THE INTENTIONS OF THE FRAMERS OF THE AUSTRALIAN CONSTITUTION REGARDING RESPONSIBLE GOVERNMENT AND ACCOUNTABILITY OF THE COMMONWEALTH EXECUTIVE TO THE AUSTRALIAN SENATE

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‘the colonial upper houses were an important influence on the design of the Australian Senate … and have assisted the maintenance of a culture of strong bicameralism which has supported a major and growing role for the Senate. It is too often overlooked in Australia that the institutions of national government devised in the Constitutional Conventions of the 1890s were not built from scratch but were powerfully shaped by the traditions of Australian colonial constitutionalism, within which strong elective upper houses were a prominent feature.’

> Bruce Stone, ‘Bicameralism and Democracy: the Transformation of Australian State Upper Houses’ (Pt 2) (2002) 37 *Political Science* 267, 268

ABSTRACT

This thesis aims to uncover the extent to which the framers of the Constitution of the Commonwealth of Australia conceived of the Commonwealth Executive as politically accountable to the Australian Senate. It explores how, through key financial controls, the political accountability of the Commonwealth Executive to the Senate was incorporated into the *Constitution* by the framers, not just in pursuit of federal concerns but also in pursuit of broader aims of accountability sourced in the role and benefits of upper chambers in bicameral parliamentary systems. This reflected the form of strong bicameralism with which the framers were most familiar through their own experience of constitutional practice in Australia's colonial parliaments. The thesis also considers the continuing relevance of the aims of dual accountability from Australian constitutional history to the High Court's interpretation of the need to protect a line of accountability to upper chambers in Australia.

Accordingly, this thesis concentrates on the role of upper houses in Australia's colonial parliaments prior to the Australasian Federal Conventions of 1891 and 1897-98 and on the record of the Convention Debates themselves. The investigation concludes that, when the framers came to design the *Constitution*, they transposed many of the ideas they had already developed about the appropriate role and benefits of an upper chamber to the new federal constitution. Whilst federal concerns were undoubtedly important in devising the role of the Senate, the framers were also motivated to include the forms of political accountability with which they had experienced under their own bicameral systems. Those systems provided for distinct lines of political accountability of governments to upper houses. Such accountability had been particularly conspicuous in disputes relating to parliamentary control of public finance in Australia's colonial constitutional history. The thesis also argues that concerns regarding accountability to upper chambers that were already present in Australia's pre-Federation history have remained relevant to the High Court's interpretation of the accountability of the Commonwealth Executive to the Australian Senate. It concludes with an examination of the post-Federation judicial interpretation of this constitutional relationship.

CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Karena Viglianti, declare that this thesis is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology, Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

This research is supported by the Australian Government Research Training Program.

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CHAPTER 1: THESIS OVERVIEW

I. Introduction

In *Williams v Commonwealth*[1] the High Court recognised the continuing importance of political accountability to the Senate as a significant feature in the Commonwealth Executive's expenditure of public monies. This idea has been supported by scholarship,[2] including work on the nature of dual political accountability owed by governments in bicameral parliamentary systems.[3] Of course, the form of accountability of the Executive to the Senate also played a key role, and was a source of controversy, in the dismissal of the Whitlam Government in 1975.[4] The idea of dual accountability had also played a part in various constitutional crises

[1] *Williams v Commonwealth* (2012) 248 CLR 156. (*Williams*).

[2] G Appleby and S McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 270-272; N Aroney, P Gerangelos, S Murray and J Stellios, *The Constitution of the Commonwealth of Australia: history, principle and interpretation* (Cambridge University Press, 2015), 429, 463, 475, 481. To some extent the idea of political accountability to the Senate had been recognised earlier but had not attracted much attention: see, for example, BJ Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution' (1980) 18 *Journal of Commonwealth and Comparative Politics* 247, 258; LJM Cooray, *Conventions, the Australian Constitution and the Future* (Sydney, Legal Books, 1979), 133; Commentary by GS Reid on article by L Zines, 'The Double Dissolutions and Joint Sitting' in G Evans (ed), *Labor and the Constitution* (Heinmann, 1977, 243-244; PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed ed, 1997), 415.

[3] See, for example, S Prasser, N Aroney and JR Nethercote, *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008), 2-4, 6-7; J Uhr, 'Bicameralism and democratic deliberation' in S Prasser, N Aroney, JR Nethercote (eds), *Restraining Elective Dictactorship: The Upper House Solution?* (University of Western Australia Press, 2008), 13, 14, 15-17, 19, 20, 22-23. Also J Ajzenstat, 'Bicameralism and Canada's Founders: The Origins of the Canadian Senate' in S Joyal (ed), *Protecting Canadian Democracy: The Senate You Never Knew* (ProQuest E Book, 2003), 3-8; N Aroney, 'Bicameralism and representation of democracy' in S Prasser, N Aroney, JR Nethercote (eds), *Restraining Elective Dictatorship* (2008); R Mulgan, 'The Australian Senate as a "House of Review"' (Pt 2) (1996) 31 *Political Science* 191, 196, 198-99; B Stone, 'Bicameralism and Democracy: the Transformation of Australian State Upper Houses' (Pt 2) (2002) 37 *Australian Journal of Political Science* 267, 268; D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003* (Federation Press, 2006), 100-101, 130; P Loveday, 'The Legislative Council in New South Wales, 1856-1870' (1965) 11 *Historical Studies Australia and New Zealand* 481, 482; Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 48-51; A Deakin, *The crisis in Victorian politics, 1879-1881: A personal retrospect* (Melbourne University Press, 1957), 149. For a discussion of political accountability under systems of responsible government more generally see M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447; M Flinders, *The Politics of Accountability in the Modern State* (Ashgate, 2001); J Goldring and I Thynne, 'Government 'Responsibility' and Responsible Government' (1981) *Politics* 197; R Mulgan, *Holding Power to Account* (Palgrave Macmillan, 2003); J Goldring and I Thynne, *Accountability and Control, Government Officals and the Exercise of Power* (Law Book Company, 1987).

[4] Discussed in Chapter 5.

that had arisen in Australia's colonial parliaments during the 19th century, particularly in disputes over the powers of upper houses to have any input into the control of spending. It continues to be relevant to this day.

The centrality of the doctrine of responsible government and the parliamentary control of finance to contemporary Australian constitutional law has hardly been a matter of doubt. However, the High Court's decision in *Williams* is an emphatic affirmation of the contemporary legal significance of these principles derived from Westminster convention and represents the Court's view on the requirements of their current operation. These matters are the focus of this thesis and its contribution to the legal scholarship.[5]

As with so much of constitutional law as a discrete field of legal research, the concerns of this thesis have a strong intersection with political theory, especially interest in government accountability.[6] While acknowledging that intersection, my goal in this work is to contribute principally to my own disciplinary field of knowledge. Nonetheless, political theorists may find the judicial articulation of the goals of dual accountability to be of interest, principally insofar as these represent a continued commitment by the non-political third arm of government

[5] For a discussion of legal methodology and why legal academics study legal doctrine see T Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

[6] See for example the issues for accountability raised in detailed scholarship in political theory on the topic of accountability and mechanisms to hold government to account (including mechanisms apart from parliamentary control of finance) in R Bellamy and A Palumbo, *Political Accountability* (Ashgate, 2010); CT Borowiak, *Accountability and Democracy* (Oxford University Press, 2011); M Flinders, *The Politics of Accountability in the Modern State* (Ashgate, 2001); H Finer, 'Better Government Personnel' (1936) 51 *Political Science Quarterly* 569; H Finer, 'Administrative Responsibility in Democratic Government' (1941) 1 *Public Administration Review* 335; CJ Friedrich, *Problems of the American Public Service* (McGraw Hill, 1935); CJ Friedrich and ES Mason, *Public Policy* (Harvard University Press, 1940); M Harmon, *Responsibility as Paradox* (Thousand Oaks: Sage, 1995); JR Lucas, *Responsibility* (Clarendon Press, 1993); HC Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993); R Mulgan, 'Accountability: an ever expanding concept?' (2000) 78 *Journal of Public Administration* 555; RS Parker, 'The Meaning of Responsible Government' (1976) 11 *Politics* 178; R Pyper (ed), Aspects on Accountability in the British System of Government (Tudor Business, 1996); BS Romzek, MJ Dubnick, 'Accountability in the public sector: lessons from the Challenger tragedy' (1987) 47 *Public Administration Review* 227; A Sinclair, 'The chameleon of accountability' (1995) 20 *Accounting Organizations and Society* 219; B Stone, 'Administrative accountability in the "Westminster" democracies: towards a new conceptual framework' (1995) 8 *Governance* 505; I Thynne and J Goldring, 'Government Responsibility and Responsible Government (1981) *Politics* 1; I Thynne and J Goldring, *Accountability and Control: Government Officials and the Exercise of Power* (Law Book Company, 1987); N Johnson, 'Defining Accountability' (1974) 17 *Public Administration Bulletin* 3; J Waldron, 'Accountability: Fundamental to Democracy' (2014) 14 *Public Law and Legal Theory Working Papers*, New York University Law School; D Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (Oxford University Press, 1994); J Uhr, *Deliberative Democracy in Australia* (Cambridge University Press, 1998); D Kinley, 'Government Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices' (1995) 18 *University of New South Wales Law Journal* 409; D Kinley, 'The Duty to Govern and the Pursuit of Accountable Government in Australia and the United Kingdom' (1995) 21 *Monash University Law Review* 16.

to some of the objectives claimed by political theory for bicameralism. As will be discussed in Chapter 2, these assumed benefits to democracy are argued to be achieved through a broader representation of interests than those represented in unicameral systems, the facilitation of further opportunities for debate and review and the amendment of legislation, opportunities for the representation of minority interests as a means of offsetting some of the assumed deleterious effects of popularism, as well as the provision of a form of external accountability (since the executive must remain accountable for its actions to a chamber that it does not necessarily control through voting).[7] Apart from political theorists and political scientists, this thesis will be of interest to interdisciplinary scholars whose work concerns the judicial use of history to justify legal reasoning. In this case, the Court's use of constitutional and political history to understand the doctrine of responsible government and the principle of parliamentary control of finance is a major theme of this thesis.[8]

Scholarly attention in constitutional law to date has focused more on concepts of federalism and how they shaped the *Constitution*[9] than it has on the importance placed by the framers on political accountability to an upper house. While some acknowledgment has been made of the importance of Australia's colonial constitutions as formative models upon which political accountability under the *Constitution* was based,[10] further examination of these institutional influences on the framing of the political accountability of the Executive to the Senate provides us with a deeper understanding of the early and continuing relevance of the purpose of accountability to upper chambers in Australian constitutional history.[11] This thesis seeks to add

[7] See the discussion on the assumed benefits of bicameralism in Chapter 2.

[8] I discuss the Court's continuing use of constitutional history in Chapters 5 and 6. I discuss the Court's basis for using history in Chapter 5.

[9] *Commonwealth of Australia Constitution Act* 1900 ('the *Constitution*'). For example, S Chordia and A Lynch, 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (Pt 1) (2014) 33 *University of Queensland Law Law Journal* 83; Appleby and McDonald, above n 2, 264-65; N Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901' (2002) 30(2) *Federal Law Review* 265; N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009); N Aroney, "A Commonwealth of Commonwealths": Late Nineteenth Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901' (Pt 3) (2007) 23 *Journal of Legal History* 253.

[10] Aroney (2009) above n 9, 70-71; Stone, above n 3, 268; Deakin, above n 3, 145-46; G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional Analysis* (Melbourne University Press, 1983), 72; Aroney, et al above n 2, 407; B Galligan, *Federal Republic* (Cambridge, Cambridge University Press, 1995), 71.

[11] The closest examination appears in Aroney (2009), above n 9, 200-206 in which Aroney analyses the Convention Debates. The major historical works on the *Constitution* by each of La Nauze, Irving, McMinn and Wise do not examine concepts of political responsibility to upper chambers (or the Senate) specifically. Irving's work does examines the broader social and political reasons for Federation: see JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972); H Irving, *To constitute a nation: a cultural history of Australia's constitution* (Cambridge, Cambridge University Press, 1997); WG McMinn, *A Constitutional History of*

to the current literature on the framing of the *Constitution* by delving further into how its framers drew on their experience of political accountability under their own bicameral parliamentary systems in order to create political accountability for the Commonwealth Executive to the Senate. I consider how that accountability was based not only upon what have been described as concerns motivated by federalism but also on the framers' desire to replicate the models of political accountability with which they were most familiar through their own experiences of accountability to upper houses. Within those constitutional systems, governments owed upper chambers a separate yet important form of accountability, one that would prove to be particularly important in the protection of the principle of parliamentary control of finance. The High Court has now made clear in its decision in *Williams* that *both* federal concerns and concerns based on accountability of the Executive remain relevant in the Court's interpretation of political accountability to the Senate. The Court relied upon a sense of history to achieve this interpretation.

What emerges from the history explored in this thesis is that arguments about the benefits of political accountability to Australia's colonial upper houses were relevant and influential during the Conventions in framing the Executive's accountability to the Senate. The same ideals of accountability to upper chambers have appeared in judgments of the High Court, remaining relevant to the Court's jurisprudence on Executive accountability to this day. The historical perspective provided in this thesis addresses the relationship of accountability recently highlighted by the High Court in *Williams* on the power of the Senate to hold the Executive to account as part of its address of the broader goals of political accountability to two parliamentary chambers. It supports the works of authors who have argued that Australia's form of bicameralism is not a complete replica of the British model of executive accountability.[12] The goals of accountability to upper houses in Australia have always involved

Australia (Melbourne, Oxford University Press, 1979); BR Wise, *The Making of the Australian Commonwealth 1889-1900* (Longmans, Green and Co, 1913).

[12] Based on Professor Lijphart's theory that Australia's federal system is an example of strong bicameralism and consensus democracy, and not a true reflection of Westminster-style government or majoritarian democracy, in which simple majority rule (based on the support of a majority in the lower house alone) decides the totality of the accountability of the executive. The Australian models of constitutional government required supra majorities through 'consensus democracy', which itself requires government to be conducted on behalf of as many people as possible through seeking to share, disperse and limit political power in various ways – including through the use of upper houses acting as a check on majoritarian democracy: see A Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty One Countries* (Yale University Press, 1984). This theory has been supported by a number of Australian authors, including Aroney (2008) above n 3, 33-34; Uhr (2008), above n 3, 16; Stone (2002), above n 3, 271; Mulgan (1996) above n 3, 198-99, 200; Lane, above n 2, 415. See also Ajzenstat, above n 3, 3-4, 7-8, 19, 20-21, 23, 24 on the same idea replicated in the Canadian Constitution.

ideals around achieving broad representation, an appropriate degree of separation between the legislative and the executive arms of government, achieving appropriate levels of review and scrutiny of legislation, and maintaining parliamentary control of finance.[13] This thesis provides an explanation of how these concerns have long been a feature of Australia's bicameral parliamentary systems.

II. The Research Question

This thesis asks to what extent did the framers of the *Constitution* incorporate broader goals of political accountability already present in Australia's colonial bicameral parliamentary systems at the time of the Conventions and to what extent has the High Court recognised these goals of political accountability to upper chambers. I consider the extent to which ideas underpinning accountability to an upper chamber were incorporated into the *Constitution*, not only to address federal concerns but also because the framers were already familiar with the desirability of rendering governments accountable to upper houses and wished to replicate part of that system of accountability in the Australian Federation. The evidence for this is found in the conduct of upper houses under Australia's colonial constitutions, in literature surrounding the Conventions (and relied upon by delegates to the Conventions) and in the Convention Debates themselves. The specific focus of the thesis is on how upper houses used their powers of amendment and veto of financial legislation, particularly veto of supply bills, since this is regarded as the ultimate sanction of political accountability that a parliamentary chamber can use to call the executive to account.[14] This is not to deny that there may be many other ways in which governments are called to account. The reason to focus on fiscal accountability however is that fiscal power has traditionally been regarded as the key form of accountability. The importance placed on fiscal accountability by parliamentarians is apparent in the 19th century conflicts between the House of Commons and the House of Lords (discussed in Chapter 2) and in the pre-Federation history of Australian Parliaments (this is the focus of Chapter 3). It also dominated the Conventions (examined in Chapter 4). For these reasons it makes sense to focus on fiscal accountability in the main because it formed the central pre-occupation of the framers of the *Constitution* as well.

The thesis ultimately considers the continuing relevance of accountability concerns in the form of the principle of parliamentary control of finance under the doctrine of responsible

[13] This is discussed in Chapters 2 and 3.
[14] On this point see Winterton, above n 10, 72.

government to the High Court's understanding of the Senate's role and how the Court has used its understanding of Australian constitutional history and the Convention Debates to reach those conclusions.

III. Methodology and Structure

This section sets out the methodology through which the thesis argument was researched and tested and how the findings of the research are presented.

The thesis adopts two key research methodologies, each of which is well known to the discipline of law. Parts I and II adopt the accepted methodology in the study of constitutional law of closely examining the Convention Debates, parliamentary records (of Australian colonial parliaments) and the works of leading scholars.[15] Part III undertakes a doctrinal analysis of relevant decisions on executive accountability by the High Court.

I do not seek to undertake any detailed examination of the appropriateness of the Court's approach to constitutional interpretation more generally.[16] Competing interpretive methodologies are already frequently examined by leading scholars and it is not the purpose of this work to adopt a supplement those general debates further.[17] Instead, my thesis merely observes the extent to which the Court has asserted a right to refer to 'constitutional history' and 'historical facts', including the Convention Debates and Australian colonial political

[15] Based on the approach by the High Court in accepting the potential relevance of limited historical materials as a potential aid to constitutional interpretation: see *Cole v Whitfield* (1988) 165 CLR 360; *Singh v Commonwealth* (2004) 222 CLR 322, [14], [15], [16], [19], [20] (Gleeson CJ). For an explanation of the relevance of limited historical materials to constitutional law see C McCamish, 'The Use of Historical Materials in Interpreting the Commonwealth Constitution' (1996) 70 *Australian Law Journal* 638 and H Irving, 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95; H Irving, 'Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning' (2015) 84 *Fordham Law Review* 957 on the relevance and limits of history in the High Court. Also J Waugh, 'Lawyers, Historians and Federation History' in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003); JA Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309. For examples of scholarship in constitutional law that have adopted this methodology see J Quick and RR Garran, *The Annotated Constitution of the Commonwealth of Australia* (Angus & Robertson, Sydney, 1901); La Nauze, above n 11; JA La Nauze, *No Ordinary Act* (Melbourne University Press, Melbourne, 2001) McMinn, above n 11; Aroney (2009), above n 9; Aroney (2002), above n 9.

[16] I discuss in detail in Chapter 5 my reasons for not considering the debates in scholarship on interpretive methodology. In summary, although there is some limited debate in Australia about the relevance of constitutional history to constitutional interpretation, the High Court has made clear that it will continue to refer to constitutional history in interpreting the *Constitution*. The better view in scholarship also appears to be that the *Constitution*, including the requirements of fundamental doctrines like the doctrine of responsible government, can only be understood as part of a continuing constitutional story.

[17] The scholarship on interpretive methodology is discussed in Chapter 5.

history, in interpreting basal constitutional doctrines such as the doctrine of responsible government.

It is also not the purpose of this thesis to engage with the broader, more theoretical question of the extent to which the judiciary should defer to the will of the political arms of government. This also includes any referee role the courts may play vis-à-vis the executive and legislature. The doctrine of responsible government and the principle of parliamentary control of finance are accepted as legal doctrines and principles that have been incorporated into the *Constitution*.[18] As Justice Gageler has recently highlighted –

> 'It is of the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament. That critical aspect of the relationship between the Executive Government of the Commonwealth and the Parliament of the Commonwealth was not left to chance in the design of the Constitution.'[19]

While members of the Court agree that it is the role of a constitutional court to interpret and enforce the *Constitution*, including the doctrine of responsible government and the principle of parliamentary control of finance, uncertainty exists in the decisions of the Court (examined in this thesis) over how prescriptive the Court should be in fixing the relevant constitutional requirements. The complex question of how far the Court should go in policing the metes and bounds of parliamentary approval of spending has produced a steady deluge of constitutional law scholarship in recent years.[20] No doubt it will continue to raise interesting debates well into

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[18] *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 and *Williams*.

[19] *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* (2016) 257 CLR 42, [121], citing *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410. 441.

[20] For scholarship following the decisions in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (*Pape*) and *Williams* see P Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry' (2018) 37 *University of Queensland Law Journal* 191; A Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government' (2017) *Australian Public Law,* (27 November 2017), available at https://auspublaw.org/2017/11/wilkie-v-commonwealth/; also G Appleby and S McDonald, above n 2; A Twomey, 'Post-*Williams* Expenditure: When can the Commonwealth and the States Spend Public Money Without Parliamentary Authorisation?' (Pt 1) (2014) 33 *University of Queensland Law Law Journal* 9; G Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the Williams Case' (Pt 2) (2013) 39 *Monash University Law Review* 348, 370-374; G Appleby, 'There must be limits: the Commonwealth Spending Power' (2009) 37 *Federal Law Review* 94; G Appleby and JM Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate' (2009) 20 *Public Law Review* 194; Aroney et al, above n 2, 472; D Kerr, 'Executive power and the theory of its limits: still evolving or finally settled?' (2011) *Constitutional Law and Policy Review* 22, 28-29; D Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrins of Responsible Government and Rule of Law' (2010) 28(2) *University of Tasmania Law Review* 145; D Meagher, 'The Commonwealth and the Chaplains: Executive Power after Williams v Commonwealth' (2012) 23 *Public Law Review* 153, 161- 165. For earlier scholarship dealing with this vexed question see E Campbell, 'Parliamentary Appropriations' (1971) *Adelaide Law Review* 145; G Lindell, 'The *Combet* Case and the Appropriations of

the future. This thesis acknowledges and draws upon that existing scholarship as appropriate, but as its central methodology is to examine the connection between 19th century pre-Federation constitutional history and doctrine, it comes at the topic not through an abstract approach to institutional responsibility requiring consideration of the fundamental doctrines under the *Constitution* of separation of powers and the rule of law.[21]

Lastly, the thesis unquestionably prompts reflection on the merits of dual accountability and perceived benefits and pitfalls of bicameral systems (whether generally or specifically in the present political context). However, this is taken by the thesis as a structural setting in which its concerns with constitutional accountability are exercised – not as a matter needing to be examined or reviewed from first principles. In my thesis I seek to highlight where relevant historical actors in Australia, including during the Convention Debates, referred to such theories in seeking to explain and justify the need for accountability to upper chambers in matters of finance. The benefits of dual accountability are essentially accepted as given rather than subjected to questioning critique. This is a consequence not merely of the need to assign a suitable scope to the thesis but also the fact that bicameralism is the parliamentary model for all sovereign political systems in Australia bar that of the State of Queensland.[22]

A. Part I – Models of Political Accountability to Upper Houses

The thesis explores the research questions in three parts. It considers the context in which the framing of the *Constitution* took place in order to understand the way the key provisions on accountability to the Senate were drafted.[23] This involves an analysis of both the constitutional models and the underlying theories of political accountability of upper chambers on which the framers relied on during the Conventions. Accordingly, Part I (Chapters 2 and 3) is dedicated to analysing the key sources the framers used to inform themselves as to how political accountability could operate in the models of responsible government examined during the Debates. These models included the British and Canadian Constitutions, as well as Australia's

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Taxpayers' Funds for Political Advertising - An Erosion of Fundamental Principles?' (Pt 3) (2007) 66 *The Australian Journal of Public Administration* 307, 319-320; G Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21. For scholarship on the broader issues involved in the rule of law and responsible government see also H Pringle and E Thompson, 'The Tampa Affair and the Role of the Australian Parliament' (2002) 13 *Public Law Review* 128; J Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51.

[21] For a recent examination of the complexities and the issues at stake see P Gerangelos, 'The Relationship between the Executive Government and Parliament in Australia: Accommodating Responsible Government with the Separation of Powers' (2018) 5(2) *Journal of International and Comparative Law* 279. See the detailed discussion in D Kerr, (2010), above note 20 as well.

[22] For relevant scholarship to date see works in accountability theory set out in above note 6.

[23] Aroney (2009), above n 9, 8, 9.

colonial parliaments prior to the Federal Conventions of 1891 and 1897-98. The focus is on what these models demonstrated to the framers as to how political accountability to upper houses could work. To inform the analysis of these models of accountability to upper chambers, reference is made to a range of primary and secondary sources relevant to the discipline of law, especially parliamentary debates and leading treatises on the operation of these constitutions.

The review undertaken in Part I demonstrates that many of the concerns that would later be expressed by delegates during the Debates about rendering the Commonwealth Executive politically accountable to two chambers of parliament had their genesis, to a large extent, in the constitutional conflicts that had taken place during the development of responsible government in the Australian colonies. Part I is thus a survey of the constitutional landscape against which the discussion during the Conventions took place about the relative merits of accountability to the Senate. The chapters in this Part set out the constitutional frameworks and experience on which delegates relied to decide how political accountability could be rendered to the Senate.

Chapter 2 introduces the two international models of political accountability under responsible government considered by the framers: the British Constitution and the Canadian Constitution. In order to understand these constitutional models, the framers adopted the same approach taken by constitutional lawyers to this day, relying on a range of works by leading scholars to explain the operation of the British and Canadian Constitutions.[24] The chapter focuses on what the framers learned from key treatises about the operation of political accountability to upper chambers under those constitutions. The chapter also briefly outlines the ideas the framers appropriated from these works on accountability during the Conventions.[25] It outlines the theories from political theory the framers relied on, mediated, as they were, through constitutional law authorities.

Although previous scholarship has examined texts used by the framers and their impact on the framers' ideas of federalism, I come to these sources with a different focus. My interest is in what these works told the framers about how 19th century British and Canadian upper houses called the executive to account, as well as goals that underpinned such accountability. Attention here falls on the matter which would occupy the framers throughout most of the Debates on this question of accountability and which resulted in those provisions of the *Constitution* which

[24] Ibid, 71.
[25] Ibid, 73.

deal with the respective powers of the House of Representatives and the Senate – the power of upper houses to control the finances of the State. The power to hold an executive to account is thought (and was thought by the framers) to lie in this power.[26] My focus is therefore on the powers reported in these treatises on the role of the upper houses in the British and Canadian Constitutions to amend or to veto money bills.

For absolute clarity it should be noted that I am cognisant of the impact of federal ideas, particularly American federalism, had on the design of the Australian Senate. However, the impact of ideas of federalism has been extensively acknowledged elsewhere and I do not seek to replicate the detailed and considered works on the impact of ideas surrounding federalism on the design of the Senate by leading authors (these have already been detailed above). Rather, I look beyond the federal foundation for the powers of the Senate and focus on how accountability under the doctrine of responsible government provided a reason for the framers including accountability to the Senate under the *Constitution*.

The chapter concludes by providing an outline of the theoretical context in which the operation of Australia's colonial constitutions and the Conventions took place, focusing on theories regarding the benefits of having upper houses to ensure the accountability of the executives. The summary of these goals provides important context to how these ideas were originally adopted in the colonies and then used by the framers during the Debates and, eventually, adapted to the new *Constitution*.

Chapter 3 examines how political accountability to upper chambers worked in Australia's colonial parliaments. The colonial constitutions provided models during the Debates for the

[26] Since the blocking of supply to a government did, and still can, have a paralysing effect on government, it is the provision and use of these powers by upper houses which has been argued to constitute the ultimate sanction of political accountability: see John Waugh, 'Deadlocks in State Parliaments' in G Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006), 185-210, 198-199; Winterton, above n 10, 79; S Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* [1896] AU Col Law Mon 2, 18, 19; RR Garran, *The Coming Commonwealth* [1896] AU Col Law Mon 3, 150; WH Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, Melbourne, 2nd ed, 1910), 144, 145; Bruce Stone, 'The Australian Senate: Strong Bicameralism Resurgent' in P Passaglia R Tarchi and J Luther (eds), *A World of Second Chambers* (Giuffrè, Milano, 2006), 578-79; S Bach, *Platypus and parliament: the Australian Senate in theory and practice* (Canberra, Department of the Senate, Parliament House, 2003). 306; also *New South Wales v Bardolph* (1934) 52 CLR 455, 450. Ultimately, the inability to secure supply could lead to a loss of office, with an executive unable to carry on government by being unable to find the funds to carry its policies into effect. For leading figures of the Conventions like Alfred Deakin, such disputes were the only true deadlock: *Official Report of the National Australasian Convention Debates, Adelaide, March 22 to May 5, 1897* (Adelaide: Government Printer, 1897: reprinted Sydney: Legal Books, 1986), 295 (Deakin). See also BJ Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in P Weller and D Jaensch (ed), *Responsible Government in Australia* (Drummond Publishing, Richmond, 1980), 2, 3, 7-8, arguing that the framers were acutely aware that giving power to an upper house to veto money bills could well be as significant as giving it a power of amendment.

way political accountability might operate between two parliamentary chambers (including elected upper chambers), particularly with respect to what would become the key provisions that dealt with the powers of the Senate over money bills.[27] It is therefore necessary to examine the role afforded to and played by upper houses in each of the Australian constitutional systems on which the framers drew during Debates. They provide an important part of the context in which the *Constitution* was developed.[28] In particular, this chapter provides us with the detailed survey of experience of the framers of the Constitution that framed much of the discussions during the Conventions on the powers of the Senate. In order to understand the discussions that took place during the Conventions, it is necessary to understand how much of the framers' experience of their colonial constitutions, particularly in matters of finance and accountability to upper houses, framed the debate on how accountability to the Senate could be rendered. Further, although the important role of Australia's colonial constitutions in framing the *Constitution* has been acknowledged, there is still work to be done in considering the reasons given by the upper houses in those parliaments for insisting on their role of review, including when and why they used the ultimate sanction of political accountability – the denial of supply.[29] Australian parliamentarians were aware of the doctrine of responsible government taking shape in the Constitution of the United Kingdom and her other colonies, albeit in a fluctuating form during the 19th century, but they had their own experience of political accountability that they brought with them to the drafting of the *Constitution*.[30] This chapter

[27] See sources at above note 6 for recognition of the influence of Australia's colonial constitutions on the *Constitution*. The relevant constitutional provisions and the colonial models on which they were based are discussed in Chapters 3 and 4.

[28] As will be discussed in Chapter 3, each colony that had a relevant history to examine on this point of accountability to the upper house is considered. For example, Western Australia has no relevant history to examine since its Constitution only came into existence in 1890 – one year before the first Federal Constitutional Convention took place. In Tasmania, no conflict has led to discussions on the role of the upper house in that colony in the way that the constitutional conflicts in South Australia and Victoria did. The remaining colonies each have a history to explore and are set out in Chapter 3.

[29] Aroney (2009), above n 9, 70; Deakin, above n 3, 145-46; Winterton, above n 10, 72; Aroney et al, above n 2, 407; Galligan, above n 10, 71.

[30] See ACV Melbourne, *Early Constitutional Development in Australia Part V* (2nd ed, University of Queensland Press, St Lucia, 1963), 273, 276, 276-7; Winterton, above n 10, 72-76; JM Ward, *Colonial Self-Government: The British Experience 1759-1856* (Palgrave Macmillan, London, 1976), 65, 66, 70. For a discussion of responsible government and the impact of the Durham Report in British Colonies generally, see J Ajzenstat, *The Political Thought of Lord Durham* (McGill-Queens University Press, 1988). The Durham Report can be found in 'Report of Affairs of British North America from Lord Durham (11 February 1839)', in CP Lucas (ed), *Lord Durham's Report of Affairs of British North America* (Clarendon Press, Oxford, 1912). As to the fluidity of concepts of political responsibility throughout the 19th century, see M Loughlin (2003), above n 3, 48-51. In Chapter 4 I discuss specific references during the Convention Debates in which leading delegates made clear that they understood the fluidity of the concept of responsible government during the 19th century. See also J Allan and N Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney*

sets out the relevant part of that experience of political accountability to upper chambers under Australia's own constitutions. It provides a basic outline of the constitutional design in each of the Australian colonies, focusing on what powers were given to upper chambers in those constitutions to amend and veto money bills. This approach reveals that upper chambers of Australia's colonial parliaments had quite extensive powers to call the executive to account. This includes powers given to both elected and to nominated upper chambers. The chapter provides us with an overview of the Australian constitutional systems in the lead up to the Conventions, setting out the constitutional frameworks the framers drew upon during the Debates to frame the powers of the Senate. It thus sets out an essential part of Australian constitutional history that informed much of the framers' thinking during the Conventions in the viability of a system of dual political accountability.

As a constitution includes not merely the constitutional text but the 'assemblage of rules, principles, canons, maxims, customs, usages and manners that condition, sustain and regulate the activities of governing', it is necessary to examine constitutional practice in addition to the constitutional texts in place by the 1890s.[31] This of course reflects the importance of constitutional conventions derived from political practice in the operation of the *Constitution*.[32] These conventions are established through constitutional practice, including the practices adopted by the respective chambers of a parliament.[33] Accordingly, to understand how political accountability to upper houses worked in those constitutions, we must go beyond the simple constitutional texts and explore how the powers of colonial upper houses were exercised in practice and the reasons members of those chambers gave to justify their actions.

The analysis conducted in Chapter 3 concentrates on the practices employed in Australia's colonial upper houses in amending and vetoing money bills. Focusing on the constitutional practices surrounding this power tells us a lot about when and why upper houses viewed

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Law Review 245, 262 on the role of Australian Constitutions in influencing the framers in drafting the *Constitution*.

[31] Loughlin, above n 3, 115; see also M Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 11; MJ Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Law Book Co, 1985), 5.

[32] It has long been accepted that the operation of constitutions in Australia include not just the written texts of the constitutions themselves, but also constitutional conventions derived from political practice. These have been recognised by the High Court, as to which see *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129, 145, 147. For a discussion of the relationship between the written constitution and constitutional conventions in Australia see G Lindell, *Responsible Government and the Australian Constitution: Conventions transformed into Law? Law and Policy Paper 24* (Federation Press, Centre for International and Public Law, ANU, 2004), 6; Winterton, above n 10, 80; Cooray, above n 2, 68-90; Aroney, et al, above n 2, 417, 422.

[33] Ibid.

themselves as enforcing a separate and important form of accountability as part of ensuring that governments remained politically accountable to their parliaments. This is not to deny that a range of motivations likely prompted members of these upper houses to oppose sitting ministries, most obviously partisan considerations. What I am interested in is the extent to which principles dealing with the accountability of governments to parliament, particularly for spending, was a motivating factor. What emerges is that upper houses in the Australian colonies often insisted on their separate powers to render governments accountable to them as part of broader aims of political accountability.[34] Most importantly, the history set out in this chapter reveals that the upper houses of Australia's colonial parliaments insisted on their role in controlling spending by the executive. Much of this insistence on parliamentary control of finance was drawn upon in the Conventions. It has also been emphasised by the High Court in its decisions on the powers of the Senate to approve spending. Thus, considerable focus in Chapter 3 is given to the experience the framers already had from constitutional deadlocks in the Australian colonies, including where upper chambers had denied governments supply. The chapter discusses the insistence of Australian upper houses on exercising powers of veto to achieve the broader aims of good government in bicameral systems. Many of the deadlocks experienced by colonial parliamentarians involved in these conflicts became a key motivation during the Conventions for the inclusion of what were to become the provisions dealing with the powers of the Senate, particulary the Senate's powers over money bills and the resolution of deadlocks between the two houses of the Commonwealth Parliament.[35]

What also becomes apparent from the analysis in Chapter 3 is that a number of the men who would become some of the most influential figures of the Federation Movement and of the Conventions had played significant roles in these colonial conflicts or were heavily influenced by participants in them. Many had acquired knowledge of these conflicts and the role deadlocks had played in disputes in their own and other Australian colonies. In Part II, I discuss how many of the lessons learned by these men based on this local experience of accountability were carried with them into designing how political accountability could work under the *Constitution* to both houses of the new, elected Federal Parliament, and why a such a system of dual accountability was ultimately preferable.

[34] These aims are discussed in Chapters 2 and 3. For a summary of them, see Aroney (2008), above n 3, 30, 33-35; Uhr, above n 3, 22.

[35] Waugh, above n 26, 185, 192. Deakin, above n 3, 147, 185; C Parkinson, 'George Higginbotham and Responsible Government in Colonial Victoria' (2001) 25(1) *Melbourne University Law Review* 181, 189; Aroney (2007), above n 9, 254.

The history of the colonial constitutions explored in Chapter 3 confirms that the framers of the *Constitution* had a good deal of experience of the role that could be played by an upper house in holding the executive to account. Australia's colonial upper houses consistently emphasised their importance in playing a distinct role in holding governments to account by representing a broader range of interests than those represented in lower chambers alone, by acting as houses of review and as the ultimate arbiters of parliamentary control of finance, and by moderating the excesses that accountability to a single parliamentary chamber might otherwise bring.[36]

B. Part II – Political Accountability to the Senate at the Convention Debates

Part II examines how the intellectual and institutional context set out in Part I became relevant during the Conventions in discussions regarding how and when the Executive would be held politically accountable to the Senate. The single chapter in this part (Chapter 4) considers the discussions that took place during the Conventions on whether and how to frame political accountability of the Executive to the Senate. It considers how much delegates during the Debates drew upon their own constitutional models and experiences of upper chambers in creating the key provisions of the *Constitution* dealing with the powers of the Senate.[37]

I explore the record of the Convention Debates with a view to uncovering the extent to which the framers emphasised accountability to the Senate in particular to achieve broader goals of accountability. I am interested in how much delegates referred to their own experience of the role that upper houses played in their colonial parliamentary systems, and how much they relied on those broader goals of accountability to upper chambers in doing so.[38] As noted, while the existence and relevance of accountability concerns to the framers have been acknowledged, the purpose of this chapter is to explore the specific conception the framers had of dual accountability from their own bicameral systems.[39] To do this I examine not only what was

[36] The powers of the upper houses were sometimes argued to operate as a check on the sort of majoritarian rule that could be produced if a government needed to rely on support from the lower chamber alone. This is discussed in more detail in Chapters 2 and 3. For now, see D Clune, above n 3, 68, 100-101, 130; Loveday, above n 3, 482; Loughlin, above n 3, 48-51; Deakin, above n 3, 149. For a discussion on the importance of upper houses acting as independent houses of review, see N Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29 *Adelaide Law Review* 205.

[37] The discussions during the Convention Debates on these points resulted in the provisions that became ss 53 and 57 of the *Constitution*. This is discussed in detail in Chapter 4. For an overview of the roles played by these models on the *Constitution* see the sources cited at above n 6 and n 7.

[38] The point being that these goals existed in unitary bicameral systems as part of goals underpinning political accountability of an executive to parliament. On this point see Uhr, above n 3, 14; see also G Brennan and L Lomasky, *Democracy and Decision* (Cambridge University Press, 1993, 214-15.

[39] Aroney (2009), above n 9, 200-206.

said during the Debates themselves but also materials written and distributed by leading delegates to the Debates.

As Aroney has noted, only a relatively small number of Australians had a direct say on the content of the *Constitution* – the delegates to the Conventions.[40] The Conventions present a detailed record of the discussions and the issues for contest during the framing of the *Constitution*. Although I have examined the contributions of all participants to the Debates, the key positions taken during the Debates with respect to political accountability to the Senate are reflected in the contributions made by leading figures at the Conventions and in the Federation movement generally – especially Edmund Barton, Richard Baker, Andrew Inglis-Clark, Alfred Deakin, Samuel Griffith, Henry Higgins, Isaac Isaacs, Henry Parkes, Charles Kingston, and George Reid.[41] These men were not only key contributors during the Debates; they also wrote materials to assist others understand the concepts of accountability at stake.[42] Their respective contributions on why the Executive should be rendered politically accountable to the Senate are considered in some detail.

I approach my analysis by following the evolution of the discussions in chronological order, since the chronology itself enables us to follow the specific context of each discussion and the way that ideas about accountability to the Senate evolved over the course of the Debates.[43] I explore the records by reference to the respective arguments about the powers the Senate needed to render the Executive accountable to it. The arguments are classified into three key groups. The first category was put by delegates who wished to ensure that political accountability was owed by the Executive to the House of Representatives alone. Their position was that the Senate should have no power to amend money bills and no power to veto them either. The second category was espoused by delegates who wanted political accountability to the Senate to be rendered by giving the Senate powers both to amend and to veto money bills. The final category was made up of men who acknowledged that there needed to be a system of dual accountability in a bicameral system in order to achieve Federation, argued that political accountability could be rendered to both the House of Representatives and to the Senate, just through different mechanisms of accountability. These men would urge other delegates to

[40] Ibid, 101.
[41] Again, this follows an acceptable approach in constitutional law, as to which see ibid, 102; Aroney (2002), above n 9, 270.
[42] These works are discussed in Chapter 4.
[43] Adopting the approach taken by leading scholars. For examples of this approach see Quick and Garran, above n 15; La Nauze, above n 11; McMinn, above n 11 and Wise, above n 11.

adopt a compromise position between the two other camps – arguing that the Senate should have no power to amend money bills but a power of veto over all legislation passed by the House of Representatives, including money bills. This reflected the form of political accountability the Australians were already used to under their own constitutions.

What surfaces from the analysis in Chapter 4 is that, although delegates in the third category did rely on federal concerns to justify their argument for dual accountability, they also made appeals to responsible government and liberal theory on the benefits of upper chambers more generally in advocating for accountability to the Senate. These delegates urged the Conventions to adopt a compromise position, pressing arguments about the flexibility of the concept of responsible government itself at this time as well as arguments based on the benefits for democracy of creating an upper house capable of acting as a check on the wishes of a bare majority.[44] These delegates urged the men who were vehemently opposed to any accountability being owed to the Senate to understand that political accountability to an upper house was not such a radical departure from the systems of accountability with which they were already most familiar, and that broader benefits were to be obtained for democracy in replicating the bicameral systems with which they were already experienced to some extent. Chapter 4 examines how these arguments developed during the Debates of the first Convention in 1891 and in the 1897-98 Convention. The chapter also traces how the fight over political accountability to the Senate moved from one about the powers of the Senate to deal with money bills to the question of how to resolve deadlocks between two elected houses. It considers how important the Australian experience of constitutional deadlocks was in motivating delegates to render an elected Senate politically accountable to the electorate for use of its power of veto.

C. Part III – The High Court and the Continuing Relevance of Accountability Concerns

Part III examines how accountability concerns present in Australia's pre-Federation history on the role of upper chambers, particularly in the control of finance, has since been adopted by the High Court. The chapters in this Part consider the judicial interpretation by the Court of political accountability to the Senate and the reasons the Court has provided for including dual accountability of the Executive. The chapters further my examination of how the pre-Federation history of dual accountability has now been continued by the High Court in its interpretation of dual accountability under the *Constitution*.

[44] The compromise position, in which accountability was owed to both the lower house and the Senate, was ultimately to be accepted by the Conventions and by the Australian people. This is discussed in Chapter 4.

Chapters 5 and 6 consider the statements the Court has made about how and why political accountability is owed by the Executive to the Senate. I discuss the extent to which the Court appears to have taken into account arguments about the Senate designed to act not just as a States' house reflecting federal concerns but also as an upper house that exists to fulfil goals of political accountability. I consider how the Court has echoed ideas regarding the benefits of accountability to upper chambers that were already present in theory and in Australia's pre-Federation history, including goals surrounding broad democratic representation, an appropriate degree of separation between the legislative and the executive arms of government as well as the function of an upper house generally to provide scrutiny and review of legislation, particularly of financial legislation.[45] Chapter 5 considers the Court's approach during the 20th century, with Chapter 6 focusing specifically on how accountability concerns have been afforded particular prominence in the Court's seminal decisions on Executive accountability for spending in both *Pape v Commissioner of Taxation*[46] and in *Williams*. The chapters consider the continuing relevance of Australia's own constitutional history of dual accountability to the Court's interpretation of accountability to the Senate, arguing that the dominant approach the Court has taken to accountability to the Senate is supported by the pre-Federation history explored in Parts I and II of the thesis.

What emerges from the analysis in Chapters 5 and 6 is that, in judgments in which Justices of the Court consider goals underpinning accountability to upper houses that had appeared in Australian constitutional history, they also tend to emphasise the role played by the Senate as an important and distinct legislative chamber, one with the particularly important function of holding the Executive to account. These considerations are particularly important in decisions dealing with parliamentary control of finance. By contrast, in judgments that do not appear to recognise the potential goals of accountability to an upper chamber, the role of the Senate as a house of review is correspondingly de-emphasised. The relative weight placed upon accountability to the Senate continues, in turn, to influence when the Court is prepared to intervene in enforcing accountability to the Senate, particularly in control of spending. I consider how the Court's interpretation accords with Australian constitutional history, and how the Court's interpretation of that history and of the Convention Debates has continued to shape its interpretation of political accountability to the Senate. I argue that the Court's protection of

[45] In Chapter 5 I explain in detail why my function in this thesis is to observe the Court's approach to interpreting the need for accountability to the Senate in matters of finance, rather than a different research question that would entail a detailed dissertation of interpretive methodology in constitutional interpretation generally.
[46] *Pape*, above n 20.

a distinct line of accountability to the Senate more accurately reflects ideas regarding accountability to upper chambers that were present in Australia's pre-Federation history.

Chapter 7 concludes that the Court's approach accords with a form of political responsibility of the executive to parliament that began in the practices of Australia's colonial parliaments. That experience of dual political accountability, particularly in matters of finance, proved to be influential on the framers of the *Constitution* when they came to determine the powers of the Senate, particularly the Senate's power to deny supply. While there is no doubt that the framers included a line of political accountability to the Senate based on considerations related to federalism, the history explored in this thesis demonstrates that they also attempted to continue the traditions of political accountability with which they were most familiar in their own bicameral systems under responsible government. These traditions were designed to achieve broader aims of accountability by rendering governments accountable to upper chambers. This history, and the High Court's emphasis on accountability concerns in its most recent decisions in *Pape* and *Williams* in particular, lends further support to scholarship that has argued that Australia's upper houses were intended to play a role in maintaining the political accountability of the executive to parliament.

PART I

INTELLECTUAL AND INSTITUTIONAL CONTEXT

CHAPTER 2: MODELS OF POLITICAL ACCOUNTABILITY TO UPPER HOUSES UNDER RESPONSIBLE GOVERNMENT

I. Introduction

This chapter considers what the framers of the *Constitution* understood about the operation of the two international models of responsible government they referred to most frequently during the Constitutional Conventions: the British and Canadian Constitutions.[1] Although other constitutions were used by the framers to inform their senses of the operation of federal models of government, it was the British and Canadian Constitutions that supplied the two key international models of responsible government.

As outlined in Chapter 1, the framers of the *Constitution* referred to a range of scholarly works on the operation of both of these international constitutional models to inform themselves as to how those constitutions operated, including the nature of accountability to the upper houses in each of those constitutional systems.[2] In this chapter, I analyse what the works the framers relied upon said about the powers of upper chambers in the British and Canadian constitutions during the 19th century to call an executive to account. I then briefly outline how these works were interpreted and used during the Conventions.[3] This is not, by any means, a far-ranging examination of political theory. As a constitutional law thesis, my focus is on the development of legal doctrine around these core principles rather than upon the political theory generally. Accordingly, my analysis is limited to the particular theories of accountability to upper chambers that were foremost in the minds of the framers of the *Constitution*. As described below, and has been noted by other constitutional historians and jurists, the framers of the

[1] Both have been accepted as the models which the framers used of a parliamentary system under responsible government: on this point see N Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901' (2002) 30(2) *Federal Law Review* 265, 268, 269-270, 272-73.

[2] See n 9, Chapter 1. See also N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 71.

[3] Chapter 4 considers in detail the ways the works were used in the Conventions.

Australian *Constitution* drew upon a relatively modest, albeit influential, sample of political treatises generally. I devote my main attention to those sources which featured especially when referred to in framing accountability to the Senate.

The purpose of this chapter is not to analyse whether the interpretation made by the framers of these leading texts is correct. Nor am I focusing on whether the views set out by authors in the works themselves on either the British or Canadian Constitutions was an accurate reflection of how those constitutions were operating at the time. My goal here is entirely descriptive, to summarise the import of the relevant sources and provide a basic outline of the use made of them by the framers during the Conventions.[4] In doing so, I adopt a methodology from previous scholarship.[5] As already noted in the introduction to this thesis, I accept the prevailing arguments at the time generally for dual accountability under bicameralism. Where my analysis contributes to the area is through examining the materials actually used by the constitutional actors who influenced the operation of accountability of governments to upper chambers in Australia. As we will see, those sources are mostly confined to the constitutional law scholarship set out in this Chapter and to the work of one political theorist specifically: John Stuart Mill.

As noted in Chapter 1, my focus is on what these works told the framers about the operation of political accountability to upper houses under those constitutions; specifically, what the treatises referred to by the framers described regarding whether upper houses exercised any control of finance. In neither the British nor the Canadian Constitutions was the upper house popularly elected. Even so, the leading treatises used by the framers and explored in this chapter reveal that the notion of sole accountability to the lower chamber in matters of finance was not necessarily settled under even these two models of responsible government.

In the first part of this Chapter I consider the descriptions of political accountability of the British Executive to the House of Lords in leading works on the British Constitution used by the framers. A number of authors, notably Dicey, Hearn, Bagehot, Todd and Erskine May, were important to the framers for their descriptions of the accountability of the British Executive under the British Constitution.[6] The works of these authors were referred to by delegates to the

[4] Following the approach adopted in Professor's Aroney work: see Aroney (2009), above n 2.
[5] As to which see Aroney (2009), above n 2, particularly Chapter 3 of that work.
[6] AV Dicey, *Introduction to the study of the law of the Constitution* (MacMillan, 3rd ed. ed, 1889); WE Hearn, *The Government of England: It's structure and Development* (George Robertson & Co, 1886); W Bagehot, *The English Constitution* (Fontana, 1963 ed, 1867); A Todd, *Parliamentary government in Englandm : its origin, development, and practical operation* (S Low, Marston & Company, 1892); A Todd, *Parliamentary Government in the British*

Conventions, either in literature published and circulated for them or during the Conventions themselves. Their import and their impact on the framers are described.

The second part of the chapter examines works on the Canadian Constitution used by the framers, considering what those works told the framers about the operation of political accountability to the Canadian Senate. As will be discussed, the Canadian Constitution came to represent what the framers did *not* want an upper house to be, with delegates during the Conventions often referring to the Canadian Senate as a chamber without any real legislative power and no real power to call the Canadian Executive to account.[7] It must be said that this was not necessarily an accurate reflection of the operation of the Canadian Senate,[8] but it is nonetheless the interpretation the framers would most often ascribe to the Canadian Senate's role and powers. Ultimately, the framers decided against replicating the Canadian model of political accountability, even though the Canadian Constitution provided the framers with an example of responsible government operating within a federal system. The Canadian model was influential in another key respect: it provided the framers with proof that a system of responsible government could exist within a federal model of government. I consider the leading works used by the framers, including Todd, Bourinot, Greswell and Monro,[9] and also briefly outline what the framers of the *Constitution* thought about why the Canadian Senate did not provide a suitable model of political accountability for Australia.

Colonies (Longmans Green & Co, 1894); T Erskine May, *Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (Butterworth & Co, London, 19th ed 1976). For a general description of the relevance of these works to the framers and during the Convention Debates see Aroney (2009), above n 2, 72. The works of other influential authors such as James Bryce, John Burgess and Edward Freeman are not surveyed as their works principally relate to matters that relate principally to federal concerns. The relevance of these works has therefore already been analysed in great detail in that context: ibid. A further work on the British Constitution available at the time was Sir William Anson's *Law and Custom of the Constitution* (Oxford, Clarendon Press, 1886). However, as there is no direct evidence of his work being referred to either during the Conventions or in literature surrounding them, I have not set out his analysis. For the most part, Anson's work replicated Dicey's analysis of the superiority of the Commons in all matters of legislation, particularly matters of supply: as to which see Anson's work at 33, 34-99, 112, 130; see also Aroney (2009), above n 2, 72 on Anson's work.

