Christmas Island: A question of self-determination
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Chapter 1: The Notion of Democratic Governance

Current Governance Arrangements on Christmas Island

Currently, Christmas Island is a non-self-governing external territory of Australia and has been since the ‘transfer’ of rights in October 1958 from the British Straits Settlement (Singapore) authority by virtue of section 122 of the Australian Constitution. That is, chapter VI, section 122 of the Australian Constitution prescribes that the Parliament may promulgate laws for the government of any territory surrendered by any State to, and accepted by, the Commonwealth, or of any territory placed by the Crown under the authority of, and accepted by, the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent and on the terms that it thinks fit. In this regard, the transfer of Christmas Island from the British Straits Settlement (Singapore) to the Commonwealth of Australia was executed expressly by order of the Queen (at the time) and by legislation by the Parliament of the United Kingdom and the Parliament of the Commonwealth of Australia. Neither the excision from the ‘Colony of Singapore’ nor the transfer to Australia involved any reference/question to the people living on Christmas Island at that time. Christmas Islanders still celebrate ‘Territory Day’ in recognition of attaining ‘independence’ from British (and Singaporean) colonial rule.

The historical arrangements (including social, economic and legislative) for Christmas Island amounted to governance by the British as a ‘dominion’ of the Empire. From its transfer to Australia as a non-self-governing external territory in 1958, Christmas Island was governed directly from Canberra until the first comprehensive consideration of the constitutional status and system of laws

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applying to Christmas Island occurred in 1991 when the Parliament of the Commonwealth of Australia’s House of Representatives Standing Committee on Legal and Constitutional Affairs reviewed the legal regimes of Australia’s external territories. The subsequent report, *Islands in the Sun, Parliamentary Inquiry Report on the Governance of Christmas Island – Commonwealth of Australia 1991*, proposed several reforms that form the basis of the current applied governance regime as introduced by the ‘Territories Reform Act 1992’.18 Thus, the report *Islands in the Sun* and its subsequent findings are integral to the study and will be examined in more detail in Chapter Four. Of particular interest specifically in respect of Christmas Island, the Committee recommended that the Commonwealth ensure, in its administration of Christmas Island, that the Territory not assume the characteristics of a non-self-governing Territory within the terms of Chapter XI of the United Nations Treaty. The reasons that this recommendation (among others) was not implemented will again be discussed and considered in further detail in Chapter Four of this study, given the change in demographic, legislative and financial circumstances some 20 years after the report completion and implementation.

**Representative Democracy and Responsible Government**

The principle of representative democracy discussed in this chapter will frame the discussion in Chapter Four regarding its application to the self-determination options for Christmas Island. This in turn will inform the options for the community to consider in Chapter Seven. This chapter will discuss how the principle of representative democracy is based on the principle of the rule of the people through their elected representatives. More specifically, in representative democracies the people’s elected representatives vote on legislation that apply to them; Chapter Four

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will explore whether this process is extended to the community of Christmas Island. This has particular relevance where ‘delegated’ legislation from Western Australia is in effect. As noted in the Introduction, this chapter will draw on several significant areas of literature including previous reports, studies and submissions made regarding the nature of governance arrangements on Christmas Island. Chapter One will begin by discussing relevant literature dealing with the broader subjects of governance and democracy in the Australian context.

Given Australia is a federation, its political system is divided by the Constitution into two tiers, with the Commonwealth Government forming the first tier and the state governments forming the second. There is an explicit sharing of power between levels of government, and no level has legal power to dominate the other level(s) in all policy domains as the essence of federation is coordination and not hierarchy. In their publication *An Introduction to Australian Public Policy*, Sarah Maddison and Richard Dennis define Australian Federalism as a division of powers between a central or ‘federal’ government states or provinces. In the *The Reform of the Federation White Paper: Issue 1 September 2014* it is noted that Federalism is regarded as one of the best systems for ensuring government is close to the people that enhances democracy. Federalism increases participation in the democratic process, as people are able to elect representatives in more that one government, can vote for different (political) parties at the regional and national levels, and can lobby

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7 Maddison and Dennis (2013), 24.
more than one government. Therefore, this system fosters and reinforces responsible government and representative democracy, such as that described by Drum and Tate where Parliament embodies the principle of representative democracy, which is defined in the Australian setting as ‘government by elected representatives of the people’. That means, instead of citizens themselves voting directly on issues, they delegate that authority to elected representatives who debate and discuss the issues of the day, and ultimately make decisions on citizens’ behalf.

