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Responsible Government, Statutory Authorities and the *Australian Constitution*

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Abstract

This article examines the compatibility of extra-departmental executive agencies, a defining feature of the modern regulatory state, with responsible government, one of the architectonic principles of the Australian Constitution. Some scholars have argued that a constitutional implication derived from responsible government should be drawn limiting the types of entities that may be established by the Commonwealth and imposing requirements relating to the relationship that must exist between ministers and entities within their portfolio. This article argues that the view that independent statutory agencies are a derogation from the principles of responsible government rests on a misunderstanding of responsible government. Responsible government is an inherently evolutionary system: as incorporated into the Australian Constitution, responsible government was intended to be flexible and non-prescriptive, allowing for change in the governmental arrangements considered necessary from time to time. Independent statutory agencies should not be seen as a challenge to the true principles of responsible government but a legitimate evolution in governance arrangements, which the Constitution deliberately left open.

I Introduction

Responsible government is one of the architectonic principles of the *Australian Constitution* and a defining feature of our hybrid constitutional arrangements.[1] The traditional theory of responsible government posits an elegant chain of accountability flowing from the government to the people: Parliament is elected by the people and subject to periodic re-election; the government holds office

1. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers Case*'); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135, 184–5 (Dawson J) ('*ACTV*').

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by maintaining the confidence of the legislature and is liable to forfeit that confidence through mismanagement or adopting disagreeable policies. Thus, the government is accountable to Parliament for its actions and Parliament is accountable to the people who elect it. The traditional Westminster model government subsumes the entirety of the public sector within this chain: every public entity is notionally within the portfolio of a minister, who is accountable to Parliament for the actions of those entities.

The massive growth in government bureaucracy, and in particular the growth of extra-departmental executive agencies, is a defining feature of the modern regulatory state.[2] The size, composition and nature of the public sector has changed enormously since federation. The number of public sector employees has increased exponentially and there has been a proliferation of officers, agencies, authorities, boards, corporations and other entities.[3] This development has placed the principle of responsible government under immense strain. Independent statutory offices and authorities do not neatly fit within the tidy schema envisioned under the traditional conception of responsible government whereby governmental functions are carried on by departments, subject to ministerial oversight. The sheer size of modern government bureaucracies makes it difficult for ministers to monitor the activities of every entity, officer and official connected with their portfolio.

Some have viewed the growth of extra-departmental executive agencies with concern, considering this to be inconsistent with or a threat to responsible government, which is assumed or even mandated by the *Constitution*.[4] One response has been to argue that the *Constitution* places limitations on the types of entities that may be established by the Commonwealth and imposes requirements relating to the relationship that must exist between a minister and entities within the minister's portfolio. One leading scholar argued that the British system of responsible government 'does not countenance the existence of government officials for whom *no one is accountable or responsible in the Parliament*'; accordingly, legislation which establishes government officials or entities which are not under the control of a minister may be of questionable constitutional validity.[5] The text of the *Constitution* does not contain any prohibition to this effect, and so arguments such as these seek to draw an implication from the incorporation of responsible government into the *Constitution*.

These arguments fall within a broader trend to seek to 'constitutionalise' certain of the principles of responsible government, that is, to argue that that responsible government—or, more accurately, a particular conception of responsible government—should be entrenched as a constitutionally mandated and legally enforceable feature of the *Constitution*, and that the conventions

2. Benedict Sheehy and Don Feaver, 'Re-Thinking Executive Control of and Accountability for the Agency' (2016) 54(1) *Osgoode Hall Law Journal* 175, 196.
3. In 1901, there were 6 Commonwealth government departments, with approximately 133 800 persons employed by the Commonwealth and State governments: A Barnard, N G Butlin and J J Pincus, 'Public and Private Sector Employment in Australia, 1901–1974' (1977) 10(1) *Australian Economic Review* 43, 50. As at June 2018, there were 1 987 000 public sector employees in Australia, which includes 240 700 Commonwealth, 1 558 700 state government and 187 600 local government employees: Australian Bureau of Statistics, 'Employment and Earnings, Public Sector, Australia, 2017–18', *Australian Bureau of Statistics* (Result Summary Release, 8 November 2018) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6248.0.55.002>.
4. Terence Daintith and Yee-Fui Ng, 'Executives' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 587, 589.
5. Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 18 (emphasis in original).

of responsible government should be considered constitutionally required implications. According to this trend, any arrangement that violates the notion of responsible government should be deemed constitutionally invalid.

The arguments of Lindell and others may also derive support from a motivation analogous to that underlying the High Court's decision in *Kirk v Industrial Court (NSW)* ('*Kirk*').[6] In *Kirk*, the High Court held that the power to grant relief in relation to the decisions of inferior courts and tribunals on the ground of jurisdictional error was a defining characteristic of state Supreme Courts which could not be removed by state legislation.[7] The plurality held that '[t]o deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint'.[8] It might be thought that mandating a particular relationship of political accountability to which statutory authorities are subject would have the beneficial effect of preventing such authorities from becoming 'islands of power immune from supervision and restraint'.

These arguments prompt the search for principles to guide the interpretation of the *Constitution*. This article considers the question of whether the Commonwealth's power to create statutory agencies[9] and determine their structure and powers should be limited by a constitutional implication derived from responsible government.[10] I argue that no such implication should be drawn. This article argues that attempts to 'constitutionalise' the principles of responsible government are misguided. It is not desirable—or even possible—to attempt to mandate the principles of responsible government, as practised in 19th-century Britain, as normatively necessary in 21st-century Australia. The view that the existence of independent statutory authorities are a derogation from the principles of responsible government rests on a misunderstanding of responsible government. Responsible government was—and is—an inherently evolutionary system: as incorporated into the *Australian Constitution*, responsible government was intended to be a deliberately flexible and non-prescriptive system of government, allowing for change in the governmental arrangements considered necessary from time to time. Independent statutory agencies should not be seen as a challenge to the true principles of responsible government but a legitimate evolution in governance arrangements, which the *Constitution* deliberately left open. There is no support in the text, structure or history of the *Constitution* for arguing that a particular type of governmental structure—the independent statutory authority—is constitutionally impermissible, and the arguments for drawing an implication to this effect are not persuasive.

To make this case, this article examines the incorporation of responsible government into the *Australian Constitution,* exploring the conception of responsible government held by British constitutional writers in the late 19th century, and the understanding held by the framers of the *Australian Constitution.* Responsible government, despite its centrality to the *Constitution*,[11] is nowhere delineated or defined,[12] and so elucidating its nature requires careful attention to history,

6. (2010) 239 CLR 531 ('*Kirk*').
7. Ibid 566 [55], 581 [98]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
8. Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
9. A variety of different terms are used in the literature to describe these bodies, including statutory authorities, statutory corporations, non-departmental bodies, executive agencies, public corporations and arms' length bodies.
10. This article considers only the position relating to the Commonwealth, not the states.
11. *Engineers Case* (n 1) 146 (Knox CJ, Isaacs, Rich and Starke JJ).
12. W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 168.

convention and practice. I argue that the views of the framers best accord with the evolutionary history of responsible government, the sparse text of the *Constitution*, and with constitutional and political practice today. While the mere fact that the framers held a particular view does not require that such a view must be adopted today, I argue that their views make the best sense of the *Constitution*.

The approach outlined in this article may also have implications for the interpretation of legislation and the constitutional relationship between ministers and statutory authorities, such as the scope of a minister's power of direction and whether ministers must retain a power of direction, but these issues are beyond the scope of this article.[13]

II Responsible Government and the *Australian Constitution*

The framers of the *Constitution* incorporated responsible government modelled on the principles of the British Constitution as practised at the time of federation into the *Australian Constitution*, albeit with some important modifications reflecting Australian colonial experience. The focus of this article is 'responsible government' in its narrower, constitutional meaning, which refers more specifically to the relationship between the head of state, the executive branch and parliament, rather than broader notions of responsibility which may include responsiveness to public opinion and prudent decision-making.[14] In *Williams v Commonwealth* ('*Williams [No 1]*'), French CJ noted that '[t]he system of responsible government under the British Constitution was embedded in the federal Constitution and cannot now be disturbed without amendment to that Constitution'.[15] Responsible government is thus considered central to the *Australian Constitution*.[16]

