard Government’s offshore processing regime was sanctioned by the traditions and conventions of parliamentary responsible government and the Federal Court’s orthodox approach to executive authority in migration matters.

Ultimately, these developments in migration and refugee policy are integral to understanding the philosophical arguments that underpin the Malaysia Solution.

In response to an increase in asylum seeker boat arrivals and deaths at sea, the Gillard government sought to expand and develop Australia’s offshore processing regime. In March 2011, the government endorsed the multilateral Regional Cooperation Framework, the ‘Bali Process’, to develop international solutions to issues relating to refugees and asylum seekers. Member nations agreed that an inclusive regional cooperation framework would provide a more effective way for states to reduce refugee migration throughout the region (Davies 2013: 30). The announcement of the Malaysia Solution was viewed by the Gillard government as a practical outcome of the Bali Process. For Gillard (2011a), the Malaysia Solution represented an important step ‘in building a sustainable regional framework and a solid foundation upon which to continue engaging with our neighbours and the international community.’ Importantly, the ‘Bali Process’ required negotiating with states, including Malaysia, that have not ratified the Refugee Convention (Davies 2013: 30). The Gillard Government believed that historical precedent would allow the Minister to make a valid declaration that would comply with section 198 A of the Migration Act.

To meet the provisions established in section 198A, the Gillard Government sought specific assurances from Malaysia. On 25 July 2011, Minister Bowen (2011: 1) stated that ‘the arrangement reaffirms Malaysia’s commitment that transferees will be treated with dignity and respect in accordance with human rights standards.’ This view was supported by Gillard (2011b) who reiterated that the government had worked hard to ensure appropriate protections “… if people are genuine refugees, and have a fear of persecution, then they will not be sent back to their country of origin.” The government contended that the Minister could make a valid declaration that meets the criteria in section 198A (3), despite Malaysia not having specific domestic legislation or being a signatory to the Refugee Convention. Addressing the media, Minister Bowen outlined the Government’s position

… in 2001 the Parliament passed legislation to allow for offshore processing. This was legislation supported by both sides of the Parliament at that time. The clear understanding of both sides of the Parliament … was that this enabled the Minister for Immigration of the day to nominate a country for third party processing where the Minister had made the determination that the protections in place were appropriate. Indeed, under that existing legislation, a declaration was made for Nauru and Papua New Guinea by Minister Ruddock (Bowen 2011).

As with the Howard regime, the Gillard Government believed human rights could be assured through ministerial accountability. The traditions of responsible government and
parliamentary sovereignty allowed Gillard to develop an innovative offshore processing policy that the government believed to be in the national interest. Despite Gillard’s attempts to calm anxiety over human rights, the Malaysia Solution received widespread criticism for being inconsistent with Australia’s international legal commitments.

Critics of the government rejected the Malaysia Solution on the basis it did not conform to predetermined concepts of human rights. In a Senate inquiry into the Malaysia Solution, community organisations such as the United Nations Association of Australia (2011), the Law Council of Australia (2011) and the Human Rights Commission (2011) argued that the Malaysia Solution breached Australia’s human rights obligations. Submissions to the inquiry asserted that Malaysia is not a signatory to the Refugee Convention and has no obligation to respect fundamental human rights such as the principle of non-refoulement. The submissions utilised international human rights agreements to challenge the executive’s authority to implement its offshore processing policy. The Law Council (2011: 5) argued that:

> The agreement appears to be inconsistent with Australia’s obligations under at least the Refugee Convention, the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Rights of the Child (The Law Council 2011: 5).

A contested aspect of the Malaysia Solution was the extent to which obligations in the Refugee Convention beyond Article 33 (non-refoulement) operate to constrain the transfer of asylum seekers. There is a question whether the Minister need only consider compliance with Article 33, or whether a determination of the situation in the receiving state must extend to all of Australia’s international commitments (Foster & Pobjoy 2011: 622). These questions result from the emergence of rights-based liberalism in Australia. Human rights are increasingly being utilised to denounce public policy and undermine executive action. For example, Adam Bandt moved a motion in the House of Representatives ‘to condemn the Gillard government’s deal with Malaysia’ (Hansard 2011: 4950). Bandt argued the agreement was ‘contrary to the spirit of Australia’s broader international human rights commitments’ (Hansard 2011: 4950). Supported in the Senate by the Greens and seconded by independent MP Andrew Wilke, the motion reveals one of the challenges that have developed in conjunction with the increased prominence of human rights. Community organisations and MPs utilise human rights in an attempt to limit the capacity of the executive on the basis of individual liberties, such as the human right to seek refuge.

By discussing the historical development of offshore processing policy, the section first section of the chapter has situated the Malaysia Solution within Australia’s longstanding
and bipartisan approach to migration policy, which is underpinned by the traditions of parliamentary responsible government. To justify offshore processing both the Howard and Gillard governments relied on ideas of ministerial accountability, cabinet government and a prime minister accountable to the people through the Parliament. Furthermore, the legislative framework that was developed to support the Malaysia Solution and the Pacific Solution provided the prime minister and cabinet significant discretion and flexibility to implement offshore processing. At different times, the High Court and the Federal Court have supported this orthodox approach to offshore processing policy, developing a non-statutory executive or prerogative authority in migration matters. This is important because in 2011 the longstanding acceptance of parliamentary sovereignty in migration matters was challenged in the High Court. Throughout the M70 case, the High Court heard contending arguments regarding the appropriate limits on executive power. Significantly, the High Court did not endorse the sovereignty of parliament or the conventions of ministerial government. The Court’s decision prohibited the Malaysia Solution, forcing the Gillard Government to seek further amendments to the Migration Act.

The High Court and human rights
On 7 August 2011, an application was made to the High Court challenging the validity of the Malaysia Solution. The case concerned an application brought on behalf of two Afghani asylum seekers who were detained pending their removal to Malaysia. The Court was required to assess whether the Minister’s declaration with respect to Malaysia satisfied the criteria in section 198A of the Migration Act (Wood and McAdam 2012: 282). Analysis of the judicial process reveals contending understandings of Australia’s constitutional arrangement and its operation in regards to individual rights and the separation of powers. The case was characterised by disagreements regarding the extent and limits of ministerial authority, particularly when human rights are concerned. The plaintiffs contended that the Minister’s declaration regarding section 198A was not sufficient to guarantee Australia’s international human rights obligations. The plaintiffs sought to utilise the High Court to limit the capacity of the executive on the basis of human rights. Conversely, the government believed all that was required for the Minister’s declaration to be valid was an evaluative judgment made in good faith. Drawing on concepts of responsible government, the defendants contended that the Minister’s authority was sufficient to guarantee Australia’s international human rights obligations. In a departure from the Court’s previous decisions to support wide ranging executive authority, a majority of the Court held invalid the Minister’s
declaration on the basis it did not comply with legislative protections designed to uphold the *Refugee Convention* (2011 244 CLR 144). To understand the philosophical and theoretical arguments that underpin the decision in *M70*, the discussion analyses the contending arguments elaborated in the Court, the majority decision and the dissenting judgment of Justice Heydon. The section argues that in determining whether the Minister’s declaration was a ‘jurisdictional fact’, the Court adopted an understanding of the judiciary’s role in Australian government, which prefers the dominance of the written Constitution and a strong separation of powers. The Court privileged its own role in statutory determination, preferring the written, federal elements of the Constitution over the traditions and conventions of responsible government.