[7] Lijphart describes the Canadian Constitution as a model of majoritarian democracy and 'weak bicameralism' because of the dominance of the lower house and the comparative weakness of its Senate. In contrast, Lijphart has described the Australian Constitution as an example of consensus democracy and 'strong bicameralism': A Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty One Countries* (Yale University Press, 1984).

[8] On this contrasting view of the role and importance of the Canadian Senate as a house of review, see J Ajzenstat, 'Bicameralism and Canada's Founders: The Origins of the Canadian Senate' in S Joyal (ed), *Protecting Canadian Democracy: The Senate You Never Knew* (ProQuest E Book, 2003).

[9] Including Todd (1894), above n 6; JG Bourinot, *Manual of the Constitutional History of Canada* (The Copp Clark Co, Toronto, (1901); J Monro, *The Constitution of Canada* (Cambridge, Cambridge University Press, 1889); W Greswell, *History of the DomInion of Canada* (McMillan, 1889).

The final part of this chapter summarises some of the ideas about the goals of accountability and the benefits of upper houses that were circulating in the latter part of the 19th century in Australia. These circulating ideas form a further part of the intellectual context in which the operation of Australia's colonial constitutions, and the framing of the *Constitution*, took place. Ultimately, the analysis undertaken in this chapter sets out the ideas that appeared in many of the reasons given by upper houses in Australia for intervening in executive action that will be discussed in Chapter 3. Chapter 4 then examines how these ideas were carried into the Conventions to design the political accountability of the Commonwealth Executive to the Senate, and Chapters 5 and 6 consider how these ideas have continued to be employed by the High Court.

Chapter 2 reveals that, while the framers referred to works on the British Constitution, they did not ultimately replicate the form of political accountability under that constitutional model. I also conclude that the Canadian Constitution was important to the framers because it provided an example of the form of accountability they did not wish to replicate – a constitution providing for a weak upper house. The Canadian Constitution also contrasted with the form of political accountability the framers were already most familiar with under their own systems of government, in which dual political accountability, including accountability to elected (and even to nominated) upper chambers, had become part of Australian constitutional practice.

II. Political Accountability of the British Executive under the British Constitution

A. Introduction

As discussed in Chapter 1, the framers of the Australian *Constitution* drew on leading expositions by constitutional scholars on the operation of political accountability under the British Constitution.[10] In this section, I examine what these authors said about the power of the House of Lords to amend and/or to veto financial legislation. The works of each author are considered separately, since each provides a slightly different analysis and emphasis on the operation of political accountability of the British Executive to the Lords. I also set out (in summary) what the framers of the *Constitution* took with them from each of these works, including how they were used and interpreted during the Conventions. I commence by examining texts that emphasised accountability to lower chambers (Diceyan approach) which

[10] See also Aroney (2009), above n 2, 72. As noted above, these included works by Dicey, Hearn, Bagehot, Todd and Erskine May.

proved to be so influential to nationalists during the Conventions, before returning to compare and contrast how Thomas Erskine May's analysis differed from those accounts.

B. Treatises on the British Constitution

1. Albert Venn Dicey

Perhaps the key work relied upon by the framers was Albert Venn Dicey's work on the operation of the British Constitution.[11] Dicey needs little introduction to students of constitutional law. The most significant features of Dicey's career for our purposes are that he was the Vinerian Professor of English Law at Oxford University from 1882 to 1909, on a long list of distinguished jurists and scholars who held (or who went on to hold) that position, and published his central treatise on the British Constitution in 1885, before the Australian constitutional conventions and after the colonial crises in Australia's local parliaments.

Dicey's impact on the framers of the *Constitution* has been widely recognised.[12] He was cited throughout the Conventions[13] and referred to by Quick and Garran in their seminal work on the *Constitution.*[14] Quick and Garran, as well as leading representatives from Victoria and of the Conventions themselves, such as Henry Higgins and Isaac Isaacs, used Dicey's work to support an argument that dual accountability to the House of Representatives and to the Senate undermined strong government, an undesirable feature in a new constitution.[15] Dicey's work was thus used mainly by attendees at the Conventions who supported the accountability of the British Executive to the House of Representatives alone and rule based on the opinion of a

[11] AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (London, Macmillan & Co, 1885). Dicey edited the text until 1915 (8th edition of the work). The last contribution Dicey made to the 1915 edition was after the reforms introduced by the Parliament Act of 1911 (discussed later in this Chapter). Five editions of Dicey's work had been published by the time of the last of Australia's Convention Debates, including the 1885, 1886, 1889, 1893 and 1897 editions of his work. Three editions had been published prior to the first Convention in 1891, those in 1889, 1893 and 1897. Each is materially the same on the points considered in this Chapter. Throughout this thesis, reference is made to the 1889 edition of Dicey's work unless otherwise indicated.

[12] See Aroney (2009), above n 2, 4, 92. For general background on this point see sources cited by Aroney, including RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London, McMillan, 1980); HF Trowbridge, *Albert Venn Dicey; The Man and his TImes* (Barry Rose Publications, 1986); see also references in ff 114; also A Inglis Clark, 'Australian Federation (Confidential)' (Hobart, AI Clark, 1891); 4; J Quick, *A Digest of Federal Constitutions* (Bendigo, JB Young, 1896), 12-14; RR Garran, *The Coming Commonwealth*: *An Australian Handbook of Federal Government,* [1897] AU Col Law Mon 3, 15-16, 76 and J Quick and RR Garran, *The Annotated Constitution of the Commonwealth of Australia* (Sydney, Angus & Robertson, 1901), 325-8.

[13] On the use of Dicey during the 1897 Convention Debates, for example see *Official Report of the National Australasian Convention Debates, Second Session: Sydney, 2nd to 24th September, 1897* (Sydney: Government Printer, 1897; reprinted Sydney: Legal Books, 1986), 312-13 (Isaacs); 910-12, 952 (Barton); 307 (Clark). See also Aroney (2009), above n 2, 92-100.

[14] Quick and Garran above n 12, 15-16, 76, 325-8; Quick, above n 12, 12-14.

[15] Quick and Garrran, above n 12, 195, 335-6. See also Aroney (2009), above n 2, 120-21, 127. Aroney has argued that Quick and Garran were also drawn, theoretically at least, to the nationalising tendencies of a system of government in which responsibility would be owed to the House of Representatives alone: ibid, 121-122.

majority of the voting population. These delegates found support in Dicey's description of responsible government, which they interpreted as meaning simply that the party who loses command of the lower house loses office. For these delegates, it followed that the *only* form of political accountability owed by the British Executive under a system of responsible government was to the lower chamber of parliament, particularly in matters of supply. They interpreted Dicey's analysis to mean that this was all that political accountability encompassed under the British Constitution. This does not mean that Dicey had nothing to say about accountability to upper chambers (a somewhat common assumption by Australian scholars). It is simply that the framers who referred to Dicey chose to emphasise his description of accountability to the lower house, either missing or possibly ignoring some of the subtleties of Dicey's work which presents a much more complicated picture of accountability.

As Chapter 4 considers, some leading intellectual figures of the Conventions, including Sir Samuel Griffith, did question the correctness of the narrow interpretation of Dicey's work that responsible government meant responsibility only to a lower chamber. For men like Griffith, the very nature of responsible government as an evolving doctrine offered more flexibility than the narrow view allowed, including the possibility that political accountability could be owed to an upper chamber in matters of finance in a bicameral parliament. This provided a contrast to the views that proceeded on a supposition that responsible government required political accountability, particularly in matters of finance, to be owed solely to the lower house.

In the next section I summarise Dicey's descriptions of accountability in matters of finance, focusing on what Dicey said about the operation of political accountability to the two parliamentary chambers in matters of finance.

Dicey's work

Dicey described the evolution of responsibility of ministers under the British Constitution from one based on legal responsibility to the Crown (in the form of impeachment) to one based on political responsibility to Parliament (under the principles of responsible government).[16] He described the principle of ministerial responsibility as meaning that ministers who could not retain the confidence of the House of Commons were liable to lose their office.[17] It was this view that men like Higgins and Isaacs would argue provided evidence that a system of

[16] Dicey, 1889 ed, 264, 302. For a more recent analysis of this evolution see the summary in G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional Analysis* (Melbourne University Press, 1983, 76-77.

[17] Dicey, above n 6, 264.

responsible government required accountability solely to the lower house in matters of finance. Dicey said nothing about political accountability of the British Executive to the Lords. But it is impossible to know whether this absence was based on a view that political accountability to the Lords did not exist, or simply because it was not part of Dicey's focus of the evolution of ministerial responsibility.

A much later version of Dicey's work may shed some light on Dicey's views of the evolution of political accountability of the British Executive during the 19th century and the role of its accountability to the Lords. In the last edition Dicey edited he added an introduction in which he traced what he said were changes in the United Kingdom and other constitutions throughout the British Empire during the 30-year interval between the first and final editions that he worked on (that is, between 1885 and 1915). In that work, Dicey wrote of the 'diminishing' authority of the Lords over this time period.[18] This interpretation of a diminishing role for the Lords in rendering the British Executive accountable most likely refers to the conflict between the Commons and the Lords over the power of the Lords to deny supply to a sitting government right up until the passage of the Parliament Act in 1911.[19] This Act followed the House of Lords' rejection of the so called 'People's Budget' in 1909.[20] Although the budget was eventually passed by the Lords,[21] the Commons sought to resolve the matter of the powers of the Lords by restricting its rights and powers to review legislation.[22] The Act curtailed significantly the ability of the Lords to prevent the passage of legislation proposed by the Commons, whether in the form of ordinary or financial legislation.[23] In respect of money bills, the Act made clear that the Lords had no power to amend *or* to veto such bills, and only to

[18] AV Dicey, *Introduction to the study of the law of the constitution* (London, Macmillan, 1915), c, ci.
[19] Erskine May, above n 6, 574.
[20] The background to this event is not specifically relevant to the matters under consideration in this thesis. In summary, the Budget was opposed by the Lords since it introduced unprecedented taxes on the lands and high incomes of Britain's wealthy to fund new social welfare programmes. For a detailed history of the Budget and events leading up to the conflict with the Lords see Richard Cavendish, 'House of Lords rejects the "people's budget": November 30th, 1909' (Pt 11) (2009) 59 *History Today* 8; M Hawkins, 'Why was the People's Budget of 1909 so important? ' (Pt 1) (2011) 22 *Hindsight* 24.
[21] Following the re-election of the Government (under Lloyd George) once in early 1910 and again at the end of that year.
[22] The Act was widely opposed in the Lords, partly because its passage would restrict the ability of the Lords to reject the Irish Home Rule Bill as well. Again, the background to this event is not specifically relevant to the matters under consideration in this thesis. For a description of the Irish Home Rule Bill and events surrounding it see T Allen, 'Constitutional Rights in the Irish Home Rule Bill of 1893' (Pt 2) (2018) 39 *The Journal of Legal History* 187. A second general election occurred in December 1910 and the Act was passed. The Government (with the eventual support of the King) threatened to create sufficient peers to overcome the majority (of Conservatives) in the Lords.
[23] Ibid.

delay them briefly.[24] In respect of ordinary legislation, the Lords retained a power to delay the passage of such legislation for a limited period.[25] The key point is that the authority of the Lords had diminished, and by the passage of the Parliament Act was finally resolved. This also suggests that the Lords had possessed (or arguably possessed) power to amend or to veto financial legislation up to 1911.

Unfortunately, Dicey never made explicit in his work when the alleged superiority of the Commons to deal with money bills had occurred, so it is not possible to state conclusively his views on this point. The absence of any focus in Dicey's work on accountability to the Lords makes sense to a certain extent, since his principal concern was not the specific ways in which political responsibility was rendered by the British Executive in its bicameral parliament. Although his final contributions to his work suggested that conflict had continued throughout the 19th century between the Commons and the Lords through to at least 1911.[26] Notwithstanding this possibility, delegates during the Conventions referred most frequently to Dicey's work to support the proposition that political accountability for financial measures should be owed *solely* to the House of Representatives. Moreover, Dicey's preference for that interpretation does appear to be supported by his own thoughts on the operation of the Australian *Constitution,* which he provided some years after its commencement.

In a contribution Dicey made to the 1908 edition of his work, Dicey said that the Australian *Constitution* exhibited four main characteristics, only two of which are relevant to the present analysis: a federal form of government and a parliamentary executive.[27] He acknowledged that the framers had 'as far as [was] compatible with the existence of federalism, imported into the *Constitution* ideas borrowed, or rather inherited, from England.'[28] According to Dicey, the key

[24] Ibid. The Act restricted the power of the Lords to reject money bills, since it allowed money bills to be presented for Royal Assent without the consent of the Lords. Further, the Lords could not delay a money bill for more than one month.

[25] Ordinary legislation could not be delayed by the Lords for more than two parliamentary sessions. In respect of all ordinary legislation, the Act provided that any bill passed by the Commons in three successive Sessions and having been rejected by the Lords in each of those Sessions, would become law *without the consent* of the House of Lords on the Royal Assent being declared. The Act said this only occurred provided that at least two years had elapsed between the date of the first introduction of the Bill in the House of Commons and the date on which it passed the House of Commons for the third time.

[26] Dicey, above n 16, c, ci.

[27] The other two were 'an effective Method for amending the Constitution' and 'the maintenance of the Relation which exists between the United Kingdom and a self-governing colony': Dicey, *Introduction to the study of the law of the constitution* (London, Macmillan, 7th ed, 1908), 529.

[28] Dicey, above n 27, 529.

idea that had been borrowed was the concept of a strong parliamentary executive. In summary, for Dicey, the founders of Australia's *Constitution* had:

> 'not even in so many words enacted that the executive shall be a body of ministers responsible to the federal Parliament; but no one who has the least acquaintance with the history of the English constitution, or of the working of the constitutions which have been conferred upon the self-governing colonies of Australia, can doubt that the federal executive is intended to be, as it in fact is, a parliamentary ministry, which, though nominally appointed by the Governor-General, will owe its power to the support of a parliamentary majority, and will therefore, speaking broadly, consist in general of the leaders of the most powerful parliamentary party of the day.'[29]

Dicey added that the constitutional model adopted by the framers favoured the 'spirit of modern English constitutionalism', so much so that 'the elaborate and ingenious plan' under the *Constitution* for avoiding parliamentary deadlocks between the House of Representatives and the Senate could be seen simply as 'an attempt to ensure by law that deference for the voice of the electorate which, in England [sic] was enforced by the voice of the Commons.'[30] For Dicey, the will of the House of Representatives would ultimately prevail. As we shall see in subsequent Chapters, it is highly unlikely the framers adopted such a model of accountability, or that the Australian colonial parliaments which provided some of the foundational models had adopted this system of political accountability either.[31] In Chapters 5 and 6, we discuss how the High Court has now also apparently rejected this interpretation of political accountability under the *Constitution* as well.

[29] Ibid, 531-32.
[30] Ibid, 533.
[31] In these views, Dicey appeared to interpret the *Constitution* as having reached no real compromise between accountability to the House of Representatives alone and accountability of the Executive to the Senate. The course of the Conventions examined in Chapter 4 suggests that a different result was achieved in Australia. See also Aroney (2009), above n 2, 151 on the different operation of accountability under the *Constitution* compared to Dicey's interpretation of it; also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (London, Sweet & Maxwell, 2nd ed, 1910), 155 and P Loveday, 'The Legislative Council in New South Wales, 1856-1870' (1965) 11 *Historical Studies Australia and New Zealand* 481 on this difference. For further suppport see WR Curtis, 'The Origin and Genesis of the Deadlock Clause in the Australian Constitution' (1945) LX *Political Science Quarterly* 412 who further supports this view as does Lihjphart's work on the operation of the Australian Senate: see Lijphart, above n 4.

2. William Hearn

Hearn was an Irish university professor and politician[32] who became one of the four original professors at the University of Melbourne and the first Dean of the University's Law School.[33] In 1886 he published a treatise on *The Government of England*,[34] in which he made observations about the operation of accountability of the British Executive to the Lords. Like Dicey, Hearn emphasised the superiority of the Commons' power to use sanctions, such as the amendment or rejection of money bills, to render governments accountable. But Hearn also discussed powers of the Lords to render the British Executive accountable to it separate to any accountability a ministry might owe to the Commons.

Hearn's work was of particular relevance to the framers of the *Constitution* because he had been a teacher of some of the key figures in the Conventions, among them Alfred Deakin and Henry Higgins, both of whom would advocate during the Conventions for the political accountability to be owed to the House of Representatives alone.[35] Along with Dicey, Hearn's analysis of the British Constitution was used during the Conventions to support the idea that political accountability under responsible government meant accountability to the lower house alone. For example, during the Conventions, Andrew Thynne (Member of the Legislative Council of Queensland) considered Hearn's definition of responsible government, that the Crown acted 'exclusively by the advice of ministers having the confidence of Parliament', to be a complete definition of the system of responsible government, requiring that accountability be rendered solely to the lower parliamentary chamber.[36] Hearn's ideas, along with Dicey's, were used during the Conventions to argue that political accountability of an executive under responsible government meant political accountability only to a lower chamber. The parts of Hearn's work which referred to the benefits of upper chambers as houses of deliberation, delay and consideration, or of ensuring a consensus view rather than rule based upon simple majoritarianism, were largely lost on delegates to the Conventions.

[32] He had also been a member of the Legislative Council of the Victorian Parliament.

[33] His work was praised by Dicey at the time as 'teaching' Dicey more about the way in which early constitutional principles were developed 'than any other work': see Dicey, above n 6, iv; also La Nauze, above n 30, *370-372.*

[34] Hearn, above n 6.

[35] JA La Nauze, *entry for* 'Hearn, William Edward (1826-1888)'*, Australian Dictionary of Biography (Carlton: Melbourne University Press, 1972),* 370-372.

[36] *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891* (Sydney: Acting Government Printer, 1891; reprinted Sydney: Legal Books, 1986), 105 (Thynne).

Hearn's work

For the most part, Hearn's work supported Dicey's analysis of the superiority of the Commons, particularly in matters of finance, but a few important additions present in Hearn's work make his understanding of political accountability under the British Constitution worth considering separately. Hearn agreed with the Diceyean view that the Crown was bound to follow the advice of ministers who had the confidence of parliament[37] and that ministers had to resign from office when they lost a majority of support in the Commons.[38] He argued that a hostile resolution of the Lords against a sitting government would not result in its loss of office.[39]

What is not entirely clear from Hearn's work was whether political accountability of the British Executive was to be rendered to the Commons alone, or to both parliamentary chambers, although, as noted, many of the delegates who relied upon his ideas interpreted them as meaning that political accountability was to be owed solely to a lower house.[40] Hearn said that control by parliament over taxation and appropriations had been established in Great Britain by the late 18th century.[41]

His analysis provided a detailed history of how constitutional conflicts between the Lords and the Commons were resolved (according to Hearn) during the 19th century, with Hearn finding that the Lords had a right to advise the Crown which was co-extensive with the rights of the Commons.[42] He said that a complex question arose when the Crown did not *accept the advice of the Lords* where the Lords' advice contradicted advice offered by the Commons. In that instance, Hearn argued that the appropriate course for the Crown was to accept the advice of the Lords unless a contrary opinion had been proffered by the Commons.[43] Interestingly, he noted that this was necessary because the lack of approval by the Lords would be seen as weakening a ministry.[44] His suggestion to resolve any disagreement between the two houses was that, if the Lords passed a hostile vote against a ministry and the ministry would not resign, the Commons ought to pass a vote of confidence in the ministry.[45] It was implicit that if the

[37] Hearn, above n 3, 154, 205, 207. In accordance with Dicey's history, Hearn outlined how political accountability had replaced legal responsibility as the dominant typology for the accountability of ministers in the British Constitution: ibid, 18, 20-55, 140.
[38] Ibid, 120, 151, 162, 239, 243.
[39] Ibid, 174., 177, 237.
[40] Ibid, 120-121, 152, 156.
[41] Ibid, 146, 386, 380.
[42] Ibid, 168, 558.
[43] Ibid, 168, 175, 236.
[44] Ibid, 169, 175-176.
[45] Ibid, 168-69, 176.

Commons reasserted its faith in the ministry following an objection from the Lords, then the Lords should acquiesce to the wishes of the Commons (and the government it had approved). But Hearn also said that, Parliament consisting of two parts (Lords and Commons), a ministry needed the approval of both to carry out its legislative agenda.[46] He acknowledged that a lack of support in the Lords, unlike the Commons, did not result in an immediate loss of office for a ministry, but he did not argue that this meant that political accountability was owed solely to the Commons.[47] This was because he also described a system in which the Lords, as a matter of course, approved of any appropriations that had already been approved by the Commons.[48] The potential of conflict did not arise. He also said that, although it was the function of Parliament as a whole to grant supply, the powers of the Lords and the Commons were not the same in respect of such legislation. According to Hearn, the Commons had acquired exclusive powers over all questions of finance in the sense that the Commons had exclusive power with respect to the initiation of money bills and with their details.[49] For money bills, however, he said that the Lords retained the power of approval or rejection.[50] The difficulty is that, even though Hearn described the Lords as having such a power of rejection, he also argued that the Lords (in practice) approved appropriations already approved by the Commons.[51] Thus, even though Hearn acknowledged that the Lords retained formal power to call the British Executive to account (through the power of veto of supply) he also suggested that it was *not the practice* of the Lords to disagree with the Commons.[52]

Hearn detailed what he saw as an important distinction between rejection by the Lords of ordinary legislation (matters of legislation) and of money bills (matters of administration – specifically, supply bills providing for the ordinary annual services of the government).[53] In the case of matters of legislation, an immediate loss of office would not occur if the Lords rejected a bill that had been passed by the Commons, since matters of legislation could be the subject of compromise or delay between the two Houses.[54] Matters of administration (supply

[46] Ibid, 169, 249.
[47] Ibid, 168, 246-7, 254.
[48] Ibid, 370. He also said that no expenditure could be carried out by a ministry without parliamentary sanction: 378.
[49] Ibid, 380.
[50] Ibid, 380.
[51] Ibid, 381.
[52] As previously noted, this is questionable since the Lords were still using powers of veto of supply until the passage of the Parliament Act in 1911.
[53] Ibid, 169.
[54] Ibid, 169. Hearn said that where conflicts occurred over matters of legislation, the Lords usually gave way or the Commons usually 'moderated their own demands': Ibid, 176.

of ordinary annual services) on the other hand could not be delayed because the whole machinery of government would be brought to a standstill.[55] In any conflict between the Houses over administration bills, Hearn said that the opinion of the Commons had to prevail.[56] As noted above, Dicey did not attribute a specific date to the emergence of this constitutional practice, only that a general shift was occurring from the latter part of the 18th century. What he did say was that such conflicts hardly ever occurred[57] and that, when they had, were resolved by pragmatic solutions from the parliamentary chambers.[58] The opinion of the Commons thus prevailed on questions of supply, although it seems that Hearn found it difficult to point to any specific evidence of a hard and fast constitutional practice on the point since, according to his account, the two parliamentary chambers were either busy avoiding such conflicts altogether or reaching pragmatic solutions to resolve any conflicts that did arise.[59]

While much of Hearn's interpretation of the powers of the Lords and how and when they were exercised tends towards an interpretation consistent with that provided by Dicey, advocating for the superiority of the Commons, he did also make a specific mention of the role of an upper house under a bicameral parliamentary system. He considered that the Lords played an important role as part of holding the British Executive to account, describing a bicameral system of parliament as the 'essential guarantee of freedom'.[60] He acknowledged that, although there was no doubt that the existence of an upper house could enable a minority to defeat a majority, all of which could prevent useful reforms or involve loss of time, any of the trouble caused by an upper house was the price to be paid to avoid the establishment of an 'absolute and irresistible authority'.[61] Since each House was differently constituted, each served to act as a restraint upon the other.[62] Apart from the division of power, a bicameral system had other advantages, including an opportunity for 'deliberate discussion'.[63] Overall, Hearn's assessment

[55] Ibid, 175-176, 246. He defined matters of administration as being the 'business of administration' of government.
[56] Ibid, 169, 175-76, 185.
[57] Ibid, 169.
[58] Ibid, 170-73. Hearn said that the Houses had preferred to avoid conflict altogether. Otherwise, there was always the 'healing influence' of the King or the 'potent force' of public opinion to restrain the 'ardour of the Reformer and the inactivity of the Conservative': ibid, 176. In addition, the Crown always had the power to create new Peers to change the numbers in the Lords, as undesirous and potentially unconstitutional as such a path might be: ibid, 178-184.
[59] Ibid, 178-184.
[60] Ibid, 553.
[61] Ibid, 554.
[62] Ibid.
[63] Ibid, 554.

was that the bicameral system meant that '[t]he minority is protected, and the violence or the improvidence of the majority is restrained.'[64]

It is difficult to come away from Hearn's work with the idea that the British Executive does not owe some form of political accountability to the Lords. What is less clear is how, why and when such accountability was to be rendered in light of his findings that the Lords largely never exercised any powers it had, including any power to veto supply bills. The overall import of Hearn's analysis was that political accountability was *usually* rendered to the Commons on such matters, while whether accountability was owed to the Lords was not entirely clear. Delegates to the Conventions interpreted his work to stand for the proposition that responsible government required political accountability, particularly with respect to finance, to be owed solely to the lower house of parliament. Much of his more detailed analysis of accountability to the Lords was not mentioned.

3. Walter Bagehot

Walter Bagehot was a British journalist, businessman, and essayist who wrote about government and economics. In 1867 he published a work on the British Constitution that became of interest to the framers of the *Constitution*. Much of Bagehot's account of the operation of the British Constitution accorded with the views of Dicey and Hearn insofar as Bagehot's thesis argued that the will of the House of Commons must 'finally and absolutely prevail'.[65] Little is to be gained from a detailed analysis of the text and I confine myself here to summarising the key points from Bagehot's work that were adopted or debated by delegates to the Conventions.

Bagehot put forward a theory of the operation of the British Constitution that largely fits with the idea of political accountability to the Commons alone. He was highly critical of the operation of co-ordinate legislative houses generally, stressing what he regarded as the complete failure of the American constitutional system in this respect.[66] Bagehot believed that the Lords was not a chamber that could oppose the wishes of the people expressed through the Commons.[67] The Lords had become a House that could only delay – not oppose – the wishes of the people expressed through the majority will of the Commons, although it could still act

[64] Ibid, 556.
[65] Bagehot, above n 6, 15, 21-22.
[66] Ibid, 72-74.
[67] Ibid, 74.

as a house of review in a very limited sense. The best expression of the role of the Lords according to Bagehot's hypothesis was that:

> 'the Lords has become a revising and suspending house. It can alter bills; it can reject bills on which the House of Commons is not yet thoroughly in earnest – upon which the nation is not yet determined. Their veto is a sort of hypothetical veto. They say, We reject your bill for this once, or these twice, or even these thrice; but if you keep on sending it up, at last we won't reject it. The House has ceased to be one of the latent directors, and has become one of the temporary rejectors and palpable alterers.'[68]

Given that the role of the Lords was really one of delay and limited revision, Bagehot questioned the purpose of having the Lords at all. In his view, the only answer lay in existing political theory that two chambers, a suggesting chamber and a revising chamber, were essential to good government.[69] In this respect, although Bagehot mostly appeared to be critical of the Lords,[70] he also argued that the Lords' impartiality and independence made it a respectable and useful chamber of revision.[71] Indeed, it was this impartiality, combined with the lack of 'effective control' of the Commons, that ensured some form of accountability of the British Executive in the constitutional system:

> 'The subsidiary functions of the House of Lords are real … [and includes] the faculty of criticising the executive. An assembly in which the mass of the members have nothing to lose, where most have nothing to gain, where every one has a social position firmly fixed, where no one has a constituency, where hardly anyone cares for the minister of the day, is the very assembly in which to look for, from which to expect, independent criticism. And in matter of fact we find it.'[72]

Ultimately though, whatever role Bagehot seemed to suggest for the Lords as a house of review and consideration and an important check on executive action, he was clear that the Commons was superior, and an executive which commanded a majority of the vote of the Commons could 'rule despotically if it so chose'.[73] The British system could be contrasted with the American system of co-ordinate legislative chambers:

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[68] Ibid, 74-75.
[69] Ibid, 79.
[70] Most of Chapter V of his work is entirely critical of the Lords; see at 84-88 in particular.
[71] Ibid, 82-83.
[72] Ibid, 92.
[73] Ibid, 154.

> 'The House of Commons may … assent in minor matters to the revision of the House of Lords, and submit in matters in which it cares little to the suspensive veto of the House of Lords; but when sure of popular assent, and when freshly elected, it is absolute – it can rule as it likes and decide as it likes. And it can take the best security that it does not decide in vain. It can ensure that its decrees shall be executed, for it, and it alone, appoints the executive; it can inflict the most severe of all penalties on neglect, for it can remove the executive … A stipulated majority of both houses of the American Congress can overrule by stated enactment of their executive, but the popular branch of the legislature can make and unmake ours.'[74]

Bagehot's analysis thus emphasised the importance of the lower chamber overall in executive responsibility, even if he provided a passing mention of the role of the Lords as a house of review. His views were subjected to challenge though during the Conventions. For example, Sir Richard Baker, a leading South Australian lawyer-delegate to the Conventions,[75] referred to Bagehot's work in a *Manual of Reference*[76] he wrote and distributed for the Conventions. While Baker referred to Bagehot's warning of the evil of having two legislative houses of co-ordinate power and the corresponding potential for legislative deadlocks, he ultimately dismissed those concerns because, he said, parliamentary practice in both the United Kingdom and in the Australian colonies had resolved deadlocks by 'political pragmatism'.[77] Challenging Bagehot's view, Baker concluded:

> 'There is no doubt a feeling in such of these Colonies as possess two elective Chambers, of impatience that the momentary impulses of the people are not more quickly responded to by the Upper Houses, and it may be feared by some that a similar impatience will arise if an elected Senate is provided for, but it is more than probable that the other feelings and impulses before alluded to which will arise in respect of a Federal Senate will counterbalance such impatience. Such certainly has been the case in America.
>
> No doubt in America quarrels between the two Houses are frequent. The Senate largely exercises its right of altering Money Bills, which the other House resents. Each House is jealous

[74] Ibid.

[75] Along with most of his fellow South Australians, Baker advocated for a strong Senate. His background and contributions to the Convention Debates are discussed in Chapter 4.

[76] R Baker, *Manual of Reference* (Adelaide, E A Petherick & Co, 1891).

[77] Ibid, 60-61. Baker's other objection reflected federal concerns: namely, that in a federated state, rights would have to be protected by a house representing a distinct majority, but of States as States rather than just a majority of population: ibid, 61-62. In this respect, Baker seized on comments by Bagehot that federation and a powerful states' chamber embodied 'a feeling at the root of society – a feeling which is older than complicated politics, which is stronger a thousand times over than common political feeling – the feeling of statehood within a colony': see ibid, 62, citing Bagehot. See also Baker at 70-71 dealing with Bagehot's criticism of equality of representation of States in the State House.

> and combative, but no serious deadlock has ever happened. Both Houses are servants of the same master, whose word of rebuke will quiet them.'[78]

Bagehot's views were treated in a similarly dismissive fashion by other delegates during the Conventions. For example, during the debate on the powers of the Senate over legislation, Patrick Glynn (another South Australian delegate) put it bluntly:

> 'It has been said by Bagehot that undoubtedly by giving the Senate co-ordinate powers with the Lower House it would open the way to many deadlocks. We must not follow too closely the opinions of pedants on this point.'[79]

Although Bagehot's opinions may have been dismissed by these delegates who wished for dual political accountability to the Senate as well as to the House of Representatives, they certainly did reflect the concerns of delegates who were worried about the possibility of legislative deadlocks – particularly in respect of money bills.[80] Along with Dicey, Bagehot would be used by those delegates who saw dual accountability as creating potentially divided loyalties to support the idea of the superiority of the lower house in financial matters and accountability to the lower chamber alone.

4. Alpheus Todd

Alpheus Todd was a parliamentary librarian in Canada[81] who published a series of works on British parliamentary practice and its application in Canada and other British colonies with which delegates to the Conventions were familiar.[82] Todd's work was published during the 1891 Convention and was a recent publication in the lead up to the 1897-98 Convention. Much of Todd's work reflected the theories expressed by Dicey of the supremacy of the Commons. Unsurprisingly, Todd referred to both Bagehot and Hearn in his writing on the operation of parliamentary practice in both the United Kingdom and in her colonies.[83] This section confines itself to an analysis of Todd's work on the operation of the British Constitution. His separate

[78] Baker's response to alleviate the concerns of those opposed to a powerful upper chamber was to ensure that the chamber was elected, not nominated: Baker, above n 76, 63. These sentiments would be repeated by Baker during the Conventions, discussed in Chapter 4.
[79] *Convention Debates,* 1897, 72 (Baker).
[80] Discussed in Chapter 4.
[81] Originally for the House of Assembly of Upper Canada. When, in 1841, Upper and Lower Canada were merged, he was appointed assistant librarian to the Legislative Assembly of the united province which adopted his work, *The Practice and Privileges of the Two Houses of Parliament* (1840), as an official guide for members. In 1856, he became Chief Librarian of the Assembly. Upon Confederation of Canada in 1867, he was appointed as librarian to the Dominion Parliament.
[82] Including Todd (1892), above n 6; Todd (1894), above n 6.
[83] Bagehot, above n 6, Ix.

works on the operation of upper houses in Canada are discussed in Part III of this chapter, and his views on the operation of accountability in the Australian colonies are discussed in context in Chapter 3. For now, it suffices to note that Todd was critical of the role played by upper houses in British colonies, including the Australian colonies, for what he regarded as interference with legislation, particularly money bills, passed by lower chambers. He argued that colonial upper houses were obliged to follow what he regarded as British constitutional practice, relying upon the opinion of the lower chamber of parliament in all matters.[84]

Despite the clear preference for the superiority of the Commons present in Todd's work, Richard Baker relied upon Todd's work during the Conventions to support an argument that dual accountability was indeed a feature of the British model of responsible government. In literature Baker wrote and distributed for the 1897-98 Convention,[85] as well as in argument during the Conventions. Baker said that political accountability should be owed to the Senate as well as to the House of Representatives. He referred to Todd's work to point out that, whereas the tendency in the colonies had been to equate the executive with an incumbent ministry, the Executive in the British Constitution comprised both the Crown and *both* Houses of the British Parliament.[86] Baker used this to support his arguments during the Conventions (discussed in Chapter 4) that the Commonwealth Executive should be politically responsible to the Senate in addition to any accountability owed to the House of Representatives, since it was clear that political accountability was owed to each parliamentary chamber in a bicameral system. Todd's work was otherwise used during the Conventions to support the Diceyan position of accountability to the lower chamber. This is not surprising given Todd's position on the operation of political accountability under the British Constitution.

Todd discussed the rules regarding the passage of financial legislation in the British Parliament in some detail, even though he acknowledged that Erskine May's work (discussed below) provided far more detail than his own.[87] Firstly, Todd argued that the political accountability of the British Executive meant, in practical terms, responsibility to the House of Commons:

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[84] Todd (1894), above n 6, 522. He argued that any colonial upper chamber which professed to apply the law of the British Constitution did not enjoy co-equal legislative power with its lower house. This was particularly so in the case of financial legislation, over which Todd said that upper houses enjoyed no rights of amendment: ibid, 709-710.

[85] R Baker, *The Executive in a Federation* (C. E. Bristow, Government Printer, North Terrace Adelaide 1897), 12, 17-19.

[86] Ibid, 17.

[87] Todd (1892), above n 6, 226.

> 'The Lords may sometimes thwart a ministry, reject or emasculate its measures, and even condemn its policy; but they are powerless to overthrow a ministry supported by the Commons, or to uphold a ministry which the Commons have condemned.'[88]

He described the operation of the principle that the loss of a majority in the Commons would result in a loss of office for a ministry,[89] whereas a vote of lack of confidence or of censure by the Lords was not necessarily fatal and could be counterbalanced by a vote of approval from the Commons.[90] In respect of conflicts between the Commons and the Lords, Todd simply argued that no conflicts had occurred of that kind 'since the complete establishment of parliamentary government'.[91] Todd provided no particular date for this establishment, although he did observe that, if differences of opinion occurred between the chambers in the United Kingdom, the appropriate course was to go the people.

Although Todd described the manner in which parliament approved finance, he provided no particular study of the role of the Lords in the process of such approval. It is not clear whether this was because he regarded the Lords as having no particular role to play in the review of money bills. What Todd did say was that the Commons had asserted a right to supremacy, not only to initiate bills but also to deal exclusively with any amendments, and that the Lords had 'practically acquiesced to this restriction', although they had never 'formally consented to it', and had made verbal amendments to such bills in practice which the Commons had accepted.[92] He also argued that, although the Lords had no right to initiate money bills, they were not barred from making inquiries about the expenditure of public monies.[93] Todd said that, until the Lords and the Crown had assented to the appropriation of public moneys, any vote of supply from the Commons was 'inoperative'.[94] In Todd's account, the consent of both Houses was necessary to give legal effect and validity to any spending.[95] Notwithstanding this, Todd was ultimately critical of upper houses that did not approve legislation passed by lower chambers, and his work was largely relied upon by delegates who wished to argue that accountability under the Westminster-model was one based on accountability solely to the lower chamber of parliament. Even though Baker had referred to Todd's work in support of dual accountability,

[88] Ibid, 116.
[89] Ibid, 119.
[90] Ibid, 121.
[91] Ibid, 126.
[92] Ibid, 226-227.
[93] Ibid, 191.
[94] Ibid, 217.
[95] Ibid, 226.

it is not clear from Baker's writing, nor from the contributions he made to the Conventions, as to whether he had in mind the specific parts of Todd's work referred to here that supported the proposition that all bills required the approval of the Lords. If that was intended, it appears that Baker had understood that Todd had suggested more than accountability being owed solely to a lower chamber. Unfortunately, this part of Todd's work was not otherwise picked up by other delegates to the Conventions who chiefly referred to Todd to support the idea of accountability solely to lower chambers, particularly in matters of finance. In Chapter 3, I discuss Todd's criticism of the operation of political accountability in the Australian colonies (that is, to upper houses as well as lower houses). In later chapters, I discuss how this interpretation no longer accords with the High Court's interpretation of the Australian experience of political accountability to upper chambers.

5. Thomas Erskine May

Sir Thomas Erskine May's treatise on the operation of British parliamentary practice was known to and used by Australia's colonial parliamentarians, many of whom became leading figures in the Conventions.[96] Apart from references to his work in Australian colonial parliaments, his writing was also referred to during the Conventions.[97] In Chapter 3, I discuss how Erskine May's explanations regarding the power of the Lords to amend and reject supply bills were used in constitutional conflicts in Australian colonial parliaments, specifically in debates on the powers of upper houses to amend supply bills. In those conflicts, his treatise was used to argue both for and against accountability to upper chambers. References to Erskine May's text are found in the Conventions on the debates regarding the powers of the Senate over money bills.[98] For the most part, references to Erskine May during the Conventions tended to be used to support the idea that political accountability in financial matters should lie to a lower house. Unfortunately, most of the detail of his work on the continuing battle for supremacy between the Commons and the Lords (discussed further below) was largely overlooked in the Conventions. It is still useful to set out Erskine May's appreciation for the

[96] Erskine May's work was often referred to in the parliamentary debates in the colonies, particularly in the constitutional conflicts surrounding the role and powers of many of Australia's upper houses to deal with money bills. The references to his work in this context are discussed in Chapter 3. It should also be noted that the edition used in this thesis is not materially different from the earlier editions of Erskine May's work published during the 19th century. See the next page for a discussion of the range of publication dates of his work.

[97] Including by Sir Edmund Barton. This us discussed in Chapter 4.

[98] Discussed in Chapter 4. See also Aroney (2009), above n 2, 72. One of the most important figures of the Conventions (and of the 1897-98 Convention in particular), Sir Edmund Barton, was influenced by Erskine May's work on British Parliamentary practices, referring to it at critical junctures during the Conventions to resolve the debate over the powers of the Senate (this is also discussed in Chapter 4).

complexities of political accountability under the British Constitution here, since many of the arguments he examined that were put during clashes between the Commons and the Lords were mirrored in Australia's own constitutional conflicts (discussed in Chapter 3). Given the relevance of these arguments to the Australian context, it is not surprising that Erskine May's work was known to and would be referred to during those conflicts.

Erskine May was a British constitutional theorist and Westminster parliamentarian.[99] He wrote one of the leading manuals on the operation of the British Constitution. First published in 1844, his *Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*[100] (which remained in publication over the course of the 19th century) provides a detailed consideration of constitutional conflicts between the Commons and the Lords during the 18th and 19th centuries. His work reveals the operation of a constitution in which the powers of the Commons and the Lords were very much in a state of conflict throughout most of those centuries, particularly as to the type of accountability owed by the British Executive to the Lords. In Chapter 4, I discuss how men like Samuel Griffith understood, perhaps because of Erskine May's work, that responsible government had been a rapidly evolving and unsettled doctrine by the time the framers came to discuss it during the Conventions.

Erskine May's work provides the reader with a much more detailed survey of political accountability under the British Constitution than the other authors known to the Australians and considered in the chapter. It is therefore useful to take some time to consider what Erskine May said about the operation of political accountability of the British Executive to the Lords because so much of his analysis became known by and relevant to Australian parliamentarians in their local constitutional skirmishes (discussed in Chapter 3).

Erskine May's work provides a description of the Lords' concerns regarding parliamentary control of the British Executive (mainly through control of finance). In the next chapter I discuss how these concerns were mirrored in those expressed by Australia's colonial upper houses during the latter half of the 19th century. These concerns resurfaced during the Conventions (examined in Chapter 4). Erskine May's work thus provides us with important context through which to understand the hesitations of Australia's colonial parliamentarians regarding the accountability of the executive to parliament which permeated many of the

[99] Erskine May had also been the Assistant Librarian to the House of Commons Library as well as Clerk of the House of Commons.
[100] Erskine May, above n 6.

constitutional conflicts in Australian colonial politics. These concerns were embedded in the minds of the delegates to the Conventions who had to devise the powers of the new Senate to deal with the finances of the Commonwealth. We will return to these concerns in the Australian context in the next chapter, and to how they made their way into the Conventions in Chapter 4.

While authors like Dicey and Hearn had spoken of the Commons' pragmatic approach to engagement with the Lords, the overall picture presented by those authors was of a constitutional system in which the Commons had the constitutional right to control the finances of the country, without interference from the upper house. Erskine May's account, by contrast, described a detailed history of an upper chamber that was still very much determined to assert powers to review and amend all legislation, including money bills. Chapter 3 demonstrates that this picture of an upper chamber with power to call the executive to account and to deal with financial legislation was not lost on Australia's colonial parliamentarians: Australian upper chambers asserted that they possessed equivalent rights.

For now, I approach my analysis of Erskine May's work in three parts. I first examine the author's remarks about the power of the Lords to amend legislation and, specifically, what Erskine May described as the Lords' power to amend money bills. Next, I consider what Erskine May said about the Lords' power of veto of legislation, including its power to veto supply. Lastly, I examine the practice of tacking and the Lords' objections to it as unconstitutional on the grounds that it curtailed the power of legislative review by the upper chamber.[101]

(i) Erskine May on the Lords' power of amendment

Erskine May's views on the powers of the Lords to control financial legislation described a line of accountability that the Lords was determined to use, and with which the Commons had (for the most part) attempted to avoid conflict.

Erskine May said that the Lords had accepted that it was the right of the Commons to initiate money bills and that they accepted they had no equivalent power.[102] Far from any view that the

[101] The nature of tacking is described below at heading (ii) A. Briefly, tacking is the practice of adding ordinary legislation to a supply bill on the premise that an upper chamber has no power to amend money bills. The purpose of tacking is thus to limits the chances the ordinary legislation will be amended by an upper chamber. As discussed in Chapter 3, in the Australian colonies the tactic of lower houses was to tack ordinary legislation to a supply bill.

[102] Erskine May, above n 6, 563-565.

Lords did not amend money bills, Erskine May's work described how, at various points in the constitutional conflicts between the two Houses occurring throughout the 19th century, practices had developed in the two chambers by which amendments to money bills proposed by the Lords had actually been acceded to by the Commons.[103] He also said that in a number of subject areas[104] it was not the 'invariable' practice of the Commons to assert their supremacy over money bills, and that '[t]he difficulty also of separating those amendments from other legislative provisions or amendments, to which there was no objection, frequently prompted their acceptance by the Commons.'[105] In such cases, the Commons had adopted what Erskine May described as a 'pragmatic' view that, as long as the amendments did not deal with the 'fiscal objects' of financial legislation, but only the legislative objects of ordinary legislation then, if the Commons did not accept amendments made by the Lords, the Commons would effectively 'exclude the Lords from the practical consideration of such bills'.[106] Erskine May also said that the practice of the Commons of accepting amendments proposed by the Lords (including to money bills) occurred up to the passage of the Parliament Act in 1911.[107]

The remainder of the history presented by Erskine May described how the Commons avoided bringing to a head the issue of the power of the Lords to deal with money bills. Although he said that the Commons had accepted changes by the Lords to legislation, including money bills, he also said that the Commons had carried on this course of accepting amendments by not insisting on a constitutional right to reject changes proposed by the Lords in order to reach a practical resolution to conflicts. Thus, the Commons did not concede any of its constitutional privileges, least of all having the sole power to amend money bills. He argued that, where the Commons thought the Lords was transgressing a constitutional right or privilege of the Commons (including its privileges over money bills), then the practice of the Commons had been to send an objection to the Lords to that effect.[108]

Erskine May concluded that, despite the Commons' insistence on its supremacy, the exact details of the respective powers to amend money bills were complicated, since both the

[103] Although this had occurred on minor matters that did not alter the intention of the Commons, and potentially not as an acceptance of a constitutional right by the Lords to do so: ibid, 566.
[104] The specific subject areas are not of direct interest to the matters for examination in this thesis. In summary, they included bills dealing with relief for the poor or with municipal, county and local rates and assessments.
[105] Erskine May, above n 6, 567.
[106] Ibid, 567-568. The changes by the Commons had included acceptance of changes to taxation bills made by the Lords.
[107] Ibid, 569.
[108] Ibid.

Commons and the Lords had avoided any final resolution of the issue until 1911. When the Commons raised an objection with the Lords, they had replied by saying that it would not insist on amendments in the event, but had also asserted that they made no admission as to any conclusions drawn by the Commons and did not consent to reasons offered by the Commons being turned into precedent.[109] Further, the Commons had adopted a practice whereby, if any privilege amendments (that is, where the Lords argued that it had the right of amendment) were insisted upon by the Lords, then the proposed amendments would be deferred for consideration by the Commons for a period of six months.[110] The point was not settled until the Parliament Act of 1911 determined the exact powers of the Lords with respect to legislation, The Act provided that the Lords having no power to amend any bills, including financial legislation, no power to veto money bills and a very limited power of veto over ordinary legislation.[111] The implication is that there was at least a plausible case for the existence of accountability to the Lords (including on financial matters) until 1911 when any such direct accountability, particularly for the approval of supply, was removed. The simple Diceyan model of complete supremacy of the Commons is not apparent in Erskine May's account of the same history. Certainly, it accords with Dicey's description of the *diminishing* authority of the Lords over the latter half of the 19th century, finally resulting in almost total dissipation by 1911. Erskine May's history provides us with a much more detailed understanding of the role of upper houses, including even in the United Kingdom, over the last half of the 19th century. It also potentially explains why upper chambers in the Australian colonies were insistent on maintaining what they saw as their rights to review all legislation, including financial legislation, and to exercise ultimate control over approving or rejecting supply.

(ii) Esrkine May on the Lords' power of veto

The power of veto of the British upper house was only marginally less controversial than its power of amendment. In Chapter 3 I discuss how the power of an upper chamber to veto supply bills contested by parliamentarians from Australian lower chambers (particularly in a string of constitutional deadlocks over supply that emerged in the colonies). In Chapter 4, I consider how the discussion over the power of an upper chamber had evolved somewhat, with the power of veto being largely accepted and most of the controversy focused instead on the Senate's power to amend money bills.

[109] Ibid.
[110] Ibid.
[111] As to which see the discussion above on the Act and its effect.

Erskine May said that the Lords had a power of veto over money bills up until 1911 when the issue was finally resolved by the passage of the Parliament Act.[112] His treatment of the Lords' power of veto of all legislation (including supply bills) provides a contrast to the views of authors like Dicey and other authors like Hearn and Bagehot who suggested complete and dominance by the Commons in financial matters. Erskine May's account described a real contest throughout the 19th century by the Commons to the Lords' power of veto, particularly over the power to veto supply bills, Erskine May was in no doubt of:

> 'The legal right of the Lords, as a co-ordinate branch of the legislature, to withhold their assent from any bill whatever, to which their concurrence is desired, is unquestionable.'[113]

He noted that, when the Lords rejected numerous taxation bills yet respected bills proposed by the Commons relating to supply, the Commons chose to interpret the actions of the Lords as representing a concession that the Lords would not exercise a power of veto over supply bills at all.[114] The Lords, however, had not accepted the Commons' interpretation that it had no power of veto over supply, pushing back against the Commons and its assertion of supremacy over all money bills, including the Commons' argument that it had an exclusive right to approve or veto supply. When the Lords made its view clear, the Commons asserted that it alone had powers to tax and grant supply, and that it did not require the Lords assent at all on such bills.[115] Again, Erskine May described a battle between the Commons and Lords on the Lords' power of veto, but he was in no doubt that the Lords did retain such a power.

The powers of the Lords to deal with legislation were brought to a head in the United Kingdom on one particular battleground: the Commons' practice of tacking. This practice would also prove to be the cause of most of the constitutional conflicts that occurred in the Australian colonies.[116] The practice was to 'tack' supply bills to ordinary legislation, so that the Lords would be forced to approve or reject any bill as a whole (thereby attempting to prevent amendment of ordinary legislation). Since this practice would prove to be an issue in the Australian colonies too (see Chapter 3), it is worth considering Erskine May's views about the practice and why the Lords, as an upper chamber, objected to it. In Chapter 3 I analyse how parliamentarians in Australia's upper houses became aware of Erskine May's work on the

[112] Erskine May, above n 6, 563. 565.
[113] Ibid.
[114] Ibid, 573.
[115] Ibid.
[116] This is discussed in Chapter 3.

point, including his views on the powers of an upper house to call the executive to account in matters of supply. I consider there why the practice was of concern to Australian upper houses for much the same reason; because it sought to avoid review of legislation by upper houses. Upper houses saw this as undermining their constitutional role, just as the Lords argued.

As noted, if an upper house has only a power of veto and not of amendment of money bills, then tacking ordinary legislation to a supply bill limits the chances the ordinary legislation will be amended.[117] Erskine May described how the Commons had used tacking to test the specific issue of the privileges of the Lords to amend money bills.[118] The point was that, as far as the Commons was concerned, the peers were faced with a choice: approve the bill as a whole or reject it as a whole. Tacking was therefore an attempt to remove from alteration and scrutiny the details of the ordinary legislation and to remove the privileges of the Lords to amend such legislation. The Lords' response (which accords with the response of Australia's colonial upper houses[119]) was to assert that the Commons practice of tacking was unconstitutional. Predictably, a conflict ensued between the Commons and the Lords on the point.[120]

According to Erskine May, the disagreement between the Houses over this form of 'composite bill' was not resolved until the passage of the Parliament Act in 1911.[121] Its significant curtailment of the Lords' ability to prevent the passage of legislation proposed by the Commons made clear that the Lords not only lost the power to amend money bills, but its power of veto was lost too.