In other words, in democratic countries (such as Australia) good governance is a result of the proper functioning of democratic institutions and in such systems the desire to govern well by our democratic leaders is driven by their direct accountability to the citizens. While representative democracy is a defined process where citizens elect people to represent them in the political system, who ultimately distribute resources based on public policy (e.g., for health care, unemployment, environment and transport) on their behalf for the betterment of all society, the discussion and clarification of representative democracy must also include the concept of ‘deliberative’ democracy as the supporting notion to that of representative democracy. Grayling explains in his publication Democracy and Its Crisis that this is where deliberative democracy is the democracy of debate, discussion, the mutual giving of reasons with the aim of reaching agreement or consensus upon which decisions can then be based. In other words, deliberative democracy is a form of democracy in which deliberation is central to the decision-making process. In this regard the deliberative nature applied to representative

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democracy implies a consultative process that is imperative in order to achieve a desired outcome based on purposely intended consultation and decision making. As Bessette further notes in his publication *The Mild Voice of Reason: Deliberative Democracy and American National Government*, deliberative democracy is the (inter) relationship between policy making and public opinion and the concomitant responsibilities of public officials.11 Further, those elected are also ultimately accountable at each election cycle to the people who elected them, not only based on their (past) performance but also on the public policy approach they have adopted (or propose to adopt) in the distribution of resources. A recent example of the diametrically opposed public policies of the (then) Labor Government and the newly elected Coalition Government (in 2013) specifically relevant to Christmas Island can be found in the different approaches to immigration and border protection regarding asylum seekers. In this example, the 2013 election outcome was (in part) based on the public policy approach proposed by the Coalition being ultimately accepted by the voting public of Australia whereby the authority to govern was revoked from the (former) Labor Government by the Australian people, who exercised their option to elect a Coalition Government from the genuine alternatives provided for the applicable election cycle fixed term of three years.

A view of representative government by Pitkin notes that it is a device adopted instead of direct democracy, because of the impossibility of assembling large numbers of people in a single place, and therefore, while representation as a concept is a substitute for direct participation, it is a far more preferable substitute.21 This


view is also supported by Jackson, who notes that direct democracy is difficult in large communities and that since widespread citizen participation in politics is difficult to achieve, representative democracy has evolved.\textsuperscript{22} Thus, while it can be said only the government can possibly satisfy all the demands of society in which all the people participate, and that any such participation is beneficial, it follows then that the ideal type of government must be fully representative. Williams defines representative democracy as having diverged into two modern meanings, socialist and liberal. In the socialist tradition, representative democracy continues to mean ‘popular power’, that is, the state in which the interests of the majority of the people are paramount and in which those interests are practically exercised and controlled by the majority. In the liberal tradition, representative democracy means open election of representatives and certain conditions (democratic rights, freedom of speech and political opposition) absent from the socialist meaning, which maintain the openness of election and political argument.\textsuperscript{23} In the liberal context, representative democracy must therefore not only allow voting rights, but must also allow citizens and the media some freedom of speech, freedom of assembly and importantly political opposition. These rights to additional forms of participation by citizens are an essential element of liberal representative democracy. Drum and Tate note that although Australia is one of the world’s oldest liberal democracies, it is also a young state and a young nation.\textsuperscript{24} Further Grayling notes that ‘participatory and


\textsuperscript{24} Drum and Tate, 1.
deliberative’ democracy means equal participation (by all citizens) in the making of decisions, and in the outcome of these decisions.\textsuperscript{16} According to David Held and Gareth Schott in \textit{Models of Democracy} part of the attraction of democracy lies in the refusal to accept \textit{in principle} any conception of the political good other than that generated by ‘the people’ themselves.\textsuperscript{17} Held and Scott further expand on the principle and definition of democratic autonomy by noting that persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the processes of deliberation about the conditions of their own lives and in the determination of these conditions, so long as they do not deploy this framework to negate the rights of others.\textsuperscript{18} In any given political system there are clearly limits to the extent of liberty which citizens can enjoy. What distinguishes the model of democratic autonomy from many of the other models discussed is a fundamental commitment to the principle that the liberty of some individuals must not be allowed at the expense of others, where others can be a majority or significant minority of citizens. In this sense, the concept of liberty presupposed by the model of democratic autonomy allows in some respects a smaller range of actions for certain groups of individuals. If the principle of autonomy is to be realized, then some people will no longer have the scope to, for instance, pollute the environment of others, accumulate vast unregulated resources,

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\textsuperscript{16} Grayling, 121.
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\textsuperscript{18} Held and Schott, 293.
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or pursue their own life opportunities at the expense of those of their lovers or wives. The liberty of persons within the framework of democratic autonomy will have to be one of progressive accommodation to the liberty of others. While, therefore, the scope of action may be more limited for some in certain respects, it will be substantially enhanced for others.19

In his publication *Democratic Autonomy: Public Reasoning about the Ends of Policy*, Henry Richardson argues that citizens must arrive at reasonable compromises through fair, truth-oriented processes of deliberation in order to avoid bureaucratic and administrative domination. Richardson takes the four strands of the democratic ideal – liberalism, republicanism, rationalism, and populism – to create a conception of democracy as democratic autonomy where he outlines a conception of democratic reasoning to highlight what is at stake when we reason democratically together and also to address the problem of bureaucratic domination. For Richardson, bureaucracy poses a threat to democracy, however democracy is conceptualized. The policy making power that resides in administrative hands and is counted on by modern states and provincial and transnational governments, is hard to control in practical terms and difficult to reconcile with the democratic ideal. While acknowledging that discretionary administrative power is part of the permanent landscape of modern governments, including democratic ones, Richardson’s concern is whether this discretionary power will be used arbitrarily. When this happens, administrative power creates an illegitimate type of domination that exists independently of a democratically elected legislature.20 This argument (or point)

19 Held and Schott, 299 -300.

may be relevant to Christmas Island regarding its relationship with Commonwealth Government agencies that it has interactions with, especially regarding the SDAs consultative processes that is raised in other chapters of this study.