The basis of the plaintiffs’ application was that the Minister made a false declaration because Malaysia does not satisfy the criteria established in section 198A of the Migration Act. While admitting that the purpose of section 198A is to permit the transfer of asylum seekers to a declared country, the plaintiffs relied on Australia’s international human rights commitments to question the Minister’s authority. The plaintiffs submitted that section 198A needs to be understood in the context of the overall legislative scheme:

> The purpose of the section is not simply to enable the taking of a person to another country, nor to enable removal per se, but to fulfil Australia's obligations under the *Refugee Convention* ([HCA PS] 2011: 12).

The plaintiffs contended that, properly construed, the purpose of the *Migration Act* is not advanced by enabling a declaration to be made in relation to a country that does not have any formal human rights protections. The plaintiffs reminded the Court that ‘important fundamental rights are at stake in any decision to make a section 198A (3) declaration’ ([HCA PS] 2011: 14). As such, declared countries must be legally bound by international commitments or domestic law to meet certain human rights standards. Given Malaysia’s lack of domestic human rights protections and a refusal to formally commit to the refugee convention, ‘the Court ought to conclude that none of the section 198A (3) criteria is made out and, as a consequence, the Minister had no jurisdiction to make the declaration’ ([HCA PS] 2011: 14). Crucially, the plaintiffs’ submissions relating to specific human rights protections in Malaysia were underpinned by important arguments regarding the jurisdiction of the Court. In particular, The Court had to determine whether international human rights agreements are sufficient to limit the Minister’s discretion to make a valid declaration.
Underpinning the M70 case were important arguments regarding the High Court’s capacity to check ministerial authority, particularly when human rights are involved. The plaintiffs submitted that the criteria for the Minister’s declaration set out in section 198A (3) were ‘jurisdictional facts’, subject to the review of the Court. The plaintiffs asserted that the Minister’s power to issue the declaration could be reviewed by the Court on an objective basis:

It is the function of the Court, where its jurisdiction is invoked, to determine, for itself, whether those criteria do or do not exist. That is, the Plaintiffs contend that the section 198A (3) criteria are jurisdictional facts in an objective sense, not simply matters of which the Minister must be satisfied (HCA PS 2011: 6).

The plaintiffs were concerned that a ministerial declaration may effectively preclude independent judicial analysis regarding the degree to which Malaysia satisfied the criteria in section 198A. This concern was a direct result of the Commonwealth’s defence of ministerial discretion. The Commonwealth argued that on its proper construction section 198A (3) ‘confers on the Minister a discretion, not subject to preconditions, whose valid exercise is bounded by the minimum constraint applicable’ (High Court of Australia Defendants Submissions [HCA DS] 2011: 14). The government contended that it is the existence of the Minister’s declaration itself, not the truth of the content that engages the operation of the power (McAdam and Wood 2012: 283). The Commonwealth argued that ‘in making a declaration under section 198A the Minister is required to form, in good faith, an evaluative judgment that what he declares is true’ (HCA DS 2011: 26). The Commonwealth’s defence utilised the Howard government precedent in Nauru to argue that section 198A confers on the Minister the widest possible discretion and flexibility to develop offshore processing regimes (Foster 2012: 8; HCA DF 2011: 15). Ultimately, the High Court rejected the Commonwealth’s defence of ministerial authority and responsible government.

By a 6: 1 majority, the High Court held that the Minister did not and could not establish the relevant jurisdictional facts under section 198A (3). The majority believed that the Minister’s declaration did not reflect the legislative intent of the Migration Act, which is to uphold Australia’s human rights commitments (2011 244 CLR 144). The decision rested on the Minister’s failure to appreciate the necessity of international or domestic human rights protections in Malaysia. According to the majority, the Minister’s declaration was not sufficient to guarantee Australia’s international human rights obligations:
Where, as in the present case, it is agreed that Malaysia: first, does not recognise the status of refugee in its domestic law; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments; it was not open to the Minister to conclude that Malaysia provides the access or protections referred to in s 198A(3)(a)(i) to (iii) (Plaintiff M70/2011 v Minister for Immigration and Citizenship 2011 244 CLR 144 at 135).

In a repudiation of ministerial discretion, the Court required specific and objective human rights guarantees. The Court upheld the plaintiffs’ claims that section 198A were jurisdictional facts on the basis that the Commonwealth did not sufficiently regard the ‘text, context and evident purpose’ of the Migration Act (2011 244 CLR 144 at 109). The Court was concerned that providing greater discretion would allow section 198A (3) to be validly engaged whenever the Minister believed that the relevant criteria were met regardless of the objective reality (2011 244 CLR 144 at 109). Central to the decision was that the changes to the Migration Act in 2001 should be seen as ‘reflecting a legislative intention to adhere to that understanding of Australia’s obligations under the Refugee Convention and the Refugees Protocol that informed other provisions made by the Act’ (2011 244 CLR 144 at 49). The judgement represents a shift away from the Court’s traditional or orthodox approach to executive authority in migration matters, toward a liberal democratic understanding of the separation of powers. The M70 decision was more than an exercise in statutory interpretation. The Court utilised powers of judicial review to declare legislation invalid on the basis of individual rights. This understanding of rights and judicial practice closely reflects an understanding of the separation of powers, where the Constitution’s exclusive vesting of federal judicial power in Chapter Three is understood as a legal limitation upon the powers of the Commonwealth (Wheeler 1997:249). Fundamental to this understanding of the Constitution is that the validity of all executive action is judged by the Courts. The Court becomes an avenue for political action, determining the extent of executive power and the nature of individual rights in Australian democracy (Patapan 2000: 171). Thus, an important aspect of the High Court’s decision in M70 is the extent to which human rights is utilised to recast the nature of the separation of powers in Australia.

The majority in M70 did not object to checking executive authority or utilising judicial power in defence of human rights. This was not the view of Justice Heydon whose dissenting judgement defended the capacity of the Minister to make unilateral decisions in migration matters. Heydon asserted that the Commonwealth ‘is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries’ (2011 244 CLR 144 at 150). For Heydon, the only obligations that should be imposed on the Minister
are those found in the *Migration Act*, which ‘has not incorporated the totality of the *Refugee Convention* into Australian municipal law so as to make it a direct source of rights and obligations’ (2011 244 CLR 144 at 154). Heydon believed that it was beyond the Court’s authority to read the requirements of the *Refugee Convention* into the relevant provisions of the *Migration Act*. Migration and external affairs are within the province of the executive, which is accountable to the people through the traditions of responsible government. Refuting the plaintiffs’ contention that the Minister’s decision constitutes jurisdictional facts Heydon stated:

> The Minister is accountable to Parliament for his conduct of those dealings … He may be condemned by parliamentary resolutions. He may have to resign. His conduct may lead to the passing of a motion of no confidence in the Government of which he is a part, and thence to the fall of that Government … But, unless it can be shown that he has not formed in an evaluative judgment, after asking the correct questions, that what he declared was true, he is not accountable to courts of law (*Plaintiff M70/2011 v Minister for Immigration and Citizenship* 2011 244 CLR 144 at 163).

To support ministerial discretion and executive power in migration, Heydon’s decision directly references the traditions and conventions of parliamentary responsible government. Importantly, Heydon’s orthodox understanding of parliamentary sovereignty in migration matters is at philosophical and theoretical tension with the majority decision, which did not trust the minister to make an evaluative judgment. Furthermore, by referencing international law that was not specifically legislated, the majority of the High Court decided the degree to which human rights would impact on domestic policy making. This judicial practice is at the expense of parliamentary sovereignty and raises questions regarding the appropriate executive response.