The *Constitution* incorporates responsible government implicitly, assuming its operation rather than explicitly attempting a definition of its core principles or intended functioning. This is evident from the provisions of the *Constitution* which relate to the executive. The *Constitution* confers a variety of powers on the Governor-General[17] and provides that Commonwealth executive power is vested in the Queen and exercisable by the Governor-General as the Queen's representative.[18] In exercising the powers legally vested in him or her, the Governor-General, by convention, acts on the advice of the government of the day, constituted by the ministry which must retain the confidence of Parliament. Pursuant to s 64, ministers are appointed to administer the executive government through departments of state, who provide advice to the ministers in the carrying out of these functions.[19] In order to ensure that the ministry possesses Parliament's confidence, s 64 requires that all ministers must be members of either house of Parliament.[20] The members of both

13. For discussion of these issues, see, eg, Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26(2) *Federal Law Review* 309; Enid Campbell, 'Ministers, Public Servants and the Executive Branch' in Gareth Evans (ed), *Labor and the Constitution 1972–1975* (Heinemann, 1977) 140–2.
14. See A H Birch, *Representative and Responsible Government: An Essay on the British Constitution* (Allen & Unwin, 1964) 17–21; Ian Thynne and John Goldring, 'Government "Responsibility" and Responsible Government' (1981) 16(2) *Politics* 197; R N Spann, *Government Administration in Australia* (Allen & Unwin, 1979) 493–7.
15. (2012) 248 CLR 156, 204 [58] ('*Williams [No 1]*').
16. B R Wise, *The Commonwealth of Australia* (Pitman, 1909) 195.
17. *Constitution* ss 5, 28, 32, 33, 56, 57, 58, 61, 63, 64, 65, 67, 68, 69, 72, 85, 103, 126, 128.
18. Ibid s 61.
19. Ibid s 64.
20. Ibid.

houses are elected and thereby accountable to the Australian people, although on different bases.[21] Section 49 confers on both houses of Parliament the same 'powers, privileges, and immunities' as the House of Commons possessed at the establishment of the Commonwealth, which includes powers to summon persons including Commonwealth ministers and officials and order the government to produce documents.[22] Sections 81 and 83, which require all revenue raised by the Commonwealth to be paid into the Consolidated Revenue Fund and only drawn under an appropriation made by law, have been described by members of the High Court as designed to ensure parliamentary control of government finance,[23] subject to the requirement of executive initiation of finance proposals.[24] Thus, the *Constitution* defines the legal powers available to the executive, while the manner of their exercise is determined by convention.

Despite its centrality to the *Constitution*, there is no universally accepted definition of responsible government. The core elements of responsible government in the constitutional sense are that the Governor-General must act in accordance with the advice of the ministry, and that ministers must possess the confidence of Parliament.[25] The principle of collective responsibility is arguably the most important feature of responsible government.[26] Cabinet, which is not mentioned in the *Constitution*, is collectively responsible to Parliament for the overall conduct of government and must resign if it forfeits Parliament's confidence. All ministers are equally responsible for the decisions of the government:[27] if any individual member of cabinet cannot in conscience support government policy, he or she must resign.[28] Ministers are also individually accountable to Parliament. Every minister is responsible for the management of his or her department and liable to be questioned in Parliament in relation to the affairs of that department.[29] In the event of mismanagement, the minister is liable to resign, although this is increasingly rare.[30]

Although the core of responsible government is clear, 'the edges are fuzzy and ill-defined'.[31] A great deal of this uncertainty arises from the fact that the working of the Westminster system relies considerably on conventional usage,[32] which modifies in practice the legal theory of the

21. Ibid ss 7, 24.
22. Janina Boughey and Greg Weeks, 'Government Accountability as a Constitutional Value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 108.
23. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 43 [77] (French CJ), 105 [294], 113 [320], 119 [338] (Hayne and Kiefel JJ).
24. *Constitution* s 56; ibid 110 [310] (Hayne and Kiefel JJ).
25. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 704.
26. Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Lawbook, 1995) vol 1, 75, 79.
27. Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 1988) vol 1, 86 [2.185].
28. See Ian Killey, *Constitutional Conventions in Australia* (Australian Scholarly Publishing, 2009) ch 4.
29. *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 246 ('*Hughes*').
30. Richard Mulgan, 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 177, 180; Judy Maddigan, 'Ministerial Responsibility: Reality or Myth?' (2011) 26(1) *Australasian Parliamentary Review* 158, 158; IDF Callinan, 'Responsible Government—in Dilution' (April 2008) 52(4) *Quadrant* 16; Luke Raffin, 'Individual Ministerial Responsibility during the Howard Years: 1996–2007' (2008) 54(2) *Australian Journal of Politics and History* 225.
31. George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 2.
32. L F Crisp, *Australian National Government* (Longman Cheshire, 5th ed, 1983) 37.

Constitution.[33] This is reflected in the competing definitions proffered by various scholars. Hanks, Gordon and Hill include the proposition that 'ministers control all the functions of government, including those formally vested in the Crown' as central to the system of responsible government.[34] R S Parker argued that responsible government (or the 'Westminster syndrome') consists of the following principles:

1. Ministers have to be members of Parliament.
2. Ministers require a majority in the popular House of the Parliament to hold office.
3. Parliament can be dissolved before the expiration of its maximum term.
4. Public servants must have different tenures from their ministers.[35]

While they may be more or less accurate,[36] definitions such as these conceive responsible government primarily as consisting of a static list of constitutional rules—that is, they reduce responsible government to a list of characteristics or *bric-à-brac*,[37] arguing about which principle should or should not be considered essential to responsible government.[38] Such definitions misunderstand the essence of responsible government and obscure its vitality, crystallising it into an almost arbitrary set of normative rules which obtain their force simply by virtue of having been, at one time or other, widely accepted as constitutional. By contrast, as argued in Part IV, responsible government as incorporated into the *Constitution* is not, first and foremost, a constitutional doctrine or set of rules, but rather an evolving set of political practices which imposes a minimal number of limitations on the permissible scope of governmental arrangements.

The scholarship on responsible government has tended to be preoccupied with two issues. The first is the compatibility of responsible government with federalism, especially in light of the 1975 constitutional crisis. Responsible government, it is argued, requires an executive selected by and accountable solely to the lower, more representative house of Parliament.[39] Federalism, as conceived by the framers, incorporated into the constitutional structure an upper house with coordinate or nearly coordinate powers to those of the lower house, including the power to reject taxation and appropriation bills.[40] Notwithstanding reservations about their compatibility, the framers attempted to adopt both into the *Constitution*. The High Court has described the successful combination of both responsible government and federalism in the *Constitution* as the framers'

33. Helen Irving, *Five Things to Know about the Australian Constitution* (Cambridge University Press, 2004) 33–4.
34. Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 4th ed, 2018) 237.
35. R S Parker, 'Responsible Government in Australia' (1980) 15(2) *Politics* 11, 12–13, as summarised by Lindell, 'Responsible Government' (n 26) 76–7.
36. For instance, the increasingly fragile tenure of senior public servants calls point 4 into question. See, eg, Leah MacLennan, 'New SA Liberal Government Sacks Four Senior Public Servants', *ABC News* (online), 21 March 2018 <https://www.abc.net.au/news/2018-03-21/new-sa-liberal-government-sacks-four-senior-public-servants/9571042>.
37. To borrow an epithet of Martin Krygier in a different context: 'Why the Rule of Law Is Too Important to Be Left to Lawyers' (2012) 2(2) *Prawo i Więź* [Law & Social Bonds] 30, 31.
38. See, eg, H N Collins, 'What Shall We Do with the Westminster Model?' in RFI Smith and Patrick Weller (eds), *Public Service Inquiries in Australia* (University of Queensland Press, 1978) 360.
39. Elaine Thompson, 'The 'Washminster' Mutation' (1980) 15(2) *Politics* 32, 33–4.
40. Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) ch 8.

most 'striking achievement'.[41] However, others have argued that, by doing so, the framers incorporated contradictory principles into the *Constitution* which was a direct cause of the 1975 constitutional crisis.[42]

Given that the standard paradigm in Australian political science is to view responsible party government as the dominant characteristic of Australian political institutions,[43] the tension between responsible government and the Senate is typically resolved in favour of responsible government, or, more accurately, a particular conception of responsible government. For instance, in the influential text *Australian National Government*, L F Crisp argued that '[i]t is impossible to reconcile sound democratic principles with the power of a Second Chamber constituted as is the Australian Senate to hold to ransom a Government with a clear House of Representatives majority and mandate to govern from the latest House general election'.[44] The logical conclusion of this view is that the powers of the Senate should be exercised subject to the requirements of responsible government.[45] While this debate is not of direct relevance for this article, it illustrates the normative primacy often accorded to responsible government by commentators, and also the particular, lower house centric, conception of responsible government adopted in the literature.