Accordingly, the definition of representative democracy must include the notion that citizens have genuine choices among alternative candidates at the time of relevant election cycles. Drum and Tate support this view in emphasizing that the principle of representative democracy underlies our democratic system in Australia and makes our government responsible to us. This may be applied to the ‘House of Representatives’ where the term implies exactly what the notion of representative democracy is intended to mean, representation. The House of Representatives is colloquially known as the ‘people’s house’ and is where government in Australia is ultimately formed following elections. That is, the party or parties that are able to gain the support of the majority of the voting population in the House of Representatives form the government. While the principle of representative democracy applied in this definition allows Christmas Islanders to currently participate in the election cycle as ‘constituents’ through the Federal Electorate of Lingiari in the NT (the same as all Australians can do in their relevant electorates), they are denied any participation in the election cycle where West Australian legislation is applied through the current SDAs between the Federal Government and the WA Government, which is further discussed in Chapter 4 of this study.

Another concept relevant to Parliament is responsible government; that is, the government only has the right to make decisions that affect us because we elected them to undertake that role. In addition, it is important to note that responsible government...
government simultaneously means that all governments must be responsible for their actions and Parliament Question Time provides the principle of accountability of this process. Further, one of the most important elements within any liberal democracy is the mechanism that holds the government to account and within Australia’s political system, Parliament is the traditional body that does this. Importantly Parliament is sovereign where the doctrine of Parliament means it is Parliament which is sovereign and not the people, and no other body (neither the Crown or the people) is sovereign. Grayling further notes that there was never an intention to place sovereignty in the hands of the populace otherwise it would been to be embodied in legislation as a defined Act, and it has never been the intention of Parliament to do so. The principle is that Parliament is sovereign and not the people. Parliament acts on behalf of the people; from its majority those who govern are drawn and there is no power which can overrule it; not the Crown and not the courts. As Prinsen notes the concept of sovereignty has its origins in the negotiations that resulted in the seventeenth century’s Peace of Westphalia in Europe and was the foundation for early nineteenth century nationalism and mid twentieth century decolonization, leading to today’s notion of sovereignty.

In her article *Do Uniform Schemes of Legislation Undermine State Sovereignty?* Annemieke Jongsma cites Dicey (and other authors) who describes the powers of

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26 Drum and Tate, 112.

27 Drum and Tate, 124.

24 Grayling, 132.

25 Grayling, 174.

26 Gerard Prinsen, *‘An Emerging Islandian Sovereignty of Non-Self-Governing Islands’*, (Palmerston North, New Zealand: School of People, Environment and Planning, Massey University, 2017), 57.
uncontrolled Parliaments as being sovereign however the correctness of the doctrine of sovereignty has been increasingly questioned as to whether it truly applies to Australia. This is because prior to Federation the constraints of the Colonial Laws Validity Act did not enable the notion of absolute sovereignty for the colonies and post-federation any degree of sovereignty attained was restricted by the continued links to the Imperial Parliament. However, the evolution of Australia’s constitutional independence has meant that by the time the Australian Acts were passed there was a complete and of the legal sovereignty of the Imperial Parliament and the recognition that the ultimate sovereignty resided with the Australian people.27

While the literal dictionary meaning of ‘responsible’ is to be liable to be called to account and answerable for actions, and although governments are held accountable to the people through elections, in between elections the function of the parliament is to hold the government accountable. This is achieved through mechanisms such as parliamentary questions (Public Question Time), debate on legislation and parliamentary standing committee investigations. Saunders notes that the rules of responsible government are not confined only to the House of Representatives, but that the government must also take into account the Senate. The government is responsible to the whole parliament, including the Senate and, of course, Ministers may be members of either House. Accordingly, Ministers who are Senators must also answer questions in the Senate the same as Ministers who are members of the House of Representatives and appear before Senate Committees.28 This process


underpins the concept of responsible government and goes some way to ensuring
the government of the day and its Ministers are accountable for their actions, and
those actions of the Department’ they have responsibility for according to their
portfolio allocation. For example, the Minister for Immigration would be obliged to
respond to questions from the Opposition Shadow Minister (or Opposition Leader)
during the allocated ‘Public Question Time’ in Parliament regarding questions
concerning immigration and/or other issues of portfolio responsibility that the
Minister for Immigration might have.

