Introduction

My purpose in this book is to change the way Australians think about their constitutional system of government. Baldly stated, the argument is that Australia has a constitutional system that is fundamentally federal and republican rather than parliamentary and monarchic. That is not to deny the parliamentary and monarchic elements, but to put them in proper institutional perspective as subsidiary parts of the larger constitutional system. This larger constitutional system is controlled by the Australian Constitution, which is essentially federal and republican.

In being federal the Constitution sets up two spheres of government, Commonwealth and State, and divides powers between them. Clearly, as the legislative branches of such governments, which are controlled by the basic law of the Constitution, parliaments in the Australian system cannot be sovereign or supreme in a Westminster sense. The Australian Constitution is republican because it is entirely the instrument of the Australian people who are sovereign. The monarchic forms of Queen and vice-regal surrogates remain as the formal parts of the executives for both the Australian and State constitutions but are entirely subject to the will of the people, as are the legislatures or parliaments. Hence, in substance and effect, the Australian constitutional system 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.

Those who do not recognise this to be the case, including many lawyers until recently, would point to the fact that the Australian Constitution was passed by the British parliament at Westminster and owes its status and legitimacy to that source. Such a position fails to distinguish the real from the formal source of legitimacy. The Australian people were politically sovereign as the determining political force and morally sovereign as the legitimate source of power. Passage by Westminster was

the way Australians at the time of federation chose to enact their new Constitution. In so doing they recognised the legal sovereignty of the British parliament for such an initiating purpose. Similarly, the Australians at federation chose to retain monarchic formulations and forms in the executive part of the new federal Constitution and to preserve existing monarchic forms in the State constitutions, which it incorporated. There was no implication that the Queen could claim on her own behalf or that of the British Government any inherent right to rule or share in ruling Australia. Rather, the Australian colonists in creating a new federal system of government chose, for obvious historical and sentimental reasons, not to jettison monarchic forms and their ties with the 'mother' country.

A partially contrary view is put by those currently concerned with reforming State constitutions who claim that the States have a hybrid status, which includes parliamentary sovereignty deriving from their original colonial status. As clones of Westminster, it is claimed that the colonies had a large degree of parliamentary sovereignty, which they brought into federation (Electoral and Administrative Review Commission 1993). This view has a certain plausibility but does not take proper account of the transformative act of federation whereby the people of the colonies constituted a new federal system of government in which the old colonies became new constituent States. This fundamental restructuring was effected by the people of the colonies asserting their sovereignty and constituting a comprehensive federal system of government into which the existing colonies and their colonial constitutions were incorporated. While State constitutions and State residual powers were guaranteed by the Commonwealth Constitution, the sovereign act of reconstituting the autonomous colonies into federal States changed them in so complete and radical a way as to be properly an institutional revolution.

This is not to deny the obvious historical evolution in the relationship of Australian governments, both Commonwealth and State, with Britain. In choosing not to sever the links of empire and monarchy at federation, Australia retained a series of institutional linkages and strategic and trade dependencies that were only gradually eliminated. For instance, Australia remained within the protective sphere of the British Empire and did not develop a clearly independent foreign policy until World War II (Watt 1968). Special trade and defence arrangements survived into the 1950s and 1960s. Until the 1930s the vice-regal office at both Commonwealth and State levels was filled by British appointees who acted as agents of the British Government. Not until the 1926 Imperial Conference was it recognised that the Crown and its vice-regal representatives acted on the advice of the governments of the respective

countries. At Australia's instigation, the 1930 Imperial Conference agreed that the King would appoint a governor-general on the advice of a dominion government even if he were personally opposed to the appointment, as George V had been to the appointment of Sir Isaac Isaacs as the first Australian governor-general in 1930. And it was not until the Australia Acts in 1986 that the role of the British Government was finally eliminated in the appointment of State governors, although it had long since become a formality.