The second issue which has preoccupied the literature, which is of direct relevance to this article, is the extent to which the conventions of responsible government have become legally enforceable. A trend towards entrenching or seeking legal enforcement of the conventions of responsible government is discernible in the cases and literature. George Winterton argued that responsible government is clearly implied in the *Constitution* and that the High Court has shown a willingness to give 'constitutional status' to at least some of its elements.[46] Geoffrey Lindell likewise argued that the High Court is willing to draw implications from responsible government when interpreting the *Constitution*, with the consequence that any legislation passed by the Commonwealth would have to conform to the rules of responsible government.[47] In a series of cases, the High Court discerned an implied freedom of political communication in the *Constitution*, which imposed constraints on the ability of the Commonwealth Parliament to make laws limiting

41. *Boilermakers' Case* (n 1) 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); Cheryl Saunders, 'Future Prospects of the Australian Constitution' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 212, 219. See also Gordon Greenwood, *The Future of Australian Federalism* (University of Queensland Press, 2nd ed, 1976) 55.
42. See, eg, Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 47 ('*A Federal Republic*'); Colin Howard and Cheryl Saunders, 'The Blocking of the Budget and Dismissal of the Government' in Gareth Evans (ed), *Labor and the Constitution, 1972–1975* (Heinemann, 1977) 251, 286; Brian Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution' (1980) 18(3) *Journal of Commonwealth and Comparative Politics* 247; Joan Rydon, 'Some Problems of Combining the British and American Elements in the Australian Constitution' (1985) 23(1) *Journal of Commonwealth & Comparative Politics* 67; Geoffrey Sawer, *Federation Under Strain: Australia 1972–1975* (Melbourne University Press, 1977) 121–3; Winterton (n 31) 5–11; Paul Kelly, *November 1975*: *The Inside Story of Australia's Greatest Political Crisis* (Allen & Unwin, 1995) 15–17; Thompson (n 39) 33–4.
43. Andrew Parkin, 'Pluralism and Australian Political Science' (1980) 15(1) *Politics* 50; Galligan, *A Federal Republic* (n 42) 5; Stanley Bach, 'Crisp, the Senate, and the Constitution' (2008) 54(4) *Australian Journal of Politics and History* 545, 551.
44. Crisp (n 32) 349. See also Campbell Sharman, 'Australia as a Compound Republic' (1990) 25(1) *Politics* 1, 4.
45. Bach (n 43) 551–2.
46. Winterton (n 31) 4–5.
47. Lindell, *Responsible Government and the Australian Constitution* (n 5) 2, 7.

freedom to discuss political matters.[48] This freedom was derived from the system of government established by the *Constitution*, especially the requirement of representation in ss 7 and 24, and also the conventions of responsible government.[49] In *Lange v Australian Broadcasting Corporation,* a unanimous High Court held that:

> the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.[50]

In more recent cases, the implied freedom has been interpreted to include a constitutionally entrenched guarantee of universal adult suffrage subject to reasonable and proportionate limitations[51] and also a guarantee of '[e]quality of opportunity to participate in the exercise of political sovereignty'.[52] As a result of these cases, it would seem that certain conventions of responsible government are to be considered rules of law implied in the *Constitution*, especially those which are designed to ensure that the will of the people, as expressed through their representatives, is made effective.[53] In other cases, members of the High Court have also drawn implications from the nature of responsible government for the scope of the executive power of the Commonwealth. In *Williams [No 1]*, Crennan J held that principles of responsible government and parliamentary control of the executive 'operate inevitably to constrain the Commonwealth's capacities to contract and to spend'[54] and Kiefel J cryptically held that '[c]onsiderations as to the supremacy of Parliament which underlie the doctrine of responsible government may provide a basis for limiting executive power to certain of the legislative heads of power'.[55]

While these views have not commanded a majority of the High Court, they are nevertheless evidence of continuing uncertainty about the extent to which our *Constitution* should be interpreted in light of the realities of modern Australian government, and the extent to which responsible government constrains the power of the Commonwealth. One aspect of this uncertainty is the extent to which responsible government is a static or evolutionary concept. There has been some recognition that the nature of responsible government is not fixed. In *Re Patterson; Ex parte Taylor* ('*Re Patterson*'), Gleeson CJ held that '[t]he characteristics of responsible government are not immutable'[56] and the plurality in *Egan v Willis* warned:

48. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *ACTV* (n 1); *Coleman v Power* (2004) 220 CLR 1; *Unions NSW v New South Wales* (2013) 252 CLR 530; *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448.
49. *McCloy* (n 48) 222–3 [101]–[102] (Gageler J).
50. (1997) 189 CLR 520, 561.
51. See *Roach v Electoral Commissioner* (2007) 233 CLR 162.
52. *McCloy* (n 48) 207 [45] (French CJ, Kiefel, Bell and Keane JJ). See also *Unions NSW v New South Wales* [2019] HCA 1, [40] (Kiefel CJ, Bell and Keane JJ).
53. James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 369.
54. *Williams [No 1]* (n 15) 351–2 [516].
55. Ibid 370 [581].
56. (2001) 207 CLR 391, 403 [17] (Gleeson CJ) ('*Re Patterson*').

> It should not be assumed that the characteristics of a system of responsible government are fixed or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster.[57]

III Statutory Authorities and the *Australian Constitution*

Statutory authorities are a ubiquitous feature of Australian political institutions and indeed have long been a part of the Australian political landscape.[58] A wide range of non-departmental agencies perform a wide range of functions at the Commonwealth and state level. As at 30 May 2019, there were 188 Commonwealth entities and companies,[59] employing an estimated 56 000 staff; this amounts to approximately 37 per cent of Commonwealth public sector employees.[60] There are two main types of non-departmental agencies: statutory authorities established by a special Act of Parliament,[61] which are the focus of this article, and government-owned corporations.[62] The Rae Committee defined 'statutory authority' as follows:

> An office or organisation, corporate or unincorporated, constituted by or pursuant to powers conferred by an Act of Parliament whose functions and authority are derived wholly or principally from Act of Parliament or from subordinate legislation made thereunder.[63]

Statutory authorities have no standard structure; rather, their composition and powers vary widely depending on the terms of the establishing legislation. The extent to which they are subject to ministerial control and direction varies markedly.[64]

The *Royal Commission on Australian Government Administration* found that the two main reasons for the creation of a statutory body were the need for independence and the status conferred by establishment by legislation.[65] Statutory authorities have typically been created to provide essential public services or to undertake activities which are beyond the capacity of private enterprise such as water supply, sewerage, roads, railways or coalmining.[66] It is often considered

57. *Egan v Willis* (1998) 195 CLR 424, 451 [41] (Gaudron, Gummow and Hayne JJ). See also ibid 460–5 [211]–[221] (Gummow and Hayne JJ).
58. See R L Wettenhall, *Railway Management and Politics in Victoria 1856–1906: Report of a Case Study in the Origins of the Public Corporation* (Royal Institute of Public Administration, 1961); R L Wettenhall, 'Administrative Boards in Nineteenth Century Australia' (1963) 22(3) *Australian Journal of Public Administration* 255.
59. Australian Government Department of Finance, *Flipchart of PGPA Act Commonwealth Entities and Companies* (Flipchart, 30 May 2019) <https://www.finance.gov.au/sites/default/files/Flipchart%20May%202019.pdf>.
60. There were 152 095 employees in the Australian Public Service as at 30 June 2017: 'Size of the APS', *Australian Public Service Commission* (Web Page) <https://www.apsc.gov.au/size-aps>. As at 30 June 2018, there were 95 651 ongoing staff employed in Commonwealth departments: 'APS Employment Data 30 June 2018 Release', *Australian Public Service Commission* (Web Page, 30 June 2018) <https://www.apsc.gov.au/aps-employment-data-30-june-2018-release>.
61. See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 117.
62. Roger Wettenhall, 'Non-Departmental Public Bodies under the Howard Governments' (2007) 66(1) *Australian Journal of Public Administration* 62, 63.
63. Senate Standing Committee on Finance and Government Operations, Parliament of Australia, *Statutory Authorities of the Commonwealth* (Parliamentary Paper No 1, 1979) 20 [2.5].
64. Campbell, 'Ministers, Public Servants and the Executive Branch' (n 13) 140.
65. *Royal Commission on Australian Government Administration* (Final Report, August 1976) 84.
66. W H Tucker, 'Public Control of Statutory Corporations' (1954) 13(1) *Australian Journal of Public Administration* 19, 19.