In the edited publication *Constitutional Law*, it is noted that responsible government
is a convention developed in eighteenth century Britain where the Parliament would
choose the King’s ministers and that they must be members of Parliament. The
Founding Fathers regarded responsible government as so obvious that it did not
need to be written into the constitution, but some of them pointed out that it could
not work together with federalism. The theoretical principle of responsible
government then means the public should receive regular information and advice
about the particular issue raised during Public Question Time that is subsequently
reported by the media, although in practice the answers provided by Ministers are
often predetermined and/or misleading. The issues the framers of our Australian
Constitution were debating at the various federal conventions of the late nineteenth
century would no doubt have been influenced by the historical concepts of
responsible government and representative democracy, suggesting that responsible
government and representative democracy have been a debatable concept for some
time that long predates the discussions and negotiations regarding the construction
of the Australian Constitution and subsequent Federation at various Constitutional
Conventions in the late nineteenth century.

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Matt Harvey, Michael Longo, Julian Ligertwood and David Babovic, *Constitutional Law*, (Sydney: Lexis Nexis Butterworths, 2010), 92.
Between the 1850s and 1890, the six colonies of Australia progressively and independently achieved responsible government managing their own affairs while remaining part of the United Kingdom. While control of some matters was retained by the Colonial office in London, the arrangements for responsible government by the six colonies were confirmed by the Colonial Laws Validity Act 1865. The Colonial Laws Validity Act 1865 was a British Act of Parliament to define the relationship between local (‘colonial’) and British (‘imperial’) legislation. It confirmed that colonial legislation was to have full effect within the colony, limited only to the extent that it was not in contradiction with any Imperial Act that extended to that colony. The Colonial Laws Validity Act 1865 (UK) was intended to provide a significant level of self-government to colonial parliaments within the Empire. The Act had the effect of clarifying and strengthening the position of colonial legislatures, while at the same time restating their ultimate subordination to the British Parliament. Reynolds notes in his biography of Edmund Barton (Australia’s first Prime Minister) that when the Constitution for self-government for the Australian colonies was under discussion the elder statesmen, William Wentworth sought unsuccessfully to have provision made for a General Assembly of the colonies to deal with inter-colonial questions.

There is evidence in Barton’s private papers that he carefully studied Wentworth’s proposal when he was preparing for the 1891 National Australasian Convention and further, that with the advent of responsible government in New South Wales, Edward Deas Thomson retired from the post of Colonial Secretary and entered the new Legislative Council. For six years (1856–1862), he devoted himself to the cause

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30 Drum and Tate, 337.
of Federation, which he firmly believed essential for the progress of all the colonies.\textsuperscript{31} As Reynolds further notes, during the 38 years (1862–1901), which lay between the entirely honourable failure of Deas Thomson and Gavan Duffy to achieve any progress towards federal union and the foundation of the Commonwealth, the colonial governments held many conferences to discuss questions of mutual concern.\textsuperscript{32} This preamble work subsequently laid the foundations for the more formal National Australian Constitutional Conventions that began in 1890 and occupied most of the ensuing decade towards Federation. Several National Australian Conventions were held from 1890 to discuss the framework of what would ultimately be the Australian Constitution and Federation. These Constitutional Conventions were the Australian Federation Conference in Melbourne on 6–14 February 1890; the National Australasian Convention in Sydney, 2 March–9 April 1891 and the Australian Federal Convention that met in three sessions: Adelaide (22 March–5 May 1897), Sydney (2–24 September 1897) and Melbourne (22 January–17 March 1898).\textsuperscript{33}

The debate regarding the composition of the Constitution during this time considered various matters for inclusion, where for example, one of the few ‘rights’ in the final Constitution is the right to a free and fair vote and is one of the most important privileges held by Australian citizens currently. While Saunders notes that section 41 of the Constitution guarantees that everyone who could vote in State elections at the time of federation could vote in federal elections as well, there is obviously nobody alive today to take advantage of this. However, most Australians

\textsuperscript{32} Reynolds, 85.
still have these rights to a free and fair vote at present and these derive from Acts of Parliament or the common law and not specifically from the Constitution. One of the reasons these rights were not included in the Constitution was that there was no status of Australian citizen at the time of federation. However, as noted by Drum and Tate, within its first two years of existence, the Commonwealth Parliament passed the *Commonwealth Franchise Act 1902* to determine who had the right to vote in Commonwealth elections and thus democracy existed very early within the Commonwealth. Barton’s own retrospective comments on the Convention’s approach was that it is essential to remember that the main provisions of *The Constitution* were for ensuring a Federation that could work under a system of responsible government.

A principal problem facing the delegates to the Federal Convention in the process of developing the constitution (and federation) was to solve the dilemma propounded by Western Australia where ‘either Responsible Government will kill Federation or Federation will kill Responsible Government’. Eventually the obstacle was overcome, as further noted by Barton, that to have endowed the Federation with responsible government, and at the same time to have taken away that principle of government from the States, would have been an equal absurdity, once granted that State individuality was to be preserved. Now that the system of democratic responsible government which worked in the States through a broad suffrage and the two Houses of Parliament, that naturally was a system adopted for the Federation, in which case, one chamber represented the people of Australia according to electorates, while in the other they were represented in equal numbers.