To a limited extent, the continuation of these British links might be seen to derogate from full and complete sovereignty of the Australian people in 1901. The important point is that this is what the Australian people chose because it suited their sentiment and interest. In somewhat similar fashion today, nation-states like Great Britain can voluntarily give up quite large parts of their sovereignty in order to achieve the benefits of membership in the European Union (MacCormick 1993). Australia can become party to various defence and trading agreements, for example, an Asia Pacific Economic Community if APEC becomes more than the cooperative association it currently is (Cooper, Higgott & Nossal 1993), or if Australia entered into closer political relations with New Zealand some national sovereignty in both countries would be sacrificed (Galligan & Mulgan 1994). The key point for the argument advanced here is that sovereignty does not necessarily entail creating a wholly autonomous national system but in being able to choose either that or something lesser with arrangements that compromise, to an extent, pure national sovereignty.

Despite the continuation of links with Britain, the Australian people's assertion of sovereignty in establishing their federal constitution was in sharp contrast to that of the Canadians three decades earlier. The British North America Act of 1867, as Canada's Constitution was called until recently, was drafted by political elites who quite deliberately excluded the people. Canada's colonial leaders rejected 'the heretical idea that a constitution should be derived from the people', opting instead for elite accommodation and imperial legislation that fitted their Burkean and strongly British sentiments. Canada 'continued to lean on the legal crutch of imperial sovereignty', as Peter Russell so aptly puts it, until finally patriating its constitution in 1982 because there was never sufficient consensus on an amending formula (Russell 1993a: 3, 58). It was only in voting down the cumbersome Charlottetown Accord in October 1992 that the Canadian people finally got to exercise directly their sovereignty as a people. The Australian Constitution was quite different from that of Canada, as Secretary of State for the Colonies Joseph Chamberlain noted in introducing the Commonwealth Bill into the British House of Commons in May 1900, because it 'had been

prepared by the Australian people', albeit with some slight meddling by Chamberlain at the last minute (Quick & Garran 1901: 243).

Because of its republican argument, this book might not be congenial to modern-day monarchists or republicans since it undercuts their often passionate debate and the claims that both sides make. If Australia is already in substance a republic, monarchists are overstating the significance of the monarchy in the present order and the consequences of regularising the republic by eliminating monarchic forms altogether (Atkinson 1993). Likewise, Australian republicans make similar exaggerated claims in order to fire up themselves and the public to make what is in fact a relatively small but technically difficult change to the constitutional system (Turnbull 1993). As the current governor-general, Bill Hayden, pointed out in a 1993 interview, the 'minimalist' proposal of changing to a republican head of state by substituting 'president' for all references to the Queen or governor-general in the Constitution makes very little difference to any of the problems associated with the reserve powers of the office or indeed any of the major issues facing Australia today.

It is also worth keeping in mind that eighteenth-century republican theorists did not see constitutional monarchy as incompatible with genuine republicanism (Pettit 1993a & b; 1994). Indeed, in his great classic work on republican government published in 1748, Baron de Montesquieu thought that the executive power ought to be in the hands of a monarch provided the monarch did not have legislative power and was subject to the laws of the land. He praised the English Constitution for approximating his republican ideal of the separation of powers, the rule of law and, most crucially of all, protection of the political liberty of the subject in safety and tranquillity of mind ([1748], 1949, Book XI, 6, 'On the Constitution of England': 151, 156, 162). It was not until the American founders broke sharply with monarchism in framing the United States Constitution in 1789, after a bloody war of independence with Britain, that monarchism came to be considered antithetical to republicanism. Classic republican thought reinforces the point that the current Australian debate is between Tweedledum and Tweedledee.

Because of its federal argument, this book will antagonise many who still believe in the abolition or attenuation of the States. Until the 1970s, culminating in the big-spending programs of the Whitlam Government, this was the dominant view of most progressives and reformers. Founded in the federation decade, the Labor Party was pledged to the abolition of federalism in principle and, in practice, although not regularly in federal office, preferred centralist policies such as uniform taxation introduced as a war measure by Treasurer Chifley in 1942 and extended postwar as Labor's preferred fiscal policy. While Labor became formally

reconciled with federalism in recent decades, and Labor Prime Ministers Whitlam, Hawke and now Keating have adopted 'New Federalism' agendas to make federalism work better, there remains a residual preference for centralism among federal Labor members and their supporters. This is only partly offset by the strong State organisational base of the party and articulate Labor premiers like Queensland's Wayne Goss.