that government departments—whatever their merits otherwise—are unsuitable for commercial or industrial activities, which are more efficiently and effectively performed in separate entities under dedicated management.[67] One typical justification for the creation of statutory authorities is that they allow for greater managerial autonomy, and that the entities can run in a business manner free from the restrictions to which government departments are subject.[68] Further, statutory authorities are free from the immediacy of party political pressures and can focus on long-term planning and policies.[69]

Enthusiasm for statutory authorities has waxed and waned. For some, statutory authorities (especially statutory corporations) represent the best of both worlds, being 'clothed with the power of government but possessed of the flexibility and initiative of a private enterprise'.[70] By contrast, others consider that the government department is, 'for a parliamentary democracy, by far the best form of administration yet devised', reconciling the competing demands of responsibility, policy coordination and accountability.[71] For these writers, any deviation from the departmental model should be the exception rather than the norm. In recent years, in Australia, there has been an increasing trend towards centralisation, with some key functions brought back within departmental management, and a sparing use of autonomous agencies.[72] The tendency has also been to increase government control of statutory authorities and subject them to governmental policies, especially on matters such as finance:[73] 'complete autonomy is the exception rather than the rule'.[74] All Commonwealth entities and departments, whatever their formal structure, are subject to a single framework statute, the *Public Governance, Performance and Accountability Act 2013* (Cth), which contains requirements relating to, among other things, governance, planning, record keeping, financial reporting, audit, borrowing and investment.[75]

The growth of statutory agencies poses significant challenges for responsible government.[76] One major problem is the sheer size of the public sector, of which statutory authorities form an important part. This dwarfs the size of the ministry and the Parliament. The Commonwealth Parliament consists of 150 members of the House of Representatives and 76 senators, and as at November 2019 there were 30 Commonwealth ministers (excluding parliamentary

67. R L Wettenhall, 'Government Department or Statutory Authority?' (1968) 27(4) *Australian Journal of Public Administration* 350, 353, 356; Spann (n 14) 118–20.
68. See Leicester Webb, 'Freedom and the Public Corporation' (1954) 13(2) *Australian Journal of Public Administration* 101.
69. T H Kewley, 'Some General Features of the Statutory Corporation in Australia' (1957) 16(1) *Australian Journal of Public Administration* 3, 4.
70. E L Normanton, *The Accountability and Audit of Governments: A Comparative Study* (Manchester University Press, 1966) 313.
71. Webb (n 68) 105.
72. Roger Wettenhall, 'Continuity and Change in the Outer Public Sector' in Chris Aulich and Mark Evans (eds), *The Rudd Government: Australian Commonwealth Administration 2007–2010* (ANU E Press, 2010) 55, 61. See also Roger Wettenhall, 'The Public Sector: Departments and Arm's Length Bodies' in Chris Aulich (ed), *The Gillard Governments: Australian Commonwealth Administration 2010–2013* (Melbourne University Press, 2014) 88.
73. T H Kewley and Joan Rydon, 'Australian Commonwealth Government Corporations: A Statutory Analysis' (1950) 9(1) *Australian Journal of Public Administration* 200, 202. See also Leslie Zines, 'Federal Public Corporations in Australia' in W Friedmann and J F Garner (eds), *Government Enterprise: A Comparative Study* (Stevens, 1970) 227.
74. W J Campbell, 'The Statutory Corporation in New South Wales' (1952) 11(3) *Australian Journal of Public Administration* 108, 111.
75. *Public Governance, Performance and Accountability Act 2013* (Cth) ss 25–9, 35, 37, 41–4, 57, 58.
76. Thynne and Goldring (n 14) 203.

secretaries).[77] The likelihood that Parliament—meeting irregularly and subject to the pressing demands of constituency, party and politics—has capacity to monitor effectively the hundreds of thousands of public servants which make up the modern bureaucracy seems remote.[78]

The overlapping regulatory arrangements which apply to public sector entities pose a complex challenge to traditional notions of ministerial accountability. In particular, the hybrid nature of statutory authorities has led to an awkward amalgam of private and public regulatory paradigms. One policy goal that is evident in relation to certain classes of public sector entities is the adoption of private sector structures to enable them to perform more efficiently in a competitive environment. There is also an increasing desire for the public sector to enshrine high standards of governance, drawing from private sector notions. This has led to the widespread adoption of private sector concepts of governance within the public sector, for example by directly applying corporate governance duties to public sector entities.[79]

At the same time, responsible government and parliamentary scrutiny are often considered to provide more significant checks on the exercise of public powers than the duties drawn from private sector mechanisms of corporate governance.[80] And yet, the creation of public entities with significant levels of independence from traditional ministerial and departmental structures is in tension with the typical Westminster approach, which accords normative primacy to ministerial responsibility. For some, the agency is a means of the executive shielding itself from accountability.[81] Accordingly, some have seen the creation of independent statutory authorities as a weakening of ministerial responsibility and a departure from the principles of responsible government.[82] Statutory authorities are 'neither elected nor directly politically accountable'[83] and some commentators are concerned with vesting significant governmental powers in unelected officials and institutions.[84]

Although it is common to describe ministers as being responsible for entities within their portfolio,[85] the extent to which the conventions of responsible government apply in relation to

77. 'Ministry 25 January 2019 to 2 March 2019', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Parliamentary_Handbook/Current_Ministry_List/Ministry_25_January_2019_to_2_March_2019>.
78. See Campbell Sharman, 'Reforming Executive Power' in George Winterton (ed), *We the People: Australian Republican Government* (Allen and Unwin, 1994) 113, 113; Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly Publishing, 2012) 266–8; John Summers, 'Parliament and Responsible Government' in Dennis Woodward, Andrew Parkin and John Summers (eds), *Government, Politics, Power and Policy in Australia* (Pearson, 9th ed, 2010) 73, 76.
79. Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) [47]; Meredith Edwards et al, *Public Sector Governance in Australia* (ANU E Press, 2012) 1–2; Meredith Edwards, 'Public Sector Governance: Future Issues for Australia' (2002) 61(2) *Australian Journal of Public Administration* 51, 52.
80. Edwards et al, *Public Sector Governance in Australia* (n 79) 62.
81. Sheehy and Feaver (n 2) 184. See also John Warhurst, 'Exercising Control over Statutory Authorities: A Study in Government Technique' (1980) 15(2) *Politics* 151, 151, 159.
82. Mark Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 77, 88; Sheehy and Feaver (n 2) 217; John Goldring and Roger Wettenhall, 'Three Perspectives on the Responsibility of Statutory Authorities' (1980) 15(2) *Politics* 136, 139.
83. Paul Latimer, 'Ministerial Directions to Independent Statutory Commissions: Commissions Causing Trouble for Their Minister' (2004) 25(1) *Australian Bar Review* 29, 30.
84. Thynne and Goldring (n 14) 205.
85. Victorian Ombudsman, *A Review of the Governance of Public Sector Boards in Victoria* (Parliamentary Report, December 2013) 16, 17, 22; Public Bodies Review Committee, Parliament of New South Wales, *Follow-Up*

constitutionally permissible,[100] in my view, it is inadvisable to read too much into this omission. The *Constitution* was not intended to exhaustively define the limits of the institutions of government: for instance, the *Constitution* does not define the conventions of ministerial responsibility with any precision and does not mention the Prime Minister, Cabinet or opposition. The heads of Commonwealth legislative power are broad enough to enable the creation of independent agencies.[101] A great many things not contemplated by the framers are now considered desirable for modern government, and so limiting permissible government arrangements only to what is expressly contemplated by the *Constitution* is an unattractive prospect. In *Re Patterson*, the High Court adopted a flexible understanding of responsible government, with Gleeson CJ noting that the provisions of ch II of the *Constitution* are brief and 'expressed in a form which allows the flexibility that is appropriate to the practical subject of governmental administration, consistent with the basic requirements of responsible government'; Gummow and Hayne JJ held that the court 'should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial government'.[102]

The High Court has typically interpreted the Commonwealth's power to create and structure statutory authorities in a generous manner.[103] Nevertheless, the incorporation of responsible government into the *Constitution* may limit that power. In *Hughes*, Finn J held that the Commonwealth Minister for Transport and Communications had a broad power of direction and a right to obtain confidential information in relation to a statutory corporation within his portfolio.[104] These powers were held to arise by virtue of the constitutional relationship between parliament and the executive, under responsible government, whereby statutory corporations are accountable to the executive government through the minister, who is accountable in parliament.[105] According to this reasoning, s 61 of the *Constitution* 'requires the relevant Minister to be responsible for the activities of the statutory corporation', reflecting a 'strong form' approach to responsible government.[106] Under this approach, 'the corporation can only satisfy the requirements of responsible government via the principle of ministerial responsibility'.[107] Similar logic underlies Lindell's argument that the British system of responsible government 'does not countenance the existence of government officials for whom *no one is accountable or responsible in the Parliament*', and so the entrenchment of responsible government in the *Constitution* limits Commonwealth legislative power to create officials or entities which are not under the control of a minister.[108] Goldring also considered that there was some doubt as to whether the Commonwealth had power to create independent statutory authorities.[109]