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34 Saunders, 84.
35 Drum and Tate, 31.
36 Reynolds, 127.
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It was therefore essential to finally provide the Federal Government with sufficient powers to allow it to function effectively, while preserving the identity of the States. The Federation movement that involved the numerous Constitutional Conventions of the 1890s is also discussed in more detail in the next section of this chapter since it relates to Australia’s federal system of government.

Responsible government derives from the Westminster system of government that exists in the United Kingdom. According to the Westminster system, while the monarch (or Crown) is the official head of state, ministers, who are representative of, and responsible to, the electorate and accountable to the Parliament, carry out the majority of government functions. The six colonial governments that existed within the Australian continent before 1901 all inherited from the United Kingdom a common tradition and practice of government known as the Westminster system of responsible government. Writing about Westminster in 1867, Bagehot explained that the history of English politics is the action and reaction between ministry and the parliament. The concept of a Westminster model of government in the Australian context is synonymous with the older expressions applied to the British system of government, which have been used with varying degrees of prescriptiveness since self-government was mooted in the Australian colonies.

However, crucial elements of the Westminster system as it exists in the United Kingdom, not least the idea that the lower house of government is the sovereign house, and is therefore unlimited in its legislative authority, is absent in the

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37 Reynolds, 128.
38 Harvey, Longo, Ligertwood and Babovic, 63.
39 Drum and Tate, 71.
Commonwealth. The Westminster system in the United Kingdom is also at odds with other features of our Commonwealth system of government. For instance, unlike Australia, the Westminster system in the United Kingdom does not necessarily exist within a federation. In this regard, the particular practices of responsible government in Australia have developed and changed since their adoption from the Westminster system; however, the basic principles of ministerial responsibility and parliamentary accountability remain constant. Grant and Fisher cite Rhodes and Wanna who argue that under any Westminster system, the legitimate node of decision making is the political realm, not administration. Ideally then, public servants are responsible to ministers, with ministers responsible to Parliament and Parliament to the electorate. Therefore, the interaction between ministers and public servants (the bureaucracy) is critical to the function of responsible government under the Westminster system. Essential to the concept is the symbiosis of the temporary (as elected) political minister and the experienced, permanent and often silent public servant. Both have an indispensable contribution to make where a considerable body of public servants are necessary to undertake the daily workload, research specific issues and ultimately provide knowledgeable advice to the Minister on important decisions and/or policy. The Minister acts on this advice to make final politically responsible decisions bringing, as Walter Bagehot puts it, ‘the burning glass of common sense to that rubbish of office’. Perhaps this analogy by Bagehot is a little too harsh on the modern-day Australian bureaucracy. However, the experience of Christmas Islanders in the delivery of Commonwealth services since the transfer of the Territory to Australia (and perhaps beforehand)

41 Drum and Tate, 71.
42 Harvey, Longo, Ligertwood and Babovic, 63.
44 Bagehot, 151.
would suggest that these public servants quite often abrogate their responsibility despite the representation made by Christmas Islanders to the relevant Minister of the Indian Ocean Territories (IOTs). Examples of these are further discussed in Chapters Four, Five and Six of this study.

Consistent with the Westminster system of government is the Westminster convention that is particularly relevant to Australia. Most of the procedures of the Westminster system of government (as noted earlier) have originated from the conventions, practices and precedents of the Parliament of the United Kingdom, hence the relationship to Australia. Conventions do not have the status of law. They are simply agreed practices or traditions. For example, the Westminster convention that the Governor General acts on the advice of the elected ministers is necessary for the operation of the Westminster system of responsible government. Without this one convention, there would be no secure democratic government in Australia, because the Governor-General, acting under the terms of the Constitution, could, and possibly would, override the actions of the Commonwealth Parliament or Prime Minister at will.\textsuperscript{45} Saunders also notes that conventions are not written into the Constitution or any law but are important constitutional practices, which are nearly always followed.\textsuperscript{46} That is, a convention is agreed unwritten rule(s) of behaviour accepted by participants (in most instances) in public life in Australian politics and parliament who must or should follow these. These rules can be ignored only if justification is clear, or can be provided; otherwise, consequences follow and may include ignoring some other convention that has until then been followed. Conventions may change but they do not do so necessarily because they may not be upheld on any particular occasion. Accordingly, convention is important in the

\textsuperscript{45} Drum and Tate, 78.

\textsuperscript{46} Saunders, 5.
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Westminster system of government, where many of the rules are unwritten and certainly not explicitly written in the constitution.

Drum and Tate support this importance of conventions in our Westminster system of government where the only principle preventing the Governor General from exercising this independent power is the Westminster convention that states that the monarch always acts on the advice of his or her ministers. While some conventions are not as important as others, such as the procedure for the replacement of retiring Senators that is not considered a crucial convention, one of the most important conventions that is discussed further in the next paragraph is that of the Governor General’s political neutrality that is fundamental to the existence of parliamentary democracy in Australia.