In response to the High Court’s decision, the Gillard Government sought to restore parliamentary sovereignty by seeking specific amendments to the *Migration Act*. On 12 September 2011, Gillard announced that the Government would introduce legislation to restore executive power:

> The amendments will restore the understanding of the third country transfer provisions of the *Migration Act* that existed prior to the High Court's decision … They will ensure the government of the day can determine the border protection policy that it believes is in the best interests of the nation (Gillard 2011c).

The government’s response to the High Court was underpinned by concepts of utilitarianism and the conventions of responsible government. The 2011 Bill sought to replace section 198A
with provisions that allow the Minister to personally, in writing, designate any country for offshore processing (Commonwealth 2011: 2). The new subsection 198AB (2) asserted that the only condition for the exercise of power ‘is that the Minister thinks that it is in the national interest’ (Commonwealth 2011: 14). In determining the national interest, the Minister only needs to seek a personal assurance in regard issues of non-refoulement and processing procedures. Taylor (2011) argues the proposed amendments were so broad that ‘It would have been within the Minister’s power to make a designation even if no such assurances had been provided.’ In an attempt to circumvent further High Court scrutiny section 198AB proposed that ‘the rules of natural justice do not apply to the exercise of power under subsections 198AB (1) or 198AB (6)’ (Commonwealth 2011: 14). This provision was designed to ensure that those facing removal to a designated country would not have the right to seek a hearing at the High Court (Taylor 2011). The legislation reflected the government’s intention to utilise the Parliament to restore ministerial discretion to the executive.

The Gillard Government believed that the legislation would have bipartisan support because the Coalition would also want to ensure the executive’s discretionary powers in migration matters. The government argued that if the leader of the Opposition, Tony Abbott, did not support the amendments, the Coalition may also face the situation of not having executive power to determine offshore processing policy. Discussing the government’s approach to the Bill, Minister Bowen asserted that:

All we put to the Liberal Party was that the government of the day, whether it be a Labor government or a Coalition government, should have the opportunity to implement its policies, and that they put aside partisan difference and work together in the national interest (Hansard 2011: 10825).

In a repudiation of the government’s bipartisan attempts to restore executive power, Abbott, rejected the amendments on the basis of human rights. In a speech to the House of Representatives on 20 September 2011, Abbott asserted that the proposed amendments ‘completely stripped out the human rights protections that the Howard government had deliberately and self-consciously built into the Migration Act where offshore processing was concerned’ (Hansard 2011: 10824). Abbott sought amendments to the Bill because the Coalition believed ‘what the government proposed was a serious detraction from human rights’ (Hansard 2011: 10824). The Coalition was not willing to support the Bill because it would have enabled transfer of asylum seekers to countries that were not a party to the Refugee Convention. The Opposition’s refusal to support the Bill on the basis of human rights is an example of the contested aspects of Australian constitutionalism being utilised as a
political instrument to impede the development of public policy. Powerful ideas of human rights can be utilised to reject legislation designed for a democratic majority, providing a powerful mechanism for institutions and political actors to limit executive power. On 13 October 2011, Gillard conceded that the Bill had been formally withdrawn from the House before being submitted to a vote. Gillard asserted that the lack of bipartisanship from the Coalition ensured that the government would need to negotiate with the Greens and the crossbenches to develop a legislative solution that would enable the Malaysia Solution to proceed (McAdam and Wood 2012: 275). The political impasse created by the Coalition’s refusal to support the amendments to the Migration Act on the basis of human rights ensured that the government had no coherent refugee policy.

By examining the theoretical arguments employed in the High Court, the discussion has uncovered two distinct philosophical narratives regarding the separation of powers. The government adopted an orthodox understanding of responsible government, reflected in the Commonwealth insistence that the Minister should be provided the broadest possible remit to implement offshore processing regimes. This is contrasted by the High Court’s understanding of judicial power in relation to individual rights, which reflects the Constitution’s liberal democratic traditions. Underpinning the Court’s decision is an understanding of the separation of powers that promotes the independent and impartial exercise of judicial power by directing constitutional authority away from the legislative and executive branches to a Federal Supreme Court (s.71), whose judges cannot be arbitrarily removed from office (s.72). The other significant liberal democratic concept adopted by the Court in M70 is that the separation of powers operates to promote the supremacy of law over arbitrary power, particularly when individual rights are concerned. The independent and impartial exercise of judicial functions is seen as an important check to both the legislative and executive elements of government. As Justice Heydon demonstrated, this strictly defined federal separation of powers doctrine is difficult to theoretically reconcile with a parliamentary executive founded on unwritten conventions, which traditionally allow ministers significant authority and flexibility to deal with matters as they arise.

**The Senate and the separation of powers**

Following hundreds of deaths at sea and an increase in asylum seeker boat arrivals, the Gillard Government came under public pressure to resolve the political and judicial impasse on migration policy. On 27 June 2012, the government supported the Migration Legislation Amendment (The Bali Process) Bill 2012. Introduced to the House of Representatives by
independent MP, Rob Oakeshot, the Bill sought to restore the executive’s power to implement the Malaysia Solution. After extensive debate, a number of independents supported the government, ensuring that the House of Representatives would pass the Bill. As a result of the Court’s decision in *M70* and the subsequent attempts by the Gillard Government to amend the *Migration Act*, the Senate was compelled to consider the extent and limits of executive power, particularly when individual rights are concerned. In repudiation of executive discretion and the will of the House, the Senate confirmed the High Court’s decision by rejecting the proposed amendments to the *Migration Act*. In a unique coalition, Greens, National and Liberal Senators united to condemn offshore processing with countries such as Malaysia who are not signatories to the relevant UN conventions. The Senate overturned longstanding bipartisanship on parliamentary sovereignty in migration and offshore processing policy. The final section of the chapter argues that the debate in the Senate was characterised by two different understandings of the separation of powers. A majority of the Senate preferred to limit the capacity of the executive on the basis of human rights, directly rejecting the Government’s claims that parliamentary sovereignty and ministerial accountability are the best mechanism to secure individual liberty. To show how the Constitution’s contested philosophical foundations can be used opportunistically as a political tool, the section concludes by reflecting on the Abbott Government’s decision to immediately reinstate parliamentary sovereignty in offshore processing policy. To implement Operation Sovereign Borders, the newly elected Abbott Government amended the *Migration Act* to remove all references to the *Refugee Convention*.

The *Bali Process Bill 2012* (Cth.) sought to restore executive discretion in offshore processing and migration matters by directly addressing the High Court’s decision in *M70*. The Bill differed from the proposed 2011 amendments by specifying that the designated country had to be a party to the *Bali Process*. It omitted the express exclusion of the rules of natural justice and included a twelve-month sunset clause proposed by Andrew Wilkie (Taylor 2012). The government stated that the amendments will provide the executive sufficient power to implement offshore processing and ensure ‘the government of the day can determine the border protection policy that it believes is in the national interest’ (Bowen 2012: 1). The Bill provides an expansive definition of the ‘national interest’, affording the Minister the broadest possible remit. The Gillard Government believed that the amendments would allow the Minister to transfer asylum-seekers to nations that are not a party to the *Refugee Convention*:
Offshore entry persons, in respect of whom Australia has or may have protection obligations, should be able to be taken to any country … The designation of a country need be determined only by reference to the fact that the country is a party to the Regional Cooperation Framework (Bowen 2012: 2).