The Lords insists to this day that it is a House of revision and amendment,[122] although the effect of the Parliament Act was to curtail its role further than that devised for the Senate by the framers of the Australian *Constitution*.[123] The divergence in practice is notable. In Chapter 3 I

[117] See discussion on this point in the preceding paragraph.
[118] Erskine May, above n 6, 573.
[119] See the discussion in Chapter 3 on these conflicts.
[120] Erskine May regarded the practice of tacking as an infringement of the privileges of the Lords: Erskine May, above n 6, 576.
[121] Ibid.
[122] See https://www.facebook.com/UKHouseofLords/posts/1503342709751797%20 accessed on 11 October 2017. Also B Dickson and P Carmichael, *The House of Lords, Its Parliamentary and Judicial Roles* (Oxford, Hart Publishing, 1999), 16-17, 22, 25. The authors discuss the role played by the Lords as a house of revision and amendment, including the willingness of the Lords to substantially amend, oppose and delay legislation, as well as the reality that a government can be defeated on legislation in the Lords: ibid, 18.
[123] Despite the changes made by the Parliament Act, doubt remains as to whether they made any difference to the role played by the Lords: see Dickson and Carmichael, above n 122, 4. The authors suggest the Lords continued to act as a 'bulwark against dictatorship': ibid, 25. As early as 1923, the idea that the Lords was a less powerful Chamber was still being questioned: see Loveday, above n 29, 31. On the continuing importance of the Lords as a House designed to slow down the worst excesses of popular government see ibid, 33, 34, 36-45. Cf

examine how much Australia's colonial upper houses insisted upon their rights to amend as well as to veto financial legislation, sometimes relying upon British constitutional practice to support their asserted powers and sometimes seeking to actively distinguish British from Australian constitutional powers and practices. In Chapter 4 I discuss how, by the time of the Conventions, the power of upper chambers to veto supply was largely not contested. In this respect, Australia's history of responsible government took an important turn from its British ancestor. In the United Kingdom, the Lords powers to deal with financial legislation were all but lost by 1911. In Australia, they were re-affirmed. In Chapters 5 and 6 I return to examine the High Court's appreciation of the undoubted power the framers handed to the Senate to deny a sitting government supply through exercise of this power of veto.

C. Summary

While some of the treatises relied upon by the framers of the Constitution described a real and continuing contest over the powers of the Lords to deal with financial legislation, most of the leading works on the British Constitution relied upon by the framers were used to support the idea of the Commons' complete superiority over financial legislation. During the Conventions, the Diceyan model of accountability to the lower house would be used most by delegates from the larger colonies of New South Wales and Victoria to argue that responsible government based on the Westminster model meant that an executive accounted to the lower house alone. Notwithstanding this view, leading figures like Griffith appreciated that the constitutional landscape on the powers of upper chambers to hold the executive to account was not so settled. Griffith's position is considered in Chapter 4 where I discuss that, while the framers accepted that the Senate possessed no power to amend money bills, it was not contested (ultimately) that it would possess a power of veto. In Chapter 3, I examine the long road of constitutional conflicts regarding the powers of upper houses to deal with financial legislation that led to this position. In particular, I discuss how much of the discussion during the Conventions was influenced by Australian constitutional experience on this point.

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the 'Salisbury Convention' or 'Salisbury Doctrine means that the House of Lords does not oppose legislation promised in the Government's election manifesto: (http://www.parliament.uk/documents/lords-library/hllsalisburydoctrine.pdf and http://researchbriefings.files.parliament.uk/documents/SN04016/SN04016.pdf, both accessed on 11 October 2017). See also the Report by the Joint committee on Conventions available at https://publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/26506.htm accessed on 11 October 2017.

Overall, the key impact on the framers of the *Constitution* of the British Constitution was the incorporation of the idea that a ministry must retain the confidence of the lower house in order to retain government, and that such a ministry was responsible for the initiation and also for the details of money bills. Beyond that, the British constitutional model, and the form of political accountability it provided, particularly to an upper chamber, would prove to be rather less influential on the framers.

III. Political Accountability of the Canadian Executive under the Canadian Constitution

A. Introduction

By the time of the Conventions, Canada was governed by an Act of the British Parliament.[124] The Canadian Constitution combined a Westminster model of government with federalism.[125] The governing legislation gave to Canada not only a federation but an upper as well as a lower house for the conduct of national government, creating both a House of Commons and a Senate.[126] Senators were appointed by the Governor-General on recommendation from the Executive Council.

The Canadian Constitution also adopted the political convention that the Canadian Executive retained office only so long as it retained the confidence of the House of Commons. It provided that bills for appropriating any part of the public revenue, or for imposing any tax or impost, had to originate in the House of Commons.[127] Apart from that, it said nothing about the respective powers of either the Senate or the Commons to deal with legislation. The Constitution proceeded on the basis that the approval of both chambers was necessary to pass legislation. It also proceeded on the basis that it did not confer upon either House any privilege not itself conferred upon the Commons or the Lords at Westminster.[128] Although the Senate

[124] *British North America Act* 1867 (UK).
[125] For a summary of the history leading to the passage of the 1867 Act see Aroney (2009), above n 2, 57-58.
[126] Ajzenstat, above n 8, 9.
[127] Cl 53, Canadian Constitution.
[128] The Canadian Senate did technically possess a power to amend financial legislation, as long as it did not increase any cost to the people in doing so. The constitutional basis for this power is discussed in detail in R L Watts, 'Bicameralism in Federal Parliamentary Systems' in S Joyal (ed), *Protecting Canadian Democracy: The Senate You Never Knew* (ProQuest E Book, 2003), 88. This power was often not discussed in the treatises on the Canadian Constitution.

had a power to amend or reject any bills, the available evidence suggests that it used this power infrequently.[129]

The impact of the push for self-government in Canada, a push that was felt throughout the British Empire, including the Australian colonies, has been extensively documented elsewhere and is not the focus of this thesis.[130] Rather, the concerns of this thesis lie with the impact of the constitutional arrangements in Canada and their influence on the framers of Australia's *Constitution*. I confine myself to considering those parts of the Canadian Constitution that are relevant to that question.

One important effect of the Canadian Constitution to the framers of the Australian *Constitution* was that the Canadian model provided the framers with an example of how a federal system could be 'adapted to a monarchical and parliamentary system operating within the British empire'.[131] In addition, and perhaps the greatest contribution the Canadian model would make to the *Constitution*, it provided an example to the framers of what they did not want for their own system: a relatively weak Senate with weak powers to call the Canadian Executive to account, a style of political accountability to its upper house which the framers would (as discussed in Chapter 4), by and large, reject.

In this section, I consider the works the framers of the *Constitution* relied on to inform themselves as to Canada's constitutional arrangements. I then outline how the framers understood the Canadian Constitution to be working. Texts on the Canadian Constitution were not usually referred to directly in the Conventions. They mostly appear in the literature surrounding the Conventions. I discuss what those authors told the Australians about the operation of political accountability of the Canadian Executive to the Senate, since it was

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[129] Ibid. Between 1867 and 1987, the Senate rejected fewer than two bills per year, though this has increased more recently: see The Canadian Senate in Focus 1867-2001, *The Senate of Canada. May 2001*. Retrieved August 4, 2007, a*ccessed on 17 October 2018.*

[130] For an analysis of the use of the Canadian Constitution in the push for self-government in the Australian colonies see C Buller, 'Responsible Government for the Colonies' in EM Wrong (ed), *Charles Buller and Responsible Government* (Oxford, Clarendon Press, 1929); TH Irving, 'The Idea of Responsible Government in New South Wales before 1856' (1964) 11 *Historical Studies (A & NZ)* 192; ACV Melbourne, 'The Establishment of Responsible Government' in AP Newton JH Rose, E&A Benians (ed), *7 The Cambridge History of the British Empire: Part 1: Australia* (Cambridge, Cambridge University Press, 1933); JM Ward, 'The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856 ' (1978) 63 *JRAHS* 221; J Ajzenstat, *The Political Thought of Lord Durham* (McGill-Queens University Press, 1988); David Wood, 'Responsible government in the Australian colonies: Toy v Musgrave reconsidered' (1988) 16 *Melbourne University Law Review* 760.

[131] Aroney (2009), above n 2, 71. As noted, the importance of the Canadian Constitution to deal with federal concerns has already been canvassed in detail in existing scholarship and is not the focus of my thesis.

interpretations drawn from treatises by Bourinot, Monro and Greswell that assisted the framers to understand the operation of the Canadian Constitution.[132] After summarising what these works said, I contemplate the framers' understanding of political accountability of the Canadian Executive to the Canadian Senate in the Debates.

B. Treatises on the Canadian Constitution

1. Alpheus Todd

As noted, Todd wrote a work on the operation of the British Constitution as well as texts on the Canadian and other colonial constitutions based on the British model. In his work on the operation of parliamentary government in the colonies, including Canada, Todd argued that nothing in Canadian law could be construed to:

> 'warrant a claim by [the Canadian Senate] to equal rights in matters of aid and supply to those which are enjoyed and exercised by the commons house of parliament in the United Kingdom; for such a claim … would derogate and diminish the constitutional rights of the representative chamber.'[133]

Noting that the Canadian Constitution provided that money bills had to originate in the lower house, Todd said that the Canadian Constitution provided nothing further about the powers of the respective houses.[134] The powers of the chambers to deal with legislation had to be sought in constitutional practice because, Todd maintained, any parliament modelled on the British model had by 'parity of reasoning' adopted the practices of the British Parliament.[135] In Chapter 3 I discuss how Australia's parliamentarians contested this line of reasoning and rejected any direct application of British constitutional practice based on it. Although no colonial upper chamber was a replica of the House of Lords,[136] Todd argued that the resolution of the House of Commons that money bills 'ought not to be changed or altered by the House of Lords' had been:

> 'generally, if not universally, admitted in all self-governing British colonies by the adoption in both legislative chambers of standing orders which refer to the rule, forms, usages and practices

[132] Bourinot, above n 6 and JG Bourinot, *Federal Government in Canada* (John Hopkins University Studies, 1887); Monro above n 9; Greswell, above n 9.
[133] Todd (1894), 705.
[134] Ibid, 706.
[135] Ibid.
[136] Ibid, 704.

> of the Imperial parliament as the guide to each house in cases unprovided for by the local regulations.'[137]

Todd also recognised that an upper chamber in self-governing colonies was a 'necessary institution' which provided a range of benefits:

> 'It is a counterpoise to democratic ascendency in the popular and most powerful assembly, it affords some protection against hasty and ill-considered legislation and action, and serves to elicit the sober second thought of the people, in contradistinction to the impulsive first thought of the lower house. These great benefits of a second chamber are in addition to the advantages derived from the revision and amendment of laws.'[138]

Although an upper chamber derived efficacy and importance from its independent position, in Todd's view the upper chamber should always give way to the wishes of the people.[139] Ultimately, Todd's view of the role of an upper chamber was one very much modelled on the idea that the views of the lower chamber must ultimately prevail.

2. John Bourinot

In 1887 John Bourinot, Clerk of the House of Commons of Canada and author of an earlier work on Canadian parliamentary history, published two treatises on the Canadian Constitution which were known to the framers of the Australian *Constitution*.[140] In them, Bourinot described the operation in Canada of the principle that a ministry which lost command of the House of Commons must resign.[141] He also described a model of government premised on the British model insofar as it was the responsibility of the Commons to take primary responsibility for all legislation and particularly for financial legislation, since the Senate had no power to initiate or to amend money bills.[142] Further, although the Senate was confined to a power of veto over such legislation, Bourinot argued that any veto was justified only by 'extraordinary circumstances'.[143] He also noted that the lower houses of the Canadian provinces had traditionally asserted their complete control of parliamentary finances and that this had been translated into the Federal Constitution.[144] Bourinot's view of the powers of the Canadian Senate was thus much more tightly circumscribed than those of authors detailing the powers of

[137] Ibid, 706.
[138] Ibid., 698.
[139] Ibid., 699.
[140] Bourinot, above n 9.
[141] Ibid, 126-127.
[142] Ibid, 98; see also Bourinot, above n 132, 127.
[143] Bourinot, above n 132, 98.
[144] Ibid, 112-13.

the Lords, which had clearly not lost its power of veto until 1911. While Bourinot acknowledges the existence of the Senate's veto power, he described it as a mere technicality: a power in existence but one not used in conflict to the wishes of the lower house.

Bourinot described the Canadian Senate as a house of review, arguing that the fact that the Senate did occasionally make amendments to legislation showed how 'thoroughly its members understand and are prepared to comprehend certain subjects'.[145] The other bonus in having a house of review was that the Senate both slowed down some of the 'too hasty' legislation passed by the Commons and also corrected such legislation 'greatly to the advantage of the country'.[146] In spite of this suggestion that the Senate acted as a revising chamber, Bourinot's overall assessment was that the Canadian Executive was able to exercise even more control over the lower house of parliament than the British Executive had over the Commons in the United Kingdom, principally due to a very rigid party system that had emerged in Canada but also because of a lack of independent criticism of the Executive by an upper chamber.[147]

Bourinot concluded that the Canadian Senate showed every weakness of the House of Lords with none of the advantages of an hereditary chamber.[148] He also described the difficulties created by the nomination system for members of the Senate: in his view, the problem was that the Senate was compromised by partisanship because the executive of the day tended to fill it with members of their own party or political persuasion, even if it was usually populated by 'men of fine ability'. [149] In Chapter 3 I consider how Australian upper houses that were elected felt no similar constraints in opposing government measures, in large measure because of their asserted democratic legitimacy. In contrast, nominated Australian upper houses faced similar allegations of partisanship to those faced by the Canadian Senate.

In 1916 Bourinot published a further work on the operation of government in Canada in which he detailed a few instances in which the Senate had interfered with legislation sent up by the lower chamber, including supply bills. However, he argued that, since 1870, no attempt had been made by the Senate to throw out a money bill.[150] This did not mean that the Senate had ceased to offer an opinion on such bills; merely that the parliamentary practice was to make

[145] Ibid, 100.
[146] Ibid, 100.
[147] Ibid, 105-106.
[148] Ibid, 98.
[149] Ibid, 98.
[150] JG Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (Irish University Press, 1916), 405-407.

only 'verbal or literal corrections' to such bills.[151] In Chapter 3 I discuss how the South Australian Constitution, which would become one of the formative models for the Constitution on the powers of the Senate to deal with money bills, adopted a similar approach to the upper house's power to amend money bills. Bourinot otherwise argued that the Senate had adopted the practice of the House of Lords of acquiescing in 'all those measures of taxation and supply, which the majority in the House of Commons have sent down to them for their assent as a co-ordinate branch of the legislature.'[152] He added that the Senate, in dealing with financial legislation could legitimately:

> 'institute inquiries, by their own committees, into certain matters or questions which involve the expenditure of public money. But the committee should not report recommending the payment of a specific sum of money, but should confine themselves to a general expression of opinion on the subject referred to them.'[153]

According to Bourinot it was permissible for the Senate to question the Canadian Executive regarding expenditure; what it could not do was publish any detail on questions regarding the expenditure of specific sums. The ability to publicly scrutinise spending by the Canadian Executive was limited.

For the remainder of his text, Bourinot discussed a Senate that was responsible for the initiation and rejection of other legislation, even if the 'number of bills of public importance rejected by the Senate … is very small compared with the large number coming under their review every session.'[154] This nuance was missing from the other works the framers of the *Constitution* had available to them, and the view that appears to have predominated the Conventions in Australia was that the Canadian Senate played no real role in the review of most legislation – and none at all in reviewing financial legislation. Ultimately, the Canadian Senate did not reflect the model of a chamber the framers of Australia's *Constitution* wanted to adopt because of its perceived weakness vis-á-vis the lower house.

3. Monro and Greswell

Two further Canadian works, ones by Monro and Greswell, were referred to in the literature distributed for the Conventions.[155] Monro's 1889 book on the *Constitution of Canada*[156]

[151] Ibid, 407, citing Todd (1894), above n 6, 565-70.
[152] Ibid, 408.
[153] Ibid, 408, citing Todd (1894), above n 6, 433.
[154] Bourinot, above n 150, 409-412.
[155] Baker, above n 76.
[156] Monro, above n 9.

contributed very little about the operation of political accountability to the Senate. At most, Monro said that the framers of Canada's constitutions appeared to take the House of Lords as the model of 'the type of an upper house' for the Canadian Senate, with no further description of precisely what that meant, other than to say that members of the Senate would be appointed rather than elected.[157] Money bills were described as being required to originate in the lower house but nothing further was offered about the role of the Senate or its powers to deal with money bills.[158]

Greswell's work provided a detailed history of Canada and the lead up to Federation which included one important statement of relevance on political accountability.[159] He described Canada's rejection of the American model of Federation:

> 'In the United States the President and his Ministers and Congress are practically independent for four years, in Canada the Governor-General, acting by the advice of a Ministry responsible to the Canadian Parliament, is a constitutional ruler through whom the turns of public opinion can be immediately expressed. The Executive, therefore, represents more quickly what is generally needed, affairs are brought to a direct issue, and if there is a dead-lock an appeal is at once made to the country. Canadians point out that the want of responsibility in the dead-lock between the Senate and House in the United States is a defect in their constitution.'[160]

The reference to the resolution of deadlocks being put to the country is tantalising. Unfortunately, Greswell provided no further explanation of what he meant by this. His analysis suggests that, if the Canadian Senate chose to disagree with the lower house, its members would have to face a political consequence for such opposition. In Chapter 4 I discuss how the framers of the Australian *Constitution* did not wish to leave to chance the question of what to do in the event of a deadlock between the two legislative chambers. In this context delegates to the Conventions made clear that the absence of such a provision in the Canadian Constitution was a deficiency. However, the framers' concerns regarding deadlocks appear to have been driven

[157] Ibid, 6.
[158] Ibid, 79, 153.
[159] Greswell, above n 9.
[160] Ibid, 220. The Canadian Constitution originally did not provide for what the Australian Governor-General could do in the event of a deadlock between the Senate and the House of Representatives. This was changed in 1915 when the Constitution was amended so that the Governor-General could appoint further members to the Senate: see discussion on the change and this power in WPM Kennedy, *The Constitution of Canada 1534-1937* (Humphrey Milford, Oxford University Press, 1922), 384. Kennedy notes that the Governor-General had been requested by the Mackenzie Ministry in 1873 to make appointments to the Senate to break a deadlock, which request was forwarded to the Colonial Secretary who refused it, stating that 'the power was only for use in serious deadlock which actually upheld the administration, and when it could be shown that it provided adequate remedy': ibid, 384, citing *Canada Sessional Papers* (1877), No 68.

more by a desire to avoid a repetition of their own experiences with deadlocks over supply in their local constitutions (discussed in Chapter 3) than as a response to perceived deficiencies in the operation of the Canadian Constitution.

C. Summary

During the Australian Federation Conference of 1890, the Canadian Constitution was referred to as providing a basic model of government for Australia, insofar as it combined a Westminster-style system of government within a federation.[161] The Canadian Constitution was used in Andrew Inglis Clark's draft constitution that was presented at the 1891 Convention.[162] Clark incorporated into his draft its presumption of the existence of cabinet government (that is, no strict separation of legislative and executive power as existed under the American Constitution) and its dependency on the empire.[163] Beyond these points, its model of accountability was ultimately rejected by the framers.

Even Henry Parkes, who would propose to the 1891 Convention a model of political accountability principally to the lower house, said that he could not recommend the wholesale adoption of the Canadian model for Australia.[164] Other views were more positive. For instance, Sir Samuel Griffith referred to the Canadian Constitution during the 1891 Convention as providing a model in which one house was given a 'preponderating influence',[165] with the added benefit that:

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[161] Quick and Garran, above n 12, 118-19; JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 17; Aroney (2009), above n 2, 150. Sir John Forrest told the 1898 Convention Debate that 'Canada is federated, and the Federation there is most like the Federation we are trying to constitute here, namely, a Federation based on responsible government': see *Official Report of the National Australasian Convention Debates, Third Session: Melbourne, 20th January to 17th March, 1891,* 2 vols. (Melbourne: Government Printer, 1898; reprinted Sydney: Legal Books, 1986), 1703 (Forrest).

[162] Aroney (2009), above n 2, 109-110; La Nauze, above n 161, 24.

[163] The Canadian Constitution provided 'appropriate guidance in these respects': see Aroney (2009), above n 2, 109, citing Inglis Clark, above n 22, 2-6. Inglis Clark's draft can be found in A Inglis Clark, 'A Bill for the Federation of the Australasian Colonies' (1891), available at https://eprints.utas.edu.au/10434/ accessed on 4 June 2019. See also Inglis Clark, *Studies in Australian Constitutional Law* (Melbourne, G. Partridge and Co, 1901). Inglis Clark said that the draft he had put together followed the Canadian model because it was premised on the desire of the Australian colonies to be federally united: on this point see Aroney (2009), above n 2, 257. Inglis Clark's draft survived largely intact. The draft and its influence are discussed in Chapter 4. For a summary see Aroney (2009), above n 2, 109-110.

[164] *Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne* (Melbourne: Government Printer, 1890), 80, 106 (Parkes). As discussed in Chapter 4, delegates during the 1891 Convention were divided on whether the Canadian Constitution formed an appropriate model of government at all. The basic division was between delegates from the smaller colonies who argued that Canada's history was one of amalgamation of dominions, rather than a true federation: see BR Wise, *The Making of the Australian Commonwealth 1889-1900* (London, Longmans, Green and Co, 1913), 74-5.

[165] *Convention Debates*, 1891, 31 (Griffith).

> 'the whole system of the relationship between the executive and the legislative branches might be changed in practice without the change of a word in the written Constitution.'[166]

Griffith also told the 1891 Convention that the Canadians had 'the English system in Canada; their upper house is as nearly as possible a reproduction of the House of Lords, and there the powers of the senate are naturally and properly restricted.'[167] Sir Robert Garran also referred favourably to the Canadian model in literature he distributed for the 1897-98 Convention in which he argued that responsible government meant responsibility of local ministers to the lower Houses of colonial parliaments only, Canada being an example of such a system operating within a federation.[168] During the debate over options for resolving deadlocks at the 1897-98 Convention, some delegates raised objections that the Senate should not have too much power to oppose the will of the House of Representatives. In that context, delegates drew positive analogies from the Canadian model:

> 'The senate is not intended to be an active house like the house of representatives. It is only created for the purpose of delaying hasty legislation. The upper house never does stand in the way of recording the opinion of the people when those opinions are definitely known beyond question. It has never done so in the old country. It has never done so in any of the colonies, in Australia or in Canada.'[169]

Apart from these positive references to the Canadian Constitution, other delegates to the Conventions were equally clear that various aspects of the Canadian system they did not wish to see replicated in Australia. During the 1891 Convention, Sir Winthrop Hackett completely rejected the Canadian model, saying that it had stood no test and was a failed experiment in both responsible government and in federation.[170] The key delegate who really led the charge against adoption of a weak Senate based on the Canadian model was Sir Richard Baker. In

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[166] *Convention Debates*, 1891, 36 (Griffith).

[167] *Convention Debates*, 1891, 427 (Griffith). In Chapter 3 I discuss how Griffith fought a battle with the Queensland upper house over legislative control when he was Premier of that colony. However, as discussed in Chapter 4, when it came to political accountability of the Executive under the new federal constitution, Griffith included the idea of a dual accountability to two chambers operating under a system of responsible government: see *Convention Debates*, 1891, 427-28 (Griffith). Cf Sir Winthrop Hackett, who argued that the experiment of dual accountability had been tried in Canada and had not worked: *Convention Debates*, 1891, 467 (Hackett).

[168] Garran above n 21, 81, 84, 147-48. Garran also used the example of Canada to place in context the decision the framers would have to make about accountability in their constitution in the 1897 Conventions: that is, that the framers would have to determine if political accountability was to be owed to the Senate in addition to any accountability to the House of Representatives. The debates and discussions on this specific question of dual accountability are considered in Chapter 4.

[169] *Convention Debates,* 1897, 715 (Fraser).

[170] *Convention Debates*, 1891, 279, 280, 707-708 (Hackett).

literature he distributed for the 1897-98 Convention (in which he summarised treatises on the Canadian Constitution and included a copy of the Constitution itself),[171] Baker argued that the Canadian Constitution was not a model the Australians should adopt for a number of reasons. Importantly, his attacks were based not only upon what he perceived as the shortcomings of the Canadian model to address federal concerns but also because (so Baker argued) the method of appointment to the Senate (by way of nomination based on advice from the ministry to the Governor-General) had 'no place' in the bicameral systems Australians were used to (since many upper chambers in Australia were elected).[172] He argued that the Canadian system of nomination for the upper house had led to the steady decline of the influence and usefulness of the Senate, 'not because of the lack of talent in its members, but because of the inherent defect in its constitution'.[173] The practice of nomination meant that the government of the day could also attempt to fill the Senate with pro-government members, thereby ensuring the passage of legislation approved by the House of Representatives.[174] Baker concluded that:

> 'In a Republic a Legislature, to be strong, must be elected. Nominated, the Senators do not really represent Provinces, and no nominated Senators will ever be looked upon by States or Provinces as being their representatives'[175]

and

> 'whereas in the United States power is really divided between the two Houses, and the Senate with perfect freedom controls and revises the acts of the popular House, in Canada power centres entirely in the Commons. It (the Senate) initiates nothing. It adjourns till business comes up from the Commons, and only shows it is alive about once each Session by the rejection of

[171] Baker, above n 94.

[172] As discussed, these have been considered in detail by Aroney: see Aroney (2009), above n 2, 111- 114. In summary, Baker's criticism was that Canada did not provide an appropriate model for Australian Federation because the Canadian Federation had already been criticised as not being truly federal 'since, by the nonrecognition of the States, their rights have been unduly subordinated to the national unity and power': see Baker, above n 94. On this criticism see also S Griffith, *Australian Federation and the Draft Commonwealth Constitution* [1899] AU Col Law Mon 7, 17; S Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* [1896] AU Col Law Mon 2, 7; T Just, *Leading Facts Connected with Federation* [1891] AU Col Law Mon 7, 83-92. Cf Sir Henry Higgins criticised the Canadian model of equal representation for the Senate because (he said) the Senate's power had created a dual accountability: *Convention Debates,* 1898, 768 (Higgins). Baker said that where systems of nomination for upper houses did exist, they had been less than ideal: see Baker, above n 85, 51-52, 56-58.

[173] Ibid, 53, 56-8.

[174] Ibid, 58-9.

[175] Ibid, 53.

> some secondary Bill … the ignominious failure of the Senate is not the only flaw which an experience of 20 years has revealed.'[176]

Baker was not alone in opposing the creation of a nominated Senate chamber or a weak house of review. During the 1890 Constitutional Conference, objection was made to any system of nomination of members for the Senate based on the Canadian model, arguing that the Australians should adopt a relatively powerful and elected Senate instead.[177] By the time of the 1897-98 Convention, a number of delegates had agreed that the Canadian Senate had 'no real power', a situation created in part by the method of nomination of members by the Canadian Executive.[178] The Canadian model, like its British counterpart, was to prove to be of limited use to the framers who already had their own experience of political accountability.

IV. The Benefits of Upper Chambers: the 19th century

In addition to considering the treatises the Australians used to inform themselves as to potential arrangements for political accountability from overseas models, it is necessary to set out in broad terms some of the theories that underpinned goals of accountability to upper chambers during the second half of the 19th century, when Australia's colonial constitutions and the *Constitution* were formed. I set this out here because it forms part of the intellectual context to the conflicts that occurred during the latter part of the 19th century examined in Chapter 3. The ideas explored in this section remained important during the Conventions (as is discussed in Chapter 4). The ideas set out in this section thus reflect part of the intellectual context into which the *Constitution* was born and it is necessary to have some basic understanding of that context to explain what the framers were attempting to achieve during the Conventions. To be clear, the summary in this section provides a part of the intellectual framework against which both the constitutional conflicts (examined in Chapter 3) and the debates during the constitutional conventions (examined in Chapter 4) took place. Apart from the importance of the goals of dual accountability in Australia's pre-Federation history, some of the ideas discussed in this section have continued to influence the High Court in its decisions on the political accountability to upper chambers in Australia (considered in Chapters 5 and 6). What

[176] Ibid, 58. Baker also took issue with the fact that the Canadian Constitution made no provision for the resolution of deadlocks between the two chambers: ibid, 54, 56-8.
[177] *Federation Conference,* 1890, 73 (Macrossan).
[178] *Convention Debates*, 1898, 758 (Isaacs). Sir John Downer argued that Canada was an example of a federation that had failed to preserve the integrity of the States by failing to ensure that the powers of its Senate were absolutely equal to the powers of the House of Representatives: see *Convention Debates*, 1897, 213 (Downer). Isaacs agreed with this interpretation: *Convention Debates,* 1897, 208 (Isaacs).

I ultimately argue (in Chapters 5 and 6) is that a good degree of consistency is to be found between the goals of accountability to upper chambers as they were stated in Australia's pre-Federation history and in the High Court's interpretation of that history and the Court's dominant jurisprudence on accountability to upper houses under Australian constitutions.

For further clarity about the scope of my examination in this section I note that my description here represents a summary only of the key ideas underpinning the perceived benefits of accountability to upper chambers.[179] I set them out at the level of detail needed to understand matters discussed in the remainder of the thesis – namely the use of these ideas by Australian colonial parliamentarians (explored in Chapter 3), by the framers at the Convention Debates (explored in Chapter 4) and by the High Court in the 20th and 21st centuries (discussed in Chapters 5 and 6) in describing the benefits of accountability to upper houses.

My reasons for exploring the pre-Federation history of accountability to upper chambers (in Chapters 3 and 4) and the basic ideas of constitutional theory set out below is to demonstrate that the continuity of these ideas into the decisions by the High Court in the 20th century. They had a history in Australia before then, and not a purely abstract history, that the High Court has drawn on in establishing its understanding of the requirements of accountability to the Senate in matters of finance. The following section thus represents what is needed to foreground appeals made to this same, basic level of theory – whether during the latter half of the 19th century in Australian colonial politics, during the Convention Debates and, eventually, by the High Court. As such, the description set out here is consistent with the arguments for accountability that have continued to be represented by later constitutional actors, including the High Court.[180]

Although the benefits of upper houses have been categorised and re-categorised many times and in many different ways, I set out here three identifiable categories from the literature from public law scholarship on bicameralism. No doubt these categories overlap, yet the basic taxonomy presented here provides a starting point for considering the potential benefits and goals of having a separate line of political accountability to an upper chamber. They thus provide a convenient basis on which to analyse the continuing relevance of the benefits of

[179] See for a comparable example in legal scholarship, N Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29 *Adelaide Law Review* 205.

[180] For a recent example of this level of detail in relevant scholarship see J Uhr (2002) 'Explicating the Australian Senate' *Journal of Legislative Studies* 8.

bicameralism in both the pre-and post-Federation Australian constitutional history explored in this thesis by providing a description of the overarching intellectual themes which are based on arguments about the purpose of accountability to upper houses. Again, my purpose here is descriptive. My goal is not to assess the veracity of the claims being made but to survey the theories that underpinned the goals of accountability to upper chambers which appear in the history examined in this thesis in order to better understand the concerns of parliamentarians in the constitutional conflicts examined in Chapter 3 and the concerns of the framers during the Conventions on the need for dual accountability. The survey is necessarily limited to the theory and sources the framers made use of, following accepted methodology in prior constitutional law scholarship in this respect.

A. Representation and Upper Houses

The first benefit identified in favour of bicameralism relates to the diversity of interests represented by a political system. The expectation here is that upper houses should be representative of the communities they serve and should (ideally) be elected.[181] This goal was a matter of continuing debate in Australia's colonial constitutions where, in the colonies that had elected upper houses, the evidence suggests that those chambers were prepared to flex their democratic muscles.[182] As discussed in Chapter 3, the history of conflict is one in which upper houses in Australia's colonial parliaments often used their democratic credentials as a reason to reject direct analogies between their constitutional functions with what was seen as being the (more limited) constitutional function of the House of Lords or the Canadian Senate.[183]

Another reason for an upper house lies in the belief that upper chambers could (and should) reflect or represent different interests to those represented in the lower chamber. There would be little value in any arrangement where the two chambers simply duplicated one another: for example, by representing the same political interests in the same manner. Hence the real interest in bicameralism lies in the variety of institutional forms adopted to allow two chambers to represent different interests.[184] By representing a broader section of interests, bicameralism was (and still is) thought to generate more, and therefore better, political perspectives than unicameralism.[185] This rests upon an assumption that the interests reflected in an upper

[181] J Uhr, 'Generating Divided Government: The Australian Senate' in A Mughan and S Patterson (ed), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press, 1999).
[182] This is examined in Chapter 3.
[183] Ibid.
[184] Uhr, above n 180, 16.
[185] This diversity of representation is particularly a goal in federal states, where upper houses are argued to represent a majority of states, rather than just a majority of population: see ibid, 16.

chamber can include a broader spectrum than the majority interest (based on population alone) represented in the lower chamber.[186] In this respect, second chambers are thought to facilitate consensus and deliberation in a democratic system by integrating the views of a wider variety of sectors of the community into the political decision-making process.[187] This occurs both by representing a different cross-section of the community but also by providing an additional forum for political debate, independent from the lower house and therefore independent of the executive:

> 'A thoughtfully constructed bicameral parliament is one where capacity for representation is amplified, opportunity for debate and deliberation is broadened, scope for examination of legislation increased, and avenues for scrutiny, investigation in all its forms and review augmented.'[188]

The core attraction to advocates of bicameralism was the promise of 'balance': a balance of political interests that would be difficult or impossible to arrange within one single representative chamber. This idea of balance is compatible with the use of a second chamber to protect vulnerable minority interests which were otherwise likely to be dominated by the prevailing interests represented in the first chamber.[189] Much of the analytical interest in bicameralism thus deals with the relative powers of the two chambers, to the extent they represent opposed or merely different political interests.[190] Thus, some models of government include opportunities for the inclusion of various political views, including the representation of minority views, as an essential goal of liberal democracy.[191] This goal of representing minority views was most famously described by John Stuart Mill in what remains to this day one of the most important works on representative government:

> 'The consideration which tells most … in favour of two chambers … is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their sic volo prevail without anyone else asking for his consent. A majority in a single assembly, when it has assumed a permanent character – when composed of the same persons habitually acting together, and always assured

[186] Ibid.
[187] Aroney (2009), above n 2, 34-35.
[188] N Aroney, JR Nethercote and S Prasser (eds), *Restraining Elective Dictatorship* (University of Western Australia Press, 2008), 4; Aroney (2009), above n 2, 34-35.
[189] Uhr, above n 180, 17.
[190] Ibid, 16.
[191] Lijphart, above n 7.

> of victory in their own House – easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reasons which induced the Romans to have two consuls makes it desirable that there should be two Chambers: that neither of them should be exposed to the corrupting influence of undivided power … One of the most indispensable prerequisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take … between two houses is a perpetual school …'.[192]

One criticism of upper chambers has always been that they lack the democratic legitimacy of lower chambers.[193] In Chapters 3 and 4, I discuss how this point became a key refrain of lower chambers in Australia's colonial parliaments and also from delegates from the larger colonies of New South Wales and Victoria during the Conventions, most of whom wished to render the Commonwealth Executive accountable solely to the House of Representatives. The criticism is of course based upon a number of assumptions concerning the operation of democracy and lower houses that are not entirely borne out by the experience of these constitutions.[194] Aroney has explained some of the problems with such assumptions, including the false premise that Westminster-style democracies promoted (or still promote) majoritarian rule.[195] The evidence

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[192] JS Mill, 'Considerations on Representative Government', *Utilitarianism, Liberty and Representative Government* (Everyman's Library, Dent, 1964 ed, 1861), 325-6; Uhr, above n 180, 14-15, citing A Hamlin and G Brennan, *Democratic Devices and Desires* (Cambridge, Cambridge University Press, 2000). Note that JS Mill is cited by me in my work because he is the political philosopher referred to by colonial parliamentarians and by the High Court. There is no specific evidence that any other political philosopher has been particularly relied on in Australia in defining the requirements of responsible government. As we will see in later Chapters, Australian politicans and judges appear to have favoured reliance on constitutional law scholars over political theorists in the main to support arguments for accountability to upper chambers (these theorists were discussed in the earlier part of this chapter). For detail on the political theories that JS Mill encapsulated in his own work see T Hobbes, *Leviathan* (Penguin Classics, 1981); cf J Bentham, *A Plea for the Constitution* (London, Maurnan & Hatchard, 1803). JS Mill's father was a student of Bentham, and there is much in Mill's work that reflects Bentham's ideas on the need for governments to remain accountable to parliament in order for representative government to operate, except that Mill believed that upper houses provided an essential role in ensuring that majority will did not overbear some of the broader goals of democracy in the form of review of legislation and the representation of minority interests. For a detailed discussion of the difference in Mill and Bentham's approaches see J Waldron, 'Bicameralism and the Separation of Powers' 65 (1) *Current Legal Problems* 31; also L Rockow, 'Bentham on the Theory of Second Chambers' (1928) 22 *American Political Science Review* 576. For a broader summary of the history of bicameralism see D Shell, 'The History of Bicameralism' (2001) 7(1) *Journal of Legislative Studies* 5.

[193] For a summary of the history of this criticism see Aroney (2009), above n 2, 29. See also N Aroney, above n 179.

[194] For details of the difficulties see the excellent analysis in N Aroney, 'Bicameralism and representation of democracy' in Aroney, Nethercote and Prasser (eds), *Restraining Elective Dictatorship,* 2008), 30-38.

[195] See Aroney, above n 179, 214- 220; also Aroney, above n 194, 30-38, 200.

examined in this thesis suggests that members of Australia's colonial upper houses, as well as some delegates to the Conventions, were aware of the falsity of such assumptions.

An acceptance that upper chambers reflected broader interests than the interests of simple majority votes in lower chambers was a key complaint in Australia's colonial parliaments. In Chapter 3 I consider how the idea that the upper chamber reflected a different 'estate' formed a key part of the understanding of how a bicameral system was intended to operate in Australia's colonial parliaments. When this idea came to be considered during the Conventions (examined in Chapter 4), what emerged were arguments in support of the political accountability of the Commonwealth Executive to the Senate, not just in the interests of representing a majority of States as well as a majority of population (based on federal concerns), but also arguments that democratic legitimacy would be better achieved if the interests of the majority were not allowed to trample the interests of a minority of the population of the new Commonwealth. While there is no denying that this desire for representation was based on federal concerns (to ensure the interests of the smaller colonies were not sublimated to those of the larger colonies of New South Wales and Victoria), theories of dual accountability during the Conventions also find their core basis in belief in the importance of the operation of the different 'estates' in bicameral systems, each of which were thought to be necessary for good governance.[196] In Chapters 5 and 6, I discuss how the High Court has recognised that the Senate was designed to represent a different set of interests to those represented in the House of Representatives, mirroring many of the statements and concerns expressed by delegates during the Conventions on this point.

B. Houses of Review

The second argument advanced in support of upper chambers relates to their capacity to provide a further forum for political debate and deliberation. Thus, there are thought to be two benefits to an upper house: one to exercise veto powers to render the executive accountable; the other to allow more effective democratic deliberation than is normally encountered in unicameral parliamentary systems.[197] The argument goes that, since upper houses are not necessarily controlled by the executive, they provide a forum for review of legislation not possessed by lower chambers which are effectively controlled by the executive.[198] The second chamber can perform a number of valuable functions, including review of legislative proposals in terms of

[196] Uhr, above n 180, 11.
[197] Ibid. As Uhr notes, most bicameral systems incorporate elements of both roles: ibid, 12.
[198] Ibid, 11.

their legal technicalities, practical effects and underlying policy values, as well as scrutiny of the executive in ways that are not possible in a lower house dominated by the very executive it is meant to control.[199] Upper chambers are thus said to create a forum for the improvement of the legislation produced by parliament.[200] Present in Mill's work, this idea most frequently finds its way into arguments that the role of an upper chamber is to act as a 'house of review'.[201]

The identified benefits in this category are based on the premise that upper houses improve the quality of the legislation produced by the parliament in a manner that other mechanisms of review cannot. Two factors are thought to contribute to this improvement. The first is that the legislation must be approved by a second body of persons that is both sufficiently independent of government influence and also elected to represent slightly different interests to those represented in the lower chamber.[202] This is because the upper house has a different political complexion to the lower house.[203] Even where the party in command of the lower house enjoys a majority in the upper chamber, its existence as a separate legislative chamber is still thought to make a difference because upper chambers are one step removed from the tensions of the lower house (where a loss of government occurs) resulting in a forum for debate which is 'relatively less partisan and relatively more deliberative'.[204]

The second factor is that adding an additional house of review means that the time taken to enact legislation is increased, with the benefits that delayed consideration and deliberation can bring.[205] This means that a different type and quality of debate can occur, not just within the chamber itself but also amongst the public more generally (including through the media).[206]

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[199] Aroney, above n 194, 29, citing Uhr, above n 180. See also J Uhr, above n 181.
[200] Aroney, above n 194, 29.
[201] Mill, above n 192, 325-6.
[202] Aroney, above n 179, 225-6.
[203] Ibid.
[204] Ibid, 226, citing the Commission on the Reform of the House of Lords at [4.35-4.43], [4.39] and W Heller, 'Bicameralism, Representation and Parliamentary Decision-Making' (University of British Colombia, 2007). There is evidence that this does occur in upper houses, particularly in their parliamentary committees. Aroney has noted that the sheer volume of amendments suggested by upper chambers and accepted by lower chambers indicates that they do make a difference: Aroney, above n 194, 226-7. On this point see also Uhr, above n 180, 15-16; also J Uhr, above n 181; H Evans, 'The Case for Bicameralism' in Aroney, Nethercote and Prasser (eds), *Restraining Elective Dictatorship,* 2008); Commonwealth of Austalia, *Senate Estimates Scrutiny of Government Finance and Expenditure: What's it for, does it work and at what cost?*, Parliamentary Paper No 6 (1990) available at https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops; Commonwealth of Australia, *Senate Committees and Responsible Government: Proceedings of the Conference to Mark the Twentieth Anniversary of Senate Legislative and General Purpose Standing Committees and Senates Estimates Committees*, Parliamentary Paper No 12 (1991), available at https://www.aph.gov.au/binaries/senate/pubs/pops/pop12/a01.pdf.
[205] Aroney, above n 179, 227.
[206] Ibid.

This is also justified because of the reality that, depending on voting systems, governments in lower houses are often created on majorities of less than 50% support from the voting population.[207] Upper houses that are elected on proportional representation (such as the Australian Senate) 'provide a check on government legislation by a body which more effectively accumulates the views of as many voters as possible.'[208] Ultimately, both factors contribute to the argument that there is additional and wider debate over the 'general policy of proposed laws, as well as more exacting scrutiny of the particular measures proposed in their technical details and likely consequences' when proposed laws are examined by upper chambers.[209]

In Chapter 3 I consider how arguments about the benefits of review of 'hasty and ill-advised' legislation were frequently cited in support of the existence of upper chambers, including in their role in forcing amendments to controversial policies. Chapter 4 then considers how the perceived benefits of a house of review also made their way into the Convention Debates, providing a further justification for the Senate and another distinct form of accountability to that chamber. Many delegates during the Conventions advocated for a second chamber on the basis that Australia's colonial upper houses had clearly established the benefits of second parliamentary chambers as useful and important revising bodies. In Chapters 5 and 6, I also examine how members of the High Court have consistently referred to the Senate's constitutional role as a house of review, providing opportunities for reflection that can improve legislation. While many might now argue with this, the purpose of my work is not to question whether the statement is true. My point is that the role thought to be played by upper chambers was a consistent theme in Australian constitutional history, one that has now made its way into current High Court jurisprudence.

C. Responsible Government and Parliamentary Supremacy

The final argument in favour of upper houses relates to parliament maintaining a certain degree of control over the executive in a more general sense. In Chapters 5 and 6 I will discuss how this aspect of the goals of accountability to upper chambers found a beachhead in the High Court's decisions in both *Pape*[210] and *Williams*.[211]

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[207] Ibid.
[208] Ibid.
[209] Ibid, 225, citing Jennings I, *Parliament* (2nd ed, 1957), 445-453. See also B Stone, 'State legislative councils – Designing for accountability' in Aroney, Nethercote and Prasser (eds), *Restraining Elective Dictatorship,* 2008).
[210] *Pape v Commissioner of Taxation* (2009) 238 CLR 1
[211] *Williams v Commonwealth* (2012) 248 CLR 156.

Proponents of bicameralism argue that there is a contrast between unicameral and bicameral systems insofar as upper houses provide a different (and perhaps greater) degree of parliamentary scrutiny of executive action:

> 'The general tendency of unicameralism, it appears, is to facilitate executive domination of politics by circumscribing opportunities for debate and scrutiny. The general tendency of bicameralism, on the other hand, is to provide additional avenues for scrutiny and debate, which themselves place additional pressure on governments, increasing the likelihood of electoral change over time.'[212]

This principle is related to the concept of second parliamentary chambers as houses of review and deliberation. The emphasis in this category, however, is on parliament exercising a degree of control over executive action. Translated into legal principle, arguments in this category usually refer to the importance of parliamentary sovereignty, particularly parliamentary control of finance, and responsible government. As Aroney has noted, many of the justifications in this area deal with the need to ensure the proper operation of the doctrine of responsible government under which it is for parliament to control the executive, not the other way around.[213]

In Chapter 3, I discuss how parliamentary control of the executive, particularly with respect to control of finance, was a long-standing pre-occupation in Australia, starting in Australia's colonial upper houses' insistence upon their constitutional power to deal with money bills. In Chapter 4, I examine how this theme was taken up during the Conventions in framing accountability to the Senate. The capacity of the Senate, it has been argued, to contribute 'not only to scrutiny and accountability, but also in an indirect way to the political responsibility of governments to the voters at election time'.[214] This idea of constant parliamentary surveillance

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[212] Aroney, above n 179, 241. As Aroney notes, there seems to have been a tendency in unicameral systems to facilitate the executive's domination of politics 'by circumscribing opportunities for debate and scrutiny' whereas the tendency in bicameral systems is to the opposite effect. Further, in bicameral legislatures in Australia, there have been 'relatively shorter periods of single-party domination'.

[213] Ibid, 228. See also Bagehot, above n 6, 147-48; WI Jennings, *Cabinet Government* (3rd ed, 1959); 503-509, 510; Lord Hailsham, 'Elective Dictatorship' (1976) 21 October 1976 *The Listener* 496; SE Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 377; Aroney, above n 179, 229 and sources cited therein. For a contrasting view see Lord Wakeham, arguing that lower houses of parliament can act as check on the government of the day: M Russell, R Cornes, *Royal Commission on the Reform of the House of Lords, A House for the Future* (2001) 64(1) *The Modern Law Review* 82, [3.23].

[214] Aroney, above n 179, 212. Other constitutional law scholars and Australian political theorists and scientists have endorsed Aroney's view of how the political accountability of the Executive is rendered in Australia's Commonwealth parliamentary system of government. See for example one of the current leading political scientists in this field, R Mulgan in R Mulgan, 'The Australian Senate as a "House of Review"' (Pt 2) (1996) 31 Political Science 191. See also M Harmon, *Responsibility as Paradox* (Thousand Oaks: Sage, 1995); M Flinders, *The Politics of Accountability in the Modern State* (Ashgate, 2001).

is of utmost importance, and is greater than mere parliamentary surveillance of the finances of the State.[215] Through these mechanisms of accountability, an executive is placed under 'constant parliamentary surveillance', which is regarded of being of utmost importance to responsible government.[216] In Chapters 5 and 6, I consider how the importance of responsible government in the form of parliamentary control of finance has now been emphasised by the High Court in insisting on a line of accountability to the Senate being maintained. Ultimately, this idea was part of Australia's pre-Federation constitutional history and is a principle that has remained relevant in the High Court's own analysis of the need for accountability to be owed to two parliamentary chambers.

Ultimately, arguments falling within this category regard an upper house as an aspect of maintaining a sufficiently critical distance between parliament and the executive, a distance that can only be secured if there is an upper house with a party-political composition that is different to that of its lower house.[217] To this limited extent the separation of legislative and executive power is still maintained in systems under responsible government.[218] An appropriately constructed upper house can place a constraint on the consolidation of governmental power 'thereby tending to the limitation and division of the exercise of governmental power'.[219]

This form of responsibility operates through the placement of questions during question time (particularly questions without notice), through the production of documents and through the operation of parliamentary committees.[220] However, upper chambers are argued to have more legitimacy to wield power and to enforce sanctions, which many of these other mechanisms cannot.[221] Applied to the context of the Commonwealth of Australia, the capacity of the Senate to contribute 'not only to scrutiny and accountability but also in an indirect way to the political responsibility of governments to the voters at election time' is regarded as a key feature of ensuring responsibility of the Commonwealth Executive.[222] The principles of parliamentary

[215] Aroney, above n 179, 212, citing Lijphart's work on this point (see Lijphart, above n 4). According to Aroney, under responsible government this accountability function is performed by parliaments throughout the life of the parliament, including through the operation of question time, parliamentary committees and through the operation of the principle of ministerial responsibility.
[216] Ibid, 240.
[217] Ibid, 223.
[218] Mill, above n 190, 325-6.
[219] Aroney, above n 179, 224, citing Mill, above n 190, 325.
[220] Aroney, above n 179, 232-233. The point on production of documents was affirmed by the High Court in *Egan v Wills* (1998) 195 CLR 425, discussed in Chapter 5.
[221] Uhr, above n 180; Aroney, above n 179, 223.
[222] Ibid.

control of finance, as a fundamental aspect of responsible government, are thought to be preserved by ensuring the upper house maintains its function of review and independence. These theories were present in both the pre-Federation constitutional history I explore in this thesis and have consistently appeared in the judgments of members of the High Court, throughout the 20th century and in its most recent key decisions on this point.

V. Conclusion

The leading authors relied upon by the framers of the *Constitution* to understand the operation of the British and Canadian Constitutions were, in the main, interpreted by them as portraying constitutional systems in which lower houses had an alleged or established supremacy over the upper house, particularly with respect to money bills. This included supremacy over the details of financial legislation, exercised ultimately through powers to amend money bills, as well as power to compel the upper houses of the British and Canadian parliamentary systems to pass all legislation approved by the lower chamber.

While the framers referred to works on the British Constitution they did not ultimately replicate, either in theory or in fact, the form of political accountability under that constitutional model. The Canadian Constitution was certainly not adopted by the framers. It demonstrated to the framers that Australia could keep the combination of executive and legislative power that constituted responsible government and yet still incorporate a federal system of government. Otherwise, the main impact of the Canadian Constitution was that it provided a contrast to the model of political accountability to an upper house that the framers wanted for Australian Federation.[223] It also re-enforced their views that the Senate would have to be an elected, not a nominated chamber.[224] In Chapter 3 I discuss the Australian colonial experience of, and eventual disenchantment with, nominated upper houses. The Canadian Constitution was important to the framers because it provided an example of the form of accountability they

[223] Aroney, above n 2, 50, noting the effect of the Canadian model 'has been that this convention of responsible government, together with a relatively weak, non-elected Senate has had a nationalising effect in Canada, whereas in Australia, the power of the Executive is 'subject to important limits imposed by the substantial formal powers possessed by the Australian Senate as a directly elected body.' See also Winterton, above n 16, 71-85 on this point.

[224] Lijphart's analysis agrees with this interpretation, see Lijphart, above n 7. There is further support for this interpretation elsewhere: as to which see A Mughan and S Patterson, 'Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers' (Pt 1) (2001) 7 *Journal of Legislative Studies* 39, 42 (classifying the Canadian Senate as a chamber of delay and advice only). Although it is beyond the scope of this thesis, recent scholarship has described a much more active role for the Canadian Senate in ensuring the political accountability of the executive. On this point see Ajzenstat, above n 8 and Watts, above n 128.

did not wish to replicate – a weak upper house. It also provided a contrast to the form of political accountability the framers were already most familiar with under their own systems of government, in which dual political accountability, including accountability to elected (and even to nominated) upper chambers, had become part of Australian constitutional practice.