While the above paragraph provides a brief explanation of the Westminster convention, the application of the convention by example can be best described by the events that occurred in November 1975 where the (then) Governor General dismissed the (then) Prime Minister of Australia. While it is not the intention of this study to provide a specific critique of the events and circumstances relating to the dismissal of the Whitlam Government, given the ample literature available on the subject, a brief description as it relates to the notion of representative democracy and responsible government, and in particular the Westminster convention, is presented. That is, this is a case where the Governor-General’s ‘neutrality’ was interpreted by some as a breach of the Westminster convention, thereby creating problems for the principle of responsible government and representative democracy. The dismissal of the (Labor) Whitlam Government by the (then) Governor-General in 1975 (often referred to as ‘The 1975 Constitutional Crisis’) was actually a crisis of responsible government as the (executive) government could not obtain the Senate’s approval.

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47 Drum and Tate, 78.
for its budget (supply) bills. The Governor General applied a new idea of responsible
government to say that the executive could not govern without supply, and
therefore, used his reserve power under the Constitution to dismiss the Prime
Minister and appoint the Leader of the Opposition as ‘caretaker’ Prime Minister.
Thus, the conventions of responsible government were swept aside by a Governor
General using his literal power under the Constitution to dismiss a minister (indeed
a whole ministry) that still enjoyed the confidence of the House of Representatives.48
The literal interpretation of the Australian Constitution by the Governor-General to
justify the dismissal of the Prime Minister of the day can equally be interpreted as
violating the conventions of responsible government. Drum and Tate describe the
Australian system of government resting on a paradox where the Australian
constitution provides enormous power to the Governor General to act
independently of the advice of ministers; yet, Australian democracy depends on the
Governor General not exercising this power at all.49 The 1975 crisis forced this
incompatibility to the fore, with the result that the other feature of the
Commonwealth also dormant to this time (the constitutional power of Governor
General to act independently of the advice of ministers, and therefore independently
of convention) was also bought into play.50

As noted earlier, it has not been my intention to discuss the details and
circumstances that led to the Constitutional Crisis of 1975, but to highlight that there
was a breach by the Governor-General in 1975 of ‘constitutional conventions’ that
arose from the failure by the Governor General to maintain political neutrality by
dismissing the Prime Minister when other alternatives appeared to have been
available to him. For example, the Governor General could have acted in an

48 Harvey, Longo, Ligertwood and Babovic, 93.
49 Drum and Tate, 78.
50 Drum and Tate, 80.
arbitrator role calling on the Senate to reconsider its refusal to pass the Supply Bill or have instructed Whitlam to advise him (the Governor General) to call an election or face dismissal, or maybe even made his opinion public thereby exerting pressure on both the competing political parties. However, it can be argued that the Governor General does not have a role as arbitrator in the Australian Constitution and therefore could do nothing on his own initiative other than offering to provide his advice and counsel to the Prime Minister. Further, as Watson notes, the mechanisms provided for breaking deadlocks between the two Houses (section 57) could not be used to solve a dispute over the budget because the Government would run out of money long before they could be implemented. The ambiguity might have been resolved by a High Court case, but again time would not allow that.51 Ultimately, there was a ‘constitutional deadlock’ as the Whitlam Government insisted on the Westminster convention, as enunciated by Herbert Asquith (then Prime Minister of the United Kingdom), that the party that controls the lower house has the right to govern. Conversely, the Fraser Opposition enunciated the principle that the Commonwealth is a federal system and if the government of the day lacks the confidence of an elected Senate, then it must return to the polls.52 In summary, the 1975 Constitutional Crisis occurred when the ‘convention’ that the majority political party in the lower house (House of Representatives) should be allowed to govern, came into conflict with the written provision of the Constitution which allowed the upper house (the Senate) to render that government inoperable by refusing supply, leading to the Governor General intervening.

Therefore, the convention of the maintenance of the Governor General’s political neutrality is fundamental to the existence of parliamentary democracy in Australia.

52 Drum and Tate, 80.
Despite the actions of the Governor General in breaching this fundamental convention, irreparable damage to parliamentary democracy has not necessarily resulted even though there was an outcry regarding the Governor General’s actions by some that raised serious questions about the future of parliamentary democracy and responsible government. Accordingly, the dangers in violating the convention of responsible government may or could lead to its replacement in the strictest sense of the constitution by ‘undemocratic’ conventions. Watson notes that the Governor General was placed in a difficult position where he had to ultimately decide whether or not to intervene; either way the result would be seen as partisan by one side of politics, and the Constitution had failed to provide him a satisfactory solution.53

Australia’s Federal System of Government

As noted in the previous section, Australia is a federation. Its political system is divided by the constitution into two tiers, with the Commonwealth Government forming the first tier and the state governments forming the second, which implies a federation has a constitutional division of power and functions between a central government and the set of peripheral governments.54 Wilcox comments further and defines federalism as a system of government where power and responsibility are formally (that is constitutionally) divided between two tiers. This formal division distinguishes federalism from unitary or ‘one-tiered’ political systems, where ultimate power and authority is vested in a single government.55 In the Australian context, the federal system recognises the Federal (or Commonwealth) government in addition to the State and Territory government’s as distinct legal entities.56