The executive, through the House of Representatives, again expressed a desire to implement a regional solution to migration issues through the *Bali Process*. The passing of the Bill represented a multi-party solution that clearly expressed the intention of the government to provide the Minister with significant discretion to develop offshore processing regimes. The will of the House was that in migration matters the Minister should have the widest possible powers, unlimited by international human rights.

Government Senators provided a series of speeches in defence of the legislation, questioning why the Opposition would not allow the executive greater flexibility and authority in offshore processing. New South Wales Labor Senator, Ursula Stephens, implored the Senate to provide ‘executive government, which has responsibility for dealing with these issues, the authority and the opportunity to work with our regional partners’ (*Senate Hansard* 2012: 4839). Government arguments in support of executive authority were accompanied by a reminder that migration matters have a long history of bipartisanship. Throughout the debate, Government Senators reiterated that Whitlam, Fraser and Hawke worked cooperatively on migration and Labor had supported the Howard government’s 2001 reforms (*Senate Hansard* 2012: 4826, 4784). The government argued that the Upper House in Australia has a tradition of facilitating legislation that protects executive power, particularly in offshore processing. Labor Senators argued that Opposition support in the Senate was critical to the Howard Government’s Pacific Solution. Despite the fact that Howard’s policy was contrary to Labor’s platform, Opposition Senators supported amendments to the *Migration Act* (*Senate Hansard* 2012: 4784). As with arguments in the High Court, the government maintained that it was the executive’s prerogative to determine migration matters. Introducing the Bill, Senator Chris Evans stated that in 2001 the Labor Opposition supported offshore processing because ‘we accepted that the government had the right to respond, to take a policy position that allowed them to deal with that issue, and we supported that’ (*Senate Hansard* 2012: 4773). Similarly, Labor senator Matt Thistlethwaite argued that executive government should ‘have the support of the Opposition to implement a policy that the government believes will work… That is the way the Labor Party conducted itself in opposition on this issue, and the Coalition should show the same courtesy (*Senate Hansard* 2012: 4773). Underpinning the Government’s arguments is a belief that the relationship between the Senate and the executive should be understood as part of the Constitution’s
system of parliamentary responsible government. This understanding of the Constitution emphasises that the prime minister advises the Crown precisely and solely because they have the confidence of the House of Representatives (Saunders 2011: 148). As a result, the Senate should seek amendments that improve and facilitate the transition of legislation (Thompson 2001: 664). Ultimately, Government appeals to support ministerial discretion and parliamentary sovereignty were rejected by a Senate that was unwilling to support legislation that could see asylum-seekers sent to countries that were not signatories to the Refugee Convention.

The government’s focus on the need to maintain executive power was in contrast to the majority of Senators who supported human rights at the expense of ministerial discretion. The Greens did not support the Bill because ‘It will basically sidestep the concerns about human rights protections raised in the High Court decision that found the Malaysia Solution to be invalid’ (Senate Hansard 2012: 4791). Greens Senator Sarah Hanson-Young argued that ‘the Bill goes in complete contradiction to the Refugee Convention that Australia so proudly signed up to and helped draft in 1951’ (Senate Hansard 2012: 4779). The Coalition was united with the Greens arguing that they ‘would not countenance a migration and refugee policy which entirely strips all human rights protections and standards from Australian law’ (Senate Hansard 2012: 4797). South Australian Liberal Party Senator, Simon Birmingham, outlined the Coalition’s preference that executive authority be limited by human rights:

Mr Oakeshott’s bill …would compromise the core principle that Australia has held dear for many decades … that we guarantee those who sought refuge in this country a certain standard of protection. This bill, if passed, would strip those protections (Senate Hansard 2012: 4822).

The Coalition and the Greens endorsed human rights at the expense of executive power, confirming that the Minister would be specifically constrained by the international human rights regime. The Senate’s decision to reject the majority will of the people’s house, 39 votes to 29, ensured that the government had no clear or coherent asylum-seeker policy. Underpinning the decision to reject the Government’s amendments to the Migration Act is liberal democratic understanding of the Constitution, which considers that individual freedom is best protected by a government controlled through constitutionally embedded checks and balances (Thompson 2001: 665). In this liberal democratic view, the Senate is more than an Upper House that protects State interests; the Senate is understood as a constitutional protection against tyranny (Thompson 2001: 665). Thus, the Senate’s decision to vote against the Bill implicitly rejects parliamentary sovereignty as the best mechanism to secure
individual rights. The Senate utilised a liberal democratic understanding of the Constitution to challenge the orthodox method of executive government, overturning more than 100 years of bipartisanship on untrammelled parliamentary sovereignty in migration matters.

The Liberal Opposition’s decision to reject the traditions of parliamentary responsible government in favour of human rights is significant when considered in light of the Abbott Government’s Operation Sovereign Borders. In a return to the traditional or orthodox approach to migration matters, the Abbott Government amended the *Migration Act 1958* (Cth.) to ensure that the Parliament and the executive has the authority to implement its offshore processing policy untrammelled by human rights. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth.) is specifically designed to remove Australia’s obligations under the *Refugee Convention*. The explanatory memorandum states that: ‘The Bill removes references to the *Refugees Convention* from the *Migration Act* and instead creates a new, independent and self-contained statutory framework which articulates Australia’s interpretation of its protection obligations’ (Morrison 2014: 10). The amendments set out the criteria to be satisfied in order to meet the new statutory definition of a refugee and also clarify those grounds which exclude a person from meeting the definition (Morrison 2014: 6). Schedule 2 of the Bill ensures that ‘any illegal arrivals who seek asylum in Australia will not be granted a Permanent Protection visa’ (Morrison 2014: 6). Operation Sovereign Borders is an exercise of executive power underpinned by concepts of utilitarianism and the conventions of responsible government. Outlining their opposition to the amendments, the Refugee Council of Australia asserted:

These new powers would allow the Minister to hold asylum seekers in arbitrary, indefinite and potentially incommunicado detention at sea and forcibly transfer them to countries where they could face persecution and other forms of serious harm, without any scrutiny … They grant a level of authority to the Minister which is well in excess of what is considered permissible under international maritime and human rights treaties (Refugee Council 2014: 1).

In a direct contradiction of the Liberal Party’s approach to the Malaysia Solution, the Abbott Government developed a statutory framework that re-established parliamentary sovereignty in migration matters. Defending the legislation, the Abbott Government stated that ‘it is vital that legislation underpinning maritime security operations remains robust and affords the flexibility to respond to complexities as they arise’ (Morrison 2014: 6). Comparing and contrasting the Liberal party’s views in Opposition with their legislative intentions in government shows how political actors can draw on powerful philosophical conceptions of rights and the role of government to justify politically expedient decisions. Constitutional
traditions can be used opportunistically as a political tool or instrument to support or undermine the development of complex public policy such as offshore processing.