100. Goldring and Wettenhall (n 82) 140; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46; *Re KL Tractors Pty Ltd* (1961) 106 CLR 318; *A-G (Vic) ex rel Victorian Chamber of Manufactures v Commonwealth* (1935) 52 CLR 533.
101. See R Else Mitchell, 'Australian Aspects of Government Corporations' (1947) 6(6) *Australian Journal of Public Administration* 277.
102. *Re Patterson* (n 56) 401 [11] (Gleeson CJ), 460 [211] (Gummow and Hayne JJ, Kirby agreeing at 498 [320]).
103. Mitchell (n 101).
104. *Hughes* (n 29).
105. Ibid 231, 245–6.
106. Mantziaris (n 13) 332.
107. Ibid 340.
108. Lindell, *Responsible Government and the Australian Constitution* (n 5) 18.
109. John Goldring, 'Accountability of Commonwealth Statutory Authorities and "Responsible Government"' (1980) 11(4) *Federal Law Review* 353.

time of federation regarding responsible government through an examination of their writings as well as the writings of other leading contemporaries, and an examination of the federation Convention Debates. Part V explains how these views might inform the constitutional understanding of responsible government today.

A Responsible Government under the British Constitution

It is well known that the framers intended to incorporate responsible government modelled on the British Constitution into the *Australian Constitution*,[118] with some modifications deriving from the experience in the Australian colonies prior to federation. As such, the leading works on the British Constitution during the federation period provide necessary background for understanding the framers' views. For the framers, the terms 'responsible government' and the 'British Constitution' were interchangeable, with responsible government meaning the stage of development of the British Constitution as at the time of federation.

An examination of British constitutional writing in the late 19th century reveals a very different conception of responsible government from that typically held today. The primary characteristic of the British Constitution was its evolutionary nature: the British Constitution had never been created, but had rather evolved over centuries, preserving an overall continuity while accommodating changes made from time to time.[119] There was of course no written document authoritatively setting out the principles of the British Constitution, and an unwritten constitution was inherently liable to change.[120] The Constitution was therefore 'organic' and 'flexible', enabling adaptations to reflect the changing needs of the people. As put by one historian, the Constitution 'was not a set of documents but a reading of history'.[121] The principles of 'growth and development' had 'silently effected numerous and important alterations' in the institutions of government.[122]

Writers of the late 19th century gave custom and convention an immense significance in determining the nature of the Constitution. While writers recognised a distinction between law and custom, both were considered to be 'constitutional': customs were as much a part of the British Constitution as case and statute law.[123] The Constitution was simply the sum of those laws and conventions which were considered to be constitutional. James Bryce, whose treatise *The American Commonwealth* had a significant influence on the framers,[124] accurately encapsulated this position:

118. See, eg, ibid.
119. Edward A Freeman, *The Growth of the English Constitution* (Macmillan, 3rd ed, 1890), 56–8, 90–1, 114–7, 123–6; Eduard Fischel, *The English Constitution* (Bosworth and Harrison, 1863) 4–5.
120. William Reynell Anson, *The Law and Custom of the Constitution* (Clarendon Press, 3rd ed, 1897) part 1, 36.
121. Robert Saunders, 'Parliament and People: The British Constitution in the Long Nineteenth Century' (2008) 6(1) *Journal of Modern European History* 72, 72.
122. Alpheus Todd, *On Parliamentary Government in England: Its Origin, Development, and Practical Operation* (Longmans, 2nd ed, 1887) vol 1, 6.
123. A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 6th ed, 1902) 22–4, 191–201.
124. Matthew N C Harvey, 'James Bryce, "The American Commonwealth", and the Australian Constitution' (2002) 76(6) *Australian Law Journal* 362, 362; Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43(1) *Federal Law Review* 177, 182; Harry Evans, 'Bryce's Bible: Why Did It Impress the Australian Founders?' (2001) 8 *New Federalist* 89, 89. See also John S F Wright, 'Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism' (2001) 31(4) *Publius* 107.

> There is in England no such thing as a constitution apart from the rest of the law: there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases.[125]

Thus, 'accepted usages', or conventions, were as much a part of the Constitution as statutes or judicial decisions.[126] Indeed, many of the most significant features of the British Constitution were conventional, brought about by 'slow and silent alterations of practice and of usage' rather than formal legal changes.[127] Such changes were often as fundamental—if not more so—in determining the nature of the Constitution as law, conditioning or prescribing the exercise of power. The British Constitution was therefore not something separate from the manner of its functioning, but was determined in part by that functioning.[128] The Constitution needed to be 'collected from statutes, from legal decisions, from observation of the course and conduct of the business of politics'.[129]

It follows from this that any modification to the laws or even the customs or political practices which related to the British government meant a modification to the Constitution itself. Those practices and conventions were constantly changing, as the political views and inclinations of the people changed, and different leaders introduced reforms. Accordingly, the British Constitution was conceived as flexible, organic and living, a constitution in constant flux, a 'Constitution in being'.[130] This is an important point which bears emphasis when considering the nature of responsible government. It was not merely that the British Constitution was subject to change, as all constitutions are, but that change was of the essence of the Constitution; change itself was a constitutional principle.[131]

B The Framers' Conception of Responsible Government

This section examines the views of the framers regarding responsible government, to ascertain their views and intentions as to its incorporation into the *Australian Constitution*. Responsible government was a crucial, and hotly contested, question at the federation debates. Prior scholarship typically focuses on the tension between the principles of the British Constitution, which, as at the time of federation, reflected lower house control of finance and the government, according to the convention that the ministry must maintain the confidence of the House of Commons, and the federalist demand of the smaller colonies for a Senate with powers coordinate to those of the lower

125. James Bryce, *The American Commonwealth* (Macmillan, 2nd ed, 1891) vol 1, 237. To similar effect, see Dicey (n 123) 22–4, 191–201; Moore, *The Constitution of the Commonwealth of Australia* (n 12) 83.
126. Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green, 2nd ed, 1894) 1; John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (Longman, Brown, Green and Longmans, rev ed, 1849) 7–8.
127. Earl Grey, *Parliamentary Government Considered with Reference to Reform* (John Murray, 2nd ed, 1864) 8–11; William Reynell Anson, *The Law and Custom of the Constitution* (Clarendon Press, 3rd ed, 1897) part 2, 36–44.
128. William Edward Hearn, *The Government of England: Its Structure, and Its Development* (George Robertson, 2nd ed, 1886) 2.
129. Anson, *The Law and Custom of the Constitution* (n 120) 37.
130. Walter Bagehot, *The English Constitution, and Other Political Essays* (D Appleton, rev ed, 1902) 1; Anson, *The Law and Custom of the Constitution* (n 127) xvii–xviii; Homersham Cox, *The British Commonwealth, or, A Commentary on the Institutions and Principles of British Government* (Longman, Brown, Green and Longmans, 1854) 568.
131. E S Creasy, *The Rise and Progress of the English Constitution* (R Bentley, 1853) 6; Lord Hugh Cecil, *Conservatism* (Williams & Norgate, 1912) 219–22; Dicey (n 123) 29.

house and in which the States were equally represented.[132] However, in the course of the debates, the framers made many important comments which are relevant to explaining how the final form of the *Constitution* gives effect to responsible government, which have been given little attention in prior scholarship.

In the previous section, I argued that the British Constitution was conceived as inherently evolutionary, and that it was conceived to include all practices, usages and conventions which were considered to be constitutional, as well as law. This view was presented in the leading texts on the British Constitution in the late 19th century prior to federation. With two qualifications, the framers' views are consistent with, and were informed by, this conception.

The first qualification is that there were important modifications to responsible government as practised in the colonies prior to federation. Paul Finn has noted the distinctively indigenous deviations from British practice that existed in the colonial political systems which have often been under-estimated, and that the colonial systems of administration were 'markedly different in structure and responsibilities from that of Britain'.[133] Key differences include the use of administrative boards, the conferral of significant powers on Executive Councils and the much greater emphasis on collective responsibility.[134] These practices, of course, shaped the views of the framers, who, as experienced politicians,[135] were familiar with the working of these colonial systems. Secondly, the *Constitution* itself entrenches various aspects of responsible government. These include the requirement that ministers be members of Parliament,[136] the mandated existence of a Federal Executive Council 'to advise the Governor-General in the government of the Commonwealth'[137] and the prohibition on the passage of an appropriate bill unless the Governor-General has recommended the measure.[138] Section 65 could be seen as another example, by limiting the number of ministers to seven, although the provision allows Parliament to increase the number, consistent with a flexible approach.[139] The number of aspects of responsible government entrenched by the *Constitution* is generally recognised to be minimal.