53 Watson, 56.
54 Wilcox, 140.
55 Wilcox, 140.
56 Harvey, Longo, Ligertwood and Babovic, 63.
Federalism then can be broadly defined as a system of government in which powers are divided between a central government and governments in states and/or provinces, each being quite independent of the other in its own areas of responsibilities, as described by Solomon.\(^{57}\) Saunders provides a further definition of federation in layman’s terms as enabling separate communities to make decisions for themselves in some matters while joining together to make decisions about matters of interest to all of them.\(^{58}\) Modern federalism has a long and venerable pre-history, which Elazar traces from the Achaean League of Ancient Greece to the confederations and leagues of the cities of Europe in the Middle Ages.\(^{59}\) The League can be considered one of the earliest historical attempts to achieve national unity without necessarily sacrificing local (state) independence. Elements of federalism existed in the Roman Empire and during the Middle Ages where many leagues of states or provinces were formed for specific purposes. The original seven united provinces of the Netherlands can be described in nature as a federation and was a strong Protestant religious force that was formed for specific purposes (i.e., to counter Catholic influence). Switzerland is popularly considered a prime example of a federal state that commenced the process of federation in the late 1290s with perpetual binding alliance treaties between the provinces (cantons) that gradually increased until formal federation occurred in the 1840s. The government of the Weimar Republic of Germany was federal in form, and certainly, the former Union of Soviet Socialists Republic was federal in principle by giving cultural autonomy to the different peoples of the various states and provinces.


\(^{58}\) Saunders, 15.

After some experience as a confederation, the United States adopted the federal form of government in 1789 and its Constitution has been imitated by many countries especially in Latin America, and, of course, in Australia. Drum and Tate note that our notion of federalism is a key element drawn from the United States, which established a national government yet left many roles and responsibilities to the founding states. Reynolds notes in his biography of Edmund Barton that the United States Constitution was the starting point for the Australian Constitution: ‘We are taking a copy from where advisable; but we are exercising our own judgement as to what is advisable’, was how Barton described the debt to the US Constitution. This is also supported by Galligan, who notes in Australia’s case a classic federal Constitution exists modelled on the American prototype. However, Walter notes that the form of federalism instituted in 1901 has usually been portrayed as a combination of elements from British and American systems where the British contributions were: first, the Westminster conception of responsible Cabinet government, wherein the executive was drawn from, and accountable to, parliament (in particular, the lower house); second, a political party system, which gave shape to the electoral contests of parliamentary democracy; and third, a continuing role for the monarch (through delegation to the Governor-General) as head of state of the Commonwealth.

The American system of federalism involved a written Constitution (in which the Federal Government’s powers were enumerated, leaving the residue to the states); an upper house (Senate) giving equal representation to each state; and judicial review. Further the British and the American elements were necessarily in conflict.

60 Drum and Tate, 86.
61 Reynolds, 17.
since some of the ‘founding fathers’ recognised, but most crucially in regard to a possible deadlock between the two Houses of the Federal Parliament, where the so-called states house, the Senate, could obstruct the passage of supply for a government holding a majority in the lower house.\textsuperscript{63} This, of course, is exactly what occurred in the Constitutional Crisis of 1975 as discussed in the previous section.

The Australian model can be best described as predominantly a hybrid model between Westminster and the United States where the founders of the Australian Constitution were inspired by the Westminster model of parliamentary responsible government; the United States federal model (1789); and other federal systems, such as the Swiss (1848) and the Canadian (1867) models.\textsuperscript{64} The pre-existence of the colonial States (and their constitutions) provided some foundation to modelling a federation for Australia, based on the British Westminster system, that commenced with the 1891 national convention, although there was dissent from several of the participating colonial states at the time who had some reservations that federation may result in centralised power, such as that found in unitary state arrangements. For example, in Britain (a unitary system) the national government is legally empowered to dissolve the regional councils.\textsuperscript{65} They were concerned that too much central power would be granted to a central government (the Commonwealth) that could diminish the control and functions that the strong states had already established.

In this regard, as noted by Saunders, the delegates to the numerous Conventions of the 1890s who met to draft the Australian Constitution agreed on some general principles of basic ideas, which set out what they wanted to achieve. These


\textsuperscript{64} Harvey, Longo, Ligertwood and Babovic, 106.

\textsuperscript{65} Wilcox, 140.
principles were a good indication of their priorities. For example, they wanted to be sure that trade between the colonies was absolutely free and that the new Commonwealth would take responsibility for defence for everyone. Conversely, they did not want to give any more power to the Commonwealth than was necessary. Solomon notes that the Australian Constitution was written at a series of three conventions in 1891, 1897 and 1898 by leading colonial politicians of the day. Opinions differed widely among those political figures, not least between those who wanted a strong central government and those who wanted to retain as much power as possible for the states. In this regard the demands of the states, or colonies as they were at the time, which set a price for federating, went beyond preserving their sovereignty, their exclusive right to legislate in certain areas of policy where they also insisted on preserving and writing into the Constitution provisions for state intervention in the operation and institutional arrangements of the Commonwealth Government.