Conclusion
By assessing the philosophical arguments that underpin the Malaysia Solution, the article has uncovered a debate regarding the operation of a parliamentary executive within a federal constitutional framework. Underpinning or contributing to the legislative and judicial process was a contest between two different conceptions of executive authority, individual rights and the separation of powers. An important finding of the chapter is that migration and refugee policy has traditionally been sanctioned by the Constitution’s Westminster traditions, which include a utilitarian approach to rights and a trust in the progressive will of the Parliament. At each stage of the legislative and judicial process the executive argued that the Minister and the Parliament should be trusted to enact policies deemed to be in the national interest. This is in contrast to the High Court and the Senate, which adopted a liberal democratic understanding of institutional checks and balances. In particular, the longstanding orthodox approach to migration policy was undermined by an active High Court exercising the powers of judicial review and a Senate willing to check executive power on the basis of human rights. Importantly, the arguments employed to undermine executive authority did not trust the conventions of ministerial government to ensure the human rights of refugees. Rather, members of the High Court and Opposition Senators preferred the codified rights of a UN convention and a strong separation of powers. Thus, many of the Gillard Government’s challenges were a result of questions regarding the operation of responsible government within a federal constitutional framework. Relying on the uncodified conventions of responsible government is difficult when confronted with institutions that have defined and codified constitutional powers. These challenges are exacerbated when partisan political actors exploit powerful conceptions of human rights to overturn significant and longstanding bipartisanship on parliamentary sovereignty in migration matters.

By tracing the legislative and judicial process chronologically, the chapter reveals the significant contradictions in the Liberal Party’s approach to migration policy. In rejecting the Malaysia Solution, the Liberal Party overturned its longstanding approach to migration policy, which was immediately reinstated after the election of the Abbott Government. This is important because it shows how the contested nature of Australian constitutionalism can be used opportunistically as a political tool to support or impede the development of public policy. The Coalition utilised a contest or dispute over individual rights and the separation of
powers as a political tool to challenge the orthodox method of executive government. The contested nature of Australian constitutionalism allows institutions and political actors to draw on competing philosophical narratives to explain policy or judicial decisions. The failure of the Malaysia Solution was characterised by political actors supporting their policies with reference to various elements of the Constitution’s complex and hybrid philosophical arrangement, often to the detriment of other important constitutional traditions. Thus, Chapter Seven builds on the analysis in the first two case studies by showing that the contested nature of the Constitution impacts on more than constitutional debates and issues. The two traditions approach can be used to better understand the development of complex public policy such as offshore processing. Having demonstrated practical ramifications deriving from the Constitution’s contested philosophical foundations, the final chapter collates the findings of the thesis and revisits the central questions that underpinned the development of the research. The discussion utilises the findings of the thesis to outline Australia’s unique brand of constitutionalism, which combines and synthesises diverse constitutional and philosophical traditions.
Conclusion

The thesis is primarily concerned with answering questions that relate to the influence of constitutional philosophy on contemporary political practice. The thesis questions whether the Australian polity has an established account of what constitutes the underpinning philosophy of the Constitution and, more importantly, if this philosophical inheritance has any enduring impacts. These questions are important because it is a key finding of the thesis that Australian government has a rich and diverse theoretical heritage. The first three chapters of the thesis find that Australian constitutionalism is characterised by philosophical and theoretical tensions, which are a result of the founders’ decision to combine elements of English and US constitutional thought. These two traditions shaped the development of the Constitution, contributing to Australian understandings of critical constitutional concepts such as the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights. Having established the Constitution’s rich and diverse philosophical heritage, the thesis then seeks to understand if the theoretical tensions in Australian constitutionalism manifest in contemporary political practice.

The thesis demonstrates the significance of the Constitution’s rich and diverse philosophical heritage by examining three case studies, which argue that the theoretical tensions embedded in the Constitution have had specific and practical ramifications. The case studies show that, on occasion, disagreements over the philosophical foundations of the Constitution underpin political events, contributing to both the debate and the final resolution or outcome. More specifically, the first case study examines the Whitlam dismissal to show how Sir John Kerr utilised the contested nature of the separation of powers to advance and innovate ideas of the executive and its relationship to the federal elements of the Constitution. The second case study examines the transcript of proceedings recorded throughout the 1998 Constitutional Convention to show how challenges resolving theoretical tensions in Australian constitutionalism underpinned the debate, defining the development of the proposed constitutional model that was put to electors in 1999. The second case study finds that philosophical tensions regarding the final proposed model were reconciled with a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. The final case study examines the failure of the Gillard Government’s Malaysia Solution to show that theoretical tensions in Australian constitutionalism can be used opportunistically as a political tool to alter or impede the development of complex public policy such as offshore processing.
Thus, the thesis demonstrates that philosophical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism.

To understand the significance of the thesis, the Conclusion is divided into three sections. The first section revisits the central questions of the research to outline the key findings of each chapter. The discussion draws on the themes of the thesis to show that at the centre of Australian government is an ongoing negotiation over the core values of the Constitution, which can be discerned in legislative, judicial, and constitutional debates. The thesis contends that this ongoing debate or contest over foundational ideas is a central feature of Australian constitutionalism. The second section considers the practical and theoretical implications of the research. The discussion considers whether there are any substantive benefits deriving from the Constitution’s contested philosophical foundations, as well as providing some practical reasons for the Australian polity to develop a more meaningful consensus regarding the philosophical foundations of government. The final section of the chapter discusses some of possibilities for future research that could be undertaken as result of the findings in the thesis. The discussion outlines how the findings of the thesis provide an opportunity for scholars and policy-makers to re-engage with the philosophy that underpins the Constitution. By drawing together the themes of the thesis, the final chapter seeks to reveal important insights into the philosophical nature of Australian constitutionalism and its influence on contemporary political practice.

Overview of findings
It is critical to remember that the central claim regarding the hybrid nature of the Constitution is supported by an examination of the scholarship. To establish whether Australian constitutionalism articulates an agreed set of principles that guide the direction and limitations of government, Chapter Two reviews the scholarship that has already discussed the philosophical foundations of government. The chapter finds that beyond an agreement that the Constitution is a unique hybrid arrangement, Australian constitutional thought does not articulate an established underpinning philosophical narrative that guides the operation of institutions. The philosophical foundations of government are contested and have been the subject of extensive academic debate. Furthermore, Chapter Two reveals that much of the scholarship is a debate regarding the philosophical foundations of government, which does not extend to the political ramifications of Australia’s hybrid constitutional arrangement. Much of the literature outlining the hybrid nature of the Constitution has not considered the political ramifications that result from the Constitution’s rich and diverse philosophical
heritage. There is significant scope to draw links between the philosophical provenance of the Constitution and contemporary political and policy outcomes. To this extent, the thesis is the first major exploration of the political ramifications associated with having multiple constitutional traditions embedded in Australian government.

To begin to understand the theoretical tensions at the centre of the Constitution, Chapter Three analyses the adoption of institutions that derive from English constitutional thought. The chapter confirms that English conceptions of responsible government, parliamentary sovereignty, representative democracy, constitutional monarchy and utilitarianism persist as a powerful orthodoxy in Australian constitutionalism. Australian constitutionalism is still characterised by many of the nineteenth-century British conventions and understandings of parliamentary democracy, which can be traced to philosophers and constitutional lawyers such as Blackstone, Bagehot, Bentham, Mill and Dicey. These philosophers and thinkers developed a powerful constitutional orthodoxy, which remains central to understanding Australian approaches to the separation of powers, national sovereignty and individual rights. In adopting the institutions of parliamentary responsible government, the founders imbued the executive with a liberal utilitarianism that prioritises the flexibility of unwritten convention. Institutions such as the prime minister and cabinet are designed with the assumption that a democratically elected parliament can be trusted to promote the conditions which support liberty and social progress. Responsible government, representative democracy and the Crown protect individual freedoms, while ensuring government retains the necessary political power to achieve important and continual reform. In this way, the Westminster system provides a series of constitutional safeguards that secure individual liberties without limiting the collective power of government. Ministers have the capacity to respond to political problems as they arise and are not limited by broad declarations of individual rights. These safeguards are the result of significant constitutional evolution, which is made possible through the incremental development of uncodified conventions. Thus, by examining the theoretical provenance of institutions adopted throughout the colonial period, Chapter Three discerns key philosophical assumptions regarding Australia’s constitutional system. English constitutional thought is not, however, the only influence on Australian constitutionalism.