Because of its primary constitutional focus, this book is at odds with the orientation of much Australian political science, which has ignored the Constitution or left its study to constitutional lawyers. Surprising as it might seem in a polity that is so fundamentally constitutional, few Australian political scientists have had a serious interest in constitutional scholarship. The 'conventional wisdom of Australian political culture and of Australian political science' that has featured as the textbook paradigm is 'party responsible government', as Andrew Parkin has pointed out (1980). Political scientists have focused on where the political action is, or appears to be, and concentrated attention at the party–executive nexus. This has proved a powerful analytic perspective because it encompasses the main institutions of day-to-day politics: disciplined parties, which have dominated Australian politics since 1910 and reinforced a Westminster-style adversarial model, a dominant executive supported by a burgeoning bureaucracy, which has been prominent in the postwar era of big government, and prime ministerial leadership, which has come to dominate both party and parliamentary politics.

The study of these institutions of political action meshed nicely with the legitimating model of parliamentary responsible government that neatly linked executive government through parliament to the people. The executive was supposed to be accountable to parliament through having to maintain its daily confidence, while parliament was in turn accountable to the people through elections. If the exciting action was to be found with parties and the executive, parliament and elections added democratic legitimation. In addition, political science could show its critical skills by exposing the shortcomings in the legitimating model of democratic accountability and substituting pluralist models of interest group interaction.

There was little room in this dominant political science perspective of party and parliamentary responsible government for either the Constitution or federalism. These severely constrain parliaments and executives in practice; they complicate the study of Australian government and politics enormously; and they require entirely different explanatory and legitimating theories. Hence, despite their significance, the complications of a federal constitution were largely ignored or wished away or, if seriously engaged, attacked as obsolete and inefficient. Australian political science was largely a postwar development, and postwar political

science preferred the study of political sociology and behaviour, focusing on class, interest groups and individual voters rather than institutions and constitutions. As Don Aitkin noted in surveying Australian political science, 'there has not been much interest in fundamental constitution-making, Parliament, the federal system, legal institutions and the like: these are assumed to be given, or taken to be the province of lawyers' (1984: 8–9).

Moreover, political scientists who studied Australia tended to be Keynesian and progressive by temperament, so they studied Canberra and the Commonwealth Government as the source of national economic and socially progressive policies. To the extent that a unifying symbol was required, it was at hand in the monarchy, which, because of its essentially English character, reinforced the Westminster mindset of Australian political science. For these sorts of reasons, assumptions and prejudices, Westminster concepts and their variations could be taken for granted by Australian political scientists and the basic Constitution, along with its leading federal and republican attributes, ignored.

In focusing as they did, political scientists were adopting and, through their writings, reinforcing the orthodoxies of informed public opinion. The Westminster heritage dominated Australian political culture and was taken for granted as the operational and legitimating nub of Australian government by such leading establishment figures as Sir Owen Dixon and Sir Robert Menzies, arguably Australia's greatest chief justice and prime minister. In their opinions and writings and in lectures to American audiences in the 1940s and 1960s these two men championed parliamentary responsible government as the crux of the Australian system. Dixon and Menzies were both strong constitutionalists and federalists who had opposed the more centralist aspects of Labor's post-war Chifley Government, but in their expositions of the Australian constitutional system each gave primacy to parliamentary responsible government over federal constitutionalism (Dixon [1944] 1965; Menzies 1967). This was a reversal of the order of significance for Australia's system of government and at odds with the founding conventions.

When the Australian constitutional framers combined responsible government with federalism they were fully aware of the hybrid institutional system they were creating. Some, like John Winthrop Hackett from Western Australia, warned that such an unworkable contradiction would lead to responsible government killing federalism or, as he preferred, federalism killing responsible government. Most, however, were more sanguine, preferring parliamentary responsible government with which they were familiar as colonial politicians and to which they were committed as admirers of the English constitution. But there was even greater consensus on the need for a federal constitution that would

create a new national government while also preserving the established colonies as States within the new federal compact. Some like Sir Samuel Griffith and Sir Richard Baker were primarily constitutional federalists who proposed novel executive structures more compatible with a strong federal Senate. The majority of those who drafted the Constitution accepted neither the Hackett claim of strict incompatibility nor the Griffith–Baker proposals for a new form of executive. They opted for combining federalism and responsible government in the expectation that prudent politicians who understood the system could make it work (Galligan 1980a; 1984). And the system has worked reasonably well except for the Kerr–Whitlam constitutional crisis of 1975 when both sides of politics pushed brinkmanship to its limits and an intemperate governor-general, badly advised by the chief justice of the day and misunderstanding both the Constitution and his own role, dismissed the prime minister and gave victory to the Opposition who were blocking supply in the Senate.