Subject to these qualifications, the framers saw responsible government as an inherently evolutionary system: as put by J A Cockburn, '[t]he essence of the British Constitution is elasticity and development'.[140] Responsible government, for the framers, was not primarily a set of constitutional rules or conventions (for example, that the ministry must maintain the confidence of the lower house of Parliament), but an understanding of how the British Constitution, and the governments modelled on the British system, functioned. Indeed, the term 'responsible government' can be understood to have meant something like 'the way the British Constitution, and the colonial systems modelled on that constitution, functioned'. They expected the *Australian Constitution* to function consistently with the British Constitution. The framers spoke of the *Constitution* as a 'skeleton' that the people would breathe into life and considered that the way the system of government would work in practice would be determined by the people, not the text of the

132. See, eg, Winterton (n 31) 5–11; Galligan, *A Federal Republic* (n 42) 75–86; Howard and Saunders (n 42) 252–60.
133. Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 5.
134. Ibid 13, 46–7, 58–61, 64, 86–91.
135. With one exception, namely James Thomas Walker, who was a delegate to the 1897–98 Federal Convention.
136. *Constitution* s 64.
137. Ibid s 62.
138. Ibid s 56.
139. Ibid s 65.
140. John A Cockburn, *Australian Federation* (Horace Marshall, 1901) 100.

Constitution.[141] It was not simply that the *Constitution* would be modified as a result of (for example) judicial interpretation, but that the very manner of its operation was insusceptible of prescription. Such a view was widely held among the delegates to both the 1891 and the 1897–98 Federal Conventions.

In 1891, the President of the Convention, Henry Parkes, moved a series of resolutions which formed the basis of the substantive debate. Parkes proposed that the *Constitution* should provide that the Governor-General's advisors consist of those who possessed 'the confidence of the house of representatives, expressed by the support of the majority'. This assumed the requirement for the ministry to maintain the confidence of the lower house to be a key feature of responsible government and indeed would have had the effect of entrenching that position as a core feature of the *Constitution*.[142] Samuel Griffith, the Vice President and one of the principal authors of the 1891 Constitution Bill,[143] challenged this, arguing that the essence of responsible government was not that the ministers must possess the confidence of the lower house of Parliament. Instead, Griffith considered that its essence was that the head of state administered the government through ministers who were responsible to Parliament. The linking of the ministry's tenure with the confidence of the lower house of Parliament was merely the stage of development as at the federation period; significant changes had taken place in the working of responsible government up until the 1890s and changes would continue to occur in the future.[144]

Griffith wanted the nature of the relationship between Parliament and the executive to be left open for further development and considered that Parkes's proposal would ossify a particular form of the relationship between the executive and Parliament. Griffith expressed some disapproval of party government, which was becoming 'somewhat discredited' in the colonies, and anticipated its replacement with something better.[145] However, he did not consider it was possible to prescribe how government functioned in practice.[146] While Griffith's view has been taken as a challenge to or redefinition of responsible government,[147] it is in fact consistent with the understanding of the British Constitution presented in the leading constitutional texts. Thus, rather than a redefinition of responsible government, it is more accurate to see it as a historically attuned conception which drew on familiar themes relating to the British Constitution.

Griffith's evolutionary conception was not exceptional but was the dominant way of conceiving responsible government in the 1890s. It was widely held that the British Constitution was evolutionary; as put by Adye Douglas, the Constitution of England was a 'continually changing one'.[148] Andrew Inglis Clark, Henry Wrixon and John Downer all wanted an elastic

141. *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 86–7 (Joseph Carruthers), 13 April 1897, 511 (Alfred Deakin) ('*Convention Debates*, Adelaide, 1897'); Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 6; cf Alfred Deakin, 'The Federation of Australia' (1891) 10 *Scribner's Magazine* 549, 549.
142. *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 23, 26–7, 447 ('*Convention Debates*, 1891'). Cf at 5 March, 1891, 46 (James Munro).
143. J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 48–50.
144. *Convention Debates*, 1891 (n 142) 34–5, 37, 767. See also at 298 (Adye Douglas); Samuel Walker Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer, 1896).
145. *Convention Debates*, 1891 (n 142) 431 (Samuel Griffith).
146. Ibid 40, 431, 527 (Samuel Griffith).
147. See, eg, Galligan, 'The Founders' Design' (n 117) 2; Frank Roland McGrath, *The Intentions of the Framers of the Commonwealth of Australia Constitution* (PhD Thesis, University of Sydney, 2006) 37.
148. *Convention Debates*, 1891 (n 142) 401 (Adye Douglas), 229, 239 (Duncan Gillies), 410 (Edmund Barton).

arguments misunderstand the framers' views. A careful reading of the Convention Debates indicates that, notwithstanding the changes to the draft Constitution, the 'evolutionary' view survived relatively intact in the 1897–98 Convention.

The arguments made by Strangio and Galligan are based on the incorporation of s 64 into the *Constitution*. However, while contemporaries considered that s 64 embedded responsible government into the *Constitution*,[161] its principal purpose was not to ensure lower house dominance, but ministerial accountability. Introducing the Constitution Bill into the New South Wales Parliament, Edmund Barton, the leader and principal drafter at the 1897–98 Convention, noted that s 64 requires ministers to hold seats in either house of Parliament so that they can be called to account, rather than leaving this to the insistence of Parliament.[162] Far from entrenching lower house dominance, s 64 leaves a great deal of freedom in relation to matters such as how the government is to be formed and held to account, and what role the Senate has to play in this. Barton expected that it would be for the Parliament to determine the precise manner in which responsibility would be divided between the two houses.[163] Contemporaries recognised that it left considerable scope for further evolution.[164] As put by Bernhard Wise, s 64 is sufficiently wide to allow for systems other than responsible government, should the latter prove unsuited to a federation:

> Except that Ministers must sit in Parliament, there seems no limit to the changes which might be made with the acquiescence of the Governor-General, in the method of appointment, tenure of office, or function. No part of the Constitution evinces greater sagacity or function.[165]

A belief in the evolutionary nature of responsible government was very evident in the 1897–98 Convention debates and contemporary writings, which formed part of a more general belief that the *Constitution* should be flexible and allow scope for future development.[166] Such views were expressed by 'conservatives' as well as 'liberals', and by delegates from the larger as well as the smaller colonies. Robert Garran, co-author of the *Annotated Constitution of the Australian Commonwealth*, wrote in 1897 that the *Constitution* should not 'attempt to fix the present pattern of responsible government as a thing to be clung to for all time' but must allow scope for development, so that it could be 'moulded to fit the political ideas of each generation'.[167] Alfred Deakin said that '[t]he forces of national life are not to be confined by artificial forms' and Downer, discussing responsible government, considered that 'Constitutions must be a growth',

161. Robert Randolph Garran, *Draft Bill to Constitute the Commonwealth of Australia* (Government Printer, 1898) 17; John Quick, *The Federation Bill* (Wilson and MacKinnon, 1898) 7; New South Wales, *Parliamentary Debates*, Legislative Council, 14 July 1897, 1896 (Edmund Barton).
162. New South Wales, *Parliamentary Debates*, Legislative Council, 14 July 1897, 1897 (Edmund Barton); John Alexander Cockburn, 'The Biology of Federation' (1903) 52(2674) *Journal of the Society of Arts* 272, 278.
163. *Convention Debates*, Adelaide, 1897 (n 141) 443–4, 910–13; *Official Report of the National Australasian Convention Debates*, Melbourne, 10 March 1898, 2252–3, 2255 ('*Convention Debates*, 1898'). See also Moore, *The Constitution of the Commonwealth of Australia* (n 12) 103.
164. See also Barton's comments in *Convention Debates*, Adelaide, 1897 (n 141) 443–4.
165. Wise (n 16) 193, 195.
166. *Convention Debates*, Adelaide, 1897 (n 141) 45, 94, 271, 534; *Official Report of the National Australasian Convention Debates*, Sydney, 404 ('*Convention Debates*, Sydney, 1897'); *Convention Debates*, 1898 (n 163) 344, 503, 613, 737, 739, 740, 904, 917, 1787, 1985, 2239. See also Cockburn (n 162) 275; Victoria, *Parliamentary Debates*, Legislative Assembly, 20 July 1897, 526 (Isaac Isaacs).
167. Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 149, 150–1. Cf Quick and Garran (n 25) 706–7.