To establish the hybrid philosophical foundations of the Constitution, Chapter Four discusses institutional traditions that can be traced to US constitutionalism. Chapter Four shows that institutional traditions such as federalism, judicial review, popular sovereignty, a Senate and human rights all have philosophical links to US constitutional thought. This is
significant because the Constitution’s federal and republican institutions are founded on an understanding of human nature that is crucially different to the conventions of parliamentary responsible government. The Constitution’s federal and republican institutions were initially designed with the assumption that government cannot be trusted to protect individual liberties. A distrust of human nature and a belief in God-given natural rights authorises an institutional framework that limits and defines constitutional power in a written document subject to judicial review. Thus, Chapter Four shows that the Constitution contains institutional traditions that conceptualise the purpose of government in specifically different ways to institutions that derive from the colonial period. Australia’s federal constitutional framework has a philosophical and theoretical explanation that is at tension with the liberal utilitarianism underpinning the executive and its associated traditions of parliamentary responsible government. By tracing and comparing the shifts and developments in received tradition, Chapter Four discerns that Australia’s constitutional system does not imply or endorse a singular set of constitutional principles. Rather, two predominant philosophical traditions shaped the development of the Constitution, contributing to Australian understandings of critical constitutional concepts such as the separation of powers, the foundations of national sovereignty and the best mechanism to secure individual rights. Furthermore, by comparing the Constitution’s federal philosophical inheritance with the political and legal theory that informs the Westminster tradition, the thesis shows that the two predominant influences on the development of Australian constitutionalism are often at theoretical tension. Having established the Constitution’s rich and diverse philosophical heritage, the thesis then seeks to understand if the theoretical tensions in Australian constitutionalism manifest in contemporary political practice.

The thesis demonstrates the significance of Australia’s theoretically rich constitutionalism by examining three case studies. The case studies find that theoretical tensions in Australian constitutionalism have resulted in or contributed to political innovation, conservatism and opportunism. More specifically, the case studies show that theoretical tensions embedded in the Constitution have been utilised by political actors to advance innovations in Australian constitutionalism, have limited the possibilities for constitutional reform and have also been used as a political tool or instrument to alter the outcome of policy development. The first case study examines how a lack of clarity regarding the separation of powers was utilised to advance innovation in Australian constitutionalism. Chapter Five examines the philosophical arguments employed by Whitlam, Fraser and Kerr throughout the 1975 constitutional crisis. The discussion outlines how each of the major
proponents of the crisis utilised contending philosophical conceptions of the separation of powers to justify partisan and political decisions. Significantly, the thesis finds that Sir John Kerr utilised the contested nature of the separation of powers to advance an innovative and novel interpretation of Australia’s constitutional system. The uncertainty surrounding the separation of powers and the archaic formulation of the vice-regal office in a federal constitutional framework allowed Kerr to redefine the meaning of responsible government, reinvigorate the reserve powers and re-constitute the role of Governor-General.

The second case study was chosen to show that the Constitution’s contested philosophical foundations have been used for more than advancing a novel interpretation of the separation of powers. The chapter examines the 1998 Constitutional Convention on Australia’s potential transition to a republic to show that philosophical tensions regarding the final proposed model were reconciled with a conservative approach to constitutional reform, which favoured a continuation of parliamentary sovereignty and the conventions of responsible government. Many of the delegates struggled to reconcile ideas of parliamentary sovereignty with a directly elected president, choosing to reject republican ideas in preference for minimal change to the current Constitution. This is important because it resulted in a final proposed model that would establish Australian republic, while also ensuring that national sovereignty would continue to operate through the prism of parliamentary democracy. The ARM developed and supported a republican constitutional arrangement that would have confirmed the sovereignty of the Australian Parliament. Thus, the Constitution’s contested philosophical foundations have been used for more than advancing an innovative interpretation of Australian constitutionalism. The second case study finds that theoretical tensions in Australian constitutionalism have also resulted in political conservatism.

The final case study investigates the philosophical arguments that underpinned the Gillard Government’s failed attempts to legislate the Malaysia Solution. The discussion outlines how the Constitution’s contested philosophical foundations can be used opportunistically as a political tool or instrument to support or undermine the development of complex public policy such as offshore processing. By analysing the philosophical arguments employed in the High Court and in the Parliament, the chapter finds that the Gillard Government’s inability to legislate offshore processing policy was, to a certain extent, the result of political actors opportunistically exploiting theoretical tensions that exist within Australia’s constitutional system. In the High Court and in the Parliament, political actors exploited the contested nature of individual rights to justify the decision to undermine executive authority and overturn longstanding bipartisanship on the executive’s capacity to
develop and implement migration policy. Thus, the Constitution’s contested philosophical foundations impact on more than constitutional debates and issues. The two traditions approach can be used to better understand the development of complex public policy.

By examining the use of constitutional traditions in contemporary political and institutional discourse, the thesis reveals that the Constitution’s contested philosophical foundations have had specific political ramifications. The thesis finds that contrary to the existing scholarship on the pragmatic or anti-theoretical nature of Australian politics, competing philosophical conceptions of the Constitution are regularly employed in political discourse. Thus, understanding the subtleties of Australian constitutional theory provides greater insight into the important role of philosophy and tradition in contemporary political debates. To a certain extent, political actors rely on established understandings of government and the Constitution to support policy arguments and defend the actions of institutions. The discussion does not dispute that partisan actors regularly determine the course of political events. Rather, a central theme of the thesis, identified in each of the case studies, is that politicians and institutions utilise constitutional traditions to justify political and judicial decisions. This is significant because at different times, the contested nature of the Constitution has resulted in political actors and institutions adopting contending positions on important political or constitutional issues. Moreover, the thesis shows that on occasion disagreements over the philosophic al foundations of the Constitution underpin political events, contributing to both the debate and the final resolution or outcome.

The capacity to draw on contending philosophical conceptions of the Constitution to justify decision-making is not limited to the political process. The thesis shows that the High Court also draws on contending philosophical conceptions of the Constitution to justify judicial decisions. The thesis finds that at different times since Federation the High Court has employed contending conceptions of individual rights, national sovereignty and the separation of powers, occasionally synthesising traditions to develop a uniquely Australian understanding. Significantly, the thesis reveals that High Court decisions regarding the contested elements of Constitution have not ended debates regarding the philosophical foundations of government. While the separation of powers has been regularly considered by the Court, debates regarding the operation of a parliamentary executive within a federal constitutional framework continue to feature in contemporary political debates. In a similar way, parliamentary legislation and High Court decisions confirming the sovereignty of the people have not ended the republic debate. The Court’s decision to confirm Australian sovereignty preceded the public momentum to formally excise the Queen from the
Constitution. The republic debate is largely about updating the Constitution to reflect developments in Australian constitutionalism. Finally, High Court attempts to embed international human rights treaties into Australian law have been countered by powerful ideas of utilitarianism and parliament sovereignty, which continue to be utilised by both major political parties to justify policies such as offshore processing. Consequently, the thesis concludes that the High Court has not resolved disputes regarding the philosophical foundations of government. Rather, the High Court’s role as constitutional adjudicator has served to confirm and strengthen the philosophical tensions at the heart of Australian government. The High Court, the Parliament and political actors have been constantly re-employing Australia’s constitutional traditions to meet the demands of contemporary circumstances. This has resulted in an ongoing negotiation over the core values of Australia’s constitutional system, which can be discerned in legislative, judicial and constitutional debates. The thesis contends that this ongoing debate or contest over foundational ideas is a central feature of Australian constitutionalism. Thus, the thesis is significant because it sheds new light on the fundamental philosophical characteristics of the Constitution and how they are impacting on contemporary political practice.