The benefits of upper chambers, including the ideas that an upper chamber reflected a greater diversity of interests to those in the lower house alone, that they provided opportunities for further review and mature consideration of proposed legislation, and that greater levels of accountability could be achieved, including by the independence an upper house could bring to parliamentary control of finance, were all themes that were present in the works of leading authors the framers relied upon. In the next Chapter, I return to the use of these themes during the constitutional conflicts between lower and upper houses in Australia's colonial parliaments in the lead up to the Conventions. In Chapter 4, I consider how these ideas resurfaced during the Conventions on the powers of the Senate to deal with money bills. As noted, in Chapters 5 and 6, I then discuss the continuing influence of these ideas on the High Court.

In the next chapter, I consider how much Australia's colonial constitutions had already diverged from the Diceyan notion of political accountability owed solely to a lower parliamentary chamber. I examine this dual accountability in Australia's colonial parliamentary systems, continuing my consideration of the key constitutional models the framers used to form the new federal constitution: their own local constitutions. What is revealed is that most of Australia's upper houses had significant constitutional powers to call the executive to account, including powers of amendment (potentially) and veto of money bills. Most importantly, it shows that Australia's upper houses were more than prepared to use such powers, often insisting on the rights of the upper chamber to exercise oversight of executive action as part of achieving the political accountability of the executive and as an assertion of the supremacy of parliament – particularly with respect to control of spending and protection of the principle of parliamentary control of finance.

In the next two chapters I suggest that, while the Diceyan idea of accountability (owed solely to a lower house) was important to the framers, it was ultimately not the model of accountability they adopted for the *Constitution*. The explanation for the rejection of this lies partly in the way in which Australia's colonial constitutions provided the framers with a lived experience of dual political accountability, including both its benefits as well as its pitfalls, which they brought with them to the framing of the *Constitution*.

CHAPTER 3: POLITICAL ACCOUNTABILITY TO UPPER HOUSES IN AUSTRALIA'S COLONIAL PARLIAMENTS

I. Introduction

This chapter continues my consideration of the key sources the framers of the *Constitution* used to inform themselves as to how political accountability could operate. It focuses on Australia's colonial constitutions as models of accountability debated by the framers during the Conventions.

The previous chapter demonstrated that the British Constitution had probably not reached the point of insisting on accountability solely to the lower chamber by the time the *Constitution* was formed. However, many of the leading treatises on the operation of the British Constitution did suggest that political accountability was owed only to the lower chamber, particularly in matters of finance. Further, there is little doubt that Dicey's theory of accountability to the lower chamber made quite an impression on many of the framers of Australia's *Constitution*. I also suggest that, notwithstanding that influence, many delegates to the Conventions believed that accountability could be owed to two parliamentary chambers under Westminster-style systems. Treatises, however, provided only one means for the framers to understand how political accountability operated in a Westminster-model. In addition, the framers relied upon their own experience of political accountability under Australia's colonial parliamentary systems. As discussed in Chapter 1, that experience became essential in informing delegates to the Conventions about the potential benefits and pitfalls of such dual accountability. In this chapter, I consider the experience of accountability to upper chambers under those constitutions.[1] In later chapters, I return to the way ideas and concerns raised in Australia's

[1] As noted in Chapter 1, whilst the importance of Australia's colonial constitutions in framing the *Constitution* has certainly been addressed, work remains to be done on the reasons upper houses in those parliaments gave for opposing proposals by governments, including when and why they used the ultimate sanction of political accountability, control of public finance. For work to date on the importance of Australia's colonial constitutions see N Aroney *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 70; JA La Nauze, *The Making of the Australian Constitution*

colonial parliaments on the need for accountability to an upper chamber re-emerged during the Conventions and continue to appear in the High Court's jurisprudence on accountability to the Senate to this day.

This chapter uncovers that Australia's colonial upper houses insisted on their powers to control public finance in the interests of ensuring that an executive remained politically accountable to a parliament and, in turn, to the electors, for its actions. In doing so, they insisted on adhering to the British parliamentary practice of obtaining parliamentary approval for all measures, including spending measures. But Australia's colonial upper houses made clear that, whatever the constitutional position in Britain, such approval needed to be obtained from *both* parliamentary chambers in Australia's parliaments. The reasons proffered by upper chambers when insisting on this role for themselves included many of the goals of dual accountability discussed in Chapter 2, including representation of a distinct set of interests from those represented in lower parliamentary chambers as well as their role as houses of independent review and, most importantly, to ensure that governments remained accountable to parliament for spending. The material discussed in this chapter concludes that Australian colonial parliamentarians were familiar with theories regarding the benefits of dual accountability, including the idea that upper chambers played an important function as houses of review of executive action.

What is most striking about the history set out in this chapter is how often Australian upper houses insisted on their role in upholding the principle of parliamentary control of finance. The material discussed in this chapter ultimately provides important insights into why related themes about the benefits of an upper chamber rendering the executive accountable to parliament emerged during the Conventions, as well as why the High Court has made clear that such themes inform the Court's reasoning on accountability to upper chambers. Ultimately, the history examined in this chapter supports the works of leading authors who have argued that Australia's colonial constitutions were particularly important in creating a style of accountability that was not a complete replica of the British constitutional model, and that

(Melbourne University Press, 1972); A Deakin, *The crisis in Victorian politics, 1879-1881 : a personal retrospect* (Melbourne University Press, 1957), 145-46; G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional Analysis* (Melbourne University Press, 1983), 72; N Aroney, et al, *The Constitution of the Commonwealth of Australia: history, principle and interpretation* (Cambridge, Cambridge University Press, 2015), 407; B Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995), 71.

Australia's constitutional systems were more influential on the design of political accountability of the Commonwealth Executive to the Senate than has been recognised to date.[2]

This chapter refers to primary sources and to the works of leading historians who have already undertaken detailed analysis and consideration of many of the relevant primary sources. As Chapter 1 noted, the study of constitutional conventions needs to examine the actions of actors in the conflicts that created them, including the members of the relevant parliamentary chambers and governors in each colony.[3] It is therefore necessary to go beyond the texts of the constitutions and explore how the powers of colonial upper houses were put into practice by relevant actors and the reasons they provided to justify their actions. I commence with an examination of constitutional conflicts over the power of the upper house to deal with money bills in the colony of New South Wales, followed by conflicts in Victoria, Queensland and then South Australia.[4]

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[2] B Stone, 'Bicemeralism and Democracy: the Transformation of Australian State Upper Houses' (Pt 2) (2002) 37 *Australian Journal of Political Science* 267, 268. See also A Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty One Countries* (Yale University Press, 1984) and A Lijphart, *Patterns of Democracy* (Yale University Press, 1999); G Lindell, 'Responsible Government' in PD Finn (ed), *Essays on Law and Government* (Law Book Company, 1995), 76; R Mulgan, 'The Australian Senate as a 'House of Review'' (Pt 2) (1996) 31 *Political Science* 191, 198-99, 200; PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed ed, 1997), 415.

[3] For a discussion of the relationship between written constitutions in Australia and constitutional conventions see G Lindell, *Responsible Government and the Australian Constitution: Conventions transformed into Law? Law and Policy Paper 24* (Federation Press, Centre for International and Public Law, ANU, 2004), 6; Winterton, above n 1, 80; LJM Cooray, *Conventions, the Australian Constitution and the Future* (Sydney, Legal Books, 1979), 68-90; more recently Aroney et al, above n 1, 417, 422. See also the discussion in Chapter 1 about the relevance of constitutional conventions to constitutional interpretation in Australia.

[4] The arrangements in Tasmania and Western Australia are not discussed because those colonies have no relevant constitutional practice to survey. They experienced either no extended deadlocks over money bills (Tasmania – only had one brief dispute, in 1879) or the relevant local Constitution had only just come into effect (Western Australia's Constitution commenced in 1890). Further, delegates to the Conventions referred very little to the constitutional arrangements in these two colonies. For a discussion of the one disagreement in Tasmania in 1879 see A Todd, *Parliamentary Government in the British Colonies* (Longmans Green and Co, 1894), 716-719. The houses of the Tasmanian parliament had no call to argue about the powers of its upper house to deal with money bills because the Tasmanian Constitution made clear that the Council had such a power: see J Quick and RR Garran, *The Annotated Constitution of the Commonwealth of Australia* (Sydney, Angus & Robertson, 1901), 62. The delegates from Tasmania and Western Australia did make important contributions to the Convention Debates. The contributions of Andrew Inglis Clark and John Forrest (in particular) are discussed in Chapter 4, as is the critical role played by the Tasmanian delegates to the 1897 Convention Debates in resolving the major conflict of the Debates on the powers of the Senate to deal with money bills. Examining Tasmania's constitutional history is difficult too because, before 1979 there were no official reports of the Tasmanian parliamentary debates: see https://guides.slv.vic.gov.au/tasgovpubs/hansard accessed on 16 November 2018. The West Australians solved their only problem on the powers of the chambers to deal with money bills very quickly when, in their very first parliament, they adopted South Australia's approach to dealing with money bills: see D Clark, 'The South Australian Compact of 1857: The Rise, Fall and Influence of a Constitutional Compromise' (2006) 10 *Legal History* 145. 147.

II. Accountability and Upper Houses in the Australian Colonies

In the lead up to the Conventions, each Australian colony had a bicameral parliament, with three, South Australia, Victoria and Tasmania, having elected upper houses.[5] The leading colonial historian, John Waugh, has argued that there is ample evidence that the lower and upper houses of Australia's colonial parliaments were designed to disagree.[6] This is supported by Uhr and Aroney who have examined the political philosophy which influenced the creators of Australia's colonial constitutions.[7] There is yet further support for the importance of upper houses in Australia's colonial constitutions as houses of review in constitutional law scholarship[8] and also in political theory.[9] This literature, and the analysis provided in this chapter, supports the idea that upper chambers provided an important check and moderating influence on executives as part of liberal democratic ideals of good government.[10]

What needs to be borne in mind is that the colonial constitutions considered in this chapter provided a lived experience for the framers of accountability to upper chambers in the absence of a federal justification for a strong upper house.[11] As will be discussed, even in these unitary constitutions, Australian upper houses did not see themselves as exact copies of the Westminster constitution, and certainly did not regard themselves as being compelled to approve financial measures that had been sanctioned by lower chambers. Indeed, it was in matters relating to parliamentary control of finance that Australia's upper houses were most prepared to flex their muscles as chambers of review. Since it was on the issue of control of finances that most of the conflicts about the role of upper chambers took place (and on which the argument would once again focus during the Conventions), the analysis in this chapter concentrates on disputes over money bills and the powers of upper chambers to amend and to veto such legislation. Since there is no reason to prioritise the experience of one colony over

[5] Western Australia had a nominated upper house with fixed number of appointments until an elected house replaced it in 1893. Queensland and New South Wales had upper houses with nominated members at the time of the conflicts discussed in this chapter. Each is discussed below.
[6] Ibid.
[7] These authors and their contributions were discussed in Chapter 2. See, in particular, J Uhr, 'Bicameralism and democratic deliberation' in N Aroney, JR Nethercote and S Prasser (eds), *Restraining Elective Dictactorship: The Upper House Solution?* (University of Western Australia Press, 2008), 11; N Aroney, 'Bicameralism and representation of democracy' in N Aroney, JR Nethercote and S Prasser (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008).
[8] A Twomey, *The Constitution of New South Wales* (Sydney, Federation Press, 2004); Winterton, above n 1; Yee-Fu Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).
[9] J Goldring and I Thynne, *Accountability and Control, Government Officals and the Exercise of Power* (Law Book Company, 1987); R Mulgan, *Holding Power to Account* (Palgrave Macmillan, 2003).
[10] Uhr, above n 7; M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003).
[11] Stone above n 2, 268.

any another, I adopt a traditional approach from constitutional law, commencing with an examination of the constitutional conflicts in New South Wales, followed by Victoria, Queensland and then South Australia.

A. The Upper House in New South Wales

1. Background

The Legislative Council in New South Wales insisted on its role to revise legislation and to stand as a gatekeeper against the passing of certain measures, including supply bills. There is evidence that it regarded itself as being removed from partisan politics, viewing its role as a house of review that acted as a check on hasty and ill-considered legislation from the lower house. This attitude emerged as part of the transition of the fledgling democracy in the colony. Even though the Council was a nominated chamber, it maintained its rights to control the NSW Executive. Most notably, it determined to preserve its rights to amend and to veto supply bills as part of upholding the fundamental principle of parliamentary control of finance. In this section, I discuss the reasons the Council gave for refusing to pass many government measures. These include statements consistent with the upper house ensuring the accountability of the NSW Executive to Parliament.

In the lead up to the conferral of responsible government in 1856, the NSW Parliament consisted of a Legislative Council that comprised 54 members. Two thirds of those members were elected on a limited franchise.[12] Twelve members were nominated by the Crown and appointed by the Governor. Of those twelve, no more than six were to be members of the Executive Council.

By the time of the grant of responsible government in 1856, the NSW Parliament consisted of the Legislative Council and the Legislative Assembly. The Council consisted of no fewer than 21 members, nominated by the Governor on the advice of his Executive Council and initially appointed for 5 years and thereafter for life. There were no property qualifications for appointment.[13] The Assembly comprised 54 members, drawn from any men qualified and registered as voters. Voters had to be men over 21 who met a modest property or income qualifications.[14] Further changes were made in 1858 expanded voting rights from landowners only to almost every adult male in New South Wales. Every male over the age of 21 years

[12] *Australian Constitutions Act 1842* (UK).
[13] *New South Wales Constitution Act 1856* (UK).
[14] *Electoral Reform Act 1858* (NSW).

could vote if he was 'natural born or who being naturalised . . . shall have resided in this Colony for 3 years'.[15]

There was no debate about the Legislative Council's power to veto money bills, or its power to amend taxation bills.[16] The focus of the arguments that occurred between the Legislative Assembly and the Council was on whether the Council had power to amend money bills. This was regarded as being a greater form of control by an upper house than a power of veto, the theory being that a power of amendment of money bills would provide an upper house with powers to alter the details of spending programs (and thus the policy agenda) of a government. The New South Wales Constitution provided that the Council had no power to initiate money bills, but it was silent as to whether the Council had a power to amend them.[17] The existence or absence of such a power became a source of much dispute, not only in New South Wales but also in other colonies in which the local constitution was silent on the powers of the upper house to amend money bills.[18]

Little guidance is to be obtained from the drafting history of the New South Wales Constitution on whether the Council had a power of amendment of money bills. It is not entirely clear why the drafters of the Constitution did not specify the Council's powers in this respect.[19] Connolly has argued that the most likely explanation is that an assumption was made that the Council

[15] Ibid.

[16] D Clune and G Griffith, *Decision and Deliberation: the Parliament of New South Wales 1856-2003* (Federation Press, 2006), 80. Despite threats by governments to constitutionally enshrine the position, these constitutional arrangements remained in place until 1902. An amendment in 1902 made clear that the upper house had no power of amendment over money bills and the final approval of the upper house for any legislation other than money bills providing for the ordinary annual services of the government did not require the approval of the upper house in order to become legislation of the parliament: see Twomey, above n 8, 641-642. Numerous attempts at reform had been made and had either been abandoned or had not succeeded. For a discussion of those attempts Twomey, above n 8, 249; Clune and Griffith, above n 16, 69.

[17] All references to 'the Constitution' in this section are references to the Constitution of New South Wales. The Constitution did provide that all appropriation bills had to be passed by both houses of the Parliament. Power to frame Australia's colonial constitutions came from the *Australian Constitutions Act* 1850 (13 & 14 Vict c 59, UK), itself the result of a prolonged British debate concerning legislative policy for Australia.' Section 32 of the Act of 1850 gave the Governors and Legislative Councils of the four existing colonies and the new colony of Victoria power to replace their single chambers with bicameral legislatures': J Waugh, 'Framing the first Victorian Constitution, 1853-5' (1997) 23(2) *Monash University Law Review* 331.

[18] Including Queensland and South Australia: see J Waugh, 'Deadlocks in State Parliaments' in G Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 185, 190.

[19] Including William Wentworth (landowner), John Macarthur (landowner), William Manning (Solicitor-General), Dr HG Douglas (medical doctor and civil servant), Deas Thomson (Colonial Secretary), John Plunkett (Attorney-General) and James Martin (Solicitor).

would refrain from making substantial amendments to money bills, but no one then or since has provided a convincing explanation for that assumption.[20]

Two key groups of political opposition in the colony at the time each advocated for the creation of a bicameral legislature, albeit for different reasons. The first group consisted of conservatives who represented the older interests of class, property and education. Their interests were mostly represented through the views of members of the Council. The other group comprised the liberals who wished to see the extension of the franchise and the superiority of the elected lower house.[21] Each was more interested in the general character of the upper house than in its particular powers with respect to legislation. Both groups appear to have pushed for a nominated upper chamber.

For the conservatives, nomination appeared to be preferable because they distrusted democracy. The liberals on the other hand did not wish to see the lower chamber compete with the upper; a nominated chamber, by comparison, they thought, lacked democratic legitimacy.[22] They were hopeful that the Assembly, as the only elected chamber, would prove to be more powerful in the long run.[23]

The conservatives also appear to have been influenced (at least in part) by the idea of a 'balanced constitution', one in which each of the 'estates' was represented: the monarchy (the executive), the aristocracy (the upper house) and democracy (the lower house). Each estate was designed to operate as a check on the other two, moderating the consolidation of power that would otherwise occur if power was to repose in any one chamber.[24] In this respect, the desire appeared to reflect the goals of accountability thought to be achieved by ensuring that an upper chamber reflected a different set of interests to those reflected in the lower house. In this

[20] CN Connolly, *Politics, ideology and the New South Wales Legislative Council, 1856-72* (Thesis submitted to the Australian National University, 1974), 30, 34, 138, citing Thomson and Douglas in *Empire*, 5 February 1857; Macarthur in *Empire*, 25 February 1857; Plunkett in the *Sydney Morning Herald*, 22 June 1860; Thomson and Douglas in *Empire*, 5 February 1857; Macarthur in *Empire* 25 February 1857 and Plunkett in the *Sydney Morning Herald,* 22 June 1860.

[21] Conservatives like Wentworth originally pushed for a mixed unicameral chamber – consisting of both elected and appointed members. Wentworth eventually agreed to a separate nominated chamber after the then Secretary of State for the Colonies, Sir John Pakington, highlighted the benefits of a second chamber as a house of review: Pakington to Fitzroy, 15 December 1852, V & P (Legislative Council, NSW) 1853, Pt 1, cited in Waugh, above n 17.

[22] Twomey, above n 8, 248; Waugh, above n 18, 191.

[23] Connolly, above n 20, 15-16, citing *Sydney Morning Herald*, 13 December 1852. The new Secretary of State for the Colonies, the Duke of Newcastle, also preferred an elected upper chamber, but it was clear that most conservatives favoured the idea of nomination: ibid.

[24] Connolly, above n 20, 12, 14.

respect, liberals agreed with the conservatives on the benefit of such a balanced constitution, saying that nomination of members should be left:

> 'in the hands of those to whom it properly belongs … the aristocracy. … History showed that this independence of the House of Lords, so far from having any oppressive tendency, has been the means, on many occasions, of preventing the people from being tyrannized over.'[25]

In spite of these ideals, the conservatives mostly appear to have wanted an upper chamber because it could act as a conservative check on the rise of liberalism.[26] In totality, the better view appears to be that both the conservatives and the liberals wanted an upper house which would be 'conservative' but would 'not have the power to ignore strongly expressed public opinion for too long'.[27] The ultimate resolution on the composition of the upper house was that:

> 'The Upper House … must be essentially conservative in its character, that is, constituted as far as possible … by any justifiable conditions of the franchise, of those members of society who are most identified with the interests of the country by long experience of its various interests, who are best known for their intelligence and general independence, and who have most merited the confidence of their fellows by the exercise of a matured judgment and the performance of public services.'[28]

Apart from a desire to avoid ascribing democratic legitimacy to an upper chamber, liberals foresaw a very specific problem that could be created by adopting an elected upper house – the possibility of legislative deadlocks between two elected chambers.[29] Conservatives too were concerned by this possibility, arguing that deadlocks should be avoided since, if the upper house was elected:

> 'by the class of people who elect the Lower House, there will be no distinction between it and a democracy. … If we make it elective by another and a higher class, we shall make it an oligarchy.'[30]

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[25] R Campbell, *New South Wales Constitution Bill, The Speeches in the Legsislative Council of New South Wales, on the Second Reading of the Bill for Framing a New Constitution for the Colony*, (Government Printer, 1896), 148.
[26] Twomey, above n 8, 249; Waugh, above n 18, 190.
[27] Connolly, above n 20, 38, 39.
[28] *Sydney Morning Herald*, 23 November 1853, reporting on the Constitution Bill; cited in Connolly, above n 16, 28.
[29] Connolly, above n 20, 27.
[30] HM Marsh in *New South Wales Constitution Bill, The Speeches in the Legsislative Council of New South Wales, on the Second Reading of the Bill for Framing a New Constitution for the Colony*, above n 21, 215-216.

So both political forces appear to have been motivated by a desire to ensure that the Council could fulfil a distinct role in legislative review, acting as a revising body with a different set of skills, and representing a different set of interests to those in the Assembly. Ultimately, both chose a nominated chamber.

Twomey has described aspects of the Council's history as reflective of the continuing struggle to find a role, as well as an attempt to answer the fundamental question of what role an upper house of a parliament should play in a democracy:

> 'If the Lower House is directly elected by the people to form a government, what is the point of having a second House? Why choose two Houses to do the job of one? Why establish a system where one House is established to block the work of the other?'[31]

Twomey concluded that the drafters of the NSW Constitution distrusted democracy, and designed a Council that could act as a check on both the liberal and the democratic elements in the Assembly.[32] This accords with two of the benefits thought to eventuate from the existence of an upper house: representing a different constituency to that represented in the lower house,[33] and acting as a house of review.[34] Both cases allowed for policies to be 'studied and improved' while also allowing government policies to prevail.[35] Each of these ideals would prove to be important to the Council in New South Wales.

Once the possibility of veto of legislation between two legislative chambers was created, a solution needed to be devised to resolve any deadlock. The solution in New South Wales was modelled on the British Constitution, providing the Vice-Regal representative of the Crown (the Governor) with power to make appointments of new members to the Council to break any

[31] Twomey, above n 8, 361. See also Loveday's discussion on the factionalism that marked NSW politics at this time, with the Assembly and the Council reflecting divisions of class in the colony at the time: P Loveday, 'The Legislative Council in New South Wales, 1856-1870' (1965) 11 *Historical Studies Australia and New Zealand* 481. Twomey, above n 8, 361. For discussions of the reforms themselves see ibid, 363-366; Clune and Griffith, above n 16, 71; AW Martin and P Loveday, *Parliament, Factions and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889* (Melbourne University Press, 1966), 8.

[32] Twomey, above n 8, 361. 702; EA Benians, J Holland Rose and AP Newton, *The Cambridge History of the British Empire* (Cambridge University Press, 1929), Vol 1, 60, 71; Clune and Griffith, above n 16, 68.

[33] Twomey, above n 8, 361-62; Uhr, above n 7.

[34] Clune and Griffith, above n 16, 100-101, 130. For a discussion of the amendments and rejections made by the upper house ibid, 103 – 104, 128.

[35] Twomey, above n 8, 362. Clune and Griffith, above n 16, 68.

legislative deadlock.[36] William Wentworth, one of the most influential figures in colonial politics in New South Wales,[37] specifically approved of this approach:

> 'if the time should arrive … that there is an obstructive body in the Upper House impeding the legislation of the Lower House unnecessarily – impeding it, not for the purposes of revision or consideration, but for the purposes of faction, or even from an erroneous conviction or opinion of their own – I say, if a dead lock of this kind should ever arise, there is a remedy. The constitutional minister of the day has only to advise a further creation to the extent necessary to get rid of the obstruction …'[38]

Precisely where the line between useful revision and obstruction was to be drawn was not clear. There is evidence that Wentworth and other conservatives were aware of the conflicts between the Lords and the Commons, and that Wentworth regarded the eventual submission of the Lords to the wishes of the Commons as 'one of the purest efforts of patriotism' by its members and a model for all second chambers.[39] This appears to accord with Wentworth's view of the constitutional remedy of intervention by the Governor to resolve any deadlock based on pure 'factionalism'. Overall, though, it appears that the conservatives like Wentworth had faith that a Governor would not use a power of appointment to swamp a nominated upper house for any other reason.[40] That faith would prove to be misplaced when, in 1861, the Governor enlarged the Council to allow the passage of the Robertson Ministry's land reform legislation. However, the year before, a major conflict erupted over the powers of the Council to amend appropriation bills. It is necessary to understand the earlier conflict in order to understand the reasons behind the crisis of 1861.[41]

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[36] Connolly, above n 20, 27-28.

[37] As noted, Wentworth was also one of the first members of the first Legislative Council in the colony. He was a key figure in the push for responsible government in the colony: on Wentworth's role on the push for self-government see ACV Melbourne, *Early Constitutional Development in Australia Part V* (2nd ed, University of Queensland Press, St Lucia, 1963).

[38] Wentworth, *Sydney Morning Herald*, 9 December 1853, cited in Connolly, above n 20, 28.

[39] *New South Wales Constitution Bill, The Speeches in the Legsislative Council of New South Wales, on the Second Reading of the Bill for Framing a New Constitution for the Colony,* above n 21, 215-216.

[40] Even though some warned of this possibility during the Second Reading of the Constitution Bill in the NSW Parliament: ibid, 76.

[41] The conflict proved to be inconclusive on the issue of the powers of the Council to amend such legislation anyway. This is discussed below. See also Loveday, above n 31, 496. Waugh has described the history of conflicts between the Legislative Assembly and the Legislative Council in New South Wales as a history of 'long-lived frustration' of governments attempting to get their legislation through the Council: Waugh, above n 18, 188, 190.

2. Lead up to the Constitutional Conflict over Money Bills

For the first two years of its operation, the Council appeared to adopt the independence and lack of partisanship in reviewing legislation that had been hoped for.[42] This was not surprising, since several members of the Council had been appointed by the incumbent Donaldson government. The composition of the Council was not significantly altered by the new appointments made by the Parker and Cowper Ministries which followed.[43] Most of the men appointed by Cowper were however regarded as his tools.[44] Conflict was also avoided initially between the two parliamentary chambers was because both the Donaldson and Parker Ministries had trouble getting legislation through the Assembly, meaning that the Council did not receive much legislation to review.[45] Clashes between liberals and conservatives escalated quickly, however, and the Council became involved in them.[46]

The Parker and Cowper ministries may have inadvertently laid the foundations for the Council's much greater objections to the infringement of its powers in 1860 by appointing a majority of men to the Council who were lawyers or former judges – and thus disposed to considering the constitutional ramifications of incursions by the Assembly on the powers of the Council to control public finance.[47] Whatever the reason, many of these men would insist on the Council's power to review executive expenditure as part of the fundamental requirement of parliamentary control of finance, anticipating the more protracted disputes that were to occur between the Assembly and the Council in subsequent years.

The Council began to assert its powers to amend money bills when, in 1857, it made a verbal amendment to a money bill (a loan bill) that had been approved by the Assembly. When the bill was returned to the Assembly, members of that chamber accepted the Council's amendment but requested that it should not 'be drawn into a precedent to authorise the Legislative Council to alter or amend in any manner whatever, any Money Bill passed by this House'.[48] Robert Johnson, a member of the Council and one of the lawyers appointed to that chamber (and a member who would play a fundamental role in the 1861 conflict), interpreted

[42] See *Letter from Sir Alfred Stephen as President of the Council to the Speaker on the Formation of a Second Chamber*, 1953, 17, cited in Connolly, above n 20, 61.
[43] Connolly, above n 20, 61-62.
[44] Ibid. The conservatives in the Council were soon being described by these new appointees as 'the opposition'. Connolly argues that this marked the arrival of party government to the Council.
[45] Connolly, above n 20, 62.
[46] Ibid.
[47] Connolly, above n 20, 65-66. For a list of appointments see ibid, 108-109.
[48] *Journal Legislative Council*, NSW, 30 January 1857.

the Assembly's response as an attack on the Council's powers to deal with money bills. Johnson responded by asserting that the Council possessed a power of amendment of such bills as part of 'good governance' in the colony.[49] For two years, the Council continued to make verbal amendments to money bills.[50]

The real seeds of the later disputes were sewn not only in this clash between the houses on the power of the Council to amend money bills. The underlying cause, which evolved into an argument about the powers of the Council of amendment, was the Council's concern regarding the lack of accountability of government to parliament for spending public money.

Since 1857, when the Assembly had been unable to pass the estimates for the coming year, a practice had developed whereby governments spent money under the authority of the Governor's warrant alone (that is, without parliamentary approval), sometimes after a vote of credit by the Assembly. In other instances, governments spent without any parliamentary approval at all.[51] Certainly, no practice emerged of involving the Council in seeking approval for spending, and no source of conflict arose. All that was about to change.

In 1858, James Martin, another lawyer-member of the Council, questioned the legality of the practice of votes of credit approved solely by the Assembly.[52] Other Councillors disagreed and the matter went no further.[53] At least one contemporary observer pointed to the need for parliamentary approval of spending to be made by both chambers, regarding any other method as illegal and also discourteous to the Council.[54] These objections gathered pace in the years to come.

The first real challenges by the Assembly to the powers of the Council began over land reform introduced by a new member to the Cowper Ministry, John Robertson, Minister for Lands and Works.[55] In the face of stern opposition, Cowper approached the new Governor, Sir William Denison, to appoint additional new Councillors to block a potential impasse on the reform legislation.[56] On this occasion, the approach by the Premier to the Governor yielded no result

[49] *Empire*, 5 February 1857, cited in Connolly, above n 20, 139-40. All conservatives in the Council supported the motion, other than the men who had been part of the drafting committee for the Constitution: see above n 16.
[50] Connolly, above n 20, 140.
[51] Ibid.
[52] *Sydney Morning Herald*, 7 August 1858, 5.
[53] Ibid.
[54] *Sydney Morning Herald*, 9 August 1858, 4.
[55] Connolly, above n 20, 63.
[56] Connolly, above n 20, 64 and sources cited in ff 2 and 3.

for the Ministry, with Denison refusing to make any appointments.[57] In 1858, the Ministry then proposed reforms to the Electoral Act, the goal being to increase the number of liberals being elected to the Assembly.[58] Conservatives in the colony began to realise that their last line of defence against the liberal movement would be their supporters in the Council.[59] When conflict returned, the Council's powers to deal with money bills would become the focus of the argument.

In early 1859, the Cowper Ministry spent money on the authority of votes of credit approved solely by the Assembly. The Council once again questioned the legality of the practice.[60] The Constitution did not contain a term requiring appropriations by law before moneys in the Consolidated Revenue Fund could be drawn upon by the ministry. Conflict on the point was avoided by the eventual passage of an appropriation Act to support the spending.[61] As noted, the practice followed by the Assembly in seeking subsequent approval of appropriations (and only from the Assembly) was not unusual at the time in the colony.[62]

By late 1859, the Cowper Ministry had fallen and the Forster Ministry came to power. It introduced bills in the Assembly to transform the Council into an elected house.[63] This reform made conservatives in the Council particularly nervous, as it promised to implement an extension of the form of democracy the conservatives in the Council had feared all along.[64] The seeds of distrust had been well and truly sown by now, and the Council objected to the introduction of the bills as a breach of the powers of the Council to reform its own chamber.[65]

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[57] Ibid. In 1861, an approach to the next Governor, Sir John Young, over land reform resulted in a different outcome. This is discussed below.

[58] For full details of all of the attempts for reform of the Council see the excellent summary in Clune and Griffith, above n 16, 145-153. In summary, the reforms provided for vote by secret ballot, universal manhood suffrage, representation primarily by population and more equal electoral districts.

[59] Connolly, above n 20, 140.

[60] *Sydney Morning Herald*, 9 April 1859, 4.

[61] Connolly, above n 20, 141.

[62] Since the Assembly did not manage to obtain the necessary supplies before the year in which the requisite appropriations began. In Chapter 5, I discuss the judgment of Isaacs J in the *Wooltops Case* (*Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421) in which his Honour expressed the opinion that parliamentary practice in Australia had required a prior parliamentary approval of funds. In Chapter 6, I discuss how a majority in *Williams* has now also taken the view that an appropriation Act must be passed prior to spending being undertaken by the Commonwealth Executive.

[63] Connolly, above n 20, 97. As well as land reform legislation and the Ministry's acquiescence to the separation of Queensland as a new colony. For a detailed summary of the debate on reform of the Council see Chapter IV of Connolly, above n 20.

[64] Connolly, above n 20, 123-4, 126.

[65] Connolly, above n 20, 97, citing *Sydney Morning Herald*, 1, 2, 8 December 1859.

By December 1859, Robert Johnson moved this attack on the Council into the broader arena of parliamentary control of finance. He foreshadowed a conflict over what he (and other Councillors) regarded as the illegal practice of spending moneys without approval of both chambers of the parliament.[66] Johnson moved that the Council refuse to consider any bill not laid on the table by 28 December 1859, including the appropriation bill for the following year.[67] Johnson was insistent that 'in point of law, that bill must be passed into an Act before the expiration of the present year, and unless it was on the table of this house by the 28th … there could be no time for its consideration'.[68] Attempting to rush such legislation implied, in Johnson's view, that the Council had no right to consider the bill in detail – a proposition with which he (and other members of the Council) disagreed.[69]

The Forster Ministry's response was that there was not the 'slightest chance' that the appropriation bill would be placed before the Council before the end of the year.[70] Although Johnson withdrew his motion at the time, he added that he could not understand why the government should take it for granted that the Council would necessarily grant the government a vote of credit and that:

> 'he was sorry to hear from the exponent of a ministry claiming common sense and common honesty, that a vote of credit of one house would be deemed sufficient by them to justify expenditure of the public money.'[71]

By early 1860, the Council was well and truly angered by the Ministry's failure to seek authorisation for spending from the Council. Johnson gave notice of motion condemning expenditure by votes of credit from the Assembly alone:

> 'That the practice which has prevailed of spending the public monies upon votes of the Legislative Assembly only, is illegal, and subversive of the rights and privileges of this House, and ought not to be continued.'[72]

The Ministry lost office before any censure motion could be voted on. Johnson had the motion deferred, saying that he hoped that 'whoever assumed the reins of government, their first

[66] *Sydney Morning Herald,* 16 December 1859, 4.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.

measure would be one for the legalization of public expenditure.'[73] The new Robertson Ministry, with Cowper as its Chief Secretary and sitting as a member of the Council, did not seek any approval of supply from the Council. Johnson then asked the Council to refuse the new Ministry's request for an adjournment of his motion until it obtained votes approving the spending from both parliamentary chambers. Although an adjournment was refused, the President of the Council at the time, Deas Thomson, convinced Councillors that continuing to sit in the circumstances (when the Assembly was not also sitting) was contrary to parliamentary practice – and the conservatives deferred to his judgment on the point.[74] The scene had been set for a real conflict on the powers of the Council to deal control spending by the NSW Executive.

3. The Dispute over the Power of the Council to amend Money Bills

When Parliament resumed on 3 April 1860, the Council condemned spending undertaken by the Ministry authorised by the Assembly alone. Some Councillors asserted that, with the exception of the right of the Assembly to initiate money bills, the houses were co-equal in their powers to deal with all legislation – including that the Council had 'as much right to interfere in money concerns as the Assembly'.[75] While some of the moderates in the Council (including Deas Thomson) did not necessarily agree with this assertion of co-equal legislative powers, they substantially agreed to the motion and the principle that spending required approval from both chambers.[76] Thomson argued that expenditure by a ministry without the approval of the entire parliament was illegal and that a vote of credit from the Assembly alone was not sufficient to authorise spending.[77] Members of the Council referred to British parliamentary practice to support their position, noting that, when the British Government spent sums that were in the estimates but not yet authorised by an appropriation bill, the spending was met by exchequer bills authorised by an *existing* Act of the Parliament or by a partial appropriation Act.[78] This parliamentary practice, of a prior appropriation of funds to support spending, is a matter the High Court would refer to nearly 150 years later in its decisions on the power of the Commonwealth Executive to spend public monies.[79] Further, members of the Council noted

[73] *Sydney Morning Herald*, 2 March 1860, 4.
[74] *Sydney Morning Herald,* 9 March 1869, 5 and 10 March 1860, 5.
[75] *Sydney Morning Herald,* 4 April 1860, 4.
[76] Ibid.
[77] Ibid.
[78] *Commons Papers*, 1857, Session II, vol 9, 520-521, cited in J Waugh, 'Evading Parliamentary Control of Government Spending: Some Early Case Studies' (1998) 9 *Public Law Review* 28, 35. For a full description of the British parliamentary practice at the time see Waugh's article.
[79] The High Court's decisions are discussed in Chapters 5 and 6.

that British use of votes of credit had been confined to emergency expenditure by government outside of the usual estimates and appropriations processes. Thomson specifically referred to the work of Sir Thomas Erskine May on this point.[80] This meant the colonial practice was different from British parliamentary practice and, potentially, unconstitutional. In the end, Cowper conceded the point, admitting that the practice of not seeking approval from both houses was 'irregular' or 'illegal'.[81] The Attorney-General, John Hargrave, also conceded that the practice was 'illegal, and most decidedly unconstitutional'.[82] The Ministry then adopted British practice. It incorporated the Assembly's vote of credit in a partial appropriation bill that was then passed by both chambers. It seemed that the Council had won its point about appropriate legislative control of finance by *both* parliamentary chambers. It had done so by insisting on its role in maintaining the accountability of the NSW Executive to Parliament.

Matters were complicated further because, apart from the vote of credit, the Assembly had also passed an indemnity bill to legalise the expenditure undertaken by the Ministry under the vote of credit only. The difficulty was that the way in which the Bill had been framed by the Assembly did not indicate that there had been any illegality by the Ministry in failing to obtain authorisation from parliament for supply, other than a conceded illegality for a limited period of one month (March). Governor Denison warned Cowper that the indemnity bill which the Assembly had proposed did not go far enough, since it should cover all expenditure undertaken since the beginning of the year. Denison advised Cowper that, unless the bill was amended, it would be opposed by the Council.[83] Cowper ignored Denison's advice. The conflict between the Assembly and the Council over the indemnity bill continued for some time, with liberals in the Assembly objecting to having to ask the Council for approval of the vote of credit or an indemnity because either step would amount to the 'practical recognition' of co-ordinate legislative powers of the Council with respect to supply.[84] This amounted to an assertion that the upper house had no role to play in approving spending. A further motion put up by the Assembly failed to recognise Denison's and the Council's recommendations, and since

[80] *Sydney Morning Herald,* 9 June 1860, 5. Connolly asserts that, in fact, the Commons had used votes of credit – but that this was not discussed in the parliamentary manuals the Australians relied upon: Connolly, above n 20, 144.
[81] *Sydney Morning Herald,* 28 June 1860, 3.
[82] *Sydney Morning Herald,* 30 June 1860, 4.
[83] Denison to Cowper, 11 April 1860, Cowper Correspondence, Vol 1, A676, cited in Connolly, above n 20, 146.
[84] Windeyer, *Sydney Morning Herald,* 22 June 1860, 2.

acceptance of a more limited indemnity would amount to a recognition that the Council had no power to deal with supply, the Council, predictably, rejected the motion.[85]

As Cowper and the liberals appeared to be becoming more radical, members of the Council pushed back further. Geoffrey Eager, one of Johnson's supporters in the Council, argued that it was clear that ministries were politically responsible to *both* parliamentary houses in systems of responsible government, and that governments should take care 'how they undertook the formation of governments without a majority of either House … to back them'.[86] To members of the Assembly, this sounded like an attack on the principle of responsible government. In the event, the Council amended the indemnity bill so that it covered all money spent by the Ministry, including any moneys spent under the sole authority of the Assembly vote of credit. During the debate in the Council, the Ministry defended the Assembly's position. Even though Cowper was in possession of a legal opinion that the Council possessed greater powers than the House of Lords with respect to the revision of legislation, Cowper said that he had dismissed the opinion because he paid 'very little attention to the construction of the lawyers of Acts of Parliament'.[87] The Attorney-General (Hargrave) similarly argued that he would not let legal technicalities override the power of the Assembly to control finances, it being the House most closely associated with the people.[88]

These assertions by members of the ministry, and by the chief law officer in particular, led the usually moderate Thomson to express his astonishment that an Attorney-General could hold such an opinion.[89] Thomson subsequently made clear that any indemnity bill without the Council's amendments would not be approved by the Council and the Council would refuse altogether to indemnify any government for illegal expenditure undertaken in the current year.[90] The Council maintained that it played an important role in the review and control of public finance.

When the bill was returned to the Assembly with the Council's amendment, the liberals in the Assembly became even more intransigent, insisting now that the indemnity bill was a money bill that the Council possessed absolutely no power to deal with it.[91] This was clearly not

[85] *Sydney Morning Herald,* 10 May 1860, 4.
[86] *Sydney Morning Herald,* 9 June 1860, 5.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] *Sydney Morning Herald,* 13 June 1860, 4.
[91] Ibid.

correct, yet the Assembly adopted its attack as a ploy to deny the Council power to make any further amendments to the bill.[92] The Indemnity Bill now passed by the Assembly approved expenditure authorised under the Assembly's resolution alone. The Assembly wanted to make clear that it was specifically excluding the Council's amendments and rejecting the Council's power to make amendments to the Bill at all.[93] Another member of the Assembly, lawyer William Windeyer, condemned the Council's approach as constituting an attack on the rights of representation of the Assembly.[94] He also questioned the need for parliamentary appropriation at all, but ultimately argued that a vote of credit from the Assembly was all that was required to approve spending in the colony.[95] Henry Parkes, another Assembly-man and a future Premier of the colony, supported Windeyer.[96] The Assembly sent back the indemnity bill to the Council as a 'money bill' to prevent the Council from making any amendments to it.

The Council certified that the Bill was certainly not a money bill, so amendments could be made to it without breaching the privileges of the Assembly.[97] The Council argued that the Assembly's attempt to classify the bill this way was an attack on the powers of the Council since, if it could be classified as a money bill, then many other bills might well be classified in the same way, removing the power of the Council to review legislation in detail at all. A number of Councillors, including Johnson and his friend Eager, had already said that they would not pass the appropriation bill until the Assembly passed the indemnity bill with the Council's amendments, because approval of the appropriations would amount to the Council's approval of illegal expenditure already undertaken by the NSW Executive.[98] Members of the Council protested that the Assembly was attempting to 'breach the fundamental privileges of parliament' to control the finances of the colony.[99] Thomson drafted resolutions which declared that the appropriation bill failed to indemnify previous illegal expenditure and which condemned the practice that had been adopted by the Ministry as 'derogatory of the principles

[92] Connolly, above n 20, 150-51.
[93] *Sydney Morning Herald,* 22 June 1860, 2. The *Herald* says that the approval of the Assembly on this point was met with 'loud cheers'.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] *Sydney Morning Herald,* 20 June 1860, 4.
[99] *Sydney Morning Herald,* 29 June 1860, 2.

of Parliament, and subversive of the Constitution'.[100] That position was in turn predictably rebutted by Cowper, relying on alleged British precedents.[101]

The Assembly then threatened that it would not pass the appropriation bill at all unless the Council first passed the indemnity bill. Denison had been supportive of the Council's position on the indemnity bill but now, seemingly wearied by the ongoing political conflict, took a different view on the approach it was now taking to the appropriations bill. He warned the Council that the course it was taking on the bill would result in him having to make new appointments and the Council should not play into the Ministry's hands in that way.[102] Refusing to support the Council's resolutions, even though he agreed with the Council about the way in which the vote of credit had been used to approve payments for items in the estimates, Denison was supported in his warnings to the Council by the Colonial Office.[103] The Secretary of State for the Colonies took the view that the Council's protest could not be upheld because the Council should not use its technical right of amending money bills (which the Secretary admitted was held by the House of Lords at that time), but should follow the practice of the House of Lords and allow the appropriation bill.[104] The larger point with respect to parliamentary control of finance neither the Governor nor the Colonial Office appeared to believe was any longer in issue. The Council was thus maintaining its position now in the face of opposition not just from the Assembly but from the Imperial Government. As events unfolded, the issue was not resolved, and the dispute only ended because Cowper resigned from office.

The Council did not budge in 1860 from its stance on its role as an important part of the constitutional processes of maintaining parliamentary control of executive spending. In Chapter 4, I discuss how, by the time of the Conventions, this requirement of approval of spending by both chambers, made its way into the debate over the power of the Senate to deal with money bills.

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[100] *Sydney Morning Herald,* 30 June 1860, 4.
[101] Ibid.
[102] W.T. Denison, *Varieties of Vice-Regal Life, 2 vols* (1870) Vol I, 487, diary entry for 1 July 1860; also Denison to Newcastle 13 July 1860, CO 201/513, cited in Connolly, above n 20 and Waugh, above n 18. Please note that all references throughout this thesis to records from the Colonial Office (and other original sources) are cited as they are in the sources I have referred to.
[103] Want and Forster, *Sydney Morning Herald*, 22, 28 June 1860, 3; The Duke of Newcastle, Henry Pelham Clinton, Secretary of State for the Colonies in Lord Palmerston's Liberal administration.
[104] *Journal,* No 5, 1859-60, Part I, 28 June 1860, 115-117; Minute on Denison to Newcastle, 13 July 1860, CO 201/513, cited in Waugh, above n 18.

4. Conflict over the Role of the Council more generally

The following year, the two chambers came into conflict once again – this time over the powers of the Council to deal with ordinary legislation. The Robertson Ministry had put forward proposals for land reform as well as introducing a bill intended to substitute elected members for the nominee members of the Council. Robertson's land bills passed the Assembly on 27 March 1861, and Robertson resigned from the Assembly so that he could be appointed a Legislative Councillor on 3 April to complete the process of getting the legislation through the Council.

Although the conflicts that ensued were not challenges to the Council's powers with respect to dealing with money bills, they require some consideration here because they provide further insight into the Council's insistence on its role as a house of review generally. The dispute in New South Wales also provides important context for disputes that would later occur in Queensland, highlighting some of the problems of legitimacy faced by nominated upper chambers in Australia – concerns that would also be raised during the Conventions when the framers rejected nomination for members of the Senate.[105] For these reasons I consider the swamping of the Council in 1861 here. These appointments of Councillors by Governor Young on advice from the Robertson ministry ultimately explains how the Assembly came to occupy an increased importance within the constitutional system in New South Wales, so much so that, by the end of the century, politicians like Henry Parkes and George Reid (both former Premiers of the colony and in the 1890s leading Convention delegates for New South Wales) would continually assert the superiority of the Assembly in all matters – a view that (as Chapter 4 will demonstrate) Reid in particular took with him to the Convention on the operation of political accountability under the new *Constitution*.[106] I am interested in the reasons provided by the Council for opposing the Assembly as part of its insistence on its role as an independent house of review. I am also concerned with the Governor's views on the Council's actions and his reasons for making the appointments to enable the land reform legislation to go through the Council.

Governor Young may not have made the appointments to the Council because he agreed with the Ministry and the Assembly's view of its superiority over legislation. The events described

[105] In Chapter 4 I discuss how, by the time of the Convention Debates, challenges to the legitimacy of nominated upper houses in both New South Wales and Queensland provided a reason for many delegates to not wish to replicate the perceived weakness of nominated upper chambers for the new Commonwealth.
[106] Parkes' and Reid's contributions during the Convention Debates are discussed in Chapter 4.

here demonstrate that he was faced with little choice politically but to do so. Since I am interested in the views of the Council and the Governor on its role as a house of review, I confine myself to brief summaries of the events that promoted the swamping itself.[107]

As previously noted, in 1861 the Assembly rejected Council's proposed amendments to the land reform legislation and the Council insisted on maintaining them.[108] The Robertson Ministry advised Governor Young to make 21 new appointments to the Council to break the legislative deadlock and secure the passage of the legislation through the Council. Robertson advised Young that the Ministry would resign if he did not make the appointments.[109] Young had little choice but to accept the advice, since no other party could form a majority in the Assembly at the time, and the Robertson Ministry had been returned just six months prior with an increased majority on the very issue of land reform.

Evidence indicates that Young did not particularly agree with the advice provided to him by Robertson, but that he acceded to making the appointments as the lesser of two evils available to him.[110] The current term of the Council was due to expire in three days anyway, and it may have been thought better to make appointments that would only last for that term (of three days).[111] Young later said that, if it had not been for his intervention, the Council would not have been preserved as a 'conservative and independent institution'.[112] He also imposed important conditions on the appointees he had been advised to make, including conditions to the effect that they must not consider themselves entitled to indefinite appointment. These indicate that the appointments were made for the specific purpose of resolving this legislative deadlock only, rather than intended by Young to alter the composition of the Council on a more permanent basis.[113]

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[107] For a detailed examination of the politics surrounding these events see Connolly, above n 20, 162 – 183.
[108] The bill dealt with the occupation and alienation of Crown land. The Council altered the bills to remove a right of free selection before a survey of the land was undertaken, even though this promise had been a key point of Robertson's campaign for election: see Young to Newcastle 21 May 1861, CO 201/518, cited in Waugh, above n 14.
[109] Young to Newcastle 19 July 1861, CO 201/518, cited in Waugh, above n 18.
[110] Young to Newcastle, 21 May, 19 July, 23 September 1861, CO 201/518 and CO 201/519, cited in Waugh, above n 14.
[111] Connolly, above n 20, 180-81.
[112] Young's note, 23 December 1867, in Newcastle to Young, 14 December 1861, *Government House Papers*, Despatches from the Secretary of State, 1861, cited in Waugh, above n 18.
[113] Loveday, above n 31, 492.

In the event, the dispute ended not by Young making the appointments but when he secured concessions from the Ministry to amend the bill to deal with the concerns of the Council.[114] All of this suggests that, rather than Young taking any hard and fast view about the supremacy of the lower house and some absolute right for the will of the Assembly always to prevail, he was interested in resolving matters in the most pragmatic way in the circumstances and, importantly, in such a way that preserved the reputation of the Council as a house of independent consideration and review of legislation, rather than as a partisan political chamber. Young made clear following the swamping that the position in which he had found himself placed would not be allowed to recur under his governorship.[115]

Whatever the Governor's long-term intentions to preserve the integrity of the Council as a house of independent review, the reaction of the conservatives in the Council to Young's decision to swamp it was one of shock and disappointment. The new President of the Chamber, William Burton, was told nothing of the Governor's decision in advance. Only when he entered the Chamber did, he discover that rumours about swamping were true. Burton then wrote immediately to the Governor resigning as a member of the Council and as its President.[116] He then went back to the Chamber to make his actions known, explaining the reasons for his resignation as follows:

> 'The sudden introduction of so large a number of members, for the purpose of coercing a majority of the … Council, [was] … a highly dangerous and unconstitutional exercise of the prerogative, [which put] an end absolutely to the power and object of deliberation in the Council, as a co-ordinate branch of the Legislature, and to all proper means of decision … [and it was] a fatal blow to the dignity and independence of the Council, and exposed the Constitution to the imminent hazard of subversion.'[117]

[114] Wentworth eventually agreed to act as President on the Council on the condition that 'the Council is not to be swamped on any future occasions, until after the rejection by it of some vital question upon which the opinion of the country had previously been taken, after a dissolution of the Assembly for that express purpose': Wentworth to Young, 14 June 1861, *Wentworth Papers*, A756, 221 (cited in Waugh, above n 18). It does appear that Wentworth had some sympathy for the idea that the Assembly should be able to amend money bills, since he attempted to introduce a rule to the Council that (like the House of Lords in his opinion) the Council should not amend money bills: *Journal*, Legislative Council, 1861-2 Session, Vol 8, 1, 11 October 1861, 17 January 1862 (cited in Waugh, above n 17). The Council later refused to accept Wentworth's proposed rule under its next President though: see *Journal*, Legislative Council, 1861-2 Session, Vol 9, 16 October, 28 October 1862, 1.

[115] Young to Newcastle, 21 May 1861, CO 201/518, cited in Waugh, above n 18.

[116] Burton to the Administrator of the Government, 10 May 1861, enclosed in Young to Newcastle 19 July 1861, CO201/518, cited in Waugh, above n 18.