Conversely, the British Westminster tradition had been one of an unwritten Constitution and colonial governments established in the nineteenth century had adopted these conventions and operated in accord with them, so it was automatically assumed that they would apply and operate in the new Commonwealth Government. Therefore, the development of Australian federalism (and the Constitution) was an attempt, as described by Wilcox, to accommodate the requirements of the colonial governments that their political strength be maintained. The authors of the Australian Constitution drafted a document designed to give the new states guaranteed strength, if not the upper hand, in the federal system. Hence Commonwealth powers and responsibilities were listed in an attempt to limit them.

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66 Saunders, 17.
67 Solomon, 22.
68 Watson, 52.
Chapter 1

The assumption of the authors of the Constitution was that textual definition of the responsibilities of the Commonwealth would therefore provide a means by which to limit them.\(^69\) Eventually at the end of the nineteenth century, when representatives of Australia’s colonies met to discuss the formation of a national government, they saw federalism as an appropriate system for sharing power between a national government and state governments.\(^70\)

As occurred in the formation of the United States, the architects of the Australian Constitution eventually found agreement in the drafting of the Constitution to separate and delegate certain functions to the centralised government (Commonwealth) while retaining residual powers to the States. For example, direct responsibility and delivery for health, education, local government, law and order and transport services is held by the States, while direct responsibility for defence, taxation, telecommunications and customs and immigration is held by the Commonwealth. Wilcox noted that this separation was a deliberate manoeuvre to limit the Commonwealth’s power by definition rather than concede to the delegates’ demands at the various Constitutional Conventions. As described by Drum and Tate, in the Australian context, federalism is generally taken to refer to the dispersing of power between our national government, known as the Commonwealth, and our six States plus two major Territories.\(^71\) In Australia, the federal structure was officially adopted at the time of ‘Federation’ in 1901 that drew together as a nation all the previous colonies into the Commonwealth of Australia. In this regard, Australia became a parliamentary federation where its main characteristics are a combination of a federal division of powers and a parliamentary

\(^69\) Wilcox, 142.

\(^70\) Drum and Tate, 86.

\(^71\) Drum and Tate, 85.
mode of operation of executive authority as noted by Solomon.\textsuperscript{72} Therefore, the Australian Constitution is integral to the concept of Australian Federalism as a document that enshrines the composition of the Federal Parliament in its roles and responsibilities, and more importantly in a federal context its relationship with the existing States and Territories. Then, the original purpose of the Australian Constitution was to provide a set of written rules determining the shape of the nation’s government. Drum and Tate support the importance of the Constitution to our federal structure, arguing that federation would never have been achieved without the creation of a Constitution that expressly declared, but in doing so also limited, the powers of the new Commonwealth Parliament.\textsuperscript{73} Further, it is impossible to understand the nature of our federal system without understanding how it is dealt with in the Australian Constitution.\textsuperscript{74}

When originally drafting the Australian Constitution, it was clear that the Federal Government should be given complete executive control over certain aspects of policy (as noted earlier), for example, defence, taxation, telecommunications, customs and immigration. However, there was much debate at the time about whether any further additional powers should be handed to the Federal Government. Saunders notes that there were delegates in favour of a stronger Federal Government and those who expressed concern and wanted to protect the ‘state’s’ rights and that this second group of delegates (the more numerous) did not want to give any more power to the Commonwealth than was necessary.\textsuperscript{75} Federalism, at the very least, requires two levels of government. The Australian Constitution clearly states that the Commonwealth cannot use its powers to

\textsuperscript{72}Solomon, 10.

\textsuperscript{73} Drum and Tate, 73.

\textsuperscript{74} Drum and Tate, 88.

\textsuperscript{75} Saunders, 17.
discriminate against the States or between them. It certainly cannot use its powers to destroy the States of their ability to function, and within the limits of their power to legislate to affect the Commonwealth at all, the States cannot discriminate against the Commonwealth either.\footnote{Saunders, 133.}

Having established then that the Australian concept of federation is based on a constitutional division of power and functions between a central government (the Commonwealth) and peripheral governments (the State and Territories), the essence of federation should then be one of coordination and not hierarchy. This would be debatable among some, especially Premiers and Chief Ministers of Australia’s States and Territories who would argue that from time to time, the Commonwealth appears to take on a more ‘unitary’ (British) approach that tends to occasionally diminish the rights of the States and Territories. This is reinforced by section 109 in Chapter V of the Constitution which states that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.\footnote{The Australian Constitution’, 42.} This is also supported by Harvey, Longo, Ligertwood and Babovic who note that when a valid State law is inconsistent with a valid Commonwealth law it ceases to operate and the word ‘invalid’ in section 109 has been interpreted to mean inoperative rather than ultra vires.\footnote{Harvey, Longo, Ligertwood and Babovic, 119.} In the end, the Australian Constitution granted to the Federal Government only those powers, which, at the end of the nineteenth century, seemed essential for the purpose of Federation.

How the Australian Constitution and Federation will be referenced as contextual points that specifically relate to the purpose of this study, as well as the governance
structure of Christmas Island, Federalism and the status of non self-governing territories that has been noted briefly in this chapter, is further explored and discussed in Chapter Four of the thesis.