and cannot be statute made.[168] Joseph Carruthers noted in Sydney that '[w]e have always expressed our admiration for the British Constitution because it has been of such a character that it has adapted itself at all times to the circumstances of the people and to their growing aspirations'.[169] Richard Baker said: 'I do not care in what way you frame the constitution, the people of Australia will mould and modify it in accordance with their ideas and sentiments for the moment, although its outward form may remain the same'.[170] Matthew Clarke, Josiah Symon and Henry Dobson argued for sufficient flexibility to allow for future development;[171] William Lyne and George Reid wanted the Constitution to be flexible.[172] Patrick Glynn considered that the Constitution included 'that principle of elasticity which is a peculiarity, if not one of the glories of the British Constitution'.[173] Symon considered that the Constitution was 'an elastic Constitution . . . saturated with those principles of free government which are inherent in the British race'.[174] Frederick Holder considered that the draft Constitution was a 'people's Constitution, which conserves everything that is good, and yet provides ample scope for natural growth' and Quick argued that 'we want to provide reasonable scope for the growth and evolution of national life'.[175] Wrixon wrote that 'nothing is more certain than that a free people will insensibly mould any constitution which they may live under, by the mere attrition of its daily working, to suit their own wants and wishes'.[176]

This belief also found expression in an unwillingness to attempt to prescribe how government ought to be carried out in practice. The framers believed that the manner of the Constitution's working was not something that could be prescribed. Barton considered that the people of Australia would adapt and work the institutions of federal government as they saw fit, arguing that '[w]e cannot predict how this constitution will work. We can only form, from our experience of political and constitutional matters, a reasonable judgment as to how it will work'.[177] The precise allocation of responsibility between the two houses would be worked out by the Commonwealth Parliament after federation.[178] Deakin considered that in drafting a Constitution the delegates were 'simply making a mask and form of government into which life has yet to be breathed' which 'the great force of national will' would 'hereafter shape into its own form and expression'.[179] In response to

168. *Convention Debates*, Adelaide, 1897 (n 141) 214, 478 (John Downer), 511 (Alfred Deakin). See also R C Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention* (WK Thomas, 1891) 46.
169. *Convention Debates*, Adelaide, 1897 (n 141) 275 (Joseph Carruthers), 531. Cf 194 (Henry Dobson).
170. *Convention Debates*, 1891 (n 142) 545 (Richard Baker).
171. *Convention Debates*, Adelaide, 1897 (n 141) 194 (Henry Dobson), 307 (Matthew Clarke); *Convention Debates*, 1898 (n 163) 2262 (Josiah Simon).
172. *Convention Debates*, Adelaide, 1897 (n 141) 161–2 (William Lyne), 274, 280, 284 (George Reid); (1898), 2350 (George Reid).
173. *Convention Debates*, 1898 (n 163) 2514 (Patrick Glynn).
174. Ibid 2508 (Josiah Simon).
175. F W Holder, 'Why South Australia Should Accept the Bill' (1898) 12 *Review of Reviews* 302, 303; John Quick, 'Why Victoria Should Accept the Bill' (1898) 12 *Review of Reviews* 305, 306. See also Cockburn (n 140) 27 (discussed in 'Personal Notes from London', *The Advertiser*, 6 February 1901, 6); Patrick McMahon Glynn, *Federation* (Adelaide, 1897) 5.
176. Henry Wrixon, *The Constitution of the Commonwealth of Australia: An Address* (Melville, Mullen & Slade, 1901) 9.
177. *Convention Debates*, Sydney, 1897 (n 166) 628.
178. *Convention Debates*, Adelaide, 1897 (n 141) 443–4.
179. Ibid 511.

the arguments of framers who wished to get rid of the party system by means of a Senate with coordinate powers, Deakin argued:

> no change of form . . . can confine, or is capable of seriously altering, the political spirit under which the inhabitants elect to work it. . . . We all recognise that, not only would it be impossible for us to frame an ideally-perfect, and scientifically-flawless Constitution, but that if we did devise it any people would speedily reduce it in its operation to their own level. Be the form adopted what we will, the reliance which we place upon the future of Australia will never be based upon the form of its Government, but always upon the intelligence, the conscience, and the judgment of the people.[180]

In drafting the Constitution, the framers conceived their task as providing the architecture of the new Commonwealth: the Constitution should contain the minimum number of provisions necessary to establish the federal government and leave considerable freedom to the federal Parliament to make laws.[181] This accounts for the sparsity of the text of the Constitution. In part this constitutional restraint arose because the framers were humble enough to admit that they could not foresee the conditions of the future.[182] The framers considered that the way the government was to be worked by the people was not something that a constitution should attempt to prescribe. As Reid put it:

> We have endeavoured to deal with broad principles, irrespective of the way in which they may affect this or that part of Australia. For the sake of these broad principles we have all been willing to leave the actual working of the Constitution, in any precise direction, to the fortune of party warfare in the constituencies after federation is accomplished.[183]

Learned contemporaries considered that the later drafts of the Constitution Bill gave effect to an evolutionary conception of responsible government. Harrison Moore thought it was not possible to predict how the Senate's power would be exercised, but considered that it was certain that responsible government would suffer modifications as a result of the powers of the Senate: 'its powers are too great for it not to claim some share in the making and unmaking of Cabinets'.[184] He later wrote that the provisions of the *Constitution* relating to the ministers of state were made 'with a view to the Cabinet System' but did 'not preclude very extensive modifications of that system': the 1898 Bill established no more than a parliamentary executive, and left the rest to custom and convention.[185] Griffith was absent from the 1897–98 Convention and was unsurprisingly critical of s 64.[186] Despite this, he saw the final *Constitution* as largely consistent with his views. Although requiring ministers to sit in Parliament, the draft Bill remained open as to the mode of appointment of the government. The extent to which the Senate would use its powers to claim a share in the

180. Ibid 288. See also Wise (n 16) 227.
181. *Convention Debates*, Adelaide, 1897 (n 141) 745 (Edmund Barton), 708 (William Trenwith), 747–8 (Frederick Holder), 752 (George Reid). See also 919–20; *Convention Debates*, Sydney, 1897 (n 166) 113 (Richard O'Connor), 418 (Edmund Barton), 1002 (Issac Isaacs), 1013–14 (Patrick Glynn), 1032 (Frederick Holder).
182. *Convention Debates*, Sydney, 1897 (n 166) 368 (William McMillan).
183. *Convention Debates*, 1898 (n 163) 1465 (George Reid).
184. Moore, *The Commonwealth of Australia: Four Lectures* (n 116) 80–1.
185. Moore, *The Constitution of the Commonwealth of Australia* (n 12) 168–9. See also Thomas Brassey, 'Australian Federation' (1899) 266 *Nineteenth Century* 548, 550–1.
186. Griffith was appointed Chief Justice of Queensland in 1893.

appointment of the ministry would depend on the resoluteness with which the Senate was prepared to insist on its powers, which in turn would depend upon public opinion.[187] If it proved necessary to modify the present system of responsible government, Griffith considered that there was 'ample power in the *Constitution* to make the necessary alterations without undue friction or difficulty'.[188]

Accordingly, the differences between the draft 1891 Bill and the 1898 Bill should not be overstated. The views of the delegates to the 1891 and 1897–98 Federal Conventions were substantially similar. A strongly evolutionary conception of responsible government was affirmed at both Conventions, and the provisions of the 1898 Bill gave effect to such a conception, notwithstanding the inclusion of the requirement for ministers to hold a seat in Parliament.

The *Constitution* required ministers to sit in Parliament and assumed the Head of State would act on the advice of the ministry, but with a small number of exceptions,[189] otherwise left the relationship between Parliament and the executive free to develop. Winterton argued that the framers failed to stipulate the features of responsible government in the *Constitution*—which in his view was a 'serious and dangerous mistake'—due to fear of appearing 'gauche and uneducated in British eyes'.[190] This, however, misunderstands the nature of responsible government as the framers conceived it and fails to do justice to the principled reasons for the approach taken by the framers. The framers considered that the British Constitution was incapable of being reduced to writing because fixing its principles would destroy the elasticity which was its very essence. The framers also believed strongly in self-government by the people. To entrench the features of responsible government would have been to limit the future freedom of the people of Australia to govern themselves.