[117] Young to Newcastle 19 July 1861, CO 201/518, cited in Waugh, above n 18.

Burton's reasons thus made clear that he regarded the actions of the government and the Assembly, and the Governor's use of nomination to swamp the Council to secure the passage of legislation, as undermining the Council's role as a co-ordinate legislative chamber. When Burton told the Council what had occurred, nineteen other members of the Council resigned and walked out of the Chamber before the Council formally assembled.[118] This meant that there was no quorum, preventing the 21 new appointees made by the Governor from being sworn in.

On this occasion the Council's position was supported by the Colonial Office, with the Office admonishing Young for having made the appointments recommended by the Ministry.[119] Sir Frederic Rogers, then the Permanent Under Secretary to the Office, expressed dissatisfaction with the practice of appointments as being likely to lead ultimately to the destruction of the Council and, in turn, the 'people's respect for their Government'.[120] The Secretary of State then admonished Young for a 'proceeding which is not creditable to the cause of Constitutional government in Australia'.[121] He also instructed Young to secure the re-appointment of as many former members of the Council as possible.[122]

Whatever the thoughts of the ministry on the point, it seems clear that neither the Council nor the British Government regarded the steps taken by Young as supporting the Constitution and the role of the upper house in the bicameral system. Whilst Young's swamping of the Council raised the possibility that the Council could be treated in the same way by a Governor in future deadlocks, further attempts by New South Wales ministries to have a governor make appointments never succeeded.[123]

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[118] *Sydney Morning Herald*, 10 May 1861, 2.

[119] Newcastle to Young, 26 July 1891, *Government House Papers,* Despatches from the Secretary of State, 1861; Newcastle to Young, 14 December 1861, *Government House Papers,* Despatches from the Secretary of State, 1861, cited in Waugh, above n 18.

[120] Sir Frederic Rogers, Permanent Under-Secretary, Colonial Office: see 18 Dec 1868, CO 201/548, 77-81 (cited in Waugh, above n 18). Later applications by ministries to swamp the Council were refused as well.

[121] Newcastle to Young, 26 July 1861, *Government House Papers*, *Despatches from the Secretary of State*, 1861, cited in Connolly, above n 20, 184.

[122] *Empire*, 5, 21 June 1861, 2.

[123] Clune and Griffith, above n 16, 68, 246-247; Loveday, above n 31, 487, 489-91. Waugh, above n 17, 347. After 1861, attempts by the Assembly to simply appoint more members to the Council to break deadlocks were usually either reluctantly employed as a tactic by sitting Governors or refused altogether. Twomey has documented the eight occasions between 1861 and 1932 in which the Governor in NSW did act on ministerial advice to make appointments to swamp the upper house: see Twomey, above n 8, 247. The only time this had occurred prior to the Convention Debates was by Governor Young in 1861. Twomey says that Governors and the Council itself either rejected or stalled attempts by governments to appoint large numbers of members to upper houses to resolve deadlocks: Ibid, 247, 248. See also Clune and Griffith, above n 16, 110-112, 113 supporting this interpretation. Twomey and Loveday have each concluded that the practice of swamping was used by Governors only if it was needed if a 'vital measure, for which the government had an electoral mandate, was defeated in

Waugh and Loveday have each concluded that the deadlock of 1861 showed that the Council was adamant that attempts to swamp it by the appointment of nominated members to break deadlocks undermined its role as a 'co-ordinate branch of the Legislature' and its important role as a house of review and consideration.[124] Loveday has interpreted this insistence on the Council's power as being based on the idea that it was the upper house alone that was capable of providing 'mature, impartial and thorough consideration' of legislation for the colony.[125] Although the appointments were made by Governor Young in 1861, it does appear that the Governor proceeded partly based on a motivation to preserve the Council as a 'conservative and independent institution' by staving off a more fundamental alteration as to its character (from being a nominated to an elective chamber).[126]

When Young subsequently approached Wentworth to act as the new President of the Council, Wentworth accepted on the condition that the Council was not to be swamped again 'until the rejection of it by some vital question upon which the opinion of the country has been previously taken, after a dissolution of the Assembly for that express purpose.'[127] The Council had fought to maintain its role as a house of review with the power to call the NSW Executive to account. In the ensuing years it would continue that battle. Both Parkes and Reid would take the fight for supremacy by a lower chamber to the Federal Conventions.[128]

5. Further Conflicts

Following the Council's swamping in 1861, the *Sydney Morning Herald* concluded that the re-constituted Council would no longer be effective as a deliberative body.[129] The available evidence shows, however, that the Council continued its role of review and scrutiny of government bills. In each of 1862, 1864 and 1865, the Council amended money bills proposed

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the Legislative Council.': see Twomey, above n 8, 47; also Loveday, above n 31, 495. The reluctance of Governors to appoint members to resolve deadlocks received later support as well: AB Keith, *Responsible Government in the Dominions* (2nd ed, Clarendon Press, 1928), 451.

[124] Waugh, above n 18, 188, citing statement of President of the Council, Sir William Burton, in support (see Burton and other Members of the Legislative Council to the Administrator of the Government, 10 May 1861, Young to Newcastle, 19 July 1861, CO 201/518).

[125] Loveday, above 31, 470.

[126] Loveday, above n 31, 491-2; with the Governor at pains to make clear that such a power would only be used in 'special exigencies': ibid, 495, citing Young to Cowper 3 July 1865, *Cowper Papers*, D60 (cited in Connolly, above n 20, 184). Young refused to accept subsequent recommendations by governments to appoint new members to resolve deadlocks: ibid, 495. As far as the Governor was concerned, the measure of appointment was only to be used in 'extreme constitutional circumstances, all other options having failed': Clune and Griffith, above n 16, 110.

[127] Wentworth to Young, 14 June 1861, *Wentworth Papers*, A756, 221-4, cited in Connolly, above n 20, 184. Original syntax in quoted text.

[128] I discuss their respective contributions in Chapter 4.

[129] *Sydney Morning Herald*, 26 June 1861, 4.

by the Cowper-Robertson Ministry. In one instance, it avoided an outright conflict on the point by vetoing a bill it had previously amended. That veto was not contested by the Assembly. In two other instances, the Assembly let the bills lapse and conflict was avoided by that means. Ultimately, the Council never actually succeeded in getting a money bill it had amended accepted by the Assembly, but it had exercised a power of veto which the Assembly had not challenged.

It appears that one of the main outcomes of the stand-off between the Assembly and the Council in 1861 was to convince the Council that it would need to become an elected body to ensure its continued legitimacy in reviewing and, if need be, opposing government measures.[130] A number of reforms were proposed by the Robertson Ministry to turn the Council into an elected body. However, many liberals in the Assembly now did not want to create a strong upper house – in their minds, Young's swamping of the Council had actually strengthened it.[131] Moreover, Parliamentarians had become only too well aware of the power that could be exercised by elected upper chambers as events unfolded in Victoria in which a series of deadlocks over supply brought government to a standstill. The spectre of a deadlock between two elected chambers was not something members of the New South Wales Assembly wished to face.[132]

In the ensuing years, conflicts between liberals and conservatives diminished and reforms to the Council were not pursued.[133] One prominent member of the Assembly during this time was Henry Parkes, a man who would become known as the 'Father of Federation' and one of the leading figures of the 1891 Constitutional Convention. Parkes adopted an equivocal position when it came to Council reform. In the 1861 dispute, he advocated a conservative Council on the basis that any legislative body with a single chamber was liable to error.[134] In Chapter 4, I discuss Parkes' pragmatic acceptance of the Senate's power of veto over money bills at the 1891 Convention. Like his fellow delegates from New South Wales, and representing the most populous colony in Australia, most of Parkes' time during the Conventions was dedicated to attempting to ensure that the House of Representatives would maintain control over the initiation and form of money bills, replicating to a large extent the experience in New South

[130] Loveday, above n 27, 493; also Loveday and Martin, above n 31, 94-95.
[131] Connolly, above n 20, 256.
[132] *Sydney Morning Herald*, 6 December 1861, 3.
[133] Connolly, above n 20, 257-58, 296
[134] *Sydney Morning Herald*, 3 April 1861, 3.

Wales and the relations between the Assembly and the Council in that colony when dealing with money bills.

As late as 1873, the Council was still asserting that 'in order to maintain its dignity, weight, and usefulness as a co-ordinate branch of the Legislature [it is] essential that the Council should possess the power of amending Money bills.'[135] This insistence on its power to amend as well as to reject money bills was unfaltering, at least until the late 1880s.[136] By the 1890s, however, things had begun to change. A number of leading parliamentarians, most notably Parkes and then Reid, frustrated at not being able to get their respective legislative agendas through the Council, vigorously asserted that political accountability was owed by ministries to the Assembly alone and that efforts to stall or veto government proposals in the Council were 'unconstitutional'.[137] Both men led attacks on the Council on this basis. Parkes and Reid were among the first political leaders in the colony to be in a position to challenge the powers of the Council, as most ministries in New South Wales had struggled to maintain a majority government and control the Assembly, let alone find themselves in a position to fight the Council.[138] Although Parkes and Reid were political opponents, they shared the frustration of being leaders of governments who had to content themselves with opposition from the Council on various programs. Their attacks wore down the Council and, by the end of the 19th century, its role as a truly independent house of review was arguably weaker. During the Conventions, both men would extrapolate their views on the need for accountability to be owed primarily to the lower house to the design of the new Federal Parliament.

6. Conclusion: Political Accountability and the Upper House in New South Wales

The New South Wales Council insisted on enforcing significant principles to maintain the accountability of the NSW Executive to Parliament. The most important of these was its insistence on the need for the NSW Executive to obtain prior parliamentary approval for spending. The Council made clear that such approval required not just the sanction of the lower

[135] *Legislative Council Journal*, Session 1873-74, Vol 1, 285.

[136] Clune and Griffith, above n 16, 76. For a detailed discussion of the history of this practice during the second half of the 19th century in NSW see ibid, 76-82. The Council's practice was to amend appropriation bills as well as to reject them up until the late 1880s: Twomey, above n 8, 638, 639-641; KR Cramp, *The State and Federal Constitutions of Australia* (Angus & Robertson, 1913), 63-64, 65; Loveday, above n 31, 481. See also S Gageler, 'James Bryce and the Australian Constitution' (2015) 43 *Federal Law Review* 177, 646-648 on the adoption of the ministerial advice principle in the colony. For a detailed history of legislative review by the Council during this period see Clune and Griffith, above n 16, 119-135.

[137] Clune and Griffith, above n 16, 114.

[138] See Loveday and Martin, above n 31 on the instability of governments during the decades following the grant of self-government to New South Wales.

house but also the sanction of the Council as well. The Council insisted on its rights to control spending in order to render the NSW Executive accountable to Parliament. Its power to amend money bills was never established, although its power to veto money bills was not contested by the Assembly.[139] The refusal to pass legislation passed by the Assembly, including with respect to supply, made it clear that the Council intended to ensure that it acted as a house of review, not simply a rubber stamp of proposals by the NSW Executive.[140] The Council had also insisted on its role as a house of review more generally.

Notwithstanding the potential undermining of the Council's powers to call the NSW Executive to account by Governor Young, Clune and Griffith's extensive analysis of the overall record of amendments put up by the Council in the latter half of the 19th century demonstrates that it did remain an interventionist chamber 'revising the legislative agenda and with a sufficient sense of its own constitutional legitimacy to stand as a gatekeeper against the passing of certain measures'.[141] Waugh and Loveday have supported this view of the Council and its efforts at legislative review.[142]

There was evidence to support the Council's expectation that it would act as a check upon 'hasty and ill-considered legislation to be expected from the lower house'.[143] Clune and Griffith note that the Council was marked by a persistent ethos of independence, removed from partisan politics, viewing its role as a check on governments.[144] The Council saw itself as having a power to call the NSW Executive to account to it that was separate from any accountability owed to by government to the Assembly, although the Council's precise powers in respect of legislation, including in respect of the right to amend appropriation bills, were never finally or precisely determined. What the Council did clearly demonstrate was that, even though it was a nominated chamber, it viewed itself as playing an important role in the control of public finance

[139] Ibid, 496. Clune and Griffith have argued that the Council did respect the Assembly's primary dominion over appropriation bills, particularly following the swamping of the Council in 1861: Clune and Griffith, above n 16, 76 109.
[140] Waugh, above n 18, 190; Loveday, above n 31, 496, 497; Clune and Griffith, above n 16, 75-82.
[141] Clune and Griffith, above n 16, 204. For details of the specific bills rejected by the upper house see ibid, 105-109, 122-27, 129. Historians have already detailed the divisions of class which existed between the members of the lower and upper houses in the colony which led to disagreements between those two houses, including the refusal of the upper house to pass supply bills: see Loveday, above n 31, 481-482; Clune and Griffith, above n 16, 99-101, 105; Waugh, above n 17, 185.
[142] See Clune and Griffith, above n 16; 68; Waugh, above n 18; Loveday, above n 31, 482.
[143] Loveday, above n 31, 482; Clune and Griffith, above n 16, 68.
[144] Clune and Griffith, above n 16, 69; Loveday, above n 31, 483, 486. As noted, this goal for the Council appears to have been intended by both the conservatives and the liberals: see also Loveday, above n 31, 484 on this point.

as well as in the review of legislation more generally sent up by the Assembly. It certainly viewed itself as a chamber that could and would insist on the NSW Executive and the Assembly adhering to the metes and bounds of the Constitution in seeking parliamentary approval for spending. In Chapter 4, I return to the ways these themes were revisited by the framers during the Conventions in considering the role of the Senate, ideas that have also been revisited by the High Court in its decisions on the Senate's power to control spending by the Commonwealth Executive (discussed in Chapters 5 and 6).

B. The Upper House in Victoria

1. Background

If the Council in New South Wales was thought to lack the power to oppose government bills because it was a nominated chamber, the Legislative Council in Victoria suffered from no such disability. As an elected chamber, it demonstrated just how prepared it was to flex its democratic legitimacy to enforce the accountability of the Victorian Executive to Parliament. In Chapter 4 I discuss how the example set by the elected Council in Victoria became a focus of the concerns of Victoria's Convention delegates about what an elected Senate with a power to deal with money bills could do to a ministry. Many leaders in the Debates, including Alfred Deakin, Isaacs Isaacs and Henry Higgins, specifically referred to the experience of deadlocks in Victorian politics to highlight to other delegates how an elected upper chamber with a power of veto could bring government to a standstill.

On the grant of responsible government to Victoria, the Victorian Parliament consisted of a Legislative Council and a Legislative Assembly.[145] The Council was comprised of thirty elected members. Men of property were qualified to sit as members of the Council. The Assembly was comprised of 60 members. The qualifications for election were less strict that those for the Council, with any man over the age of 21 years who had been either naturalised (for two years) or resident for over five years entitled to stand for election. Men over the age of 21 years and entitled to some property were entitled to vote.

The conflicts in Victoria between the Assembly and the Council replicated, to a great extent, concerns that had been expressed by the Council in New South Wales. The Council in Victoria also objected to various actions of ministries and the Assembly based upon what it regarded as unconstitutional practices of spending monies without parliamentary approval. Although the Council had no power to amend money bills, it did use the power it had to hold the Victorian

[145] *Victorian Constitution Act 1855* (UK).

Executive to account: its power to veto supply. In this section, I explore how the Council used this power to block supply following attempts by the Victorian Executive to circumvent parliamentary processes for the control of public finance. In later chapters I return to the way this insistence on the maintenance of parliamentary control of finance became a concern of the High Court.

As noted, Victoria's Constitution specifically provided that the Legislative Council had no power to amend appropriation bills.[146] The Council's power was limited to rejecting money bills.[147] It appears that the Victorians added this provision to the original Constitution as a means of avoiding the type of conflict on this point that they were aware had already taken place in New South Wales over the power of amendment.[148] Although the Victorian Council's powers were therefore supposedly more constrained than other upper houses, which potentially had powers of amendment over money bills, the Victorian experience demonstrated just what an elected upper house could do to an executive by exercising a power of veto over supply.[149] That power was used by the Council to bring the houses into conflict and the whole machinery of government to a standstill. As an elected upper chamber, the Council proved more than willing to exercise its power and braved the political consequences of doing so.

Victoria's Legislative Council, like New South Wales', was partly intended to act as a restraint on the rising democratic power of the Assembly.[150] The Victorian Select Committee formed to draft a parliamentary constitution bill for consideration by the Westminster Parliament.[151]

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[146] All references to 'the Constitution' in this section are references to the Constitution of Victoria.

[147] Cramp, above n 136, 85; Waugh, above n 18, 190; C Parkinson, 'George Higginbotham and Responsible Government in Colonial Victoria' (2001) 25(1) *Melbourne University Law Review* 181, 185; Quick and Garran above n 4, 55. The Council was given power to make recommendations on alterations at each of the three stages of such bills: Cramp, above n 136, 85. For details of the relevant constitutional provisions see ibid.

[148] Waugh, above n 78, 340-345; Waugh, above n 17, 344, 346-47.

[149] The power of veto and its use to stop governments was clearly understood by Griffith during the Convention Debates: see *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891* (Sydney: Acting Government Printer, 1891, 35-8, 40-1, 427-9 (Griffith). I discuss Griffith's views in detail in Chapter 4.

[150] Cuninghame to Earl Grey, 31 October 1847, CO 201/390 and La Trobe to Newcastle, 2 May 1854, CO 309/25, 35-6, cited in Waugh, above n 17.

[151] For a detailed explanation of the creation of Australia's colonial constitutions under self-government see Waugh, above n 17, 331. *Report from the Select Committee of the Legislative Council on a New Constitution for the Colony; together with the Resolutions and Proceedings of the Committee, and the Draft of a Bill, Votes and Proceedings, Legislative Council (Vic) sess 1853-4, Vol I 1I, no D I, 15, 34,* Victorian Parliament, (1853-4), cited in Waugh, above n 17, 333-34. The only official records of speeches on the constitution in the Legislative Council are of the debate on the Second Reading of the bill, leaving newspaper accounts for the rest, including the committee stage. Some speeches were also lost because the reporters could not hear them: Waugh, above n 17, 333-34.

One of the drafting committee, Colonial Secretary and Legislative Councillor, John Foster, the Colonial Secretary and a member of the then nominated Council)[152] said that he envisaged that the Council 'will always be enabled not perhaps to stop the proceedings of the Lower House and year after year bar their progress, but will be strong enough to check their progress until such calm discussion has ensued as will really test the merits of any measure.'[153] The Committee agreed, and the model eventually submitted included two houses of equal power, except of course that the upper house could reject, but not amend, money bills.[154] William Stawell, first Attorney-General and subsequently second Chief Justice of the Supreme Court, also expressed the view that the Council's purpose was to check the potentially 'wild schemes' of the lower house.[155] Statements like these led Waugh to conclude that changes occurring in Victorian society meant that the response of the elite in framing the Victorian Constitution was to control the democratic tendency of the times through the Council, rather than to supress it altogether.[156] Parkinson and Waugh have each argued that the conflicts between the two elected houses in Victoria largely represented divisions (as was also the case in New South Wales) between the proponents of democracy (liberals) in the Assembly against the conservatives in the Council, which divisions were based upon divisions of class present in Victorian society.[157] This restraint of democracy was principally achieved in Victoria by creating an elected upper chamber. For men like Foster, the risk was that a government with control of nominations for the Council could reduce the Council's powers of review and the 'wise and conservative control upon the otherwise unfettered democratic tendency of the Lower House' which Foster and others involved in forming the Victorian Constitution believed to be essential to good government.[158] Even so, Foster told the Victorian Parliament during debate on the Select Committee's Report that the new legislature would have two houses, both to be wholly elected, but that the lower house would have 'the entire control of the revenue'.[159] In rejecting

[152] He also became the first Vice-Chancellor of the University of Melbourne.

[153] G Webb, *New Constitution Bill, Debate in the Legislative Council of the Colony of Victoria, on the Second Reading of the New Constitution Bill, Prepared from the Short-Hand Notes of George H F Webb, Assistant Short-Hand Writer to the Council* (1854), 18-19, 67-8.

[154] Parkinson, above n 147, 185.

[155] G Webb, above n 153, 69-70 and sources cited in ff 30-32. The third prominent member of the Committee was Hugh Childers, Auditor-General and the first Vice-Chancellor of the University of Melbourne, another Councillor in the then nominated upper house. These three men have been credited with having the greatest influence in the framing of the Constitution: Waugh, above n 17, 335.

[156] Waugh, above n 17, 340, 360, citing *The Argus*, 16 December 1853.

[157] Parkinson, above n 147, 196; Waugh, above n 17, 340-41, 360. Waugh says that the deliberate choice to provide for a strong upper house with powers to call an executive to account through the denial of supply appears to have led to the conflicts which may have been 'almost inevitable': ibid, 160, 348.

[158] Waugh, above n 78, 70, citing *The Argus*, 2 September 1853.

[159] Ibid.

arguments for a nominated upper house, Foster later explained that he thought it the duty of the Parliament to 'stem the overflowing tide of democracy'[160] and that:

> 'by democracy he did not mean the opinions of any mob that might be led away by any demagogue, but those of the educated and the intelligent of every class in the community; and it had been the aim of the committee to ensure by the provisions embodied in the Bill, that all classes of the people should have their legitimate weight and influence.'[161]

Childers said that he supported an elected upper chamber because a nominated Council under responsible government must be 'a mere reflex of the Lower House'.[162] Although election looked 'like a bold move towards democracy',[163] it was also seen as being a more effective restraint on the powers of the lower house, since elected members could have greater weight with the public than nominees in any contest between the two houses.[164] Childers agreed with Foster that the problem with a nominated upper house was that a government that could recommend nominations to the Governor could reduce the Council's power of review and its control of the 'unfettered democratic tendency' of the Assembly which Foster and others believed essential.'[165] Chapter 4 will show that these sentiments were echoed during the Conventions too. Ultimately, the Committee told the Victorian Parliament that they were:

> 'unanimous in advising that the Legislative Council should be wholly elective – that it should represent the Education, Wealth, and more especially the settled Interests of the Country. The universal failure of the Nominee element in the British Colonial System forming, as it has proved, no check on extreme views, but ensuring a preponderance to whatever party may happen to possess the Supreme power, has determined your Committee to look for an enlightened policy essential to wise legislation, in that portion of the community naturally indisposed to rash and hasty measures.'[166]

Although the Council was expected to play an important role in the review of legislation, it appears that little thought was given to the possibility of the occurrence of protracted deadlocks

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[160] Ibid.
[161] Reported in *The Argus*, 16 December 1853, cited in Waugh, above n 17, 70.
[162] G Webb, above n 153, 126. The need to avoid this possibility was one of Foster's reasons for opposing nomination as well: ibid, 10.
[163] Waugh, above n 17, 343; Webb, above n 153, 9-10.
[164] Ibid.
[165] Waugh, above n 78, citing *The Argus*, 2 September 1853.
[166] *Report from the Select Committee of the Legislative Council on a New Constitution for the Colony; together with the Resolutions and Proceedings of the Committee, and the Draft of a Bill, Votes and Proceedings, Legislative Council (Vic) sess 1853-4, Vol I 1I, no D I, 15, 34.,* Victorian Parliament, (1853-4), 3.

between two elected chambers – and the draft Constitution provided no clause for their resolution. The Lieutenant-Governor of the colony, Charles La Trobe, explained the reason for an elected upper chamber and what was then regarded as the low likelihood of conflict between the chambers in a despatch to the Secretary of State for the Colonies:

> 'It had been urged in favour of a Nominee Upper House that in case of a serious collision of opinion between the two Houses, a power would under such a system exist in the Executive, of augmenting to an unlimited extent the number of Members of the Upper House, and of thereby coercing it into concurrence with the lower. The wisdom of entrusting such a power to the Ministry of the day may be fairly questioned. The probability, however, of any collision of opinion between both Houses has been considerably diminished by the very ample powers, more especially respecting Money Bills, conferred on the Lower House.'[167]

Others foresaw the potential for real conflicts occurring between two elected chambers, particularly where the upper chamber possessed a power of veto.[168] In the end, however, the resolution of deadlocks appears not to have been a major concern of the framers of the Victorian Constitution and no specific provision was added to the draft to deal with them.[169] In Chapter 4 I discuss how, by the time of the Conventions, the possibility of a deadlock, particularly over supply, was a key concern of Victorian delegates following from their experience of the protracted deadlocks that occurred under the Victorian Constitution. Indeed, it would be the Victorian delegates who would spearhead both the debate about the powers of the Senate to amend money bills and then the inclusion of a mechanism to resolve deadlocks in the *Constitution*.

The power of the Council to veto supply became an issue in two major constitutional conflicts and was not resolved for many years. The absence of a power for the Council to amend money bills did not result in a more harmonious relationship between the two chambers of the Victorian Parliament. Waugh has calculated that, between 1856 and 1901, the Council blocked approximately 9 per cent of bills sent to it by the Assembly.[170] This was not higher than in other

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[167] La Trobe to Newcastle, 2 May 1854, CO 309/25, cited in Waugh, above n 17.

[168] See comments by Charles Griffith, a member of the Legislative Assembly at the time set out in Webb, above n 153, 39.

[169] See the analysis on this point in Waugh, above n 17, 347-48.

[170] Waugh, above n 18, 198-99, citing G Serle, 'The Victorian Legislative Council 1856-1950' in JJ Eastwood and FB Smith (ed), *Historical Studies: Selected Articles* (Melbourne University Press, 1964) 127, 138. Waugh points out that the figure in South Australia the figure was about 13 per cent (citing AC Castles and MC Harris, *Lawmakers and Wayward Wigs: Government and Law in South Australia 1836-1986* (Wakefield Press, 1987), 155.

Australian colonies at the time, but it was only in Victoria that deadlocks over supply brought the business of government to a standstill.[171] Certainly, as discussed in Chapter 4, events in Victoria left an indelible impression on many Convention delegates who became firm advocates of political accountability, particularly in financial matters, being rendered to the House of Representatives.

Victorian deadlocks over supply occurred in protracted conflicts between the two chambers in 1865-1868 and 1877-1878. In this section I examine the background to each and the Council's reasons for denying supply to governments and opposing the wishes of the Assembly in the process. The reasons provided by the Council reflected those expressed by the upper house in New South Wales and are consistent with the idea that an upper house had an important role to play as a house of review, particularly by ensuring that the executive obtained prior parliamentary approval for spending from both chambers. The Victorian Council, like its colonial counterparts, took objection not only to attempts by the Victorian Executive to subvert the process of obtaining parliamentary approval of spending, but also to what it regarded as the unconstitutional practice of tacking ordinary legislation to financial legislation in order to prevent review of legislation by the Council.[172]

2. First Constitutional Conflict

The first conflict between the Assembly and the Council occurred in 1865 and lasted through to 1868, proving to be Victoria's longest deadlock over supply.[173] The lead up to the conflict was brought about, in part at least, by rising tensions between the Assembly and the Council due to electoral reforms which increased the franchise for the Assembly but not for the Council.[174] Further, British reform of land titling in the colony gave control of Crown lands to the Victorian Parliament. This meant that revenue raised from their sale or use went into the Consolidated Revenue Fund for the colony. It also meant that its expenditure had to be authorised by statutory approval of the Victorian Parliament through the appropriations

[171] Quick and Garran, above n 4, 58.
[172] I discuss how upper chambers in both Queensland and South Australia made similar objections to the practice in the constitutional conflicts in those colonies. The objections in New South Wales by its Council have already been discussed above.
[173] Waugh, above n 18, 205. The Council had already gained a reputation for obstruction before the deadlocks of the 1860s in any event. Parkinson, above n 147, 186.
[174] Waugh, above n 17, 330. For a detailed analysis of the political aspects of the conflict of 1865-68 see FK Crowley, *Aspects of the Constitutional Conflicts between the two Houses of the Victorian Legislature 1864-1868* (Flinders University, 1947).

process.[175] As with New South Wales, attempts by the Victorian Executive to spend moneys without lawful authority would become a key point of opposition by the Council.

The stoush between the Assembly and the Council occurred when the McCulloch Ministry, expecting opposition in the Council to its program to protect local industries, attempted to tack its tariff reforms to the annual appropriation bill in 1865.[176] The Council's lack of power under the Constitution to amend money bills meant that its only choice was to approve or veto the legislation. If the Assembly's purpose was to stare down the Council, its attempt failed. The Council chose to use its power of veto.[177] The Council objected to the bill on the basis that it was unconstitutional insofar as it tacked the proposed new tax to the annual appropriation bill.[178] Voting to lay the bill aside, however, threatened the Ministry's ability to obtain supply.

One of the key protagonists in this conflict was Attorney-General George Higinbotham.[179] He led the Ministry's revolt against the Council throughout the constitutional deadlocks of both 1865-66 as well as the later conflict in 1867-68.[180] His role in the conflicts is particularly relevant in light of the influence he would come to have over leading delegates to the Conventions, especially Deakin.[181]

In 1865 Higinbotham, in company with the other law officers for the colony, argued that resolutions of the Assembly alone made funds legally available to the Ministry for spending

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[175] Waugh, above n 17, 330. For a summary of the history of political conflicts in the colony see R Murray, *150 Years of Spring Street: Victorian Government – 1850s to 21st Century* (Australian Scholarly Publishing, 2007).

[176] For a more detailed and a broader historical discussion on the crisis see D Clarke, 'The Colonial Office and the Constitutional Crisis in Victoria, 1865-68' (Pt 5) (1952) 18 *Historical Studies* 160, 161; B Knox, 'Imperial Consequences of constitutional problems in New South Wales and Victoria 1865-1870' (Pt 85) (1995) 21 *Historical Studies* 515.

[177] Clarke, above n 176, 161.

[178] Waugh, above n 17, 330; Quick and Garran, above n 4, 58; Murray, above n 170, 41. See also RA Johnson, *Groups in the Victorian Legislative Assembly, 1861-1870* La Trobe University, 1975) on the division between the protectionist and free trade factions in the Victorian Parliament at this time.

[179] Higinbotham was an important influence on some of the key architects of the *Constitution*, including Deakin and O'Connor: see Deakin, above n 1; La Nazue J, *Alfred Deakin: A Biography* (1965), Vol 2, 484 – 487 (describing the influence of Higinbotham on Deakin in particular); Knox, above n 176, 532; Quick and Garran, above n 4, 45; Twomey, above n 8, 27; Parkinson, above n 147, 182, 192; D Wood, 'Responsible government in the Australian colonies: Toy v Musrgave reconsidered' (1988) 16 *Melbourne University Law Review* 760. As Victoria's first Chief Justice, Higinbotham wrote a leading colonial judgment on the operation of responsible government in an Australian colony in *Chung Teong Toy v Musgrave* (1888) 14 VLR 349. For a description on the importance of the decision in *Toy* for responsible government as self-government see K Bailey, 'Self-Government in Australia, 185O-1900' in Ernest Scott (ed), *Cambridge History of the British Empire* (1933), 7, 395, 397.

[180] Parkinson, above n 147, 186.

[181] Deakin discussed his respect for Higinbotham and wrote his own detailed analysis of the constitutional crisis which supported Higinbotham's position on the role of the Assembly and the limited role of the Council: Deakin, above n 1, 3; see also Knox, above n 176, 532 and La Nauze, above n 1, 484 – 487.

without any need for the Council's approval.[182] This was the same argument the Assembly in New South Wales had run, and which had been rejected as unconstitutional by the Council, the Governor and the Imperial Government. As discussed, the Assembly's view was most likely an incorrect interpretation of the manner in which funds could be appropriated and spent by the executive under either British or Australian parliamentary practice at the time. Nonetheless, Higinbotham committed to that view that the approval of only the Assembly was required to validate the spending of funds and began an attack against the Council's powers to deal with legislation already approved by the Assembly:

> 'We cannot, so long as the electoral system endures, avoid the evil of subordinating the will of some men to that of some others. If there is a contest one side must be beaten in order that there may be conclusion. In other words, the minority must give way to the majority.'[183]

The Council responded to the Government's attempt at tacking by establishing a Committee which, predictably, found the tacking of bills to be unconstitutional.[184] The Council President expressed Councillors' objections to the Government's tactic, arguing that it would essentially abolish the right of veto of the upper house over supply bills as well as its right to amend ordinary legislation.[185] This prompted the Treasurer to argue for 'principle over practice': in the interest of upholding responsible government and the financial supremacy of the people's chamber, the Assembly was justified in creating a new precedent to carry out that 'which was more important than any practice'.[186] Higinbotham insisted that tacking the tariff bill to the appropriations bill was not an unconstitutional practice.[187]

As at July 1865, the Council remained unconvinced. It continued to block supply. McCulloch then obtained a dissolution of Parliament from the Governor. The Assembly went to an election and the McCulloch Ministry was returned with an increased majority. Opposition to the tariff was virtually destroyed. The Assembly passed the bill again and the Council again rejected it. The Ministry then resigned in protest at the Council's disregard for the peoples' will. The matter was not resolved before the Assembly went to another election at which the McCulloch Ministry was once again reinstated.

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[182] Waugh, above n 17, 335, citing Bowen to Secretary of State, 25 January 1878, IUP Vol 28, 67-93.
[183] *The Age*, 21 October 1864, cited in Waugh, above n 17.
[184] G Rusden, *A History of Australia* (2nd ed, 1897), 199.
[185] Ibid.
[186] *Rules and Proceedings of the Legislative Assembly* (1865), 1186, cited in Waugh, above n 17.
[187] Ibid, 1887.

Considering that the Council was unlikely to change its stance, the Ministry then considered how it might go about obtaining the necessary funds for government without parliamentary approval altogether. The alternative to obtaining parliamentary approval was, at least as far as the Ministry was concerned, to find a bank willing to provide the necessary funds until such time as reimbursement from the Consolidated Revenue would become possible. One bank, of which McCulloch happened to be a Local Director, agreed to meet the Ministry's request.[188] This attempt to source funds outside of Consolidated Revenue Fund was ultimately brought to an end when the Imperial Government deemed the scheme to be illegal.[189]

Creditors began successfully suing the Government after a second rejection by the Council of appropriation and supply bills. The Ministry, worried that this would increase the pressure on the Council and Higinbotham, instructed the Solicitor-General not to defend suits for salaries or wages. By mid-November in 1867, some 300 warrants had been signed by the Governor.[190] The scheme of payments was eventually stopped following a Supreme Court ruling that parliamentary approval of funds was needed before any damages could be paid out of public monies to creditors.[191] In Chapter 6 I discuss how this accords with the view of the High Court on the requirements of parliamentary approval of spending. That the relevant history is part of the approval process for spending in colonial Victoria is noteworthy given that, in his judgment in the *Wooltops' Case,*[192] Isaacs spoke of requirements already in existence in Australian 'parliamentary practice' governing appropriations as requiring *prior* parliamentary approval of spending.[193]

The key point for present purposes is that the Victorian Supreme Court's ruling stopped payment of creditors until supply was obtained from Parliament – which required approval not just of the Assembly but also of the Council. This of course did not stop creditors from suing the Crown, and Higinbotham's office even issued a circular to civil servants on how to sue for

[188] *Votes and Proceedings*, Victorian Parliament, Legislative Council, 1864-65, Paper A23, 3-8, cited in Waugh, above n 17. Further details of the scheme can be found in Waugh, above n 17, 331-32.
[189] For full details of the nature of the illegality see ibid, 332.
[190] *The Argus*, 19 November 1867, 5.
[191] The reasons leading up to this are beyond the scope of the matters of interest in this thesis. The case was *Alcock v Fergie* (1867) 4 WW & a'B (L) 285. Details of the events leading up to it and the principles it determined are discussed in detail in Waugh, above n 17, 33. In Chapter 5, I discuss how some members of the High Court reached a different conclusion on the requirements for prior approval of spending by an Executive in *New South Wales v Bardolph* (1934) 52 CLR 455, discussed in Chapter 5.
[192] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421.
[193] His Honour's views on the requirements of parliamentary approval of spending are discussed in Chapter 5. In Chapter 6, I discuss how a majority of the High Court followed this requirement as well.

their wages.[194] More claims were filed and, eventually, the Ministry paid out substantial sums from standing appropriations to meet the claims. Those payments had the approval of the Assembly alone.[195] The difficulty was that not every judgment creditor met the terms of the standing appropriation. Other institutions, reliant on grants and without claims, had no basis to obtain funding – including creditors such as hospitals.[196] The deadlock went on until, eventually, even public servants and government contractors were left unpaid. Various other ideas for obtaining necessary funds without the Council's approval were considered by the Ministry and by Governor Darling, all of which came to nothing.[197]

The Council made clear its position that attempts to source funds outside the ordinary approvals process and to pay creditors without approval from the Council were unconstitutional. Apart from the issue of the unconstitutionality of tacking substantive legislation to the annual appropriations, the government had thus also been transgressing constitutional practice in raising funds to support its policies outside the accepted practices of parliamentary control of finances.[198] This practice had the ability to undermine an essential principle of Westminster-style democracy: the principle of parliamentary control of finance.[199]

The Council was supported in its objections to the practice being adopted by the Ministry and the Assembly by the Secretary of State for the Colonies, Edward Cardwell, who made clear the British Government's disapproval of it:

> 'I am of opinion that in these three respects – in collecting duties without sanction of law, in contracting a loan without sanction of law, and in paying salaries without sanction of law – you have deviated from the principle of rigid adherence to the law. The Queen's representative is justified in defending very largely to his Constitutional Advisers in matters of policy, and even of equity. But … the power of the Crown ought never to be used for an immediate political purpose [that] is forbidden by law.'[200]

[194] Waugh, above n 17, 333.
[195] Ibid, 334.
[196] Waugh, above n 17, 333.
[197] For a discussion of same see ibid, 334-35.
[198] On this measure as a tactic to avoid the need for parliamentary approval for spending see the discussion in Waugh, above n 17.
[199] In Chapter 6, I discuss how the High Court has affirmed that parliamentary control of finance is the foundation upon which responsible government is based.
[200] Minute of Edward Cardwell. Secretary of State for the Colonies. 17 November 1865. Accompanying dispatch from Sir Charles-Darling, Governor of Victoria, to Edward Cardwell; Secretary of State for the Colonies, No 115, 18 September J865, AICI, CO 309/74, ii-2, cited in Parkinson, above n 147, 203, 204.

Sir Frederic Rogers, Permanent Under-Secretary in the Colonial Office, also supported Council's objection to the Ministry's conduct, arguing as well that the government's attempt to tack legislation onto an appropriation bill was unconstitutional.[201] Rogers' position was consistent with the stance he had taken in New South Wales on the need for parliamentary approval of spending to be sanctioned by both chambers of that parliament.[202]

When the Colonial Office refused to support its actions, the Ministry was forced to reach a compromise with the Council.[203] Even then, Higinbotham was determined to make his point, amending the preamble to the bill to assert the pre-eminence of the Assembly's power in matters of finance. The Council subsequently amended the preamble to assert its equal rights over all legislation.[204] The Council was conceding nothing of its powers to deal with legislation passed by the Assembly, including its right to veto supply if deemed appropriate.

Higinbotham would later say that the intervention of the Colonial Office in supporting the Council's position created a decisive 'check' on the role of the Assembly from which it 'never recovered'.[205] In 1867, though, Higinbotham determined once again to test the powers of the Council – this time on a point involving Governor Darling's pension.

During the earlier conflict with the Council, Higinbotham played a key role in advising Governor Darling to side with the Assembly.[206] Darling became personally implicated in the clash between the two chambers, aligning himself with the Ministry to support the Government's borrowing funds from the bank.[207] The Colonial Office viewed Darling as having taken part in the political struggle between the two Houses of the Victorian Parliament and recalled him.[208] As a result, Darling lost any entitlement to a pension for his role as

[201] Parkinson, above n 147, 204.
[202] As to which see above at p. 86.
[203] HG Turner, *A History of the Colony of Victoria* (Cambridge University Press, 1904), 131.
[204] Ibid.
[205] As to which see Clarke above n 176, 168.
[206] For his efforts in involving the Governor in the dispute, Higinbotham was viewed by the Colonial Office as an attempt to 'grind to pieces' the Council's power over the Government as part of a broader attack on imperial authority in the colony: Knox, above n 176, 519, citing 26 Feb, 1870, CO 309.91, 387. Sir Frederic Rogers, described Higinbotham as the leader of the 'anti-Downing Street – anti-squatter – anti-Legislative Council policy': see Manners-Sutton to Granville (Confidential), 8 November 1869 with Rogers, Minute 31 December 1869, CO 309/91 fos 281-287, both cited in Knox, above n 176, 527. The Colonial Office supported the position taken by the Legislative Council in the dispute: see Clarke, above n 176, 168.
[207] Details of acts by Darling regarded as being partisan acts can be found in Parkinson, above n 147, 197 and references cited therein; see also Clarke, above n 176, for a discussion of the attitude of the Colonial Office to the crisis as well as the Government's position that the Colonial Office should never have intervened.
[208] Parkinson, above n 147, 188.

Governor.[209] Higinbotham and the Ministry, however, wanted Darling to be compensated. Since there was no basis for providing for Darling himself, the Ministry determined that it would make a grant to his wife instead. Having been chastised by the Colonial Office for the attempt to subvert the Council's power to approve spending, Higinbotham now seized his chance to challenge the Colonial Office's control in the colony altogether.

In 1867, the Assembly tacked a proposed grant to Lady Darling to the annual appropriation bill in order to make (indirect) compensation to Governor Darling.[210] Speaking in the Assembly on the bill, Higinbotham said that the vote should be passed and should represent the 'censure' of the Assembly on the Council's conduct of 1865.[211] This was of course to make clear that, irrespective of the views of the Imperial Government, the Assembly regarded the Council as having acted unlawfully in opposing the Ministry in the earlier skirmish. Higinbotham argued that all that was required for good government was the expression of the people's will through their representatives in the Assembly, describing the Council's actions as plutocratic and asserting that the Council was falsely claiming to represent the will of the people.[212]

Needless to say, when the Bill was presented to the Council, it rejected it, saying that it regarded the Ministry's actions as yet another 'coercive and unconstitutional' attempt to tack ordinary legislation to a money bill.[213] The crisis was finally resolved when Darling was reinstated as Governor, but on condition that he advise the Ministry that neither he nor his wife could accept the grant proposed by the Government.[214] This meant that the central matter in dispute, 'whether it was the Assembly's sole right to determine the financial arrangements of the colony', was not settled. The deadlock was only resolved following yet another election for the Assembly at which the McCulloch Ministry was returned with an overwhelming majority, and when negotiations in England made it possible for Darling to receive a pension from the Imperial Government while requiring him to renounce any grant the colony might make to him or his wife.[215] Although the Ministry ultimately won the point on the payment of a pension to Darling, Higinbotham viewed the resolution of this second stand-off as yet another loss by the

[209] Ibid.
[210] Parkinson, above n 147, 189.
[211] Quoted in Turner, above n 203, 137.
[212] Ibid, 140.
[213] The Council cited Rusden's history of Australia in support of its position: see Rusden, above n 184 (1st ed, 1883), 357. Todd agreed on this point: see Todd, above n 4, 142; also Waugh, above n 18, 206.
[214] Parkinson, above n 147, 189.
[215] Waugh, above n 18, 206; Waugh, above n 13, 30. The Council then passed the appropriation bill.

Assembly because his true goal, the censure of the Council for opposing the will of the Assembly at all, was not achieved.[216]

The basis for Higinbotham's stance throughout the deadlocks was that 'the wishes of the majority should prevail immediately over constitutional obstacles.'[217] The Council was clearly regarded by Higinbotham and the Ministry as one of those constitutional obstacles. It is not difficult to conclude from the views expressed by Higinbotham at the time that he regarded the role of parliament as being to give effect to the will of a majority, expressed though the majority will in the Assembly alone, and responsible only to that chamber.[218]

Higinbotham went on to be appointed as the first Chief Justice of Victoria, from which office he held that the Council had an important but distinct role to play in holding the Victorian Executive responsible for its actions.[219] Whether this role extended to denying a government supply was not in issue in the case in which Higinbotham made this statement, so it is not possible to tell how much his views on the role of the upper house had altered, if at all, since his disputes in politics with the Council.

Following the first constitutional conflict with the Council, the Assembly proposed (and managed to get passed) an amendment to the Victorian Constitution which included a new deadlock provision to deal with the circumstances of the 1865-68 crises.[220] This provided for a simultaneous dissolution of both houses if the Council twice rejected a bill proposed by the Assembly, provided that rejection occurred once before and once after a dissolution of the

[216] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 June 1874, 223; Parkinson, above n 147, 189.
[217] Parkinson, above n 147, 206, citing letter from George Higinbotham to Sir Henry Parkes, 27 April 1872 (Mitchell Library. Sydney) A988 (CYI600) 293-306 and letter from George Higinbotham to Sir Henry Holland, Secretary of State for the Colonies, 28 February 1887, also cited in E Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice* (1895), 218. See also Clarke, above n 176, 164.
[218] The accuracy of Higinbotham's interpretation of the accountability of the executive to the lower house alone and his skill as a lawyer have both been questioned: see Parkinson, above n 147, 190.
[219] See statements in *Chung Teong Toy v Musgrave* (1888) 14 VLR 349. The facts of *Toy* and the principal issue for decision in the case are not relevant to this thesis. In *Toy*, Higinbotham acknowledged that the Victorian Executive and its responsibility to Parliament were "unrecognised facts" of the Victorian Constitution: *Toy,* 391, 392. He concluded that the Victorian Constitution provided for a complete system of government by responsible advisers, as well as responsibility to *both* houses of the legislature; that the two houses of the Victorian Parliament had been vested with 'coordinated and inter-related but distinct functions': *Toy,* 396. For a detailed discussion of the meaning of responsible government as self-government see ACV Melbourne, above n 37, 273, 276-77; Parkinson, above n 147, 191.
[220] Quick and Garran, above n 4, 58.

Assembly.[221] In Chapter 4 I discuss how this model, in part, became relevant to discussions over what became the deadlock provision in s 57 of the *Constitution*.[222]

In addition to the deadlock provision, the eligibility of candidates for election to the Council was altered to make it easier to be elected to that body.[223] These amendments enlarged the franchise for election to the Council and strengthened the claims of the Council to democratic legitimacy. All the elements were now in place for an even greater constitutional crisis over supply, one to which the new deadlock mechanism offered no particular solution.[224]

3. Second Constitutional Conflict

In May 1877 Graham Berry formed an alliance of liberals in the Assembly and become Premier of the colony. Berry had campaigned on the imposition of a proposed land tax, designed to break up the colony's conservative pastoral interests.[225] Conservatives, including their supporters in the Council, readied themselves to block the reforms. Members of the Council, already concerned about Berry's intentions on the tax bill, were ready to face a challenge. The Ministry then tacked a provision for payment of members of the Assembly to the annual appropriation bill and began a campaign of coercion against the Council.[226] The attempt to tack the payments to the appropriations bill led to the Council's rejection of the bill as being unconstitutional.[227] In doing so, the Council drew on previous arguments it had made about the unconstitutionality of the practice.

With the Council refusing to grant the Government supply, by January 1878 the Ministry began to dismiss public servants, starting with police and judges. The Ministry's argument now was that, without an appropriation bill, the public servants could not be paid. The result of the denial

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[221] *Constitution Act* 1903 (Vic), s 31, cited in Waugh, above n 18, 193; also Cramp, above n 136, 84-85.

[222] Although, ultimately, a provision like the South Australian deadlock mechanism was adopted. On the influence of Australia's colonial constitutions on both ss 53 and 57 of the *Constitution* see Waugh, above n 18, 185, 192; Deakin, above n 1, 147, 185; Parkinson, above n 147, 189; Clark, above n 4, 185; N Aroney, ' "A Commonwealth of Commonwealths": Late Nineteenth Century Conceptions of Federalsim and Their Impact on Australian Federation, 1890-1901' (Pt 3) (2007) 23 *Journal of Legal History* 253, 254.

[223] By halving the property qualification: Waugh, above n 18, 206.

[224] In Victoria, the upper house made a double dissolution almost impossible to obtain: Waugh, above n 18, 193; Murray, above n 170, 40-41.

[225] Murray, above n 170, 40-41. The reforms targeted about 800 men who owned most of Victoria's grazing lands at the time. See also Deakin, above n 1, 16.

[226] Quick and Garran, above n 4, 58.

[227] *Report of Proceedings in the Legislative Council*, 9 January 1878; reported in *The Age*, 10 January 1878. As Chapter 2 showed, the practice of tacking was not regarded as being constitutional in the United Kingdom either. The then Colonial Secretary, Sir Michael Hicks-Beach, also objected to the Assembly's practice of tacking in Victoria: see Despatch of 3 May 1879, cited in Todd, above n 4, 746. Todd agreed with the Council: see Todd, above n 4, 721, 719-748; see also Quick and Garran on the unconstitutionality of the practice: Quick and Garran, above n 4, 58.

of supply became known as the 'Black Wednesday' dismissals. In total, the Ministry dismissed about 300 public servants, including Heads of Government Departments and Judicial Officers.[228] Although the Berry Ministry remained in office, the colony was gripped in conflict. Almost no legislation was passed and the business of government ground to a standstill as necessary funds ran out.

Rather than reaching a compromise by avoiding the tack, in October 1878 the Assembly now passed a bill to the effect that finance bills did not need to be approved by the Council. The bill proposed that the Council would have no power to amend or reject money bills and, if it did not pass them within a month, they would pass automatically. It could amend or reject other bills but, if it did not pass them within twelve months, an election would follow.[229]

The Argus was certainly on the Council's side and against the Governor, calling Bowen a 'revolutionary' and 'partisan', and arguing that the lawful courses of action available to the Governor under the Constitution were to call for Berry to resign because the Ministry could not obtain sufficient funds, or to prevail upon both chambers to reach a compromise or, failing either of these, for the Governor to call for a dissolution of the parliament.[230]

Berry decided to sail to London, forming what he called an 'embassy', to seek British Government intervention and specifically to request it to amend the Victorian Constitution to, in Deakin's words, 'tame' the Council.[231] The British Government refused, simply saying that the power to amend the Constitution lay with the Victorians themselves.[232] Nevertheless, the Colonial Office recalled Bowen for having become embroiled in the fight between the Assembly and the Council and for creating the appearance of partisanship; it then had the bill overturned.[233] This was not unlike the approach it had taken with Governor Darling years before. Not until April 1879 was a compromise reached with the Council when payments were

[228] Quick and Garran, above n 4, 58; Murray, above n 170, 41-42; Deakin, above n 1, 16-17. Further sackings on 24 January brought the total number of people dismissed to nearly 400: The list of dismissed servants was published in the Victorian Government Gazette on 8 January 1878 – a Tuesday. The following day thus became known as 'Black Wednesday'.
[229] Deakin, above n 1, 20, 72; Murray, above n 170, 42.
[230] *The Argus*, 10 January 1878, 4.
[231] Deakin, above n 1, 20-21.
[232] Ibid.
[233] Deakin, above n 1, 20-21. For Bowen's account of the conflict and his views on remaining impartial in the dispute see G Bowen, *Thirty Years of Colonial Government* (ed) S Long-Poole, (Longmans and Green, 1889).

separated from the appropriations bill and most of the officials who had been sacked were reinstated.[234] The Council had won again.