As the High Court has insisted in a number of recent cases, careful study of the federation debates is a powerful aid to understanding the Constitution. By returning to those voluminous records — probably the most complete record of any constitutional founding — we can observe through the Hansard record of proceedings just what was done and why. It is still necessary to distil the institutional design at work and to reflect critically on the theoretical coherency of what was done. We must, as it were, reconstruct the collective mind of the founders and articulate the institutional structure that they created. This should be a necessary exercise for all those in high places who work with or interpret the Constitution, as well as those who have a mind to defend or reform it. Detailed reference is made to the federation debates throughout this book in relation to particular institutions.

Here, the institutional ontology of combining federalism and responsible government needs to be precisely formulated; parliamentary responsible government was incorporated into the federal constitution, not vice versa. Nor is it enough to say that there was a combining or blending of diverse institutions; neither the building metaphor of combining two different structures or the breeding metaphor of crossing two strains to produce a hybrid are sufficiently precise. And nor does the shorthand of 'federalism versus responsible government' adequately capture the issue. First, we need to be clear about the hierarchy of institutional design: it is the federal Constitution that specifies a bicameral parliamentary legislature and, albeit obliquely, a responsible government executive as two of the three branches of the Commonwealth Government. Hence both are subject to and controlled by the Constitution. Second, the institutional mismatch is at a lower level between particular parts of the

legislature and the executive; namely, in combining a powerful Senate, thought necessary for federalism, with a responsible government executive answerable to the House of Representatives. Or, to put it another way, the problem was in putting Westminster-style responsible government into a congressional-type legislature.

Given the basic structure of the Constitution, it comes as no surprise that there was much more discussion about federalism and the Senate than about parliamentary responsible government in the federation debates. In addition, responsible government was well known by the founders and could be taken for granted. It wasn't long, however, before the responsible government minor theme would become the dominant discourse of Australian politics. This was for reasons both of political practice and of political thought and sentiment.

The practice of Australian politics was changed irrevocably by the rise of the Labor Party, which had no voice in federation but in 1910 won government both nationally and in the senior State of New South Wales. Labor was ideologically committed to democratic majoritarianism and opposed in principle to the federal Constitution. Moreover, Labor was a disciplined party that exercised strict control over its parliamentary members who were bound by caucus decisions. The other looser-knit groups organised around free trade and protection, which had dominated colonial politics through the federation period and in the early Commonwealth parliaments, were forced to realign into a Liberal 'fusion' and adopt comparable disciplined practices. Disciplined party politics reinforced the logic of parliamentary responsible government and was in turn reinforced by it. The Senate became a party house and played second string to the House of Representatives where the government did battle with the Opposition.

Not surprisingly, such a massive shift in political practice was accompanied by a shift in political thinking. Labor's democratic majoritarianism was highly congenial to parliamentary supremacy in a unitary state. Hence, Labor and its supporters promoted and embellished the virtues of parliamentary responsible government and reviled the federal Constitution. For somewhat different reasons, their Liberal political opponents also championed parliamentary responsible government. Besides being the name of the main Australian political game after 1910, it was also the core of the beloved British system to which they were sentimentally wedded. Having constituted themselves as a sovereign people in forging a new nation under a federal constitution, without breaking the ties of monarchy and empire, many Australians reverted to being 'transplanted Britons' and establishment figures prided themselves in being more British than the British themselves. The British Empire, the Great War and continuing British emigration all conspired

to reinforce British sentiment. So much so that it is hard to imagine Sir Robert Menzies championing anything other than he did, but rather surprising that he could still do so as late as the 1960s.