**Practical implications and significance of the research**

The second section of the Conclusion outlines the practical significance of the research. The discussion examines some of the benefits and disadvantages deriving from the Constitution’s rich and diverse philosophical foundations. The section provides compelling practical reasons for the Australian polity to develop a more profound or meaningful consensus regarding the philosophical foundations of government, while also noting the resilience and flexibility of the current Constitution. To this extent, the thesis affords an opportunity for informed debate regarding potential developments in Australian constitutionalism.

The thesis has practical significance because the research outlines and establishes the important role of constitutional philosophy in contemporary political discourse. By revealing how political actors utilise the contested aspects of Australian constitutionalism to justify partisan and political decisions, the thesis demonstrates specific challenges for the development of public-policy. Most immediately, the Constitution’s rich and diverse philosophical foundations have ensured that political actors do not have a strong underlying or agreed narrative that influences, guides or limits the development of public-policy. Rather, there is an opportunity for political actors and institutions to utilise a contending philosophical narrative to justify a partisan decision to undermine executive authority. This is
most apparent in the tensions between individual rights and executive authority. The failure of the Malaysia Solution shows how the increasing prominence of rights-based liberalism poses unique challenges for government. The executive must reconcile Australia’s international human rights obligations with a constitutional heritage that largely rejects broad declarations of individual liberty. This process is complicated by federal institutions such as the Senate and High Court willing to exert constitutional power in defence of human rights. The increased acceptance of human rights challenges the orthodox method of executive government, providing a constitutional mechanism for political actors to block legislation or challenge executive authority in the High Court. Thus, through comparative analysis of political dilemmas, the thesis detects critical debates that impact on the executive’s ability to pass legislation.

Another significant practical implication of the Constitution’s contested philosophical foundations uncovered by the thesis relates to the inherent potential for conflict and political deadlock. The thesis finds that linking or underpinning the debates over the separation of powers, national sovereignty and individual rights is a lack of clarity regarding the extent and limits of executive authority. Australian constitutionalism does not have an agreed account of the purpose and function of executive power. By assessing the Constitution’s hybrid philosophical foundations, the thesis finds that the guiding principles of parliamentary responsible government are fundamental features of the Commonwealth that are antithetical to the Constitution’s federal structure. Notions of parliamentary sovereignty, or one element of government having greater power and authority over another, are difficult to theoretically reconcile with a federal model that ensures each element of government has limited and defined jurisdiction. As such, barring the adoption of a bill of rights or a succinct statement regarding the separation of powers, debates surrounding the extent and limits of executive authority will continue. While a lack of clarity regarding the philosophical foundations of the executive has potential to impact on a range of political and policy issues, it is particularly relevant in relation to the protection of individual liberties and in debates regarding the Senate’s constitutional powers. The thesis shows that utilitarian ideas of a powerful prime minister commanding a majority in the House of Representatives can be at the expense of both individual liberties and federal ideas of constitutionally embedded checks and balances.

Finally, the thesis provides fertile ground for both public and academic debate regarding whether the Constitution’s contested philosophical foundations should be addressed. The ability to discern in contemporary policy debates the unsettled philosophical nature of Australian democracy makes possible a self-awareness that is essential for change
and development. There may be an opportunity for the Australian polity to come to a more thoughtful consensus with respect to critical constitutional issues such as: determining the foundations of national sovereignty, developing a robust conception of the separation of powers (particularly in relation to the Senate’s constitutional power); and defining the nature of individual rights and their important role in shaping executive power. Conversely, the research provides a platform to defend and protect the current hybrid philosophical nature of Australian constitutionalism. Being able to adopt diverse liberal traditions to justify political and judicial decisions provides the Australian polity with the flexibility to redefine central aspects of the Constitution to meet unforeseen future circumstances. The High Court’s response to Australia’s gradual transition to sovereign independence is an example of this flexibility identified throughout the discussion in the thesis. Ultimately, the thesis does not contend that the contested aspects of the Constitution should be addressed or that the hybrid nature of government is either a benefit or a hindrance to policy-makers, leaving these questions for future scholarship and debate. Rather, the thesis shows that since Federation political actors and institutions have been combining and synthesising diverse philosophical traditions, producing a unique brand of Australian constitutionalism that may not require any substantive changes.

Future directions
The final section of the chapter discusses some of possibilities for future research that could be undertaken as result of the findings in the thesis. In particular, the section contends that the thesis is significant because it provides a basis for further examination of both the ideas that informed Australian constitutionalism and how these powerful traditions continue to shape and underpin contemporary political practice. The discussion outlines how the findings of the thesis provide an opportunity for scholars and policy-makers to re-engage with the philosophy that underpins the Constitution. This would allow for a more comprehensive understanding of Australia’s complex institutional arrangement, while also offering the opportunity to revitalise comparative constitutionalism.

Most immediately, the thesis reaffirms that constitutional philosophy plays an important role in contemporary political practice. This is important because it moves Australian constitutional thought away from the belief that the operation of government is devoid of philosophical context. Each of the case studies outline how political crisis, constitutional reform and policy development is animated and underpinned by the philosophical traditions that inform the Constitution. The most immediate ramification of this
is to allow and foster a return to the study of philosophy in Australian constitutionalism. For scholars that do seek to reengage with the philosophy of the Constitution, the thesis confirms the importance of a theoretical framework that acknowledges the complexity of Australian constitutionalism. The Constitution has a diverse and multi-faceted philosophical heritage that manifests in a variety of ways. As such, scholars examining the influence of single philosophical traditions, such as republicanism or utilitarianism, are in many ways contributing to the broader debate on the contested aspects of Australia’s constitutional inheritance.

For students of Australian constitutionalism, the thesis provides compelling reasons to further develop the philosophical study of specific institutions such as the judiciary, the parliament or federalism. These studies can be conducted from the perspective of the ongoing debate regarding the contested aspects of Australian constitutionalism. Such a re-evaluation will make room for new insights into the changes that are taking place within institutions and, similarly, in the relationships between institutions such as the executive and the High Court or the executive and the Senate. These studies could ultimately recommend changes to institutions or provide evidence for more far-reaching reform such as a reassessment of federalism or the separation of the executive from the parliament. Furthermore, as a result of this research it may be possible to undertake larger comparative studies of changes in constitutionalism, especially regarding former colonies influenced by English constitutionalism such as New Zealand, South Africa, India, Ireland and Canada. These countries have all adopted a mixture of Westminster and republican or federal constitutional principles. Moreover, the conclusions drawn from this research will aid in the assessment and evaluation of new constitutions being drafted on principles originally deriving from English or US constitutionalism.