4. Conclusion: Political Accountability and the Upper House in Victoria

The Victorian upper house had been limited by the Victorian Constitution to exercising powers of veto in respect of supply legislation. Nonetheless, it had used that power to insist upon parliamentary control of spending as part of proper constitutional practice. If, when the Victorian Constitution was drafted, a power of veto was thought less likely to be exercised than a power of amendment, experience proved that this depended entirely upon the views of the upper house itself. The Victorian experience also proved the fears of some liberals to be correct: the existence of an elected upper house appeared to lend further democratic legitimacy to the actions of an upper chamber, particularly where that chamber was insisting on its role in maintaining parliamentary control of finance. As noted, in Chapter 4 I discuss how the lessons learned in Victoria were matters very much on the minds of delegates from that colony to the Conventions, especially leaders like Deakin, Isaacs and Higgins.[235] As Waugh has noted, the Victorians' experiences of constitutional deadlocks had a 'profound effect' on them which can be seen in their contributions in the Debates.[236] The Victorians would seek to limit the powers of the Senate to deal with money bills at all and, once the Convention had accepted the power of the Senate to veto all legislation (including supply bills), insisted on the inclusion of a deadlock provision in the *Constitution*. Even delegates from other colonies, including debate leaders like Griffith and Barton, used the Victorian conflicts over supply to warn delegates of what a power of veto over legislation granted to the Senate could do.[237] The lesson from the Victorian Constitution not only related to the power of veto: delegates were also aware, largely because of the difficulties that had been experience in Victoria, that any deadlock provision would need to contain some form of time limitation so that deadlocks would not be as protracted as colonial Victoria's had proven to be.[238]

The position taken by the Council in the key constitutional conflicts of the colonial period makes clear that it had legitimate objections to the unconstitutional practices of tacking and to

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[234] Waugh, above n 18, 206-207, citing Bowen to Hicks-Beach, 12 April 1878, *Irish University Press Series of British Parliamentary Papers* (IUP), Colonies: Australia, vol 28, 182, Bowen to Hicks Beach, 8 May 1878, IUP, Colonies: Australia, vol 28, 187 and G Bartlett, "Berry, Sir Graham (1822–1904)", *Australian Dictionary of Biography,* Australian National University. See also Murray, above n 170, 42.

[235] La Nauze, above n 1, 158-9; Waugh, above n 17, 348.

[236] Waugh, above n 17, 348.

[237] See the discussion on this in Chapter 4.

[238] Ibid.

the Assembly's attempts to bypass ordinary parliamentary processes for the approval of spending. In this respect, the Council reflected the concerns of, and objections taken by, upper chambers in other Australian colonies, objecting to what it viewed as attempts to subvert the role and function of Parliament's control of spending.[239] Parliamentary control of finance by two parliamentary chambers had arguably become a feature of Australian constitutionalism.

C. The Upper House in Queensland

1. Background

The constitutional arrangements in Queensland were similar to those in New South Wales, because the Queensland Constitution was in essence a replica of that Constitution, including that its upper house was nominated.[240] The Queensland Constitution was likewise silent on whether the Council had a power to amend money bills. The Legislative Council in Queensland responded similarly, too. It amended appropriation bills and provided reasons for doing so which reflected those given by upper houses in the other colonies at the time.[241]

By the time of the grant of responsible government to Queensland, the Queensland Constitution provided for a Legislative Assembly and a Legislative Council. The Assembly consisted of 89 elected members.[242] As was the case in NSW, any natural born or naturalised male of 21 years or over could enrol to vote if he satisfied certain qualifications regarding residency, property or education. The Council consisted of members who met certain qualification, including property qualifications.[243]

Neither Queensland's first Governor, George Bowen, nor its first Premier, Robert Herbert, were ardent defenders of the Council.[244] However, writing in 1860 Bowen said that:

> 'the Legislative Council, as at present constituted, will prove an obstacle to any too hasty legislation. All the members have individually a large stake in the welfare of the Colony, and I

[239] See Chapter 2 (discussing the Lords' objections); and above (on the Council's objections on this point in New South Wales) and below (on the Council's objections in Queensland on the same point).
[240] Cramp, above n 136, 87, citing Victoria No. 38 (UK), 28 December 1867.
[241] Waugh, above n 18, 190. All references to 'the Constitution' in this section are references to the Constitution of Queensland.
[242] *Constitution Act 1867* (UK); *Legislative Assembly Act 1867* (Qld).
[243] *Constitution Act 1867* (UK).
[244] J Harding, 'A Tale of Two Chambers: Bicameralism in Queensland 1860-85' (2000) 17 *Journal of the Royal Historical Society of Queensland* 247, 248.

> place implicit reliance on their local knowledge and experience, as also on their patriotism and loyalty.'[245]

In the early years of the operation of the Queensland Constitution, the respective powers of the houses were not much tested, largely because no government of the period had been able to secure a majority in the lower house to pass its legislation.[246] The power of the Legislative Council to amend appropriation bills became a key source of conflict by 1885, however, with the Council insisting that the Constitution conferred upon it powers co-ordinate with those of the lower house, including with respect to the amendment of money bills.[247] The absence of clarity in the provisions of the Constitution as to the Council's powers in this respect soon led the two chambers into conflict. The Council was convinced of its power to amend appropriation bills and the Assembly was equally convinced that the Council possessed no such power. As had been the case in New South Wales, there was no debate at the time over the Council's constitutional power to veto money bills.

Although the disagreements which occurred between the Assembly and the Council in Queensland were by no means on the same scale as those experienced in Victoria, one particular conflict that occurred in Queensland is worthy of examination, partly because it considered the role of the upper house to deal with money bills, but also because it involved Samuel Griffith. In this section, I discuss how Griffith, as Premier of the Colony, engineered a dispute with the Council on the issue of the Council's power to amend money bills. In this context, Griffith was asserting the idea that political accountability under a system of responsible government was owed to the lower chamber, particularly in matters of finance. His views stand in contrast to opinions he would go on to express during the Conventions. In Chapter 4, I discuss Griffith's view on dual political accountability under responsible government during the Debates. By then a delegate from one of the less populous colonies, he had to represent the interests of his fellow Queenslanders in ensuring that Queensland was not overwhelmed by votes from the larger colonies (New South Wales and Victoria) in the new Federation. Back in 1885, however, Griffith was Premier and determined to ensure the passage

[245] CA Bernays, *Queensland Politics During Sixty Years 1859-1919* (Government Printer, 1919), 18, citing Bowen to Secretary of State for the Colonies (SSC) no. 14, 21 May 1860 and CO 234/1.
[246] Harding, above n 244, 252. Harding notes that from 1866 to 1874 the Legislative Council ceased to be a topic of debate as ministries were struggling to retain a majority in the Assembly.
[247] Bernays, above n 245, 246; Quick and Garran, above n 4, 74.

of his ministry's legislation through the Queensland Parliament. The upper house presented an obstacle to that goal.

What emerges in the fight between Griffith and the Council is the way the Council attempted to retain its position as a house of review, particularly review of spending. That it was potentially less successful than its Victorian counterpart probably has more to do with the fact that it was a nominated chamber (therefore lacking democratic legitimacy) and that it ran into a man of Griffith's intellectual and political abilities. Its attempt to defend the role of Parliament to control spending by the Queensland Executive relied upon the same concerns and arguments as those employed by upper houses in other Australian colonies. In Chapters 5 and 6 I discuss how those concerns were echoed during the Debates and have been referred to since by the High Court.

2. Griffith's attack on the Council

Griffith needs little introduction to students of Australian politics or constitutional law. Premier of Queensland 1883-88 and 1890-93, and its Chief Justice from 1893-1903, he became one of the leading figures of Federation and a leader of the 1891 Convention, as well as the first Chief Justice of the High Court of Australia. As noted, although Griffith would keep an open mind during the Conventions on the possibility of accountability to an upper house, in 1885 he was a firm advocate of political accountability owed solely to the lower chamber. Before considering the conflict of 1885, it is necessary to consider some further background to the showdown between Griffith and the Council in Queensland over the Council's rights to review and amend money bills.[248]

In 1861, the Council passed resolutions which declared its constitutional role as including the need to exercise 'deliberative and independent action' as a 'co-ordinate branch of the Legislature' and to afford a 'safeguard against hasty, pernicious and tyrannical legislation'.[249] The resolutions were made in response to events in New South Wales where the Council had attempted to block legislation approved by the Assembly and, in response, new members had been appointed to the Council by Governor Young to break the ensuing deadlock (as discussed

[248] For further background on political matters leading up to the eventual constitutional conflict in 1885 see the discussion in Bernays, above n 245 and entry for Sir Samuel Griffith in the Australian Dictionary of Biography – available at www.http://adb.anu.edu.au/biography/griffith-sir-samuel-walker-445 accessed on 14 November 2018.

[249] *Queensland Journal of the Legislative Council*, Vol 2, 1861, 33. All relevant Queensland Parliamentary Papers (starting from 1860) were accessed online at www.parliament.qld.gov.au for Hansard for both the Assembly and the Council in this period. The references are to the equivalent volumes in the hard copy. The author used Harding , above n 244 to locate the pinpoint references in the hard copy.

earlier). The Council in Queensland insisted on its power to amend bills, including, most critically, its power to amend appropriation bills.[250] One resolution referred expressly to its role as a house of review because:

> '(1) As has already been demonstrated in the neighbouring Colony, the exercise of an unlimited power of creation of Members of the Legislative Council is liable to abuse in a manner whereby all deliberative and independent action of that branch of the Legislature is destroyed; its office and functions brought into contempt; and the safeguard it is supposed to afford against hasty, pernicious and tyrannical legislation virtually destroyed and set aside'.[251]

In 1879, the Council made amendments to legislation which the Ministry had characterised as a money bill. The Ministry then insisted that the Council had no power to amend the bill. When the Council argued that it had the right to amend *all* legislation – including money bills – the then Premier, Thomas McIlwraith, denying the Council had any such right, proposed that the Assembly should send the Council a statement of policy reasons, as well as reasons on privilege, for rejecting its amendments.[252]

At this time Griffith was Leader of the Opposition in the Legislative Assembly. He warned the Assembly that providing reasons, other than reasons on privilege, would be interpreted by the Council as a sign of weakness from the Assembly.[253] Griffith was of the opinion that the Assembly should insist on its constitutional rights alone: no further justification was needed to tell the Council that it had no power to amend money bills. The matter was never brought to a head, however, because McIlwraith stressed policy over privilege, providing the Council with an opportunity to resolve matters on policy grounds without conceding any of its power to amend money bills. The Council insisted on its right to maintain its powers 'to deal with all Bills which may be before them'.[254] When the McIlwraith Ministry lost the subsequent election to Griffith, Griffith did not waste any time in seizing his opportunity to clip the Council's wings.

Following the 1883 election, the Griffith Ministry quickly ran into conflict with the Council after it put up what the Ministry considered to be unacceptable amendments to a series of

[250] *Queensland Parliamentary Debates*, Vol 47, 1570.
[251] *Queensland Journal of the Legislative Council*, Vol 2, 1861, 33.
[252] *Queensland Parliamentary Debates*, Vol 30, 1879, 1827.
[253] Ibid.
[254] *Queensland Parliamentary Debates*, Vol 28, 1879, 399.

government bills.[255] During 1884 and 1885, the Assembly also passed bills to provide for the payment of expenses to its members. The response of the Council was to order the bills to be read a second time, in six months' time in each instance.[256] The effect of this, as previously discussed, would amount to a dumping of the proposal. Griffith decided this was the time for a confrontation with the Council on the issue of its powers to amend financial legislation. As had occurred in the constitutional arguments in the other colonies, the source of the conflict would be an attempt by the Ministry to tack ordinary legislation to a money bill. Griffith was determined to give the Council enough rope to hang itself. He specifically engineered a dispute on the tacking issue and enticed the Council to refer the matter to the Privy Council for determination, which it then lost.[257]

On 11 November 1885, the Assembly passed an appropriation bill. Included in the bill was a vote of seven thousand pounds for the payment of members of the Assembly. No attempt was made by the Assembly to bring the grant to the attention of the Council.[258] The grant elicited a predictable response from the Council, one that Griffith seems to have been hoping for. In rejecting the Ministry's attempt to tack the grant to the appropriation bill, the President of the Council said that there was no 'similitude between the Imperial Parliament and our own Constitution' and moved that the grant be struck out.[259] This was an assertion that there was no analogy between the British House of Lords and the Council. The representative of the Ministry in the Council argued that allowing any amendment by the Council to a money bill would be unconstitutional.[260] The Council ignored the Ministry's objections and passed an amendment to the bill.[261] The Bill was then returned to the Assembly. The Speaker of the Assembly, William Groom, was incensed:

> 'It is the first time in the history of responsible government in Queensland that an attempt has been made on the part of the Upper Chamber to amend an Appropriation Bill … My desire is

[255] The details of these bills are beyond the scope of this thesis. In summary, the legislation included a bill dealing with land reform of Crown Lands, a defence bill and a bill for the reform of Local Government. For full details of the legislation see Bernays, above n 245, 243-5, 246.
[256] *Queensland Parliamentary Debates*, Legislative Council, 1885, 30.
[257] Discussed below at 116.
[258] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1556-57.
[259] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 237. The Council also objected to dealing with the same bill when it had already been dealt with in the same session of parliament and previously rejected by the Council. Since the Lords had also objected to the practice of tacking, it is not entirely clear why this point was not taken up by the Council. The most likely explanation appears to be that the argument was designed to respond to Griffith's assertion that British parliamentary practice proceeded on the basis of approvals from the lower chamber alone.
[260] *Queensland Parliamentary Debates*, Legislative Council, 1885, 239.
[261] *Queensland Parliamentary Debates*, Legislative Council, 1885, 250-55.

> simply to call the attention of the House to the grave constitutional question which is involved in the amendment of the Appropriation Bill. If it is admitted that the Upper Chamber possesses co-ordinate powers with the representative branch of the Legislature, then responsible government in Queensland is entirely at an end.'[262]

The speech was greeted with cheers of 'Hear, hear!' in the Assembly. [263] When the Leader of the Opposition (McIlwraith) in the Assembly argued that Griffith's plan had been to entice the Council to amend the bill by tacking the grant to the appropriation bill, he was shouted down.[264] Griffith invited the Assembly to take a night to consider the Council's conduct, and to meet the next day to consider whether to send a remonstrance to the Council for its unconstitutional conduct in having amended an appropriation bill.[265]

In the Council on that same day, Councillors made clear that their constitutional role was more than a matter of the power to amend money bills: it went to the heart of the Council's role in the oversight of executive action. They must ensure that the Queensland Executive did not simply vote moneys to itself without any degree of independent parliamentary oversight and that the Queensland Executive did not engage in the unconstitutional practice of tacking. For example, one member said:

> 'Ministers and honourable members have, against all parliamentary usage, being the custodians of the public purse, voted money to themselves. It now becomes our duty to step in and assert our privilege to avoid a recurrence of the same thing in the future, and to preserve the money of the people.'[266]

Another said:

> 'According to my reading of statute law the only point on which we have absolutely no right to deal is in the introduction of money Bills, and for adding additional imposts upon the taxpayers of the colony. If we confine ourselves within these limits we shall run very little risk of going beyond the bounds of our constitutional rights; and I may safely affirm that this House, so long as it remains constituted as it is, and the calm, deliberate, and dispassionate judgment of its members is brought to bear upon all questions connected with money Bills or taxation, there is

[262] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1561. Groom had been an advocate for the privileges of the Assembly which (according to him) included that only the Assembly had the power to pass an amendment to a money bill: Bernays, above n 245, 244-46.
[263] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1562-63.
[264] Ibid.
[265] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1562.
[266] *Queensland Parliamentary Debates*, Legislative Council, 1885, 237.

> no fear that they will trespass beyond the reasonable exercise of those rights which they possess'.[267]

Although parts of Todd's work on parliamentary government in the colonies were quoted in the Council by the ministerial representative to support an argument that the Council had no power to deal with the money bill,[268] Councillors simply insisted that, in any event, overseas constitutions had no particular bearing on Queensland's statutory constitution, from which the constitutional power of the Council was derived.[269] References were made to the discussions on powers of amendment of money bills in the constitutional conflicts that had occurred in both New South Wales and Victoria but, ultimately, the Council decided that Queenslanders had to interpret their own Constitution, rather than the Constitution of the United Kingdom or any other colony.[270] On 12 November 1885 the Council sent a message to the Assembly in the following terms:

> 'the Council neither arrogate to themselves the position of being a reflex of the House of Lords, nor recognise the Legislative Assembly as holding the same relative position to the House of Commons: …
>
> because it does not appear that occasion has arisen to require that the House of Lords should exercise its powers of amending a Bill for appropriating the public revenue, and therefore the present case is not analogous ; the right is admitted though it may not have been exercised …
>
> If no instance can be found in the history of constitutional government in which a nominated Council has attempted to amend an Appropriation Bill, it is because no similar case has ever arisen …
>
> … in the amendment of all Bills the Constitution Act … confers on the Legislative Council powers co-ordinate with those of the Legislative Assembly, and … the annexing of any clause to a Bill of supply, the matter of which is foreign to and different from the matter of said Bill of supply, is unparliamentary and tends to the destruction of constitutional government, and the item which includes the payment of members' expenses is of the nature of a tack.'[271]

[267] *Queensland Parliamentary Debates*, Legislative Council, 1885, 238-39 (F. T. Gregory).
[268] *Queensland Parliamentary Debates*, Legislative Council, 1885, 240-41. As discussed in Chapter 2, Todd's interpretation of accountability owed solely to a lower house was probably not a correct interpretation of how even the British Constitution was operating at this time.
[269] *Queensland Parliamentary Debates*, Legislative Council, 1885, 241-42, 248.
[270] *Queensland Parliamentary Debates*, Legislative Council, 1885, 248-250.
[271] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1570.

In the debate which ensued in the Assembly that day, Griffith set out his view of the operation of political accountability of government in both the United Kingdom and the colony of Queensland:

> 'It has generally been admitted that in British colonies in which there are two branches of the Legislature the legislative functions of the Upper House correspond with the House of Lords, while the Lower House exercises the rights and powers of the House of Commons. This analogy is recognised in the Standing Orders of both Houses of the Parliament, and in the form of the preamble adopted in Bills of Supply, and has hitherto been invariably acted upon.
>
> For centuries, the House of Lords has not attempted to exercise its power of amending a Bill appropriating the public revenue, it being accepted as an axiom of Constitutional Government that the right of taxation and controlling the expenditure rests entirely with the Representative House …
>
> The Legislative Assembly maintain, and have always maintained, that (in the words of the resolution of the House of Commons of 3rd July, 1678) all aids and Supplies to Her Majesty in Parliament are the sole gift of this House, and that it is their undoubted and sole right to direct, limit, and appoint, in Bills of aid and Supply, the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which ought not to be changed or altered by the Legislative Council. For these reasons it is manifestly impossible for the Legislative Assembly to agree to the amendments of the Legislative Council in this Bill.'[272]

He argued that no instance could be found in the history of constitutional government in which a nominated upper house had attempted to amend an appropriation bill.[273] As discussed in Chapter 2, this was probably not correct, and Chapter 4 will discuss how Griffith took a different approach during the 1891 Conventions, arguing that responsible government was a new and evolving concept that potentially included accountability to *two* parliamentary chambers. In 1885, however, as Premier of a ministry which wished to be effective in getting its legislative agenda through parliament, he maintained that accountability lay solely to a lower house.

[272] *Queensland Parliamentary Debates*, Legislative Assembly, 1870, also referring to Todd's work on government in the colonies in support of his arguments.
[273] *Queensland Parliamentary Debates*, Legislative Assembly, 1570. This position was also reflected in a message from the Assembly (from the Speaker, Groom) to the Council communicated on the same day: *Queensland Parliamentary Debates,* Legislative Council, 255.

The Council simply responded that its position was not analogous to that of the House of Lords.[274] Further, it claimed that the Lords had simply not had occasion to use its power to amend an appropriation bill, not that it did not possess such a right.[275] As discussed in Chapter 2, this is probably closer to the actual truth of the matter, as Erskine May's treatise on British parliamentary practice explained. The Council observed that the constitutional practice in the United Kingdom was far from clear anyway, correctly understanding that the law of the British Parliament was not immediately applicable to a local legislature, a matter the Privy Council had confirmed in 1858.[276] The Judicial Committee found then that the law of the British Parliament had not been inherited in the British colonies and that the law of the local constitutions applied.[277] The consequence of this was that it could not be assumed that the law of the British Parliament necessarily applied to a local constitution. The local legislature had to have specifically adopted British parliamentary practice, either through its constitution or through a resolution of the local legislature to that effect.

Ultimately, the Council stuck to its view that the Ministry's attempt to tack the grant to the appropriation bill was unconstitutional and that it tended to the 'destruction of constitutional government'.[278] The Council remained insistent that the Constitution conferred upon it powers co-ordinate with those of the Assembly.[279] Speaking in the Council on 12 November, one member said that he:

> 'was not desirous of claiming any greater privilege for the Council, or of objecting to any privilege for the other House either greater or less than properly belonged to them; and if it could be authoritatively ruled that they had not the power to amend an Appropriation Bill he would be perfectly satisfied, because then the responsibility would be removed from them. At present they felt that the responsibility rested on them, and that they would be wrong if they passed the matter over without exercising the discretion which had been placed in their hands. If they were to adopt the contention of the Legislative Assembly in their last paragraph [of the Assembly's sole right to amend money bills] it would follow that they would have no discretionary power, even of negativing the Bill. Such a contention, if carried out, was

[274] This point was also made by the Legislative Council in South Australia. See the discussion on this point later in this chapter.
[275] *Queensland Parliamentary Debates*, Legislative Assembly, 1570.
[276] *Fenton v Hampton* (1858) 14 ER 727. The case and its *ratio* is also discussed below at 136-7 and note 333.
[277] *Fenton v Hampton* (1858) 14 ER 727, 745. This was affirmed by the Privy Council in *Dill v Murphy* (1864) 15 ER 784 (*Dill v Murphy*). See the discussion on these cases below at p. 128.
[278] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1570.
[279] Bernays, above n 245; Quick and Garran, above n 4, 74. The Council had amended money bills by this time anyway: Waugh, above n 18, 190.

> manifestly subversive of all constitutional government, because constitutional government meant government by the three estates. If they were to adopt it they would practically place themselves under the control of the Legislative Assembly alone, and they might save themselves a great deal of trouble by not appearing in the House.'[280]

A few days later, Griffith moved for the establishment of a Select Committee to consider the problem of there being no supply for the conduct of the affairs of government in the colony. The Council agreed to the Committee being set up. This proved to be a mistake. Griffith took the Committee Chair, and got it to refer the question of the rights and powers of both Houses with respect to money bills to the Privy Council for determination.[281] Parliament was prorogued and did not meet again until July the following year.

The case submitted to the Privy Council was whether the Council had powers co-ordinate with those of the Assembly, including in respect of the power to amend money bills.[282] Unfortunately for the Council, the Privy Council's answer was that the Council's powers were not co-equal with the Assembly and that it had no power to amend appropriation bills.[283]

The Council subsequently discovered that Griffith had submitted a letter with the case papers that were sent to London. The Council then attempted to withdraw from the agreement it had reached to refer the matter to the Privy Council. Griffith's letter included a statement to the effect that it was the opinion of the Assembly that the constitutional position of the Assembly and the Council was analogous to that of the Commons and the Lords.[284] Thus, on finding out that this communication had occurred and hearing the result of the Privy Council's decision, the Council sought to withdraw from the referral, arguing that Griffith had improperly sought to influence the Court. The Council then continued to assert its right to amend money bills.[285] Eventually a pragmatic compromise was reached. But Griffith had made his point: the lower house had greater powers than the Council to deal with money bills.

3. Conclusion: Political Accountability and the Upper House in Queensland

It is impossible not to appreciate the skill of Griffith as both lawyer and politician in winning a point that had been largely lost by the Assembly in Victoria, and lost (at least in theory) by

[280] *Queensland Parliamentary Debates*, Legislative Council, 1885, 258 (AC Gregory).
[281] *Queensland Parliamentary Debates*, Legislative Assembly, 1885, 1573, 1575.
[282] Ibid.
[283] Cited in Bernays, above n 245, 253.
[284] Cited in Bernays, above n 245, 251.
[285] Waugh, above n 18, 189; Melbourne, above n 37, 473-4. This was not formally changed until 1922, when the Council was abolished.

the Assembly in New South Wales. Notwithstanding the practical blow inflicted by Griffith on the Council, the conflict reveals that the Council had insisted that government obtain parliamentary approval for spending from *both* chambers. In support of its objections, it referred to constitutional practice in both the United Kingdom and in other Australian colonies on the principle and practice of parliamentary oversight of spending by the Queensland Executive and to the unconstitutionality of the practice of tacking. Its objection to tacking was also based on its insistence on its role as a house of review of ordinary legislation, adopting a position taken by upper houses in other Westminster-style systems, including the House of Lords and upper houses in both New South Wales and Victoria, in South Australia, too, as the next section indicates. What the Council had attempted to make clear was that it was a chamber that had a role to play in the review of all legislation, including financial legislation. What it had not contended with was that it would encounter a man of such astute political acumen as Samuel Griffith.

As noted, what is most intriguing about Griffith's role in seeking to restrain the powers of the Council to deal with money bills is that, no matter how staunch an advocate Griffith had been of the rights of the lower house alone to deal with financial legislation during his time as a parliamentarian in Queensland, by the time Griffith addressed the 1891 Constitutional Convention his view of political accountability and the doctrine of responsible government appeared to have shifted slightly. Although the specific reason for his change of opinion may never be known, the scholarly literature suggests that, as a representative of a smaller colony (one that risked being swamped by the opinions of the more populous colonies of New South Wales and Victoria), Griffith understood that he would have to lay open the way for the Convention to accept that political accountability could also be owed to the Senate,[286] and that such dual accountability was not unknown to Australia's systems of responsible government. In the next chapter I discuss how, by the time of the Conventions, Griffith certainly described responsible government as an evolving doctrine and suggested that responsible government could encompass political accountability to an upper house.[287] Whether he did this because his conflict with the Council in Queensland had promoted a greater understanding in him of the true complexity of the British picture of accountability to an upper house, or whether he shifted ground to represent the interests of his the smaller colony of Queensland in the new Federation, cannot be known absolutely. What is clear from the record of the Conventions is that Griffith

[286] Griffith's position and arguments on these points in the Convention Debates are discussed in Chapter 4.
[287] Ibid.

played a key role in promoting an understanding that accountability in a bicameral system based on the Westminster model could involve accountability to an upper house. This became a theme that other supporters of the role of a Senate with power to call the Commonwealth Executive to account would come back to time and time again during the Debates. Griffith certainly never mentioned the position he had taken against the Council in Queensland. As discussed in Chapter 4, this suggests a deliberate choice by Griffith (and others who supported his position) during the Debates to ensure accountability to the Senate, including in financial matters. As will be considered in that chapter, whilst federal concerns provided one reason for including political accountability to the Senate, Griffith also suggested to the Convention that it could also be done as part of incorporating concerns based on responsible government and accountability of the Commonwealth Executive to the Commonwealth Parliament.

Ultimately, the Council in Queensland used arguments similar to those deployed in New South Wales and Victoria to object to the Assembly's conduct in seeking to by-pass the Council's control of finance. It was however outplayed by an astute political operator in Griffith. The Council also suffered from the same limitation as its New South Wales counterpart, that of being a nominated chamber.

If the Queensland upper house suffered from this limitation in its composition, the South Australian upper house did not. Like its Victorian counterpart, its members were elected.

The next section provides an overview of the compromise reached between the Assembly and the Council in South Australia. My focus remains on the Council's insistence on retaining parliamentary control of finance. Although the Council appeared to reach a pragmatic solution in its relations with the Assembly in matters of finance (agreeing not to amend money bills but to only suggest amendments) it is clear that it insisted on its right to veto all legislation, ensuring that it retained its power of veto of spending and acting as a house of review. The compromise the South Australians reached formed the basis for the position reached during the Conventions on the powers of the Senate to deal with money bills.[288] Given the importance of the South Australian solution to the outcome reached during the Conventions on the Senate's powers

[288] The Compact of 1857 has been acknowledged as the model used by delegates at the Convention Debates for what became s 53 of the *Constitution*: Waugh, above n 18, 185; Deakin, above n 1, 147, 185; Clark, above n 4, 191, 180-185; Parkinson, above n 147, 189. The deadlock mechanism in the South Australian Constitution is also through to have formed the basis for s 57 of the *Constitution*. The South Australian model and its influence on delegates to the Conventions is discussed in Chapter 4.

over finance, it is necessary to take time to consider how that compromise was reached in South Australia and why.

D. The Upper House in South Australia

1. Background

The South Australian Constitution, like its counterparts in New South Wales and Queensland, was silent on the power of its Legislative Council to amend money bills.[289] In contrast to the position in New South Wales and Queensland, the two chambers of the South Australian Parliament reached an early agreement on how money bills would be dealt with by the Council. That agreement included that the Council would only suggest amendments to money bills (including appropriation bills).[290] Its power to veto all legislation remained untouched. This agreement eventually became known as the 'Compact of 1857'.[291] As noted, this compromise provided the model during the Conventions for what would become s 53 of the *Constitution*.[292] The South Australian model ultimately provided the framers of the *Constitution* with a model of accountability in which an elected upper chamber possessed a power of veto, but in which the details of financial legislation was left, in the main, to the lower parliamentary chamber.[293]

The drafting history of the South Australia Constitution included a push for an elected upper chamber.[294] The draft originally debated in South Australia included a clause which appeared to ensure the equality of the two chambers, except that money bills were to originate in the Assembly.[295] A leading constitutional law historian of the time outlined how the conservatives in South Australia saw the benefits of restraining the effects of democracy rather than

[289] All references to 'the Constitution' in this section are references to the Constitution of South Australia. References to primary sources (apart from newspapers) are primarily taken from Clark, above n 4 and Finniss, below n 289. Unlike other parliaments in Australia, South Australian Hansard is also not presently available online for sitting dates before 1986.

[290] *Minutes of the Legislative Council*, No 31, 25 August 1857, 77, item 2; Quick and Garran, above n 4, 66; see also Clark, above n 4, 174 and ff 192, 180-85; Deakin, above n 1, 185.

[291] Clark, above n 4, 172 and ff, 176-179, citing Sir Richard Graves MacDonnell to Labouchere, CO 13/96. The eventual resolution of the conflict was one in which both houses formally insisted on their interpretation being correct whilst compromising their respective rights in practice: Deakin, above n 1, 164.

[292] Above n 281.

[293] Discussed in Chapter 4.

[294] Elected on a limited franchise. For a history of the enactment of the South Australian Constitution and the electoral arrangements for each parliamentary chamber see Clark, above n 4, 148-152.

[295] *Votes and Proceedings of the Legislative Council*, No 14, 27 November 1855, 61 item 5; *South Australian Register*, 28 November 1858 (reported by George Kingston on the debate in the Legislative Council on the previous day): *Votes and Proceedings of the Legislative Council* No 52, 4 November 1853, 173 item 4. See also *Constitution Act No 2* of 1855-6, published in the *South Australia Gazette*, 25 October 1856, 965-969.

suppressing them altogether.[296] As a result, elected parliamentary chambers were preferred in South Australia.

By the time of responsible government in South Australia the SA Constitution provided for eighteen members in the Legislative Council, comprised from any man eligible to vote. A thirty-six member Legislative Assembly was elected on a broad male franchise.[297] Male voters were entitled to vote for either the Council or the Assembly subject to requirements to hold property.

A report produced by the old Council in 1853 on its powers admitted it had great difficulties defining what those powers were.[298] Once the new Constitution was enacted, the standing orders of both Assembly and Council stated that the practice of the British Parliament was the fall-back position for parliamentary procedure if no local Standing Order applied.[299] Rulings were also made by presiding officers to the same effect.[300] The problem was that those parliamentary procedures were not themselves certain. Given that, as discussed in Chapter 2, it was not entirely clear then that the Lords possessed no power of amendment of money bills, the stage was set for an argument. This anticipated the debates in the other two colonies whose constitutions were also silent on the power of the upper house to amend money bills (New South Wales and Queensland).

In the argument that ensued between the two chambers in South Australia, the Council, like its colonial Australian counterparts in years to come, insisted on its powers to hold the SA Executive to account, particularly in matters of finance. Although it ultimately conceded that it would not amend money bills, it also insisted on retaining its power of veto over them. Unlike its Victorian counterpart, however, the Council did not engage in the protracted deadlocks over

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[296] As to which see the history of the introduction of the South Australian Constitution discussed in BT Finniss, 'Constitutional History of South Australia' [1886] AU Col Law Mon 1, 557-59. Finniss was author of one of the key works on South Australia's colonial history referred to by constitutional law scholars. He was the first head of government in 1857 and took a leading role in writing the Constitution Act 1856. He sat in Parliament in 1865 and published his account of the events of 1857 in 1886.

[297] *Constitution Act 1855-56* (Vic).

[298] *Privileges of the House*, 8 November 1853 in *South Australian Parliamentary Papers* No 84 of 1853.

[299] Standing Order 1 of the House of Assembly: 'In all cases not hereinafter provided for, resort shall be had to the rules, forms and practice of the Commons House of the Imperial Parliament, which shall be followed as far as they can be applied': *Report of the Select Committee of House of Assembly Standing Orders*, 9 June 1857, in *South Australian Parliamentary Papers* No 61 of 1857-58. The Standing Orders of the previous Parliament contained a similar clause: see *Draft Standing Orders of the Legislative Council*, 14 November 1861 in *South Australian Parliamentary Papers* No 201 of 1861.

[300] *South Australian Parliamentary Debates*, House of Assembly, 11 October 1877, 1245; *South Australian Parliamentary Debates*, Legislative Council, 19 June 1860, 236.

supply that would be experienced there because both parliamentary chambers approached the resolution of deadlocks in the colony in a spirit of compromise. What I am interested in for the purpose of this thesis is the extent to which the Council revealed an understanding that the South Australian Parliament was not a carbon copy of the Westminster system on which it had been modelled. In the dispute over its powers to deal with money bills, the Council made constant reference to its role as an elected upper house with a real role to play in holding the executive to account and retaining control of finance. Members of the Council were particularly aware of how the different composition of the Council as an elected chamber, in comparison to the unelected House of Lords, gave the Council legitimacy in its claim to have powers of review of *all* legislation. Further, many members of the Council indicated an understanding that, in the United Kingdom at this time, the idea that a ministry was never accountable to an upper house was not an accurate reflection of British parliamentary practice. I examine the insistence of South Australian parliamentarians on the practice of dual political accountability in a unitary system, part of its motivation for the perception of its role in ensuring that parliament retained control of spending by the South Australian Executive.

2. The Compact of 1857

The first major clash between the Assembly and the Council regarding the Council's powers to deal with money bills occurred in 1857 and, as noted, resulted in what became known as the Compact of 1857.[301] Although Garran later concluded that the Council only agreed to the Compact as a matter of pragmatism,[302] it is still useful to examine the arguments that the Council put forward about its role of review and its function to control public finance. I am interested particularly in objections taken by the Council to how the South Australian Executive sought to undertake spending. Like their counterparts in the other colonies, the Council in South Australia was a strong advocate for the importance of the role of the upper chamber in upholding the principle of parliamentary control of finance.

In the first session of the new South Australian Parliament under self-government, the Legislative Assembly passed a bill to repeal tonnage duties on shipping and to authorise the leasing of wharf frontage at Port Adelaide. Existing legislation had authorised a loan to pay for

[301] It had also been referred to as a compromise, an agreement and a contract. Clark explains that it became known as the Compact by 1863: see Clark, above n 4, 172, citing *South Australian Parliamentary Debates*, Legislative Council, 5 November 1873, 954; *President's Opinion on Question of Privilege*, 1 July 1874, *South Australian Parliamentary Papers* No 123A of 1874; *Votes and Proceedings of the House of Assembly*, No 75, 15 September 1863, 247-248, item 16. The Compact was discussed by Todd in his work on government in the colonies: see Todd, above n 4, 711-716.

[302] Quick and Garran, above n 4, 66-67.

improvements to the Port.[303] Unfortunately, a related levy raised little money to service the loan. The purpose of the repeal bill was to replace the levy with finance raised through leasing wharf space.[304] The bill was sent to the Legislative Council for its approval after passing the Assembly.[305]

The Council refused to pass the bill based on two separate objections. The first objection was a policy one: that the Council did not believe the lease would raise sufficient funds. The second objection was constitutional in nature: that it was contrary to constitutional practice and to a resolution of the Council to combine in a single bill two unrelated spending proposals, that is, the bill was unconstitutional since it tacked substantive legislation to a money bill.[306] As discussed in Chapter 2, this practice of tacking had been objected to by the House of Lords, and the practice became the source of conflict in Queensland, and a major point of conflict in Victoria.

John Baker, a member of the Council, argued that a message should be sent to the Assembly on the constitutional objection to tacking to the effect that 'the Legislative Council expressed no opinion unfavourable to the repeal of the tonnage dues, but simply desired to avoid legislation upon two subjects in one Bill'. More controversially, as it would turn out, he added that the powers of the Council, even though limited, did not mean that the Council might not

[303] *Votes and Proceedings of the Legislative Council*, No 69, 14 December 1854, 205 item 3. For a comprehensive account of the legislation see Finniss, above n 296, Chapters 12 and 13.

[304] Second Reading Speech, 30 April 1857, 53-54; *South Australian Parliamentary Debates*, Legislative Council, 19 May 1857, 117.

[305] Unfortunately, during the conflict of 1857, the Hansard for the chambers was only a summary. In 1863 and 1864 no Hansard was published at all. This means that historians have had to resort to newspaper reports at the time, reports which were criticised by members of the Parliament as being inaccurate. See the discussion on the problem of finding accurate records of the conflict discussed in Clark, above n 4, 153-154 and ff 58. In the end, the Assembly commissioned a full report of the Debates on the 1857 conflict and published it as a parliamentary paper which, rather unhelpfully, only covers the debate in the Assembly on one day: see *Report of the Debate in the House of Assembly on Question of Privilege* in *South Australian Parliamentary Papers* No 101 of 1857-58 (record of debate in the Assembly on 22 July 1857); and resolution in *Votes and Proceedings of the Legislative Council*, No 31, 28 July 1857, 115 item 5.

[306] *Minutes of the Proceedings of the Legislative Council*, No 14, 9 June 1857, 90 item 8, relying on Order no 78 passed in 1851 by the Council to that effect: see *Standing Orders of the Legislative Council of South Australia*, APP of 1851. See also instructions to the new Governor of the colony (R G MacDonnell) in *Governor in Chief: New Commission and Instructions*, 22 February 1858 in *South Australian Parliamentary Papers* No 17 of 1848, 4. *Appointment of Sir R G MacDonnell*, *South Australian Parliamentary Papers* No 78 of 1855, 7; *Governor-in-Chief: New Commission and Instructions* and *Sir D Daly's Commission and Instructions*, 21 May 1862, South Australian Parliamentary Papers No 41 of 1862, 3. A member of the Council objected to the conduct of the Assembly in attempting to legislate by resolution and, in doing so, bypass the upper house altogether: see objection by Mr Younghusband, *South Australian Parliamentary Debates*, Legislative Council, 10 June 1857, 242-248 and *Minutes of the Legislative Council*, No 15, 10 June 1857, 35 item 4. See also A Inglis Clark, *Studies in Australian Constitutional Law* (Melbourne, G Partridge and Co, 1901), 157.

alter a money bill.[307] He said that upper houses in the other colonies had altered and amended many money bills, and this process had been acceded to by the lower chambers there.[308] The Assembly's response to this assertion of the Council's powers was emphatic. It argued that the Council had no right to amend a money bill at all and that to do so was a breach of the Assembly's privileges.[309] In turn, the Council insisted that it had a constitutional right to amend all bills, including money bills.[310]

The President of the Council responded that the source of the Council's power was the Constitution and it gave the Council as much control over a money bill as the Assembly did. This included rights to modify such legislation.[311] Apart from arguing that no analogy could be drawn between the Council and the Lords, the President also noted that the Lords had amended money bills, and those amendments had been accepted by the Commons.[312] This shows an understanding by a leading Councillor that the British Executive was accountable to the Lords in matters of finance at this time. It also suggests that Australian parliamentarians had a detailed knowledge of the complexities of the continuing struggles occurring in the mid-19th century between the Commons and the Lords, in keeping with the type of detailed account provided by Erskine May on how accountability was operating under the British Constitution at the time.

The President also concluded that no analogy could be drawn between the Council and the Lords in any event. A principle that an upper chamber does not interfere with money bills:

> 'cannot apply to this colony and confer a greater right upon the House of Assembly as to dealing with Money Bills than the Legislatives Council, each being equally the elected representatives of the people, and each possessing by consequence the same authority and control over the finances of the colony. The duty of each House is equal; both are bound as representatives of the people to protect their interests, and if either neglect to do so it would be a dereliction of their duty. If the power of the two Houses here is equal, then the supposed analogy to the Imperial Parliament is not maintainable, nor if it were could it have the effect of varying that power, and giving to one House a greater authority than the other.'[313]

[307] Cited in Finniss, above n 296, 496.
[308] Ibid.
[309] *Votes and Proceedings of the House of Assembly*, No 24, 10 June 1857, 94 item 9. See also Finniss, above n 296, 497.
[310] Quick and Garran, above n 4, 66.
[311] 16 June 1857, *Legislative Council*, James Hurtle Fisher, reported in Finniss, above n 289, 499.
[312] Cited in Finniss, above n 296, 507.
[313] Cited in Finniss, above n 296, 508.

This theme of the upper house being a house of co-ordinate legislative importance and power had already presented itself in the conflicts in other Australian colonies. One of the distinctions the President sought to make in South Australia was later relied upon by the Victorian Council: that, as an elected chamber, the Council also acted as representatives of the people. In Chapters 5 and 6 I discuss how this theme of co-ordinate legislative power, and lack of direct analogy between an Australian Constitution and its British forebear, has now become a key part of the reasoning of the High Court in decisions on the Senate's role in controlling spending, particularly because the Senate is also an elected upper house. As the following demonstrates, its theoretical foundations are rooted deep in Australia's colonial constitutional history.

In South Australia, members of the Council provided details of their reasoning on upper house power to amend money bills, producing a report detailing the Council's powers to deal with legislation, with specific reference to its power over money bills.[314] The Report concluded that the South Australian Constitution provided the only limitation on the Council's power over money bills, namely, that it could not originate them.[315] This meant that the powers of the Council were in other respects 'co-extensive and co-equal' to those of the lower house to deal with all legislation.[316] The Report referred to both American and British constitutional practice to support the idea that the Council had power to amend all legislation. The Report is important because it clearly referred to the idea that, as an elected upper chamber, the Council's powers were more analogous to the powers afforded to the American Senate (which the report said included the right to deal with the detail of money bills) than it did to the British House of Lords.[317] It said that no analogy was applicable between the Council and the Lords because the

[314] *Minutes of the Legislative Council*, No 17, 16 June 1857, 40 item 6.
[315] Ibid.
[316] *Minutes of the Legislative Council*, No 17, 16 June 1857, 40 item 6. The Report made reference to the Constitutions of New South Wales and Tasmania and argued that the upper houses in those colonies had the ability to make amendments to money bills, and that such a power had been *accepted* by the lower houses in each of those respective parliaments: *Minutes of the Legislative Council*, No 17, 16 June 1857, 40 item 6. The Report also contrasted the South Australian Constitution with Victoria's Constitution (which expressly provided that the upper house could not make amendments); the inference being that, given the absence of such a prohibition in the South Australian Constitution, the Council must possess a power of amendment.
[317] *Minutes of the Legislative Council*, No 17, 16 June 1857, 40 item 6. The point being made by the Council was that the parliamentary systems in colonial constitutions were regulated by their own constitutions, not by the law of the British Parliament. This position was supported by the Privy Council in its decision in *Fenton v Hampton* (1858) 14 ER 727 and in a legal opinion cited in *South Australian Parliamentary Debates*, Legislative Council, 17 June 1857, 302-303 (opinion originally set out in George Chalmers, *Opinions of Eminent Lawyers on various points of English Jurisprudence* (1858), 264-67). Warnings had also been issued by the Colonial Office to South Australian officials that analogies between the British Houses of Parliament and the chambers in the Australian colonies were not apt: see *Governor-in-Chief: New Commission and Instructions*, 22 February 1858 in *South Australian Parliamentary Papers* No 17 of 1858, 4 (instructions for MacDonnell) and repeated in *Sir D Daly's*

Lords, unlike the Council, was not an elected body.[318] Further, it said that the Lords had not formally conceded that they could not amend money bills in any event.[319] It also noted important support from the Privy Council to the effect that the privileges of colonial parliaments and those of the United Kingdom were not the same, as well as instructions to the Governor from the Colonial Office to the same effect.[320] The Council ultimately argued that British parliamentary privileges did not have the force of law in South Australia and that the Council had equal powers to the Assembly conferred upon it by the Constitution itself in all things, save that it could not originate money bills.[321] The Council thus insisted that it was not precluded from amending money bills and reviewing such legislation.[322]

The response of the Assembly to the Council's Report was to establish a Select Committee which found (unsurprisingly) that an analogy *could* be drawn between the Council and the House of Lords.[323] The Assembly asserted that it was in an analogous position to the Commons and that the Commons had clearly asserted its sole right of amendment over money bills as long ago as 1678.[324] As discussed in Chapter 2, this view of the actual operation of the British

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Commission and Instructions, 21 May 1862, *South Australian Parliamentary Papers* No 42 of 1862, 3, both cited in Knox, above n 176, 522 and sourced cited in ff 43.

[318] *Votes and Proceedings of the Legislative Council* No 52, 4 November 1853, 174 item 4; Clark, above n 4, 158-59, 161-62; Cramp, above n 136, 90; Deakin, above n 1, 149, 152. The argument was that, as an elected body, the Council enjoyed the privileges of the House of Commons to deal with money bills: The Council also supported this view: see *South Australian Parliamentary Debates*, Legislative Council, 10 June 1857, 243. The Council also argued that its powers came from a written constitution, whereas the House of Lords' powers came only from an unwritten one: *South Australian Parliamentary Debates*, Legislative Council, 9 June 1857, 226, 290, 293, 315, 316; *Reasons Offered at Conference on Money Bills*, 25 August 1857, *South Australian Parliamentary Papers* No 145 of 1857-58, para 3. Interestingly, the original draft for the Constitution appeared to provide co-ordinate power to both chambers, until Sir Charles Kingston moved amendments to provide that money bills could only be introduced through the lower house: Deakin, above n 1, 149.

[319] See *Report from the Select Committee to search the Journals of the Houses of Parliament to ascertain the Practice of Each House with regards to Bills imposing or repealing Taxes*, 29 June 1860, United Kingdom, House of Commons, Session 1860, Paper No 414 (Volume XXII page 1). As discussed in Chapter 2, this was most probably a correct statement of the position in Great Britain at the time.

[320] Citing *Fenton v Hampton* (1858) 14 ER 727 and *Governor-in-Chief: New Commission and Instructions*, 22 February 1858 in *South Australian Parliamentary Papers* No 17 of 1858, 4 (instructions for MacDonnell) and *Sir D Daly's Commission and Instructions*, 21 May 1862, *South Australian Parliamentary Papers* No 42 of 1862, 3. See also Knox, above n 176, 522.

[321] *Minutes of the Legislative Council*, No 39, 22 September 1857, 93-94, item 4, para 1; *South Australian Parliamentary Debates,* Legislative Council, 10 June 1857, 243; Clark above n 4, 165.

[322] *Minutes of the Legislative Council*, No 39, 22 September 1857, 93-94, item 4, para 1; Clark, above n 4, 163.

[323] A position taken by the Assembly as well: see *South Australian Parliamentary Debates*, House of Assembly, 10 June 1857, 250; Clark, above n 4, 167. The Assembly relied upon Erskine May (3rd edition 1855, 426) to support its position: *South Australian Parliamentary Debates*, House of Assembly, 10 June 1857, 250; *Reasons on Privilege*, 4 November 1857; *South Australian Parliamentary Papers* No 183 of 1857-1858.

[324] Relying upon a resolution passed by the Commons in 1678 on 3 July to the effect that all supplies were the sole gift of the Commons, and that any provisions dealing with any grants 'ought not to be changed or altered by the House of Lords': 9 *Journal of the House of Commons* 509 (3 July 1678). The passage was cited by Erskine

Constitution is highly unlikely. That the position in Britain was more debatable was acknowledged by one member of the Assembly in the course of debate, noting that the Lords had made changes to money bills and that the Commons had, in recent times, acquiesced in that practice.[325] Notwithstanding this acknowledgment, the Assembly insisted that the Commons had always denied the Lords any right to amend money bills and that, since the Assembly was given power to originate money bills, it followed that it alone had the power to amend them.[326] The Assembly also comprehensively rejected any analogies to upper houses in the United States where, it argued, upper houses had no powers of amendment over money bills anyway. [327] It steadfastly asserted that the right to initiate money bills conferred a right to alter such bills, and that such a right was free from change or alteration by the Council.[328]

In the period that followed, the Council unsuccessfully called for a legal opinion on the matter from the Attorney-General and the Crown Solicitor.[329] The Governor expressed his view that no opinion should be proffered by him on the position at all.[330] The Colonial Office chose not to intervene either, the view being that, since the South Australians had created their Constitution, they should either abide by its terms or amend it.[331]

The Council maintained its right to amend money bills and soon proposed the compromise which was to eventually become the Compact.[332] On 25 August 1857, the Council passed relevant resolutions in the following terms to send to the Assembly:

May in the 3rd edition of his work in 1855, 426. This was the same argument Griffith used in 1885 in Queensland to support his argument on the supremacy of the Assembly, particularly in respect of finance, in that colony.

[325] Babbage, *South Australian Parliamentary Debates*, House of Assembly, 23 July 1857, col 373 citing G Bowyer, *Commentaries on Constitutional Law* (2nd ed, 1846).

[326] *Minutes of the Legislative Council*, No 55, 19 November 1857, 131 item 4.

[327] *South Australian Parliamentary Debates*, House of Assembly, 23 July 1847, 399, 342, 343. This was not correct – as to which see Clark, above n 4, 168, pointing out that James Madison had already recorded the rights of upper houses to amend money bills in his work on the American Constitution.

[328] *Votes and Proceedings of the House of Assembly*, No 28, 22 July 1857, 110 item 2.

[329] With the Executive Council and the Law Officers expressing the opinion that neither they nor the Governor could provide advice on an intra-Parliamentary dispute: see Message No 3, *Minutes of the Legislative Council*, No 29, 11 August 1857, 73 item 2. For a complete account of how the matter came to be referred and resolved see Finniss, above n 296, Chapter 13.

[330] Despatch from MacDonnell to Labouchere, 11 September 1857, *Amendment of Money Bills*, 11 August 1863, *South Australian Parliamentary Papers* No 88 of 1863.

[331] Official Correspondence between Governor MacDonnell and BT Finniss, *Minute by Executive Council advising Governor on Privilege between the two houses in South Australia,* State Records Office, GRG 24/21/92/20, cited in Finniss, above n 296.

[332] *Minutes of the Legislative Council*, No 26, 4 August 1857, 61-62 item 6. The Council proposed a conference of the two houses: *Proposed Conference Respecting Money Bills*, *South Australian Parliamentary Papers* No 11 of 1857-58. Minutes of the Legislative Council, No 26, 4 August 1857, 61-62 item 6. The Ministry (led by Boyle Finniss) resigned. The Finniss Ministry was replaced by a Ministry led by John Baker, a member of the Council.

> '3. That the Constitution Act empowers it to originate any Bills which it may think necessary for the order and good government of the colony except Money Bills, which can only be originated in the House of Assembly.
>
> 4. That [the Council] has the power to consider and discuss all Bills transmitted to it by the House of Assembly, and to alter, modify, or reject such Bills; that the House of Assembly has similar power with reference to all Bills sent from this Council, and that the powers of the two Houses of Legislature are concurrent, except as to the origination of Money Bills,
>
> 5. That it is empowered to revise all Money Bills passed by the House of Assembly with a view of checking, and if necessary of reducing the taxation of the country; and that such power, judiciously exercised, will operate more for the benefit of the colony than the power of voting to which the House of Assembly is desirous of restricting it …
>
> 7. That the limited power of saying ' yes ' or ' no ' to a Money Bill—of absolutely passing it in its entirety, or rejecting it in its entirety—is inconsistent with the advanced position of this colony in political rights; that such a restriction of power was not contemplated by the constituency who elected the members of this Council, and that this Council would be wanting in fidelity to that constituency and to the country were it to admit such restriction …'.[333]

The compromise reached was that the Council would not amend money bills, but could 'suggest amendments' to the Assembly.[334] The solution was proposed by John Baker, the father of Richard Baker, one of the leading delegates from South Australia to the Conventions.[335] In it, the Council insisted on its 'full' constitutional 'right' to amend money bills.[336] It reiterated that British parliamentary practice did not have the force of law in Australia and that the

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The Baker Ministry then resigned on 1 September 1857 and was replaced by the Torrens Ministry. Torrens lost office and was then replaced by a ministry led by Richard Davies Hanson, the Attorney-General.