The broad argument of this book is in support of taking the Australian Constitution seriously because it has primacy over the other political institutions and processes of the nation. It is primary in the sense of controlling the others: constituting and limiting the institutions of politics and shaping political processes. It is also primary in the normative sense of legitimating all other institutions and processes. From the beginning of systematic political analysis by Plato and Aristotle, constitutions have been considered fundamentally important in defining and shaping political regimes. Despite the lack of attention by Australian political science, opinion-makers and public figures, the Australian Constitution has been profoundly important not only in shaping the politics and political institutions of the nation but also in actually creating the nation itself. The Australian nation is a constitutional construct so its Constitution deserves special attention.

Internationally there is a resurgence of interest in constitutions and constitution making: in Europe and the Americas as countries move towards transnational associations, in Russia and the old Eastern Bloc in the aftermath of the breakdown of communism and the Soviet Union, and in South Africa after the failure of apartheid. In Australia, the constitutional centenary provides an obvious occasion for serious evaluation of how well our Constitution has served us during the twentieth century and whether, given all the changes to Australia's condition and place in the world, it is suitable for the twenty-first century. Australian political scientists who take their intellectual orientation from American political science can be reassured that institutions and constitutions are firmly back on the agenda, appropriately dressed up as the 'new institutionalism' (March & Olsen 1983; 1989) and the 'new constitutionalism' (Elkin & Soltan 1993). The older brigade that remains enamoured of the simplistic British paradigm of parliamentary sovereignty would do well to ponder the 'Delusions and Discontents' that modern British scholarship is showing are inherent in such an impoverished model (Mount 1993).

This book will have achieved its purpose if it persuades or provokes others to take Australia's Constitution seriously. To that end, chapters 2 and 4 engage and contest the anti-constitutional and anti-federal positions of authors, authorities and the Labor Party. Given the dominance of the responsible party government model in Australian political science and public opinion, there needs to be a good deal of critical reflection on the conceptual framework, presuppositions and prejudices of the leading orthodoxy. Australians have been schizophrenic in

governing themselves by a federal constitution but discoursing mainly about its parliamentary and party responsible government parts. This book changes the balance by focusing on the former as primary and treating the latter as supplementary parts of Australia's system of government.

In the constitutional centenary decade when there is much talk about reshaping Australian institutions, and particularly the Constitution, it is necessary to establish the precise nature of the Constitution and how its main parts were designed and have developed. Some of the key institutions of Australian politics that have constitutional bases and which are discussed in particular chapters of the book can be mentioned briefly to illustrate the point that the institutional parts of Australian government need to be considered in their constitutional context.

It would be unwise to propose changes to the powers of the Senate, for instance, if we did not appreciate its true character as a coequal house of the Commonwealth legislature and how it was designed to work with responsible government. This is explained in chapter 3. In evaluating how individual rights are protected in Australia and whether Australia should adopt a bill of rights, one needs to appreciate the extent to which existing institutional checks and balances do the job, as discussed in chapter 6. How the High Court and its law-making role, which has become publicly contentious because of such recent decisions as *Mabo* (1992) and the *Political Advertising* case (1992), fit into a federal republic is treated in chapter 7. There it is argued that it is not the High Court that has run amuck but that its critics have failed to understand the court's constitutional role as the judicial branch of government. At the subconstitutional level, proposals for reshaping intergovernmental relations and fiscal federalism, both major current agenda items, need to take account of the concurrent structure of the division of powers, including most tax powers, between the Commonwealth and the States. These topics are discussed in chapters 8 and 9 respectively.

Finally, there needs to some justification for using the term *republic* rather than *democracy*. *Republic* has not been part of mainstream Australian discourse, and now it is highly contentious in the debate between monarchists and republicans. Moreover, it is one of the oldest terms in political analysis and has had a diverse range of usages in ancient and early modern times, including mixed regimes and oligarchies, which would not be suitable for Australia or at all congenial to Australians. The core modern meaning, however, 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. The purpose of republican government remains the ideal set out by Montesquieu: achieving the liberty of the citizens understood in the positive sense of their enjoying tranquillity of mind