V Conclusion: Responsible Government and Commonwealth Power to Create Statutory Authorities

Part IV argued that the framers incorporated a particular conception of responsible government into the *Constitution* which was inherently flexible and evolutionary, reflecting standard views of the British Constitution in the late 19th century. This Part argues that a similar conception of responsible government should guide the interpretation of the *Constitution* today. I argue that, rather than seeing responsible government as a static set of constitutional rules or conventions, whose content was fixed as at federation, it is better to see responsible government as an inherently flexible and evolutionary principle. Responsible government is not an a priori blueprint to which governmental arrangements must conform, but instead the governmental arrangements which exist from time to time shape the content of responsible government in that jurisdiction.[191] It should be noted that this argument does not pre-suppose an originalist approach to constitutional

187. Samuel Walker Griffith, *Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897* (Brisbane, 1897) 4; Samuel Walker Griffith, 'The Draft Federal Constitution Framed by the Adelaide Convention of 1897: A Criticism' (1897) 11 *Review of Reviews* 56, 57.

188. Samuel Walker Griffith, *Australian Federation and the Draft Commonwealth Bill* (Government Printer, 1899) 16.

189. These include *Constitution* ss 62 (mandating the existence of a Federal Executive Council), 64 (requiring ministers to hold a seat in Parliament), 56 (which provides that a measure for the appropriation of revenue 'shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated').

190. Winterton (n 31) 3–4.

191. Cf Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2012) 35(3) *Melbourne University Law Review* 1005, 1036–7.

interpretation and does not accept that the framers' views of themselves hold any normative force.[192] Rather, I argue that the approach to responsible government outlined in this article best accounts for the text, structure and history of the *Constitution*, and is normatively desirable.

There are two principal reasons for arguing that the *Constitution* limits Commonwealth power to create government officials or entities which are not under the control of a minister. The first is based on the entrenchment of responsible government in the *Constitution*, and the second is the desire to ensure accountability for the exercise of power by statutory authorities.[193] I argue that neither of these provide a convincing reason for drawing a constitutional implication limiting Commonwealth power.

There is nothing in the text of the *Constitution* which suggests that the Commonwealth's power to create statutory authorities and determine their powers and independence should be limited. The text and structure of the *Constitution* certainly assume responsible government,[194] but this of course begs the question as to which particular conception of responsible government it assumes. While the provisions of the *Constitution* fix some aspects of responsible government, they leave considerable freedom to the Commonwealth in structuring the executive branch, with flexibility as to the allocation of responsibility within the constitutional system. Section 64 requires that ministers must hold seats in Parliament, thereby entrenching ministerial responsibility to Parliament. However, s 64 mandates nothing about the relationship between ministers and the executive branch more broadly, and certainly is a long way from limiting the Commonwealth's power in relation to statutory authorities. It does not require that ministers must 'control all the functions of government'.[195] As Harrison Moore put it, '[a]ll that has been done is to establish a Parliamentary Executive; the rest is left, as in England and the Colonies generally, to custom and convention'.[196] The long history of independent statutory authorities in both Britain and Australia is evidence that such authorities were not considered inconsistent with the principles of ministerial responsibility.[197]

The approach to responsible government proposed in this article best accords with the drafting history and evidence of the framers' intentions. Jeffrey Goldsworthy has argued that the orthodox interpretive methodology employed by the High Court is one which takes relevant evidence of the founders' intentions seriously but does not exclude application of contemporary concepts and values.[198] Accordingly, while history may not be determinative of the meaning of the *Constitution* today, the original intended meaning of the *Constitution's* text is an important starting point in determining the meaning of the *Constitution*.[199] As argued in some detail in Part IV, the framers

192. On originalism, see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1.
193. See Goldring (n 109).
194. *Engineers Case* (n 1) 147 (Knox CJ, Isaacs, Rich and Starke JJ); *Boilermakers' Case* (n 1) 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ); *ACTV* (n 1) 135, 184–5 (Dawson J).
195. Hanks, Gordon and Hill (n 34) 237.
196. Moore, *The Constitution of the Commonwealth of Australia* (n 12) 168–9.
197. R S Parker, 'The Meaning of Responsible Government' (1976) 11(2) *Politics* 178, 182.
198. Goldsworthy, 'Originalism in Constitutional Interpretation' (n 192); Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 245.
199. Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323, 359.

intended that the *Constitution* would not prescribe the features of responsible government, but allowed for flexibility and evolution. That is, they intended that the *Constitution* would preserve freedom to the people of Australia to determine the governmental arrangements they considered desirable. The provisions of the *Constitution* are consistent with this intention. The establishment of statutory authorities outside the departmental structure is an example of precisely the sort of flexibility in governmental arrangements that the framers intended to permit.

Given that the text of the *Constitution* provides no support for limiting the Commonwealth's power to create statutory agencies, commentators have argued that a constitutional implication to that effect should be drawn, derived from responsible government.[200] However, responsible government, rather than supporting an implication limiting Commonwealth power, in fact militates against such an implication. The nature of responsible government as inherently evolutionary and flexible, as discussed in detail in Part IV, suggests caution in drawing such implications from the incorporation of responsible government into the *Constitution*. Other than the requirement that ministers must be members of Parliament, the framers deliberately resisted entrenchment of the key features of responsible government on the basis that its working was not fixed, but something to be shaped and moulded by the people of each generation. There is something inherently contradictory in the attempt to draw constitutional implications from responsible government.

Therefore, the approach to responsible government proposed in this article best accords with the text, structure and history of the *Constitution*. Are there, nevertheless, good reasons to adopt a different view today? One argument in favour of Lindell's view is based on accountability. Requiring a minister to be responsible to Parliament in relation to each statutory authority created by the Commonwealth would provide a mechanism for accountability for the actions of the authority. However, while accountability is of course a core value in public law,[201] and ensuring accountability for the exercise of government power is highly desirable,[202] the precise means of ensuring that accountability is not fixed.[203] Ministerial responsibility to Parliament is not the sole means of accountability, nor is it necessarily the most effective in all cases.[204] Lindell's view rests on a pre-conceived notion of the allocation of responsibility within the constitutional framework. The modern system of public accountability at the Commonwealth level includes many elements in addition to ministerial responsibility, including administrative law, judicial review, the Ombudsman, the Auditor-General, freedom of information legislation, and many others, which may be equally effective in holding the activities of a statutory authority to account. It is desirable that Parliament should have freedom to determine the most suitable accountability arrangements, which are likely to vary from time to time, as the nature and size of the public sector changes. The *Constitution* allows such freedom and does not impose potentially counter-productive restrictions. Ministerial responsibility does not purport to be the sole mechanism for executive accountability and cannot, on its own, provide 'comprehensive accountability of all the activities of government'.[205]

200. Lindell, *Responsible Government and the Australian Constitution* (n 5) 18.
201. Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24(3) *Australian Journal of Administrative Law* 189.
202. Paul Finn, 'Public Trust and Public Accountability' (1993) 65(2) *Australian Quarterly* 50.
203. For an analysis of accountability under the *Constitution*, see Boughey and Weeks (n 22).
204. Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 82, 88–90.
205. Mulgan (n 30) 180, 191.

Lindell's view would also have undesirable consequences, being unnecessarily restrictive and limiting the self-government of the Australian people. Drawing constitutionally mandated implications from responsible government necessarily entails the fixing or crystallising of certain of the principles of responsible government. That limits the options for evolution and development and 'would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations'.[206] Constitutional limits on legislative and executive power restrict the power of future generations to govern themselves. Even if, during the federation period, it was considered desirable to ensure that every executive agency was assigned to the portfolio of a responsible minister,[207] it is an unattractive prospect to argue that the governmental arrangements permitted by the *Constitution* should be confined to what is expressly contemplated by its text, or the governmental arrangements in existence as at the time of federation.[208] Given that there is nothing in the text of the *Constitution* to support a view that the Commonwealth cannot create independent statutory agencies for which no minister is responsible, the approach that gives most flexibility to the needs of today should be favoured. The approach outlined in this article therefore is most consistent with the values of popular sovereignty and self-government.[209]

Accordingly, it is mistaken to conclude that the principle of responsible government establishes constitutional limitations on the types of entities that may be created, or the relationship between a minister and the entities within his or her portfolio. The flexible and evolutionary principle of responsible government does not mandate a particular model for these arrangements.

206. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J).
207. See Wettenhall, 'Administrative Boards' (n 58); Finn, *Law and Government* (n 133) 60–1, 97–9, 129–31.
208. Cf J R Archer, 'The Theory of Responsible Government in Britain and Australia' (1980) 15(2) *Politics* 23, 30.
209. See, eg, Paul Finn, 'A Sovereign People, a Public Trust' in Finn (ed), *Essays on Law and Government* (n 26) vol 1, ch 1.