[333] Reported in Finniss, above n 296, 540-543.

[334] *Minutes of the Legislative Council*, No 31, 25 August 1857, 77 item 2, Clause IV. Quick and Garran, above n 4, 66.

[335] Richard Baker would become one of leading delegates to the Convention Debates, particularly in respect of his contributions on the need for a line of political accountability of the Commonwealth Executive to the Senate. Baker's influence is discussed in Chapter 4. See Finniss, above n 296, 553. During the Debates Baker, along with his South Australian colleague Charles Kingston, proposed the South Australian compromise as a solution to resolve the conflict regarding the power of the Senate to deal with money bills. As noted above, this compromise formed the basis for s 53 of the *Constitution*. This is also discussed in Chapter 4.

[336] *Minutes of the Legislative Council*, No 31, 25 August 1857, 77 item 2, Clause V. This clause contained a special rule to apply to appropriations that dealt with the ordinary annual services of government where, if the upper house objected to the Bill, it could demand a conference with the lower house; Quick and Garran, above n 4, 66. The Council said that it would not insist upon its right in the present instance: see Finniss, above n 296, 544. For a full account of the message between the two houses which eventually led to a conference to resolve the matter see Finniss, above n 296, Chapter 13.

respective parliaments were not analogous.[337] The Council was making clear that its compromise was pragmatic, and not one that could amount to a concession of its actual powers.

The spirit of pragmatism appeared to carry to the Assembly as well, with the Assembly continuing to assert its right to sole powers of amendment of money bills, but accepting the Council's proposal 'for the present'.[338] The ultimate resolution of the conflict was, therefore, that each House would formally insist on the correctness of its interpretation of the powers of the Council over money bills, while compromising the right of the Council to amend money bills in practice.[339]

The following year, the Judicial Committee of the Privy Council handed down its decision in *Fenton v Hampton.*[340] I do not engage in a broader examination of the decision in this thesis since the only point of relevance of this case for present purposes is the ratio from the case that the law of the British Parliament had not been inherited in the British Colonies, where the law of the local constitutions applied instead.[341] It seemed that the Council had solid ground for its argument that the source of its power was the local constitution, not parliamentary practice in Great Britain.

After *Fenton*, steps were taken to attempt to pass legislation to determine the privileges of each house in the colony.[342] Unfortunately, the resulting legislation did not deal with the powers of

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[337] *Minutes of the Legislative Council*, No 39. 22 September 1857, 94-94, item 4, para 1; *Reasons Offered at Conference on Money Bills*, 29 September 1857, *South Australian Parliamentary Papers* No 145 of 1857-58. What happened at the Conference itself is not known since the proceedings were held in camera with no record of the debate.

[338] *Minutes of the Legislative Council*, No 55, 19 November 1857, 131 item 2; *Votes and Proceedings of the House of Assembly*, No 81, 17 November 1857, 260-62 item 9.

[339] Deakin, above n 1, 164.

[340] *Fenton v Hampton* (1858) 14 ER 727. There is nothing in either the facts or the reasoning in Fenton of relevance to this thesis. The same applies to the decision in *Dill v Murphy*. The facts in each relate to questions of contempt of parliament. The relevant principle in Fenton is that the lex Parliamenti 'applies exclusively to the House of Lords and House of Commons, in England, and is not conferred upon a Supreme Legislative Assembly of a Colony, or Settlement, by the introduction of the Common Law of England into the Colony … No distinction in this respect exists between Colonial Legislative Councils, and Assemblies whose power is derived by grant from the Crown, or created under the authority of an Act of the Imperial Parliament.' The relevant findings in *Dill v Murphy* included that 'The Legislative Assembly of Victoria was constituted by the Colonial Act of 1854, which Act was ratified and set out in the schedule to the Imperial Act of Parliament, 18th and 19th Vict. c. 55. By sec. 35 of the Act of 1854, the Legislature of Victoria is empowered to " define " the privileges, immunities, and powers, to be held, enjoyed, and exercised by the Council and Assembly, and by the Members thereof respectively.'

[341] Ibid, 745; affirmed in *Dill v Murphy* (1864) 15 ER 784. See above n 332 for further detail on this case.

[342] *Report of the Committee of the House of Assembly*, 9 September 1858 in *South Australian Parliamentary Papers* No 52 of 1858.

the houses with respect to money bills or their relations with one another.[343] This meant that the possibility of further conflict on the powers of the Council to amend money bills remained. Attempts, however, to diverge from the Compact were resisted, successfully as events unfolded.

3. Later Disagreements

Clark has suggested that (from the available evidence) the Compact was abided by for the best part of the ensuing five decades.[344] In both 1868 and 1874 questions were raised about whether the Compact was still applicable. Ultimately, these did not go anywhere, and the Compact was adhered to.[345] In the 1870s, attempts to change the Compact were ultimately rejected.[346] A conflict in 1874 brought about an insistence on adherence to the Compact, with the Council being asked by the Assembly to respect that it should only suggest amendments.[347]

In 1874 the Council amended a Loan Bill presented by the Assembly and the Assembly disagreed with the change. George Kingston, the Speaker of the Assembly (and father of Charles Kingston), drafted a minute in response to an opinion of the President of the Council[348] in which he argued that the Compact remained in force.[349] Kingston set out how the Council

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[343] *Parliamentary Privilege Act No 9* of 1858 (SA). The Act primarily dealt with the lack of power the Privy Council had considered in *Fenton* (namely, a lack of power to hold persons in contempt of the local parliament).

[344] For example, in December 1857 the annual appropriation bill was passed by the Council with minor amendments. The Council sent a message to the Assembly that it desired the concurrence of the Assembly to the proposed amendments. The Assembly allowed the amendments on the basis that they did not alter the intentions of the Assembly: see *Minutes of the Legislative Council*, No 64, 17 December 1857, 320 item 8 and Minutes of the Legislative Council, No 65, 22 December 1857, 155 item 5; *Votes and Proceedings of the House of Assembly*, No 99, 17 December 1857, 320 item 8. Clark has provided a summary of the conduct of the respective Houses: see Clark, above n 4, 174-175 an ffs 196-200, detailing with acceptances and rejections of suggested amendments from the Council by the Assembly, as well as withdrawals of parts of legislation which had been the subject of requested amendments.

[345] *South Australian Parliamentary Debates*, Legislative Council, 19 November 1868, 863-864, 866; *President's Opinion on Privilege*, 1 July 1874, *South Australian Parliamentary Papers* No 123A of 1874, 2; *Minutes of the Legislative Council*, 1 July 1874, No 13 item 28. In 1878, George Kingston had said that no clause in the Constitution either 'directly or indirectly confers superior rank or dignity on one House over the other': see Letter by Speaker Kingston to the President of the Legislative Council, January 1858 in *Accommodation for Members of the House of Assembly*, 20 January 1858, *South Australian Parliamentary Papers* No 237 of 1857-58.

[346] Including by the Legislative Assembly: Clark, above n 4, 172.

[347] Clark, above n 4, 174.

[348] *President's Opinion On Question of Privilege*, 1 July 1874, *South Australian Parliamentary Papers* No 123A of 1974, 2 para 14. The President had already actually expressed the opinion that the Compact was still in force anyway.

[349] *Speaker's Minute re Loan Bill*, 1874, South Australian Parliamentary Papers, No 153 of 1874, 2; *Votes and Proceedings of the House of Assembly*, No 31, 16 July 1874, 164 item 10. Kingston may have been responding to matters raised in the Council seeking an opinion on whether the Compact was still in force: see *South Australian Parliamentary Debates*, Legislative Council, 7 July 1874, 807-810. The Attorney-General at the time, Charles Mann, expressed the view that technically the Compact was not binding as no parliament could bind a subsequent parliament, but since the Assembly had not revoked its prior resolutions on the matter, they were still binding: *South Australian Parliamentary Debates*, House of Assembly, 25 June 1874, col 686. George

had dealt with money bills since 1857 (that is, suggesting amendments only) and he cautioned the Assembly not to be pressured into making amendments or to producing a new bill.[350] The Assembly withdrew the Bill and introduced a new one. The Council considered it and forwarded to the Assembly 'suggestions for amendment'.[351]

The Council eventually resolved the possibility of a conflict by passing the bill on the basis that the bill dealt with a matter of urgent public interest.[352] It is likely that the effect of the 1874 skirmish was to cement the Compact since, after that, the Legislative Council restricted itself to making suggestions for amendments to money bills.[353]

The last major disagreement in South Australia occurred in 1881 when a protracted conflict between the Assembly and the Council took place over reform of the upper house itself.[354] Although South Australia had not experienced protracted conflicts like those in Victoria, the Victorian experience provided a sufficient warning to South Australian parliamentarians of what an elected upper chamber with a power to veto supply could do if it so chose.

The Assembly passed a bill to amend the Constitution that included a deadlock provision to resolve disputes between the two Houses.[355] The mechanism provided that, if the Council blocked the same bill before and after a general election of the Assembly, the Governor could either dissolve both chambers or call elections of new members in each of the Council's electorates. This provided an incumbent government with a chance to win a few more seats in

Kingston lobbied for the provision in the South Australian Constitution that money bills were to originate in the Assembly. Kingston was elected to the Legislative Council in 1851 and was Speaker of the Legislative Assembly from 1857 – 1860 and again from 1865 to 1880. As noted, Kingston was the father of Charles Kingston, one of the leading advocates during the Convention Debates for the Senate to have the power to review all legislation (including money bills) of the Commonwealth (discussed in Chapter 4). Up until 1911: see Clark, above n 4, 177. Charles Kingston was the likely architect of the suggestion that the South Australian Compact be adopted as a means of resolving the major impasse that arose at the Conventions.

[350] *Votes and Proceedings of the House of Assembly*, No 31, 16 July 1874, 162.

[351] *Minutes of Legislative Council*, No 24, 4 August 1874, 51-52 item 6.

[352] *Minutes of Legislative Council*, No 24, 4 August 1874, 51-52 item 8.

[353] By 1887, the Deputy Speaker of the Assembly concluded that the Compact could not be set aside other than by a resolution of the Assembly itself: *Votes and Proceedings of the House of Assembly*, No 59, 10 November 1887, 301. From 1874 onwards the Council adhered to the Compact and only suggested amendments to appropriation bills: Clark, above n 4, 177.

[354] Waugh, above n 18, 191 and ff 30; Quick and Garran, above n 4, 66.

[355] The Bill provided for the Governor to effect a dissolution of both Houses or for the Governor to issue writs for the election of one or not more than two new members to the Legislative Council in the event that the bill had passed in two sessions of parliament, one before and one after an election of the Assembly, provided that the bill had been either rejected by the Council or had 'failed to become' a law of the legislature: see Quick and Garran, above n 4, 67.

the Council without the need to go to another general election.[356] Where a double dissolution did not change the majorities in the parliament, the deadlock mechanism attempted to provide a final step to achieve resolution through a joint sitting of both Houses.[357] This mechanism for a double dissolution would also be discussed at the Conventions.[358]

Waugh has concluded that, whatever perceived increase in power was created for the Assembly by its insistence on the adherence to the Compact and the eventual passage of the deadlock mechanism, the position of the Council as a conservative check on legislation of the Assembly remained largely intact during the 19th century.[359] The last conflict did not ultimately change the power of the Council to deal with money bills. The ramifications of the reforms on the powers of the Council were not lost on Councillors, even if the reform was not about the powers of the Council over money bills *per se*. Councillors perceived that the proposed deadlock reform could undermine the powers of the Council to use denial of supply as a sanction, since its members could now be forced to face political consequences (a ballot) if they chose to block legislation approved by the Assembly.[360] Ultimately, the Council stuck to the Compact and passed the bill. It seemed the spirit of compromise that had been the hallmark of South Australian politics was set to continue. As discussed in Chapter 4, the South Australian (and Victorian) model of political accountability for an elected upper house would ultimately be adopted by the framers of the *Constitution*.

4. Conclusion: Political Accountability and the Upper House in South Australia

Although the Council agreed only to suggest amendments to money bills, it had still insisted that it had 'full right' to deal with money bills as part of its role and privileges as an upper

[356] Waugh, above n 18, 193. As Waugh points out, this would only be effective if there was a small majority against a measure in the Council in the first place. The double dissolution mechanism was described as 'ingenious' back in London by the then Secretary of State, Lord Kimberley: see Minute of WF Drummond Jervois to Earl of Kimberley, 9 December 1881, TNA: PRO CO 13/139, f 293 (AJCP 1788), cited in Waugh, above n 14, 193.

[357] Waugh, above n 18, 193. This option was perceived as providing an advantage to the majority in the parliament because the lower house was usually the larger house of the two. Accordingly, the numbers in a joint sitting of parliament usually gave the incumbent government a better chance of forming a majority: The South Australian model to deal with deadlocks would become the model for s 57 of the *Constitution*: Waugh, above n 14, 192; Clark, above n 4, 180. Section 57 of the *Constitution* did not require a first and separate election of the House of Representatives to take place before a double dissolution could be made: noted in Clark, above n 4, 174, 177 and ff 192. In Chapter 4, I discuss how the South Australian deadlock mechanism was also part of the discussions on what would become s 57 of the *Constitution*.

[358] This debate over the deadlock mechanism under the *Constitution* is considered in Chapter 4.

[359] Waugh, above n 18, 193.

[360] Because they now faced, potentially, a dissolution of the Council or the appointment of new members to the Council to break the deadlock.

house.[361] The Council had been cognisant of the reality that the debate over the powers of the Lords to deal with money bills had not been settled. It had also insisted on the difference between its own local Constitution and the Westminster model – pointing out that, as an elected upper chamber, it may well have had more in common with the American Senate than the British House of Lords. Ultimately, the Council made quite clear that, whatever British parliamentary practice may have been, governance in South Australia would be determined by local constitutional rules and practice.

At the Conventions, South Australian delegates (particularly Charles Kingston and Richard Baker) would become key advocates for framing a constitution that reflected Australia's wants and needs. They would emphasise that an elected upper house that acted as a house of review of legislation was something most Australians were familiar with and became key proponents of the benefits to be obtained by independent upper houses, rejecting the Diceyan model of political accountability owed solely to a lower house. It was these men who recommended the South Australian Compact as a means of resolving the impasse that arose during the Conventions on the powers of the Senate to deal with money bills and the resolution of deadlocks between the House of Representatives and the Senate, putting in place suggestions for what would become ss 53 and 57 of the *Constitution* respectively.

III. Conclusion: Upper houses and Accountability in the Australian colonies

The analysis undertaken in this chapter supports the arguments of leading authors like Waugh that Australian upper houses in the late 19th century did not see themselves as carbon copies of the Westminster Constitution they had been modelled on.[362] Whilst British parliamentary practice was important, particularly for the principle of parliamentary control of finance, upper houses in Australia made clear that any suggestion that accountability would be owed solely to a lower chamber was not acceptable in the Australian colonies. Putting aside whether any such accountability was owed to the House of Lords by the 1890s (which was doubtful in principle and was in fact doubted by some parliamentarians in the Australian colonies), Australia's upper chambers argued that colonial parliamentary practice had to be determined by Australian

[361] *Minutes of the Legislative Council*, No 31, 25 August 1857, 77 item 2; Quick and Garran, above n 4, 66; Clark, above n 4, 163.

[362] Waugh, above n 18, 185; Waugh, above n 17, 344. See also N Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29 *Adelaide Law Review* 205, 227-228 on the role of upper houses as houses of review. See also the discussion in Chapter 2 on this role.

constitutions and local experience. The Colonial Office agreed that the colonists had to work out their local practices for themselves. Given the different composition of upper chambers in Australian parliaments (whether nominated or elected), upper houses in Australia were determined to insist on accountability owed by government to them, particularly in financial matters. The history explored in this chapter ultimately supports what Stone and others have argued is a history of strong bicameralism in Australia.[363] The practice of upper houses protecting distinct accountability to them had a solid base in Australia's colonial constitutions, well before federalism was added to the mix of reasons for an upper house at the Conventions.

In each colony, the mechanisms for the passage of legislation meant that an executive was politically responsible to both houses of its parliament. Australia's colonial governments ultimately required the sanction of upper houses to implement their legislative programs, including, most importantly, approval of supply. In this respect, Australia's colonial upper houses had very real power to hold governments to account. They used it to protect fundamental constitutional principles like parliamentary control of finance. Upper houses relied upon their powers with respect to money bills (whether of amendment or of veto) in objecting to tactics employed by colonial governments to by-pass scrutiny of government actions by parliament. In all instances of resistance, upper houses in the colonies insisted on their role as both houses of review and control of public finance to justify their position. This chapter ultimately supports the views of leading historians and public law scholars that Australia's upper houses operated as a check on the form of majoritarian rule that resulted from governments needing the support of a lower chamber alone.[364] The record demonstrates that the skirmishes between lower and upper chambers in colonial Australian politics primarily focused on the need for parliament to retain control of spending as part of responsible government. In their insistence on their role to that end, upper houses in the Australian colonies made clear that they regarded themselves as fulfilling their constitutional function.

Each of Australia's colonial constitutions had in place constitutional arrangements that contemplated some form of political accountability of the executive to its upper house. The

[363] Stone, above n 2, 268. Lijphart has described Australia as being one of only two federations in the world possessing 'strong bicameralism, in which the two chambers are more or less equally influential': see Lijphart (1984) and Lijphart (1999), above n 7. Systems of strong bicameralism are differentiated from Westminster style systems in which majoritarian rule gives power to the party with control of the lower house. Further support for these views can be found in G Lindell, above n 2, 76; R Mulgan, above n 2, 198-99, 200; Lane, above n 2, 415.
[364] Waugh, above n 18, 185; Waugh, above n 17, 344; Clune and Griffith, above n 16, 68, 100-101, 130; Loveday, above n 31, 482; Deakin, above n 1, 149; Loughlin, above n 10, 48-51.

matter for dispute in each colony was the extent and form that oversight should take. Nonetheless, Australia's colonial constitutions had the means by which upper houses could render governments politically responsible to them, separately from any political accountability owed to a lower chamber. Further, upper houses in the Australian colonies were prepared to exercise powers to hold governments to account. The lessons to be learned from an upper chamber, particularly an elected upper chamber, choosing to do so were not lost on Convention delegates. In the next chapter I explore what delegates took away from their experience of such accountability under their colonial constitutions when framing the accountability of the Commonwealth Executive to the Senate under the new Federal *Constitution*.

Ultimately, it is clear that upper houses in the Australian colonies maintained that they were co-ordinate houses of their legislatures, with an important role to play in ensuring the accountability of the executive to parliament, particularly in matters of finance. Whilst this insistence, and the preparedness of upper chambers in the Australian colonies to veto supply bills in particular, may have led to what foreign authors at the time perceived as instability, upper houses in Australia arguably played an important role in ensuring that proper processes for the approval of spending were followed by governments.[365] Whether those processes were part of the British Constitution (adopted by local constitutions) or whether they derived from particular features of local constitutions, Australia's colonial upper chambers were clear in their insistence that the executives must obtain parliamentary approval for spending. That approval could not come from lower chambers alone.[366] These themes of the benefits of dual accountability were echoed at the Conventions (discussed in Chapter 4). In Chapters 5 and 6 I return to how the ideals of accountability to two chambers, and the theory that underpinned such accountability, has been emphasised by the High Court in its jurisprudence on the role of the Senate in controlling spending by the Commonwealth Executive.

The history of Australian constitutional practice in the lead up to the Conventions was one in which constitutions developed and adopted degrees of political accountability for their

[365] Both Todd and Bagehot were critical of the practices of upper houses in Australia of amending money bills, and also of vetoing supply: see Todd, above n 4, 709-710. Bagehot, writing about the response to the constitutional crisis in Victoria, said 'The evil of two co-equal houses of distinct natures is obvious. Each house can stop all legislation, and yet some legislation may be necessary.': W Bagehot, *The English Constitution* (1993 ed), 129.

[366] See also Waugh, above n 18, 185, 192; Aroney (2009), above n 1, 227-228. The authors have acknowledged that it is not possible to attribute the actions of Australia's colonial upper houses to purely political motivations.

governments to both houses of their respective parliaments. Ensuring the responsibility was owed to both chambers would prove to be the modification the Australian parliamentarians who became delegates to the Debates adapted to a federal context in framing executive accountability under the *Constitution*.

In the next chapter, I discuss how the knowledge and experience of the framers of political accountability to upper houses, garnered from their own colonial constitutions and parliamentary practices, formed part of the motivation during the Debates for the inclusion of the provisions dealing with the powers of the Senate over money bills and the resolution of deadlocks between the two houses of the new Commonwealth Parliament. There is no doubt that pleas for accountability of the Commonwealth Executive to the Senate were based on federal concerns. The next chapter argues that accountability to the Senate was also based on concerns of ensuring that the Commonwealth Executive remained accountable to the Commonwealth Parliament, with delegates seeking to replicate some of the ways in which governments in the colonies had remained accountable to their respective parliaments under those unitary constitutions. I argue that rendering the Commonwealth Executive accountable to the Senate made sense to the framers, not just because it appeased the concerns of the smaller colonies in the new Federation (federal concerns), but also because giving the Senate a distinct role in rendering the Commonwealth Executive accountable to it was part of the form of political accountability with which the framers were already most familiar as part of their own constitutional experience under responsible government. It is to the use made of that experience at the Conventions that I now turn.

PART II

POLITICAL ACCOUNTABILITY TO THE SENATE: THE CONVENTION DEBATES

CHAPTER 4: POLITICAL ACCOUNTABILITY TO THE SENATE: THE CONVENTION DEBATES

I. Introduction

Part I examined the intellectual and institutional contexts with which the framers of the *Constitution* were familiar. It discussed the experiences and influences the framers brought with them to the framing of the *Constitution*. Part II now considers how ideas regarding the purpose and benefits of accountability to upper chambers and the experience of Australia's colonial constitutions were relevant to delegates at the Conventions in framing the political accountability of the Commonwealth Executive to the Senate.[1] As previously noted, my goal is to examine the record of the Conventions and literature surrounding them in order to uncover the extent to which the framers devised a framework of accountability, not only to address federal concerns but also to pursue the aims of good government and political accountability with which they were already familiar through their own unitary constitutional systems.[2]

I explore the records of the Conventions by particular reference to the arguments put by delegates as to whether and how the Executive should be made accountable to the Senate. These groups have been classified in scholarship to date as being either 'nationalists' or 'States-righters'. Nationalists include those delegates who wanted to ensure that accountability was owed solely to the House of Representatives and votes taken on a majority of population basis.[3] The nationalists primarily comprised delegates from the larger colonies of New South Wales and Victoria, led by men such as Henry Parkes, George Reid, Alfred Deakin, Isaac Isaacs and Henry Higgins. The other key grouping, States righters, comprising delegates mainly from the smaller colonies (for example, Richard Baker from South Australia) were concerned to ensure

[1] From here and for the remainder of the thesis the term 'Executive' is used to refer to the Commonwealth Executive unless otherwise indicated.

[2] J Uhr, 'Bicameralism and democratic deliberation' in S Prasser, N Aroney and J Nethercote (eds), *Restraining Elective Dictactorship: The Upper House Solution?* (University of Western Australia Press, 2008) 11, 14; see also G Brennan and L Lomasky, *Democracy and Decision* (Cambridge University Press, 1993), 214-15.

[3] N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 188; JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 43.

that the interests of the smaller colonies could not be swamped by votes from the larger colonies. They wished to ensure that the Executive remained accountable to both parliamentary chambers, including in matters of finance.[4] The respective positions of nationalists and States-righters has been viewed as a competition between those in favour of responsible government (nationalists) and those in favour of federalism (States-righters).[5]

Although there is no doubt that many delegates to the Conventions can be allocated primarily to one of these two categories, leading authors have warned against allocating every delegate to one group or the other, highlighting that many delegates did not fall clearly or comfortably into either camp.[6] Thus, although I analyse the Convention Debates by reference to the two traditional groups, I also consider the position of men who do not fit easily into either. The system I have used in analysing the record of the Convention Debates in the following manner. Nationalists are characterised as 'Category 1' advocates. During the Conventions, delegates in this category argued that the Senate should have no power to amend money bills *and* (in some instances) no power of veto of money bills either. States-righters are classified as 'Category 2' advocates. These delegates wanted political accountability to the Senate to be rendered by giving the Senate power to veto but also power to amend money bills. In the analysis that follows we will see that the conflict over the Senate's power to amend money bills reflected, to a very large extent, the same issues that had been fought between lower and upper chambers in the constitutional battles that had occurred in Australian colonial politics (discussed in Chapter 3).

In addition to these two traditional categories, I add that one can discern one noticeable further category of delegates. Some of the figures at the Conventions, including leaders of the Conventions like Samuel Griffith, Edmund Barton and Charles Kingston, fall into this third category. These delegates advocated for the possibility of dual accountability for the new constitution. In doing so, they appealed to broader goals of political accountability, seeking to build a bridge between delegates in Categories 1 and 2 and thus to pave a way forward for Federation itself. It becomes clear that they did so by referring to the ideas that underpinned

[4] J Quick and RR Garran, *The Annotated Constitution of the Commonwealth of Australia* (Sydney, Angus & Roberston, 1901), 136, 186, 414; BR Wise, *The Making of the Australian Commonwealth 1889-1900* (Longmans, Green and Co, 1913); M Coper, *Encounters with the Australian Constitution* (CCH Australia, 1987), 79. For a good summary of the respective groups and their positions see Aroney, above n 3, 29-30, 188-89. 128, 142; A Deakin, *'And Be One People'* (Melbourne University Press, 1995).

[5] Ibid.

[6] Aroney, above n 3, 107, 188-89; Quick and Garran, above n 4, 185.

the aims of dual political accountability that were already a feature of Australia's bicameral parliaments. They also argued that responsible government was an evolving doctrine, creating the possibility that it could expand to include accountability to upper chambers. Further, they maintained that Australian parliamentarians and Australian voters were already familiar with systems of political accountability to upper chambers operating under responsible government. By impressing on delegates that the new system they were being asked to adopt would not be such a radical departure from the form of accountability already at play in Australia's colonial parliaments, Category 3 delegates played a vital role in convincing their colleagues to vote for a model of dual accountability *as part of* a system of responsible government. These delegates also suggested the adoption of solutions from Australia's own existing constitutions as a means of resolving the impasses that developed between the nationalists and the States-righters, including solutions from local constitutions with respect to the powers of the Senate to deal with money bills and the resolution of deadlocks.

I trace the evolution of the arguments during the Conventions of these three groups, since the chronology of the discussions itself is part of the context in which the ultimate decision of the framework of dual accountability was reached.[7]

II. Background to the Conventions

Stone has argued that the Constitution was not built from scratch but was 'powerfully shaped by the traditions of Australian colonial constitutionalism, within which strong elective upper houses were a prominent feature.'[8] The remainder of this chapter explores the extent of the influence of those colonial constitutions. As Chapter 3 showed, Australia's upper houses had real and significant powers of review, including rights to veto (and in some cases amend) money bills and had used them to call governments to account. The role played by upper chambers, particularly elected upper chambers, was a matter with which the framers of the *Constitution* were familiar. Speaking in 1890 at the Federation Conference, Alfred Deakin said that:

> 'With regard to the first and popular Chamber, I presume that it will be as directly representative of the people as the British House of Commons, or the Assemblies of these colonies. With

[7] Following the methodology adopted by previous scholarship in constitutional law on the Convention Debates: as to which see La Nauze, above n 3. He explains there why the record of the Convention Debates make more sense when analysed in chronological order. This is a necessary part of contextualising arguments made during the Conventions.

[8] Stone, B, 'Bicemeralism and Democracy: the Transformation of Australian State Upper Houses' (Pt 2) (2002) 37 *Political Science* 267, 268.

> regard to the second Chamber, there are different circumstances to be taken into consideration. If we look at the Upper Houses of these colonies, we shall find that they differ considerably. While some of them are composed of nominee members, others are elected; and the question of the form the Upper House of the future Dominion of Australia shall take is one of the problems on which the minds of the members of the Convention will be most exercised …'.[9]

Resolving this issue would indeed prove to be one of the main challenges of the Conventions.[10] As noted, divisions formed between Category 1 delegates (nationalists) and Category 2 (States-righters) delegates. Scholars have classified these as a debate between those in favour of responsible government or those in favour of federalism.[11] In his major work on the making of the *Constitution*, La Nauze neatly summarised the key division that formed during the Conventions on this issue as follows:

> 'The main division of opinion was between the Victorians … strongly supported by Parkes, and the majority of speakers from the smaller colonies, though there were some cross currents. Thus Playford … held that on money bills the will of one House must prevail whilst Cockburn and Kingston … supported a "veto in detail" for the Senate. There was no opposition to the proposition that while money bills must originate in the popular House, the Senate might in an extreme case reject such bills in toto. "Veto in detail" was supported either as a guarantee that a simple majority of the people … should not be able to cripple … the States, by financial measures; or as a device to ensure that the excesses of temporary and enthusiastic majorities should be subject to checks and delays.'[12]

Just as had been the case in the constitutional conflicts that had occurred in most of the Australian colonies, the key division concerned whether the Senate should be given a power to amend money bills. The granting of a power of veto was largely not the subject of controversy. Only a few delegates regarded the absence of focus on the elected Senate's power of veto as an oversight.[13] The Victorians, having lived first-hand the experience of constitutional deadlocks over supply, were keen to focus the minds of other delegates on the consequences

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[9] *Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne* (Melbourne: Government Printer, 1890), 98 (Deakin).

[10] Described by Quick and Garran as the 'real battle' of the Convention Debates: Quick and Garran, above n 4, 128, 131, 138. La Nauze formed the same opinion: see La Nauze, above n 3, 43.

[11] See for example Chordia and Lynch, above n 9; Appleby and McDonald, above n 2, 264-65.

[12] La Nauze, above n 3, 43.

[13] The contributions of delegates on this point are discussed later in this chapter. They included warnings from Deakin, Griffith and Barton.

of giving the Senate a power of veto over supply. However, as will be seen, they were not ultimately successful.

III. Accountability to the Senate: the 1891 Convention

As noted, the key division in the Convention was on the issue of the power of the Senate to deal with financial bills. The division largely followed population lines, with delegates from the more populous colonies of New South Wales and Victoria generally advocating for accountability solely to the House of Representatives on money bills, while delegates the smaller colonies of Queensland, Tasmania, South Australia and Western Australia wished to see the Executive accountable to the Senate for all legislation, including financial legislation.[14] In each case, the focus of debate was on whether the Senate should be granted a power to amend finance bills, with the power of veto of such legislation attracting little controversy.

A. Category 1: nationalists

Victoria's delegates led the opposition early during the 1891 Convention to the Senate being granted any power to amend money bills. This position reflected that of the Victorian Constitution which denied the Council power to amend money bills.[15] Some delegates from Victoria went even further, indicating their opposition to the Senate even having a power of veto over money bills. Their position was hardly surprising given their experience of legislative deadlocks in which an elected upper house had used a power of veto to such crippling effect.[16] Indeed, so entrenched was the position of the Victorian delegates during the Conventions on removing the power of the Senate to deal with money bills that Quick and Garran would later describe the superiority of the lower house on financial matters as being an 'article of faith' in Victorian politics during the 1891 Convention.[17]

The Victorians were largely supported in their position by leading delegates from New South Wales. Sir Henry Parkes (then Premier of New South Wales) put forward a series of resolutions to the 1891 Convention which set out New South Wales' position on the power of the respective chambers.[18] In a concession to the smaller colonies, Parkes' proposal was that the Senate

[14] Quick and Garran, above n 4, 127. See also Coper, above n 4, 65.
[15] Quick and Garran, above n 4, 127.
[16] These were discussed in Chapter 3. See also Quick and Garran, above n 4, 43.
[17] Quick and Garran, above n 4, 127.
[18] Quick and Garran, above n 4, 124; see also Deakin, above n 4, 49. To an Australian reader, Parkes needs little introduction. He has often been labelled as the 'Father of Federation' (due to his early promotion of Federation): see P Serle, 'Sir Henry Parkes (1816–1896)' *Dictionary of Australian Biography*. *Project Gutenberg Australia. Retrieved 29 March 2007*. Accessed on 11 October 2017. For a discussion of Parkes and his role in bringing about the 1891 Convention see Coper, above n 4, 61-63 and Wise, above n 4, 1-47. Cf Irving on the over-estimation in

consist of an equal number of representatives from each colony.[19] Despite this acceptance of the need for an upper chamber to represent each of the colonies equally, Parkes and his colleagues from New South Wales also argued that the House of Representatives should 'possess the sole power of originating and amending all bills appropriating revenue or imposing taxation'.[20] In Parkes' view, a government could only work if only one authority could decide 'how the people are to be taxed, and as to how the product of taxes is to be appropriated in the interest of the people'.[21] The idea that a power of veto would actually give the Senate ultimate control of finance did not appear to concern Parkes or the other delegates from New South Wales. The Convention was simply asked to consider whether a provision should be included in the draft constitution to the effect that there be a new federal government as well as:

> 'An Executive, consisting of a Governor-General, and such persons as may from time to time be appointed as his advisers, whose term of office shall depend upon their possessing the confidence of the House of Representatives expressed by the support of the majority.'[22]

Thus, so much of responsible government that rested on the idea that only the House of Representatives should have a power to initiate and to amend money bills was included in Parkes' proposal.[23] It followed (as far as Parkes was concerned) that this would in turn create a system of political accountability of the Executive to the lower house. Whether this excluded any form of accountability to the Senate as well was not entirely clear in Parkes' proposal. Certainly, it would seem from the remainder of his contributions to the Convention that Parkes' did not wish to create a Senate with equal powers to the lower chamber. He did appear to appreciate the threat to the will of the lower house which an elected upper house might represent, namely, the possibility that the Senate itself might gain an independent political legitimacy with electors. Keen to ensure that the Senate could not be placed in a position of

history of Parkes' contribution as the 'Father of Federation' in Richard Latham, 'The Law and the Commonwealth' in WK Hancock (ed), *Survey of British Commonwealth Affairs: Problems of Nationality 1918-1936* (Oxford University Press, 1937) vol 1, 510, 60-61, although Irving still says that a number of things are in favour of interpreting Parkes' as an important contributor to Australian Federation.

[19] Quick and Garran, above n 4, 124.

[20] Quick and Garran, above n 4, 125-126; La Nauze, above n 3, 35.

[21] *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891* (Sydney: Acting Government Printer, 1891; reprinted Sydney: Legal Books, 1986), 381 (Parkes).

[22] La Nauze, above n 3, 35-36, 38, 39.

[23] *Convention Debates,* 1891, 26 (Parkes).

equal power with the lower house he argued that, even though the Senate would be accountable to the Australian people, the House of Representatives was 'more accountable':

> 'if the two houses are elective, because we may naturally expect – if we have an elective upper chamber, whether elected by the colonies as provinces or by bodies of electors – that that body will contend for an equal authority in dealing with what are called money bills, unless we expressly provide that these bills shall originate and be amended in that chamber which is more directly and more truthfully responsible to the whole body of the electors. Hence, then, I contend that it will be absolutely necessary not to trust to derivations to be drawn from principles or practice in other countries, but to expressly provide that all money bills shall originate and undergo amendment only in the house of representatives.'[24]

Parkes added that, unless the constitutional document itself made clear that the Senate was not a house of co-ordinate power when it came to determining how the finances of the State were administered, it was likely that the Senate would be able contend that it had equal authority to the House of Representatives to deal with finance.[25] For Parkes, this could only result in confusion. Only by ensuring that responsibility for money bills was left to the lower house could the new Commonwealth manage its affairs 'by a solid united government representing the whole people.'[26] Any concession made in favour of equal representation in the Senate should be made only on the 'unequivocal condition' that the House of Representatives should have the 'predominating voice' in financial matters and, as a consequence, the 'predominating' control of the Executive.[27] The position thus put to the Convention by Parkes and most of the New South Wales delegates was one which pushed for the adoption of executive accountability solely or at least predominantly to the lower chamber in financial matters. They said that this could only be achieved if the House of Representatives, not the Senate, was given the power to initiate and to amend money bills.

Precisely why a power of veto was not seen as representing a particular threat to the will of the House of Representatives is not entirely clear. Quick and Garran have suggested that the power of veto was perceived at the time to have been less likely to be used by an upper house than a

[24] *Convention Debates,* 1891, 25 (Parkes).
[25] *Convention Debates,* 1891, 25, 27 (Parkes).
[26] *Convention Debates,* 1891, 27 (Parkes); see also H Parkes, *Notes on Australian Federation* (1896), 448; Quick and Garran, above n 4 131; C Saunders, *The Constitution of Australia: A Contextual Analysis* (Oxford and Portland, 2011), 148.
[27] *Convention Debates,* 1891, 448 (Parkes); Quick and Garran, above n 4, 131. Parkes described this as a power equivalent to that held by the House of Commons: *Convention Debates,* 1891, 448 (Parkes), 131.

power of amendment.[28] This makes sense in the context in which the Conventions arose, given that most of the conflict between lower and upper chambers in the Australian colonies (and in New South Wales specifically) had focused on the power of the upper house to amend financial legislation. However, it makes less sense when one considers that colonial upper houses had used their power of veto. Apparently, the views of delegates were focused on the matters that had dominated the conflicts in their own legislatures, more so anyway than the much more nebulous spectre of the use of a power to block supply. Parkes also accepted that some concession with respect to the power of the Senate was the price that would have to be paid to convince delegates from the smaller colonies to accept Federation at all, so the power of veto would be necessary to obtain the support of the smaller colonies.[29] Ultimately, it appears that neither Parkes nor his New South Wales colleagues viewed a power of veto as being a sanction that would be wielded by the Senate.[30] Although Griffith pointed out to the Convention that delegates would be wise not to assume that this view of the power of veto was necessarily correct, the power of veto did not raise that much interest during the 1891 Convention.[31] Whatever the reason for largely ignoring the power of veto, the focus of Parkes' and his colleagues' concerns remained the Senate's power to amend money bills.

Notwithstanding any preference for legislative dominance by the lower house, Parkes evidently accepted that an upper house could play an important role in a bicameral parliament. For example, in discussing the Senate he described a chamber of review, saying that:

> 'What I mean is an upper chamber … which shall have within itself the only conservatism possible in a democracy – the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character – which are the only qualities we can expect to collect and bring into one body in a community young and inexperienced as Australia.'[32]

Other statements made by Parkes confirm this view that the Senate could be a house which reflected the role that had been played by upper houses in the Australian colonies, acting as a

[28] Quick and Garran, above n 4, 416.

[29] *Convention Debates,* 1891, 23. 26 (Parkes); Quick and Garran say that pragmatism led Parkes to the realisation that Federation would only be achieved if the Senate was given an equal and final say in the passage of legislation of the new parliament, including approval of financial legislation: Quick and Garran, above n 4, 416, 191. Other delegates from New South Wales made the same point about the practicalities of achieving Federation during the 1897 Convention: for example, *Convention Debates* 1891, 105-10 (Wise). This is discussed below as well at IV.

[30] Quick and Garran, above n 4, 416; Aroney, above n 2, 191.

[31] Griffith's view on this point is discussed below.

[32] *Convention Debates,* 1891, 26 (Parkes); also Quick and Garran, above n 4, 416.

check on majoritarian government in those parliaments.[33] Ultimately Parkes' view has been seen as one that advocated the adoption of accountability to the lower house alone, even though his view was not widely shared at the 1891 Convention or in the subsequent Conventions.[34] His proposal did succeed in one respect. The eventual compromise of the Conventions (as will be discussed) was that the House of Representatives would have the predominating influence in both the proposal and amendment of financial legislation.[35]

While many of the delegates from New South Wales and Victoria supported Parkes, a conservative element in the New South Wales delegation argued that the Senate should be given powers of amendment over money bills.[36] Overall, however, the position in favour of a stronger Senate was vigorously opposed by the 'solid phalanx' of Parkes and most of the Victorian delegates, as well as by the then Premier of South Australia, Thomas Playford.[37]

Deakin led the charge for the delegates from Victoria on this position, seeking to restrict the accountability of the Executive to the Senate even further than Parkes. Having an intimate knowledge of the deadlocks that had occurred in Victoria, Deakin suggested that the Senate should only have power to veto bills relating to States' rights.[38] Deakin's position is understandable considering his background and experience of the blocking of supply that had occurred in Victoria, particularly his self-described admiration and support of George Higinbotham's role in those conflicts.[39] During the Convention, he described delegates who advocated for co-equal powers for the Senate as 'reactionary radicals and iconoclastic conservatives' who were seeking to 'tie the hands' of the Australian people.[40] One can see why Quick and Garran described accountability only to the lower house as being an 'article of faith' for the Victorian delegation.[41] Deakin was thus deeply attuned to the potential for conflict if

[33] *Convention Debates,* 1891, 319 (Parkes).
[34] Aroney, above n 2, 192.
[35] Quick and Garran, above n 4, 152. 'Proposal' is the term used by Quick and Garran for the resolution Parkes put to the Convention: see Quick and Garran, above n 4, 192; 416.
[36] Against Parkes on the point: see Quick and Garran, above n 4, 138; noted also by C Saunders, *Senate Powers and Deadlocks: Historical Background*, Appendix F to *Report of Standing Committee D*, 1977, 141.
[37] Quick and Garran, above n 4, 44, 138.
[38] Quick and Garran, above n 4, 127. Deakin said that he had been particularly influenced by George Higinbotham in his interpretation of the conflicts that had occurred in Victoria: Deakin, above n 4, 9, 39. As discussed in Chapter 3, Higinbotham maintained that the Council in Victoria had no role in controlling parliamentary finance under responsible government.
[39] Deakin had also been a member of the Legislative Assembly for Victoria. For his interpretation of the unlawful approach taken by the Council during the Victorian constitutional conflicts, see A Deakin, *The crisis in Victorian politics, 1879-1881: a personal retrospect* (Melbourne University Press, 1957); also Deakin, above n 4, 9, 39.
[40] Deakin, above n 39, 138.
[41] Quick and Garran, above n 4, 138.

the Senate was granted equal legislative power with the House of Representatives, including a power of veto.[42] Deakin entirely disagreed with the proposition that would be put to the Convention by Griffith, namely, that political accountability could be owed by the Executive to two different majorities – one to a majority of the people and one to a majority of the States.[43] He argued that the Senate should only be represented by direct election and that parliamentary government required the majority's will, expressed through the lower house, to carry over any expression of will by the majority of States.[44] I argue (below) that it was more likely Griffith's view was ultimately adopted by the majority of delegates when votes were taken on the point.

James Munro, a Victorian delegate and a minister during one of the constitutional crises in that colony, also joined Deakin in the campaign against a strong Senate, supporting his colleague's objections to the Senate having powers of amendment and of veto of financial legislation. In an argument similar to Deakin's, Munro alleged that giving the Senate a power of veto meant creating minority rule; since granting the Senate ultimate power over money bills entailed that the will of only a section of the population would prevail. [45] Munro appreciated that it was not just a power of amendment that was a source of potential conflict. Again, having lived through the experience of the crisis in Victorian politics, he had first-hand experience of the potential risk to the will of the lower chamber that a power of veto to an elected upper house presented. Thus, according to Munro, the potential for a system of dual accountability would lead to problems. Disagreeing with Griffith on the point, Munro clearly took issue with the idea that dual political accountability was possible at all in any system of responsible government:

> 'Mr. MUNRO: … The hon. gentleman also puts it that he does not think the government or the executive should be responsible to the house of representatives.
>
> Sir SAMUEL GRIFFITH: No, no. I said nothing of the kind. I said I did not think it should be a rigid rule of the constitution that it must be responsible to one house only. I repeated that about ten times, and I thought I had made myself clear.

[42] *Convention Debates,* 1891, 80-81, 127, 383 (Deakin).
[43] *Convention Debates,* 1891, 78 (Deakin). Part of Deakin's argument was that, since there was no discernible difference in voting populations of either chamber, and because each house should be equal, it made no sense to have dual accountability: ibid.
[44] *Convention Debates,* 1891, 74-5, 78 (Deakin).
[45] Quick and Garran, above n 4, 127; *Convention Debates,* 1891, 47, 53 (Munro).

> Mr. MUNRO: I admit that that is clear enough; but to whom is the executive to be responsible? Is it to be responsible to both houses; will it be absolutely necessary to have a vote of want of confidence in both chambers to remove a government? Is that what is proposed?
>
> Sir SAMUEL GRIFFITH: No, no!
>
> Mr. MUNRO: I really want to understand where we are, and what is meant. If the vote of the house of representatives is not sufficient to dislodge a government, what is sufficient? What is to be the process by which a government is to be dislodged. What is to be the process by which a government is to be removed if the house of representatives has not the power to remove them? Whilst the hon. gentleman submitted a number of conundrums to us, he did not clearly show us how to get out of the difficulty. I followed the hon. gentleman very closely, and I read his speech very carefully this morning in order that I might understand what he really means; and it appears to me that he brings us into this difficulty. He says, "I do not want this constitution to provide that the executive shall be responsible to the house of representatives; I want the responsibility to be divided between the two chambers." But he has not indicated how that is to be carried out; how the two chambers are to act with the view of either appointing or removing the executive. That is the difficulty submitted to us, the difficulty which we do not get over.
>
> Sir SAMUEL GRIFFITH: I propose to leave to the future the avoiding of these difficulties, and that we should not make difficulties in advance!'[46]

As is now well known, this 'difficulty' certainly was, to a large extent, left to the future.[47] The difference in Munro and Griffith's thinking on the point echoed almost a century later by leading protagonists in the dismissal of the Whitlam Government in 1975. The difficulty with Munro's reasoning, as leading authors have now pointed out, is that there was no direct analogy between the British and Australian Constitutions, particularly on the effect on the Executive of a denial of supply by the Senate.[48] As Aroney, Gerangelos, Murray and Stellios have suggested, the idea that a government in Australia that was not able to obtain supply from the Senate was in the same position as a government in Britain which could not obtain supply from the House of Commons actually appears to be a misunderstanding of the effect of a denial of supply by

[46] *Convention Debates,* 1891, 48 (Munro and Griffith); as will be discussed below, Griffith envisaged the possibility of political responsibility of the Executive to both houses, but at no point did he argue that a want of approval by the Senate would result in an immediate loss of office.
[47] The crisis and its ramifications for accountability to the Senate are discussed in Chapter 5.
[48] On this point see N Aroney,,et al *The Constitution of the Commonwealth of Australia: history, principle and interpretation* (Cambridge, Cambridge University Press, 2015), 413, 414; Chordia and Lynch, above n 9, 97. The view and its basis are discussed in more detail in Chapter 5.

the Senate.[49] In the case of the British Constitution, a denial of supply by the House of Lords had no effect. On the other hand, a government that lost the confidence of the House of Commons on a supply bill lost office immediately, because a refusal by the Commons to pass a supply bill amounted to a vote of no confidence in the government.[50] In Australia, a denial of supply by the House of Representatives would have the same effect. But a denial of supply by the Senate does not amount to a vote of no confidence in the government and will not result in an immediate loss of office by a government which otherwise has the support of the House of Representatives.[51] Munro's concern appeared to be, however, that a denial of supply by the Senate could have that effect. If so, his position is curious, since, the denial of supply in Victoria by the Council had not resulted in an immediate loss of office by a ministry, even if the long-term consequence of such a denial might well have proved to be the ultimate downfall of an Executive.[52] It may be that Munro was concerned by the impact this could have on a sitting ministry. For present purposes, it suffices to say that the possibility of dual political accountability was something squarely in the minds of delegates to the Conventions. As will be discussed later in this chapter, whatever the perceived difficulties, it is more likely than not that a system of dual accountability was the position finally adopted by delegates.

Since there was no way for Munro to conceive of the operation of political responsibility unless veto by the Senate of a money bill would result in an immediate loss of office, Munro's position remained that, if the Senate could veto a money bill, the result would be that the Senate would be supreme.[53] In 1975, Chief Justice Barwick would similarly limit his thinking regarding the operation of political accountability in a system of dual accountability.[54] By way of contrast, Griffith appears to have conceived of a form of accountability which did not necessarily have to employ the ultimate sanction of a loss of office; accountability to the Senate could still exist without the imposition of that immediate sanction. Thus, accountability simply took a different *form* when owed to the Senate. I discuss Griffith's reasoning on the point below, including his acceptance that political accountability under responsible government could take more than one form and was still an evolving concept at this time.

[49] Aroney et al above n 48, 416-417.
[50] Ibid.
[51] Ibid n 48.
[52] As recognised by Professor Lane: see PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed ed, 1997), 415.
[53] *Convention Debates,* 1891, 49 (Munro).
[54] Barwick's position on the constitutional crisis of 1975 is discussed in Chapter 5.

Munro very much reflected the position adopted by the rest of the Victorian delegation, insisting that responsible government could only mean responsibility solely to a lower chamber in matters of finance:

> 'how can you have responsible government if you have a governor calling in an executive as his advisers, and if after that executive has submitted financial measures to the house of representatives, and shown that they are absolutely necessary for the good of the country, the senate vetoes the measures. Where, then, does the responsibility lie? The responsibility must lie in the senate, not in the house of representatives, because if the senate is to prevent the house of representatives carrying out financial operations the result is that the senate is supreme. And that is the difference between what we are proposing to do, and what has occurred in the United States … Now, I quite admit that in the Australian colonies we have never had true responsible government. We have what is called responsible government, but we have not responsible government in reality. If we had responsible government we should never have had the troubles we have had in the past in regard to our two chambers. … our ministers occupied the positions they ought to occupy under a dominion government, and such as are occupied by the British Government … I am only dealing with the fact that someone must be responsible for the finances. You cannot arrange the finances of a country by having co-ordinate jurisdiction in two chambers.'[55]

Rather than resolve the issue, discussion then moved to a means of breaking potential deadlocks. Henry Wrixon, a former Attorney-General of Victoria, proposed a mechanism at this early stage of the Convention that, if an amendment was put forward by the Senate but rejected by the House of Representatives, the Senate might request a joint sitting at which a majority of the vote would decide the outcome.[56] All groups at the 1891 Convention struck down this suggestion.[57] By the time of the 1897-98 Convention it had become clear how important a mechanism to resolve deadlocks would be if the Senate was given a power to veto money bills.[58] As will be discussed, the ultimate deadlock mechanism (which would become s 57 of the *Constitution*) would employ a joint sitting of the two parliamentary chambers.

The result of the proposals and arguments by Parkes and Deakin during the 1891 Convention were later described as placing in frame at the outset all the 'elements of the subsequent

[55] *Convention Debates,* 1891, 49-50 (Munro). Wise later said that the debate was about how to admit the equality of the Senate with that of the House of Representatives while retaining the 'power of the purse in the popular Chamber': Wise, above n 4, 127.
[56] Wise, above n 4, 139.
[57] Ibid.
[58] This is discussed in Chapter 5.

discussions' on 'States-rights' (Category 2 and federalism) and 'majority rule' (Category 1 and responsible government).[59] It was against the advocacy of delegates from New South Wales and Victoria of a tightly-circumscribed role for the Senate that the states-righters issued equally vehement objections that, for Federation to exist, accountability would have to be owed to *both* parliamentary chambers. Delegates from the smaller colonies thus reacted by asking for the Senate to be a house of co-ordinate legislative power, including co-ordinate powers to veto and to amend money bills.[60]

B. Category 2: States-righters

States-righters were led by delegates from South Australia, especially Richard Baker, who argued in favour of a strong Senate, with both a power of veto and a power of amendment of money bills.[61] Baker had spent part of his life as a South Australian parliamentarian arguing that the Council in that colony should not be subordinate to the Assembly.[62] He brought these views on the role of an upper house to the Convention. He played an important role in advocating for accountability to the Senate during the Conventions, being described by leading authors as the leader of the States-righters during the Convention.[63]

As discussed in Chapter 3, although the South Australians had reached a compromise in their own parliament to limit the powers of the upper house to amend money bills, the proposals by the delegates for New South Wales and Victoria during the early stage of the 1891 Convention appeared to have prompted an equal and opposite reaction from the South Australians and from other delegates from the smaller colonies. Quick and Garran described the debate that ensued on the powers of the Senate as 'warm', and not one in which the idea of compromise immediately occurred to either side.[64]

For example, Baker argued that the Senate should have the power to amend money bills, referring mostly to what have been characterised as federal concerns.[65] His arguments,

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[59] Wise, above n 4, 127. The questions were referred to the Constitutional Committee: ibid, 129. During the 1891. The Committee was composed of Parkes, Barton, Gillies, Griffith, Thynne, Playford, Downer, Inglis-Clark, Douglas, Grey, Russell, Forrest and Lee-Steere.