By using constitutional traditions to examine the political process, students of Australian constitutionalism can understand how philosophy continues to shape contemporary politics. Given the complex nature of Australian constitutionalism, the two traditions approach can be used as a mechanism to understand the philosophical debates that underpin the democratic process. As outlined and evidenced in the case studies, the two traditions approach provides an entry point to examine a range of complex constitutional issues. The three case studies identified in the thesis provide a small sample of the many constitutional and policy debates that might be better understood in light of the philosophical traditions that inform Australian constitutionalism. For example, debates regarding freedom of religion and the High Court’s interpretations of section 116 of the Constitution may be
better understood with reference to the Constitution’s contested and hybrid philosophical foundations. Likewise, as a consequence of the research it may also be possible to better examine the complexities associated with Indigenous recognition in the Constitution. More broadly, an enhanced awareness of the Constitution’s contested philosophical foundations may assist scholars to identify potential challenges inhibiting reform. In this way, the thesis uncovers a crucial link between Australian constitutional thought and contemporary political practice. Philosophical reflection on the Constitution animates key theoretical debates that continue to impact on contemporary political practice.
List of Transcripts

Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne 1890, University of Sydney Library, NSW.


Official Report of The National Australasian Convention Debates (First Session), Adelaide 1897, University of Sydney Library, NSW.

Official Report of The National Australasian Convention Debates (Second Session), Sydney 1897, University of Sydney Library, NSW.

Official Report of The National Australasian Convention Debates (Third Session), Sydney 1898, University of Sydney Library, NSW.

List of Statutes and Bills

Commonwealth of Australia 1999 *Referendum Legislation Amendment Bill 1999*, Prepared by the Office of Parliamentary Counsel, Canberra

Commonwealth of Australia 2011 *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, Prepared by the Office of Parliamentary Counsel, Canberra


Commonwealth of Australia 2003 *Commonwealth of Australia Constitution Act*, Office of Legislative Drafting, Attorney General’s Department, Canberra, Australia


*Commonwealth of Australia 2014 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*


Commonwealth of Australia 2014 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*
List of Court Cases

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129
Australian Capital Television Pty Ltd v. Commonwealth (1992) 177 CLR 106
D’Emden v. Pedder (1904) 1 CLR 91
Huddart, Parker and Co Proprietary Ltd v Moorehead (1909) 8 CLR 330
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
Mabo v Queensland (No 2) (1992) 175 CLR 1
M70/2011 v. Minister for Immigration and Citizenship (2011) 244 CLR 144
Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1
New South Wales v Commonwealth (the Inter-State Commission case) (1915) 20 CLR 54
Osborne v Commonwealth (1911) 12 CLR 321
Parker v The Queen (1963) 111 CLR 610
R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254
Robtelmes v Brenan (1906) 4 CLR 395
Ruddock v Vadarlis (2001) 110 FCA 491
Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104
Victoria v Commonwealth and Connor (1975) 134 CLR 84
List of References


Bagehot, W 1915, The works and life of Walter Bagehot, (Historical & financial essays; the English Constitution), vol. 5, The Online Library of Liberty, Liberty Fund Inc., USA.

Barton, G 2000, The draft bill to constitute the Commonwealth of Australia, University of Sydney Library, NSW.

Barwick, G 1983, Sir John did his duty, Serendip Publications, NSW.


Coorey, L 1979, *Conventions, the Australian Constitution and the future*, Legal Books, NSW.

Craven, G 1998, ‘Conservative republicanism, the convention and the referendum’, *UNSW Law Journal*, vol. 21, no. 3.
Crotty, M 1998, *The foundations of social research*, Allen and Unwin, NSW.
Davies, S 2013, ‘Protect or deter? The expert panel on asylum seekers in Australia’, *Social Alternatives*, vol. 32, no. 3.
Deakin, A 1890, *Official record of the proceedings and debates of the Australasian Federation conference, Melbourne 1890*, University of Sydney Library, NSW.
Douglass, R 2012, ‘Montesquieu and modern republicanism’, *Political Studies*, vol. 60, no.3

Fraser, M & Simmons, M 2010, Malcolm Fraser: the political memoirs, The Miegunyah Press, Vic.


Garran, R 1897, The coming Commonwealth: an Australian handbook of federal government, Angus and Robertson, NSW.


Gleeson, M 2007, The constitutional decisions of the Founding Fathers, Inaugural annual lecture, University Of Notre Dame – School of Law, Sydney.

Gough, J 1950, John Locke’s political philosophy: eight studies by J. W. Gough, Oxford University Press, UK.


Hancock, WK 1961, Australia, new edn, Jacaranda, Brisbane.


Holmes, B 2013, *Tracking the push for an Australian republic*, background note, Parliament of Australia, Department of Parliamentary Services, Canberra.


Howard, J 2001, Transcript of the Prime Minister the Hon John Howard MP National Press Club address, Canberra, 8 November.


Jost, J 1975, ‘The buck stops when the money runs out’, *The Age*, 16 October.


Kelly, P 1976, *The unmaking of Gough*, Angus and Robertson, NSW.


La Nauze JA 2000, The federal story the inner history of the federal cause 1880–1900, Deakin, Alfred (1856–1919), University of Sydney Library, NSW.

Law Council of Australia 2011, Australia’s agreement with Malaysia in relation to asylum seekers, Senate Legal and Constitutional Affairs References Committee and the Human Rights Commission, 15 September 2011.


Locke, J 2010, Two treatise of government, in P. Laslett (ed.), Cambridge University Press, USA.


Lumb, R 1983, Australian constitutionalism, Butterworths, Australia.


Machiaveli, N 1996, Discourses on Livy, University of Chicago Press, USA.


Marr, D & Wilkinson, M 2003, Dark Victory, Allen & Unwin, NSW.


McAdam, T & Purcell, K 2008, ‘Refugee protection in the Howard years: obstructing the right to seek asylum’, Australian Year Book of International Law, vol. 27.

McAdam, J & Purcell, K 2009, ‘Refugee protection in the Howard years: obstructing the right to seek asylum’, Australian Year Book of International Law, vol. 27.


Melleuish, G 1995, Cultural liberalism in Australia: a study in intellectual and cultural history, Cambridge University Press, UK.


Menzies, R 1967, Central power in the Australian Commonwealth: an examination of the growth of Commonwealth power in the Australian Federation, University Press of Virginia, USA.


Patmore, G 2009, *Choosing the republic*, University of NSW Press, Australia.

Pierson, P 2004, Politics in time, Princeton University Press, USA.


Quick, J & Garran, R 2000, Commentaries on the Constitution of the Commonwealth of Australia, University of Sydney Library, NSW.


Singleton, G, Aitkin, D, Jinks, B & Warhurst J 2009, Australian political institutions, Pearson, Australia.


Stoner, JR 2003, *Common law liberty: rethinking American constitutionalism*, University of Kansas Press, Lawrence, Kansas.


Whitlam, G 1975a, Prime Minister’s Speech at a Public Meeting, Port Augusta, 2 November 1975, Whitlam Institute E-Collection.

Whitlam, G 1975c, ‘PM counting on rift in Opposition’, *Sun Herald*, 19 October.

Whitlam, G 1975d, Prime Minister's interview with Kerry O'Brien on Four Corners, PM Transcripts, Department of Prime Minister and Cabinet, Saturday 18 October, http://pmtranscripts.dpmc.gov.au/release/transcript-3925


Yanow, D 2003, ‘Interpretive empirical political science: what makes this not a subfield of qualitative methods’, *Qualitative Methods*, 2nd edn, Fall.