[60] Wise, above n 4, 132.

[61] Baker was the son of John Baker, whose role in achieving the South Australian Compact of 1857 was discussed in Chapter 3. Richard Baker attended both the 1891 and 1897-98 Conventions as a South Australian delegate. He also published texts on Federation for the guidance of delegates to the 1891 Convention: R Baker, *Manual of Reference* (E A Petherick & Co, 1891). He was appointed as the first President of the Senate following Federation.

[62] http://biography.senate.gov.au/richard-chaffey-baker/ accessed on 11 October 2017.

[63] Quick and Garran, above n 4, 166; La Nauze, above n 3, 119, 126; Aroney, above n 3, 112, 114, 211 and ff 109.

[64] Quick and Garran, above n 4,128.

[65] Quick and Garran, above, n 4, 128; La Nauze, above n 3, 43, 138.

however, were also interspersed with descriptions of the need to ensure that an upper house had effective powers to consider and review legislation as part of more general considerations of political accountability. He felt that the Senate needed a mechanism to be able to call the Executive to account, expressing concern about the potential power of the Executive if it owed its accountability largely to the lower house.[66] Accordingly, he argued that the Senate had to be given equal power with the House of Representatives over all legislation, including the power to initiate and alter money bills. He thought that, without such a power, the Senate would be 'a mere dummy'.[67]

Ultimately, he argued that political responsibility in the Federation could only work by rendering the Executive accountable to Senate in *addition* to any accountability owed to the House of Representatives.[68] In arguing that responsibility should be owed to both houses, Baker did not just rely on federal concerns. He also referred to what Aroney calls 'classically conservative arguments' in favour of political accountability to upper chambers.[69] Baker's solution was to create a system in which the Executive was, effectively, chosen by and responsible to both houses.[70]

The debate then evolved into whether upper houses should act as chambers of review at all, working as a check on majoritarian power.[71] It was in this context that the most extreme statements were made about the supposed diametrically-opposed aims of 'responsible government' and federalism.[72] For example, John Downer (from South Australia) lamented the manner in which the power of colonial upper houses had been pared back over time. He said

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[66] Arguing that 'the Senate should be at least as powerful as the House of Representatives': Baker, above n 60, First Preface.

[67] *Convention Debates,* 1891, 544 (Baker); Baker, above n 60, First Preface, 166.

[68] Aroney, above n 3, 211.

[69] Aroney, above n 3, 189.

[70] *Convention Debates,* 1891,111 (Baker); Aroney, above n 3, 113. Cockburn supported Baker on this point: see *Convention Debates,* 1891, 197, 199 (Cockburn). Baker carried these views into effect following Federation. During his campaign for election to the Senate in 1901, Baker called the suggestion, that the Senate be subordinate to the House of Representatives, ''absolutely destructive of the first principles of the federation': http://biography.senate.gov.au/richard-chaffey-baker/ accessed on 11 October 2017. When he became President of the Senate he also said that the Senate should not import 'inappropriate procedures' from the British House of Commons to Australian parliamentary practice: see http://biography.senate.gov.au/richard-chaffey-baker/, accessed on 11 October 2017.

[71] These included some of the most cited statements of Dr John Cockburn, a former Premier of South Australia, who supported Baker and Downer's position on the power of the Senate to amend money bills on the basis that the principle of Federation required not just equal representation in the Senate but equal power for the Senate: see *Convention Debates 1891*, 16 (Cockburn).

[72] Wise, above n 4, 80. See *Convention Debates,* 1891, 16 (Cockburn); see also J Cockburn, *Australian Federation* (Horace Marshall & Son, 1901), 155.

that he did not wish to see a similar result occur for the Senate.[73] Andrew Thynne, a member of the Council in Queensland, expressed his emphatic opposition to a system in which the will of a 'brutal majority' would be allowed to prevail over 'good sense' or the rights of minorities.[74] He argued that the result was likely to be the passage of 'hasty and ill-considered legislation', creating a weak union not respected by its own people or around the world.[75] It was entirely possible that Australia's Constitution would have to make clear that the responsibility of the Executive was owed to both houses of the parliament, including that an Executive may not be able to continue in office solely with the approval of the House of Representatives.[76] This manifests those classically conservative arguments in favour of dual accountability that had been a feature of both liberal theory and of parliamentary practice in the Australian colonies.

John Winthrop Hackett, a member of the Council for Western Australia, also advocated for the Senate to be granted co-ordinate legislative powers. In the course of his argument,[77] Hackett undoubtedly relied upon federal concerns,[78] but he too referred to broader democratic ideals regarding accountability which underpinned some of those ideals:

> 'I would like to know since what time have centralisation and democracy been associated? Those who advocate state rights advocate local government, under whose shadow alone democracy can exist. There is nothing in common between centralisation and democracy, and if you handicap a house, which is erected, to preserve state rights, what have you to prevent the establishment, in this huge island of Australia, of a strong central government which is local only to one portion of the continent, and as far as the rest of the continent is concerned is distant and central? I maintain that a central government, just inasmuch as it never can be associated with the power of the people, is inseparably associated with tyranny, arising either from ignorance or design – frequently from ignorance – because a central and distant government can never properly appreciate the local conditions for which it is to legislate'[79]

Overall, pleas for co-ordinate power for the Senate were undoubtedly predicated in part on what have been categorised as federal concerns, but these delegates also made submissions that

[73] *Convention Debates,* 1891, 102 (Downer).
[74] *Convention Debates,* 1891, 111 (Thynne).
[75] Ibid.
[76] *Convention Debates,* 1891, 122 (Thynne).
[77] *Convention Debates,* 1891, 277, 279, 280. 707-708 (Hackett).
[78] *Convention Debates,* 1891, 279, 280 (Hackett).
[79] *Convention Debates,* 1891, 707-708 (Hackett).

there were good reasons for granting the Senate some control of the finances based on the idea of an upper house as an effective reviewer of Executive action.

By the end of the debate, the delegates for and against a powerful Senate had effectively achieved a stalemate on the issue of the Senate's powers to deal with money bills. It would be left to a third category of delegates to suggest a way forward that was acceptable to both groups. The next section considers how delegates in this category accepted the reality that there would have to be dual accountability in order to achieve Federation. Each proposed a way forward that included accountability to the Senate, relying on appeals to the goals of political accountability to two chambers based on delegates' own experience of such accountability in their own constitutions under responsible government.

C. Category 3: the compromise position

Delegates in this category argued that dual accountability was not necessarily inconsistent with the form of responsible government with which delegates were most familiar, and that bicameral systems could countenance more than one form of accountability to more than one chamber of a parliament.

Following the contributions from his South Australian colleagues, Charles Kingston replied to arguments in favour of a power for the Senate to amend money bills. Adopting the solution the South Australians had used to resolve the debate between the Assembly and the Council in that colony in 1857, Kingston proposed that the solution to the impasse that had formed between the nationalists and the States-righters might be to allow the Senate the right to suggest amendments only. This idea became the basis of s 53 of the *Constitution*.[80] At the 1891 Convention, Kingston worked closely with Samuel Griffith and Andrew Inglis Clark, having been appointed to assist them prepare the original draft of the Bill for Federation that was distributed to Convention delegates.[81] Following Kingston's proposal for the possible resolution to the impasse, Griffith addressed the Convention, attempting to convince delegates to adopt it.

[80] I discuss below how Kingston recommended the adoption of the South Australians' approach to the powers of the upper house (to suggest amendments to money bills, with no right to make amendments).

[81] Deakin, above n 4, 38; La Nauze has described how the draft put together by Kingston reflected Inglis-Clark's draft in most respects, with some additions of Kingston's own: La Nauze, above n 3, 26; also BJ Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution' (1980) 18 *Journal of Commonwealth and Comparative Politics* 247, 251.

Griffith was one of the leading figures of the Conventions, particularly of the 1891 Convention.[82] He led the 1891 Drafting Committee and later acted as an adviser on the draft Constitution Bill of 1898.[83] He also published a series of key documents on Australian Federation and became the first Chief Justice of the High Court of Australia. During the 1891 Convention, he explained in detail what responsible government required, including questioning assumptions that political accountability should lie solely or even predominantly to a lower parliamentary chamber.[84] In the following pages I consider step by step the arguments Griffith put to the Convention, as well as the order in which he put them. In this respect, I follow an accepted approach in constitutional law.[85] Both the detail and the order in which Griffith structured his submissions are important. They show that he acknowledged the case against dual accountability before turning to explain why objections to dual accountability were not necessarily supported by the concept of 'responsible government'. Since Griffith's arguments have not been examined in scholarship to date with my specific purpose in mind (that is, Griffith's idea about the possibility of dual accountability as part of responsible government) it is necessary to take some time here to consider his arguments to the Convention.

According to Griffith, responsible government did not necessarily mean political accountability owed solely to a lower house. His position is interesting since, at the time of the 1891 Convention, Griffith was still Premier of Queensland. Barely five years before (as Chapter 3 showed), Griffith had undermined the Queensland Council's alleged powers to amend money bills.[86] During the 1891 Convention (and in his published works on Federation) his views on political accountability to an upper house shifted somewhat – at least insofar as proved necessary to advocate for the interests of a smaller colony in the new Federation.

As a representative of one of the smaller colonies, Griffith had advocated earlier in the Convention not just for the Senate to have the power to veto all legislation but also to retain a

[82] Aroney (2009), above n 3, 114-15. Deakin described Griffith's influence on the Convention as being 'supreme' with no other delegate to rival him: Deakin, above n 4, 52.
[83] Deakin attributed the eventual draft produced by the 1891 Convention as the work of Griffith 'in the main': Deakin, above n 4, 50.
[84] S Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* [1896] AU Col Law Mon 2; S Griffith, *Notes on the Draft Federal Constitution* (1897); S Griffith, *Australian Federation and the Draft Commonwealth Constitution* [1899] AU Col Law Mon 7.
[85] See La Nauze, above n 3 and Aroney (2009), above n 3. My work differs from both authors because I have a different focus: that is, I am concerned with what the contributions to the Conventions revealed about accountability to the Senate (this was discussed in Chapter 1). La Nauze's work is a general piece on all matters discussed during the Conventions. Aroney's work focuses mostly on the impact of ideas regarding federalism during the Conventions.
[86] See Chapter 3.

power of amending money bills.[87] He also warned the delegates about something most of them had for the most part ignored (and continued to ignore) – that there was little difference between a power of veto and a power of amendment in any event, since either could result (in practice) in a denial of supply to the Executive.[88] He also advised delegates that the focus on the power of amendment of money bills was peculiar to Australia, being 'a fetish which is not worshiped in any other part of the world; it is not worshiped even in the United Kingdom'.[89] Griffith's involvement in the political skirmishes in Queensland politics on this issue is consistent with this view. He steadily maintained during those conflicts that the upper chamber's power of amendment of money bills had been lost. Despite Griffith's insights into the power of amendment, the fixation of most delegates on this power permeated much of the discussion on the powers of the Senate during the Conventions, replicating to a large extent earlier-expressed concerns surrounding this power in Australian colonial politics.

Griffith emphasised that the matter delegates had to resolve was the 'relative constitution of the two houses of the legislature' and the need to accept the possibility that approval for legislation, including financial legislation, by a lower house alone would not be sufficient to achieve Federation.[90] He said that, in practical terms, the questions the Convention would have to answer included to which chamber of the parliament ministers would have to be responsible: the House of Representatives? Or both the House of Representatives and the Senate? Regardless of which, how was such accountability to be rendered?[91] Delegates would have to devise a system in which:

> 'the states must also concur by a majority in every proposal such that 'one house cannot have that preponderating influence. There must be on all important matters a deliberate and not a coerced concurrence of the two branches of the legislature.'[92]

Further, if accountability was to be rendered by the Executive to the Senate, including on money bills, then the constitution would also need to provide a measure to determine what

[87] *Convention Debates,* 1891, 40 (Griffith), also at 127.
[88] *Convention Debates,* 1891, 35-8, 40-1, 427-9 (Griffith). He pointed out that a power of veto was more likely to result in a loss of office through the Senate blocking of supply than a power of amendment might be: *Convention Debates 1891,* 429 (Griffith). This is because amendment could result in negotiation of minor parts of legislation the Senate did not like, whereas a power of veto might mean that an entire legislative program would be thrown out for the want of a few minor changes: ibid.
[89] *Convention Debates,* 1891, 428 (Griffith). He also said that each of the American States that had Senate chambers gave those chambers the right to reject and to amend money bills.
[90] *Convention Debates,* 1891, 39 (Griffith).
[91] Ibid. See also Wise, above n 4, 123.
[92] *Convention Debates,* 1891, 33 (Griffith).

should occur in the event of a deadlock between the two chambers.[93] He reminded everyone of the parliamentary deadlocks in their experience of their own colonial constitutions with which they were 'all too familiar'.[94] Thus, Griffith specifically directed the minds of his fellow delegates to Australian parliamentary experience on deadlocks. He clearly felt comfortable with suggesting that his colleagues knew from their own experience what he was speaking of, without the need for any further elaboration. Using his considerable skill as an advocate, Griffith then laid out the case in favour of accountability solely to a lower house, first setting up the case against dual accountability before returning to address the Convention on why dual accountability could and should be adopted by delegates.

Firstly, he said that, in his understanding of how political accountability worked in the United Kingdom and the Australian colonies, the evidence was that lower chambers could generally force legislation to become law.[95] The role of the upper chamber in these bicameral systems was to 'exercise at most a power of delay to prevent undue haste in government; but sooner or later it has to give way'.[96] Lower houses, being elected bodies, had more 'real control'.[97] He argued that, in any contest between the two chambers, the will of an upper house, even an elected upper house, had to give way to that of the lower house.[98] This position is consistent with the one Griffith had taken during his battles with the Council in Queensland (discussed in Chapter 3). Overall, his conclusion on the role played by Australia's colonial upper houses was that:

> 'The functions of a legislative council are all more or less supposed to be founded on those of the House of Lords, the powers of which have become considerably diminished, and are now principally those of a checking and a useful revising body. This is the case with regard to our councils, especially the nominee bodies which exist in many of the colonies. The elective councils have a more real control; but in all great contests between the two houses of parliament, one representing the whole body of the people, and the other representing only part of them, the body representing only part of the people has necessarily had to give way; and it has become

[93] *Convention Debates,* 1891, 429-31 (Griffith). Griffith said that he saw deadlocks between two elected houses as being the real threat to democratic government: ibid.
[94] *Convention Debates,* 1891, 36 (Griffith).
[95] *Convention Debates,* 1891, 31, 35 (Griffith).
[96] *Convention Debates,* 1891, 31 (Griffith). He said that such a model reflected the functions of most of the colonial legislative councils in the Australian colonies: *Convention Debates 1891*, 32 (Griffith).
[97] *Convention Debates,* 1891, 31 (Griffith). Admittedly, this ignored the claims of upper houses that were elected at this stage – including the Councils in Victoria and South Australia.
[98] *Convention Debates,* 1891, 31, 36 (Griffith).

> recognised that the two houses have not in substance, although they have in form, equal authority in the state.'[99]

Griffith then turned to the case against sole accountability to the House of Representatives, saying that the idea that the lower house should have the sole power of originating and amending all bills appropriating revenue or imposing taxation appeared, so far as he was concerned, 'quite inconsistent with the independent existence of the Senate as representing the separate states'.[100] In part, Griffith based this reasoning on federal concerns, including the principle of double representation, namely, that every law passed by the parliament should be passed not just by the majority of the people of Australia as a whole but also by a majority of States.[101] It was during this discussion that Griffith also asked delegates to think more flexibly about the concept of responsible government itself. He told the Convention that responsible government was not a firm and fixed concept. It was one that had been evolving throughout the 19th century, and might change further in the future; including that it might evolve to include political accountability to upper chambers.[102] He made some important observations about responsible government more generally, including that he doubted that responsible government had a specific definition at all. At the commencement of the debate on 4 March 1891 Griffith stated:

> 'We are accustomed in these colonies, as we have been accustomed from our reading of the history of the United Kingdom for the last 100 years – not more, not so much indeed – to the system called responsible government, and I will venture to say that there are many misapprehensions as to what is the essence of the system called responsible government. We are accustomed to think that the essence of responsible government is this: that the ministers of state have seats, most of them, in the lower house of the legislature, and that when they are defeated on an important measure they go out of office. That I venture, with the greatest submission, to say is only an accident of responsible government, and not its principle or its essence. In form – legal form, I mean, statutory form – so far as our written Constitution goes,

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[99] *Convention Debates,* 1891, 33 (Griffith).

[100] *Convention Debates,* 1891, 33, 278, 280 (Griffith). In the context of Griffith's recounting of political responsibility to lower houses, Winthrop Hackett made one of the most repeated statements in scholarship: that 'responsible government would kill Federation or Federation would kill responsible government': *Convention Debates,* 1891, 280, (Hackett). Noted also in Deakin, above n 4, 38 and La Nauze, above n 3, 41; G Sawer, *Federation Under Strain* (Melbourne Univesity Press, 1977) 121-122.

[101] *Convention Debates,* 1891, 4-5, 31-2, 126. Deakin said that Griffith assumed this proposition was fundamental: Deakin, above n 4, 47. See also Wise, above n 4, 122: Wise describes the Convention as having 'proceeded on the basis' of dual accountability: ibid, 243. Both La Nauze and Aroney agree with this interpretation: La Nauze, above n 3, 39; Aroney, above n 3, 115-118, 193-194.

[102] *Convention Debates,* 1891, 33 (Griffith).

> and so far as the unwritten and partly written Constitution of the United Kingdom goes, the system depends on these propositions – that the ministers are appointed by the head of the state, the Sovereign, or her representative, and that they may hold seats in Parliament. That is all that will be found in the Constitution of the United Kingdom.'[103]

Griffith went on, however, to add that even this principle was:

> 'not common by any means to the system of responsible government, as it is known throughout the British empire, nor as it is known in the other European country where they have adopted, after profound study, what they believe to be the essential principles of the British Constitution as at present administered.'[104]

He thus ultimately reminded delegates of how uncertain the idea of responsible government was at this point in constitutional practice. He repeated that the 'present system' of responsible government had only been in existence 'for one century or nearly one century'[105] and was cognisant of 'very great changes in the relationship of ministers to one another, and of ministers to Parliament, in the Australian colonies', as well as the fact that the conventions of political responsibility were subject to change.[106] Since responsible government was still a concept in 'flux' at the time, Griffith argued that any constitution should remain 'elastic' enough to allow for the further development of responsible government, including that the responsibility of ministers to parliament be allowed to work out its own course.[107] In putting these arguments to the Convention, Griffith was asking delegates to consider that responsible government did not mean accountability solely to a lower house.

Griffith acknowledged that the reconciliation of responsible government and federalism was a new experiment, but emphasised once again that responsible government itself was, at that stage, still an amorphous concept.[108] His conclusion was that, although there may have been a real tension in trying to provide for a Senate with importance and power relative to any power enjoyed by the lower house, responsible government was such a relatively recent idea that it could and should be allowed to develop further.[109]

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[103] *Convention Debates,* 1891, 33 (Griffith).
[104] *Convention Debates,* 1891, 33 (Griffith).
[105] *Convention Debates,* 1891, 37 (Griffith).
[106] Ibid.
[107] Quick and Garran, above n 4, 127.
[108] Aroney above n 3, 118.
[109] *Convention Debates,* 1891, 35-8, 40-1 (Griffith). Wise noted this contribution: Wise, above n 4, 129.

Griffith's concluding submission to the Convention was, thus, that it would be sufficient to incorporate into the new constitution the convention that the lower house of the Parliament must support the Executive for it to retain government.[110] He emphasised, however, that the adoption of this one principle of responsible government did not preclude the co-existence of another form of political accountability, such that the Executive could be made politically responsible to both houses of the new parliament. One form of accountability did not necessarily undermine the other.[111] What Griffith wished to make clear to the Convention was that the new system they were providing for would have to render the Executive politically accountable to the Senate as well as the House of Representatives: the real key was to make sure that there would be a means of resolving a deadlock between two houses. Griffith did not see having two lines of political accountability to two separate chambers as a problem in and of itself. In a document he published in the lead-up to 1897-98 Convention in which he reviewed the proposed arrangements for Federation, Griffith described the essential elements of political responsibility in systems of responsible government as needing no more than a Parliament that was able to call the Executive to account.[112]

By the end of his submissions to the 1891 Convention, Griffith had managed to refer to both British and Australian colonial practice on responsible government to establish a number of things. First, a basic convention was in place by this time under responsible government that a ministry that lost its majority in the lower house, lost office. Second, ministers needed to be members of parliament. Other than these two propositions, Griffith made equally clear that the means through which ministries were rendered accountable to parliament was a quickly evolving space and, being still in a state of flux in both Great Britain and in Australia, the wisest thing would be to allow for flexibility in any constitutional arrangements to allow for further development of the doctrine. He had thus done his best to leave open the possibility of dual accountability not being inimical to responsible government but, potentially, a chance for its future development.

Griffith was supported in his efforts to convince delegates of the possibility that responsible government would not be undermined by the inclusion of a framework of dual accountability by a man who would emerge as the leader of the 1897-98 Convention. Edmund Barton, a member of the Legislative Council in New South Wales and a delegate from that colony (and

[110] *Convention Debates,* 1891, 40 (Griffith).
[111] Ibid.
[112] Griffith (1896) above n 83, 17.

former member of the Legislative Assembly), would come to be regarded by some of his contemporaries as the saviour of the 1897-98 Convention from an apparently impassable bridge between the nationalists and the States-righters.[113] While Barton is often regarded as falling within the nationalist camp, it has also been accepted that he took a pragmatic position on the need for accountability to the Senate.[114] During the 1891 Convention, Barton argued (along with his colleagues from New South Wales) that the wisest course to follow was to make the Executive primarily responsible to the lower house in matters of finance.[115] However, he also explained to delegates that they would have to accept that the federal parliament they would create would embed the principle of accountability to two houses of the legislature 'The organ by which the will of the people is expressed is not necessarily the house of representatives alone.'[116] He said that each chamber would have to be given a right to determine the fate of legislation, including money bills:

> 'it seems to me that it is not good argument to fall back upon the representative principle to the extent of saying that there is only one representative legislature, and, therefore, only one which can deal freely with the question of money and taxation if the very spirit upon which federation rests is threatened by any scheme in a money or taxation bill.'[117]

Although Barton favoured accountability primarily to the lower chamber, he supported the position of the States-righters when he acknowledged that the Senate should be given power to amend money bills. It seems that he supported this because he recognised the same possibility that Griffith had, namely, that a power of veto might prove to be more destructive than a power of amendment.[118] Barton specifically referred delegates to their own constitutions and their familiarity with upper houses that had rights of veto. He said that the systems with which

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[113] A series of participants described it this way: see Deakin, above n 4, 87, 88: Wise, above n 4, 127; Quick and Garran, above n 4, 178.

[114] Barton was a member of both the Constitutional and Drafting Committees. Deakin described him as one of the most important figures during the Conventions: Deakin, above n 3, 34, 86. By his own report, Barton was asked by Parkes to take over the leadership of the federal movement: see Wise, above n 4, 33, 165. Wise says that by 1896 Barton had become 'the acknowledged leader of the federal movement in all Australia': Wise, above n 3, 165. Other authors have agreed with these interpretations of Barton's significance during the Conventions: see La Nauze, above n 3, 75-76; JA Thomson, 'The Founding Father? Edmund Barton and the Australian Constitution' (2002) 30 *Federal Law Review* 407; 421-25, 426. For further details of Barton's contributions to Federation generally see G Bolton, *Edmund Barton* (Allen & Unwin, 2000); John Reynolds, *Edmund Barton* (Angus and Robertson, 1979).

[115] Barton argued that only a defeat in the lower house should be able to force a government to go to the people: *Convention Debates,* 1891, 94 (Barton).

[116] *Convention Debates,* 1891, 91 (Barton), referring to Esrkine May's treatise on British parliamentary practice.

[117] *Convention Debates,* 1891, 90 (Barton).

[118] *Convention Debates,* 1891, 91 (Barton).

delegates were most familiar all included dual accountability. Such dual accountability did not mean that those constitutions were not constitutions operating under 'responsible government', since each of the colonial constitutions, even those that allowed the upper house a right of amendment, still operated under the 'principles of political responsibility'.[119]

By the time Griffith and Barton had finished speaking, little else could be added. The more moderate arguments of both men seem to prompt a shift toward compromise, and South Australia's delegates returned to suggesting the compromise they had reached in 1857 as a possible solution to the impasse that had been reached between the nationalists and the States-righters.[120] Munro decided to bring matters to a head by informing the Convention that the only compromise the Victorians would find acceptable was one modelled on the South Australian Compact.[121] Delegates on both sides then urged its adoption of the compromise and, when a vote was taken, it was approved.[122] Unfortunately, apart from the fact that a vote was taken and its result, the record of the Convention itself offers little insight into the ultimate motivations of delegates for accepting the compromise. Private papers of delegates shed no further light on the specific motivations of each voting delegate that day.[123] In his detailed analysis of the Convention Debates, La Nauze remarks that it appeared that the warnings regarding the possibility of deadlocks if the Senate retained a power of veto were seemingly set aside in the desire for compromise in the interests of achieving Federation.[124] Whatever the ultimate motivation for its acceptance, the adoption of the 'Compromise' became the 'turning point' of the Convention.[125]

The Convention resolved to refer matters to the Drafting Committee and the Compromise made its way into the draft.[126] Over Easter that year, a drafting sub-committee met aboard the *Lucinda* to complete the final draft.[127]

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[119] *Convention Debates,* 1891, 411, 414 (Barton).
[120] Quick and Garran, above n 4, 127. 132; La Nauze, above n 3, 53.
[121] La Nauze, above n 3, 43-44.
[122] Quick and Garran, above n 4, 128, 139; La Nauze, above n 3, 44.
[123] Apart from the contributions of Deakin and Wise regarding dealings behind the scenes in which the Tasmanian delegates were convinced to vote for the compromise in the interests of achieving Federation: see below n 178 on this.
[124] La Nauze, above n 3, 44, 71, 131. La Nauze describes the ensuing debate and the eventual division, 22 to 16, in favour of the Compromise as 'reflecting the predictable division between the larger colonies of Victoria and NSW and the smaller colonies: ibid, 71.
[125] La Nauze, above n 3, 44.
[126] La Nauze, above n 3, 45; Wise, above n 4, 127. La Nauze discuses Griffith's role in compiling the draft in detail: see La Nauze, above n 3, 49-50, 74-75.
[127] La Nauze, above n 3, 64-69.

In 1895 a Premier's Conference was held in Hobart. At this Conference a suggestion (later adopted during the 1897 Convention) was made for the deadlock mechanism that deadlocks should be resolved by a three-fifths majority at a joint sitting of the two chambers.

It would be another five years before representatives from the colonies met again to continue the debate about how political responsibility could be structured to render a government politically accountable to two chambers. Despite the adoption of the Compromise during the 1891 Convention, when delegates from the colonies re-formed in 1897 the question of dual accountability was canvassed at length once again.

IV. Background to the 1897-98 Convention

In the lead up to the 1897-98 Convention Robert Garran, who would go on to co-author (with John Quick) the most authoritative contemporary text on the *Constitution* and the Convention Debates,[128] published *The Coming Commonwealth.*[129] *The Coming Commonwealth* was distributed to delegates to the 1897-98 Convention in order to provide them with a history of both the Federation movement generally and the 1891 Convention specifically. Soon after its publication, George Reid, then Premier of New South Wales and a delegate from that colony to the forthcoming Convention, invited Garran to be his secretary during the 1897-98 Convention. Reid also had Garran appointed Secretary of the Drafting Committee.[130] Garran would support, along with his contemporaries from New South Wales, a system of political accountability to the lower house. However, he also picked up the points that had been made by Griffith and Barton during the 1891 Convention as to the need for dual accountability if Federation was to be achieved at all. Following the approach of Griffith, he suggested that responsible government was a malleable concept and that the new constitution should not fix the parameters of that principle, allowing scope for its further development. In fact, Garran went even further, suggesting that the confidence of both chambers might be required to support a ministry:

> 'That the parliamentary system for federal purposes may develop special characteristics of its own is not unlikely. Thus the familiar rule that a Ministry must retain the confidence of the representative chamber, may, in a Federation—where both Chambers are representative—develop into a rule that the confidence of both Chambers is required. This would mean that

[128] Quick and Garran, above n 4.
[129] RR Garran, *The Coming Commonwealth* [1896] AU Col Law Mon 3.
[130] Garran was also made a member of the Press Committee at Barton's request: 'Garran, Sir Robert Randolph (1867-1957)' in papers at the *National Library of Australia's Federation Gateway.* Archived from the original on 8 July 2006. Retrieved 20 July 2006.

> executive (as well as legislative) acts should have the support of a majority of States as well as of a majority of citizens.'[131]

He reasoned that a majority of the population could not force legislation 'upon an unwilling majority of States'.[132] He referred as well to classic arguments about the benefit of upper chambers, pointing out how such chambers helped to 'check sudden and violent changes of policy' and ensure 'a more effectual representation, as it guards against the very real danger of the legislature reflecting too thoroughly many mere passing phases of popular opinion or emotion'.[133] This argument reflected views about accountability that had been present in liberal theory, as well as in Australian colonial politics (discussed in Chapter 3). For Garran, the Senate would act as a house of review. It would check governmental action as upper houses always had, and would review legislation on behalf of the States as a States' house. Thus, appeals to both federalism and accountability were made by Garran. Chapter 6 returns to the ways the High Court has recognised that both ideas were relevant to the framers of the *Constitution* in the Court's determinations on the accountability of the Executive to the Senate.

In addition to the contributions of Griffith and Barton during the Convention, and Garran in the lead-up to the 1897-98 Convention, one more of the leading figures of the Conventions and his contributions to this intermediate category (Category 3 delegates) are required: those of Andrew Inglis Clark. Clark's contributions are of interest since, in them, we can see appeals to arguments about the need for accountability to an upper chamber, not only to satisfy the goals of federalism but also as part of both good governance and the legitimate aims of a liberal democracy.

Clark had been one of the delegates from Tasmania to the 1891 Convention. He had drafted and circulated his proposed constitution to the 1891 Convention. Although the Convention resolved not to use his draft as the formal basis for drafting its own constitutional document,

[131] Garran, above n 128, 148, also at 61. Also, Garran, above n 128, 147-48, 149. Although he also said in the same text that responsible government meant responsibility of local ministers to the lower Houses of colonial parliaments only equating this to the system in place in Canada: Garran, above n 128, 81, 84, 147-48.
[132] Like Griffith and Barton, he pointed to the reality that anything less than approval of legislation from both the House of Representatives and from the Senate was not likely to be accepted by the Australian colonies: Garran, above n 128, 130.
[133] Garran, above n 128, 131.

Clark's draft had achieved this status in practical terms during the 1891 Convention, because the Drafting Committee had indeed used his work as the principle guide to its own labours.[134]

Clark's draft incorporated a strong parliamentary Executive moderated by the role of the Senate.[135] Although he is known for having expressed a preference for American federalism, the starting point for Clark's draft included a presumed continuance of 'responsible government' and dependency on the British Empire.[136] When it came to the Senate's powers over money bills, he considered that any power of amendment for the Senate of such bills would undermine the principle of control of legislative policy by the majority in the House of Representatives.[137] However, he also noted that the British system of 'responsible government' was not founded on the principle of rule by an absolute majority (based alone on commanding a majority in the Commons).[138] He appreciated that Australia's colonial parliaments were not based on the idea of majority will – since equality of representation was not a feature of any Australian upper house at the time.[139] Although Clark ultimately presumed the continuance of responsible government, he also expressed severe reservations about the domination by the Executive of Parliament and said it was necessary to include provisions for the creation of a moderating influence through the Senate.[140]

Appeals to both federalism and accountability had, thus, been made by leading figures of Federation. Those men had advocated dual accountability as a means of achieving a compromise between the claims of the nationalists and the States-righters. By 1897, the idea of the need for dual accountability based on both federalism and broader concerns of

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[134] Garran, above n 128, 165-66, 168. The role of Clark and Clark's draft on the version of the Constitution ultimately adopted is discussed in detail in Aroney, above n 3, 187; also A Twomey, 'A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth' (Pt 2) (2001) 30 *Federal Law Review* 399. His importance to and influence on the 1891 Convention was also emphasised by his contemporaries: see Garran, above n 128, 24; Wise, above n 4, 75.

[135] This was contained in a memorandum which Clark distributed alongside his draft to the 1891 Convention: see Andrew Inglis Clark, 'Australian Federation (Confidential)' (1891).; *Convention Debates*, 1891, 106 (Clark).

[136] Aroney above n 3, 109.

[137] *Convention Debates 1891,* 247 (Clark).

[138] Ibid. Clark thought the Canadian Constitution was skewed too much in favour of majoritarian government: A Inglis Clark, *Studies in Australian Constitutional Law* (2nd ed, 1905). In that work Clark says that the Canadian model was used as an example of how to reconcile a strong parliamentary Executive with federalism, but it had been rejected because the 'Australians felt that the Canadian model resolved the tension too much in favour of a powerful lower house'. See also N Aroney, 'Althusias at the Antipodes: The Politica and Australian Federalism' (2004) 1 *University of Queensland Law Research Series,* 151-2.

[139] *Convention Debates,* 1891, 247 (Clark).

[140] Aroney, above n 3, 71, 78-87, 109; C Saunders, *The Constitutional framework : hybrid, derivative but Australian* (Centre for Comparative Constitutional Studies, Law School, University of Melbourne, 1989), 2-3, 5-7 and La Nauze, above n 3, 19.

accountability would once again be accepted by the Convention. In the intervening six years, arguments about political accountability to the Senate were afforded an opportunity to develop. Notwithstanding the passage of time, in 1897 the same arguments made during the 1891 debate on the role and powers of the Senate were made once again. These arguments were relived in detail, but the same result was ultimately reached by the 1897-98 Convention and the Compromise of 1891 was reinstated. The next section explores the references delegates made during the 1897-98 Convention to the need for two parliamentary chambers that could call the Executive to account, with the Senate operating not just as a States' house but also as a house of review generally. I consider what appeals were made to the benefits of accountability to two chambers and to the Australian experience of such dual accountability.

V. Revisiting the contest on the powers of the Senate in 1897-98

During the First Session of the 1897-98 Convention the delegates split into familiar categories, with most delegates from the larger colonies taking the nationalist position and those from the smaller colonies becoming advocates of States' rights.[141] The debate which had occupied most of the time of the 1891 Convention was thus repeated as the 'burning question' of the First Session.[142] La Nauze described the debate as both 'exhaustive and exhausting'.[143] Any reading of the record of the Convention Debates shows how close the Convention came to breaking up altogether as a result of the entrenched positions of the nationalists and the States-righters on the power of the Senate to amend money bills. Once again, the Senate's power to veto such legislation attracted little attention from either side.

At the commencement of the Convention, a series of Committees was formed, the most important of which, for present purposes, was the Drafting Committee. It comprised some of the leading figures of the Conventions, including some who had been present at the 1891 Convention (Deakin, Barton, Baker and Downer) as well as some who were to become prominent in the 1897-98 Convention (Richard O'Connor, a Member of the Victorian Legislative Council who was soon to become a member of the first High Court; Isaac Isaacs, then Attorney-General of Victoria at the time, another future member of the High Court; as well as Garran's co-author, John Quick).[144] As La Nauze has noted, for reasons not discernable

[141] La Nauze, above n 3, 119. 185-6, also, 161-6.
[142] La Nuaze, above n 3, 118; Wise, above n 4, 232; Garran, above n 128, 233.
[143] La Nauze, above n 3, 126.
[144] The Committee also included (Joseph) Abbott, Carruthers, Trenwith, Cockburn, Gordon, Hackett, Hassall, Brown, Douglas, Lewis and Moore: noted in La Nauze, above n 3, 167. Quick and Garran described how a number

from the available records, the Drafting Committee overturned the Compromise of 1891, thereby reinstating power to the Senate to amend money bills.[145] Deakin, Higgins and Isaacs from Victoria were staunch advocates of accountability being owed solely to lower chambers. Baker and Downer from South Australia, as States-righters, could have taken the position for reinstatement of the Senate's power to amend money bills. Whatever the reason, the idea of the power of amendment for the Senate over money bills was included by the Committee. Since there is no record of the Committee meetings, nor of any voting in them, it is impossible to know whether the Victorians voted for or against the re-instatement of the power of amendment, and little is to be achieved in speculating on the possible motivations the Committee for putting up a draft that had already been rejected by the 1891 Convention. Other than statements that the new Convention would have to consider matters anew, there does not appear to be much other explanation for proposing what had already been rejected in 1891.[146] The conflict over the Senate's power of amendment was thus re-ignited when the Committee's draft was put to the 1897-98 Convention.[147]

On 13 April 1897 the debate on the money bill provision began, proving once again to be, as La Nauze has described it, the most 'momentous' debate of the Convention.[148] The discussions have been accurately described by him as 'fairly acrimonious'.[149] In total, twenty-one delegates spoke on the issue. Perhaps because of the passion in the speeches of some of the more entrenched nationalists and States-righters, most delegates ended up pleading for the Compromise of 1891 to be maintained.[150]

As Leader of the Convention, Barton opened by framing the matters delegates would have to resolve – doing as much as he could to set out the arguments and their relative strengths and weaknesses. He told delegates that their task was to create a draft constitution which could be approved by the electors in each State, not just by the Convention itself.[151] He specifically reminded delegates that they would have to determine how to incorporate a system in which

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of key delegates on this Committee were particular students of 'these subjects', most notably Griffith, Parkes, Barton, Deakin, Wrixon, Baker, Kingston and Inglis Clark: see Quick and Garran, above n 4, 130.

[145] La Nauze, above n 3, 129 168, 169.

[146] In no subsequent work have any of the Committee's members or any delegate to the Convention made clear what the motivations of the Committee were in reinstating the power of amendment. In the absence of records, no scholar has speculated to date about the possible reasons for the Committee overturning the Compromise of 1891 and I do not propose to do so either.

[147] La Nauze, above n 3, 137.

[148] La Nauze, above n 3, 172.

[149] La Nauze, above n 3, 121, 503.

[150] La Nauze, above n 3, 142.

[151] La Nauze, above n 3, 119.

the Executive would be politically accountable to both a majority of the population and a majority of the States.[152]

As noted, the delegates divided into the predictable categories of nationalists and States-righters. In addition to those divisions, however, a few delegates once again suggested the intermediate position, appealing to concerns of both federalism and accountability in order to urge others to reinstate the Compromise of 1891. I provide a brief summary of the positions of the nationalist and the States-righters before returning to the more interesting position of the Category 3 delegates during this Convention.

The reversal of the Compromise of 1891 by the Drafting Committee was quickly opposed by delegates from the larger colonies, spearheaded by Reid from New South Wales. Reid immediately began by asking for an amendment to the draft that would prevent the Senate from amending money bills.[153] He said that the right to amend money bills had to remain with the House of Representatives alone and argued that a power of veto of money bills already gave the Senate a 'real living power'.[154] In this, he had the support of other delegates from New South Wales and Victoria.[155] Two Victorians, Higgins (a member of the Legislative Assembly for Victoria who would also become a High Court judge) and O'Connor, took the opportunity to comprehensively reject the work that had been achieved by delegates like Griffith on suggesting that responsible government was a developing and flexible concept. For Higgins and O'Connor, responsible government could only be achieved if political responsibility of the Executive was owed to the lower house alone.[156]

Higgins proved to be one of the staunchest advocates of accountability to the House of Representatives alone during the Convention.[157] While he accepted that there could be two houses for the national parliament, he wanted to ensure a system in which the majority will of

[152] *Convention Debates,* 1897, 22 (Barton). He said that he personally thought that responsible government could only be achieved if the Executive were politically accountable only to the lower house: *Convention Debates,* 1897, 22 (Barton). The point he was making was that he was willing so support dual accountability in order to achieve Federation.

[153] *Convention Debates,* 1897, 172, 484-485 (Reid); see also La Nauze above n 3, 141.

[154] *Convention Debates,* 1897, 484, 485 (Reid); La Nauze, above n 3, 145, 146.

[155] For example, Turner supported Reid: *Convention Debates,* 1897, 485 (Turner); 488 (Wise).

[156] *Convention Debates, 1897,* 492, 493, 499-500 (Higgins); 507, 511 (Deakin); 525-526 (Trenwith).

[157] Even after the compromise over the powers of the Senate had been resolved during the 1897 Convention, Higgins continued to lobby for majority rule expressed through the House of Representatives once the Conventions had finished. On Higgins' position against accountability to the Senate throughout the Conventions, see Aroney above n 3, 12, 131 and HB Higgins, *Essays and Addresses on the Australian Commonwealth Bill* (Melbourne, Atlas Press, 1900), 9, 16-18, 47, 62, 79, 101, 110, 180, 184.

voters based on population alone would always prevail.[158] His colleague from Victoria, O'Connor, also forcefully argued that it was clear that 'one House must have sway'.[159] He encapsulated the position of those in favour of a dominant lower house as being necessary because when:

> 'the existence of the government depends upon the will of the Representative House, it follows that the other House cannot be given equal powers with regard to those matters which effect [sic] the existence of the Government.'[160]

He clarified this by saying that money bills were the only 'matters' which 'effected [sic] the existence' of the Executive.[161] In those cases, he was insistent that the will of the House of Representatives had to be superior to the Senate's.[162] A number of other delegates then followed O'Connor's and Higgins' lead, arguing that responsible government necessitated political responsibility of the Executive solely to the lower house.[163] The majority being Victorians, the impact of the conduct of Victoria's upper house had, as Waugh has suggested, made quite an impact on them.[164]

It was in this context of the possibility of a return to accountability to the House of Representatives alone that delegates from the smaller colonies were prompted to express equally adamant views that the political responsibility of the Executive would have to be owed to the Senate – and that this could only be achieved if the Senate had a power to amend money bills.[165] Baker in particular returned to the arguments he had put to the 1891 Convention on the point, stating that:

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[158] Noted in Aroney above n 3, 188, 212.
[159] *Convention Debates,* 1897, 52 (O'Connor).
[160] *Convention Debates,* 1897, 52-3 (O'Connor).
[161] *Convention Debates,* 1897, 53 (O'Connor).
[162] Wise, above n 4, 183. O'Connor suggested at this stage that one method of resolving deadlocks might be by a joint sitting of both houses: *Convention Debates,* 1897, 53 (O'Connor).
[163] *Convention Debates,* 1897, 96-97 (Higgins), 51-57 (O'Connor). For example, Henry Wrixon said that government was all about control of public finances and, under the English model, executive responsibility could only be to one house, being the lower house of parliament: *Convention Debates 1897*, 214-215 (Wrixon);, 44 (Turner), 73 (Glynn), 94 (Carruthers), 106, 107 (Wise), 134, 135, 137 (Symon); 210, 213 (Downer) (although Downer also said that responsible government could change); 275-76 (Reid); 292-94 (Deakin); 390 (Isaacs).
[164] J Waugh, 'Framing the first Victorian Constitution, 1853-5' (1997) 23(2) *Monash University Law Review* 331, 348.
[165] La Nauze, above n 3, 142. See for example *Convention Debates 1897,* 494 (Douglas). Downer also rejected any compromise which would erode the power of the Senate to reject money bills altogether, saying that enough ground had already been conceded by already having agreed to limit the Senate's power of amendment over such bills: *Convention Debates,* 1897, 487 (Downer). See also 146 (Holder); 256 (Solomon); 309 (Clark).

> 'What we want in a federation is this: an executive responsible to parliament, responsible to the people through the parliament, but not exclusively responsible to one house of parliament. We want the executive so constituted that it is enabled to lead debate and legislation in both houses of parliament, not dissociated altogether from the legislature, as is the case in America, but so connected with parliament that it can perform the function of leading and informing parliament, which is necessary to secure harmonious working, but at the same time so constituted as not to be exclusively responsible to one house.'[166]

Downer supported Baker, arguing, as Griffith had in 1891, that it was a mistake to think that responsible government did not mean responsibility to *both* chambers in a bicameral parliament.[167]

By the end of the day, the respective positions of the nationalists (Category 1) and the States-righters (Category 2) appeared not only completely at odds with one another but also irreversibly entrenched.[168] Once again, it was left to a few delegates to convince their colleagues that there was a way forward in which political accountability could be owed to both chambers – only through different mechanisms of accountability.

A. The compromise position in 1897

Griffith's arguments at the 1891 Convention on the possibility of dual accountability and responsible government co-existing were clearly remembered in the 1897-98 Convention. In attempting to resolve the impasse that had once again flared between the nationalists and the States-righters, Griffith's arguments about the possibility of responsible government encompassing political accountability to more than just a lower chamber were referred to once again. Further, as well as arguments about the flexible nature of responsible government, delegates in Category 3 during the 1897-98 Convention referred to the broader objectives of ensuring accountability to an upper chamber that had been present in Australia's colonial constitutional systems. Category 3 delegates appreciated that they were being asked to create something that was more or less a replica of the form of political accountability with which delegates were already familiar through their own local legislatures.

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[166] *Convention Debates* 1897, 785, also at 30 (Baker). Baker expressed concern that a power of veto alone was too big a weapon to be wielded by the Senate: see *Convention Debates* 1897, 784-85 (Baker).
[167] *Convention Debates,* 1897, 487 (Downer).
[168] La Nauze, above n 3, 142. Ultimately, the representatives from the larger colonies had made clear that they were not going to accept any changes to the Compromise of 1891. La Nauze says that It seemed that no compromise would be reached at all: ibid.

Barton took up the baton, prosecuting the argument that Griffith and he had made to the 1891 Convention on dual accountability. He started by reminding all present that there was no real difference between a power of amendment or a power of veto, since either had the potential to block government initiatives.[169] Again, this point was largely ignored by the other delegates. Others then acknowledged that, although the lower house might have the greater responsibility for spending, it would be necessary to ensure that the Executive sought ultimate approval of all legislation from the Senate as well.[170] Others specifically referred to Griffith's arguments at the 1891 Convention that responsible government did not necessarily entail responsibility to a lower house alone.[171]

The issue was brought to a head when George Turner, then Premier of Victoria, explained that, unless the House of Representatives was given the predominating say in matters of finance, the people of Victoria and, most likely, of New South Wales, would not approve Federation at all.[172] Thus, if the Compromise of 1891 was not adhered to, Federation would simply not happen.[173] The possibility of the Senate possessing a power of veto over money bills was apparently still saleable to people in the largest colonies. Perhaps this power of veto was explicable because both colonies had accepted a power of veto for their upper houses – notwithstanding the difficulties such a power had created for governments in Victoria.

As leader of the Convention, Barton returned to press upon delegates the need to achieve the essential goal of the Convention: to produce a suitable draft for submission to colonial legislatures and to the Australian people. He returned to the Compromise, pointing out that the Senate would retain a power of veto over money bills.[174] In order to satisfy the larger colonies, he reminded their delegates that the proposal was that the Senate would be directly elected.[175] At this stage, sensing that delegates' tempers had been exhausted on the point, Barton

[169] *Convention Debates,* 1897, 382, 390, 391 (Barton), still maintaining that responsible government meant responsibility to the lower house but that Australia would need to create a system in which the Executive would be responsible to Parliament as a whole; the solution lay in the Compromise of 1891: 384-5, 443 (Barton).
[170] *Convention Debates,* 1897, 222, 504 (McMillan); 324 (Gordon); 345-346 (Cockburn, arguing that responsibility to both Houses would entrench responsible government); 487 (Downer).
[171] *Convention Debates,* 1897, 492, 531 (Dobson); 548 (James); 504, 506 (McMillan).
[172] *Convention Debates*, 1897, 166 (Turner). Turner said that the Drafting Committee's rejection of the Compromise of 1891 was something that he 'dare not submit' to the people of Victoria and that his colony would reject it: 172 (Turner).
[173] La Nauze, above n 3, 141. Ultimately, both Turner and Reid (as head of the New South Wales delegation) were unwavering on this point: ibid. Carruthers went so far as to withdraw any support for the Senate even being able to suggest amendments at this stage: Quick and Garran, above n 4, 173.
[174] Aroney, above n 3, 203.
[175] Ibid.

suggested an adjournment.[176] In response to Barton one of the Tasmanian delegates, John Henry, made clear that he would vote for the Compromise being reinstated, given that 'Federation itself was in danger' of not being achieved at all.[177] This submission by Henry was brilliantly tactical, highlighting to others precisely what was at stake and showing strong resolve, from one of the least populous colonies, to achieve Federation.

The adjournment left the delegates a night in which to think about whether Federation itself was more important than the division between the larger and smaller colonies on the issue of the Senate's power to amend money bills.[178] When the delegates re-appeared the following morning, the debate over the power of amendment was essentially over. The Convention returned to its work after the adjournment. Barton redoubled his efforts once again using the approach Griffith had taken in 1891 of reminding the Convention that responsible government meant no more than self-government by politically responsible institutions.[179] He then specifically referred to Australia's own responsible governments under its colonial constitutions, arguing that delegates were already familiar with institutions that were moderated by equal representation in 'reasonably powerful' upper houses.[180] The Senate would, by analogy, need to be reasonably powerful if Federation was to be achieved.[181] This was a direct appeal to the idea that the system of government delegates were now being asked to create was similar to that which they were already used to in their colonial constitutions. We can see here how important Australia's constitutional models were to Barton's arguments to get the Compromise accepted again. Barton also reminded the nationalists that they had already conceded that two houses would be necessary for good government.[182] He also ultimately reminded all delegates that these questions had already been debated at length by the great minds who had represented the colonies at the 1891 Convention, and the solution that had been arrived at was the Compromise.[183] He then outlined the arguments for and against granting the

[176] *Convention Debates,* 1897, 549 (Barton). Both Wise and Quick and Garran described this as one of the most critical moments of the entire convention, giving delegates time and space to think about what was at stake, Federation itself: Wise, above n 3, 235; Quick and Garran, above n 4, 173. Deakin and Wise felt that some discussions that occurring during the adjournment may have tipped the balance – including (importantly) that three Tasmanians delegates (Neil Elliott Lewis, Nicholas John Brown and John Henry) put their support behind re-instating the Compromise, as well as Sir Joseph Abbott from New South Wales: Deakin, above n 4, 84; Wise, above n 4, 235.
[177] La Nauze, above n 3, 143. Henry was a delegate from Tasmania.
[178] Quick and Garran, above n 4, 144.
[179] Noted by Aroney, above n 3, 189.
[180] *Convention Debates,* 1897, 555 (Barton).
[181] *Convention Debates,* 1897, 555 (Barton). See also *Convention Debates* 1897, 626 (Kingston).
[182] *Convention Debates,* 1897, 377 (Barton).
[183] *Convention Debates,* 1897, 556-57 (Barton).

Senate a power of amendment over money bills, and left the delegates in no doubt that the question they were resolving was whether or not they would achieve the Federation 'we have been sent here to accomplish'.[184] Little more could be said.

Keeping with the alliances he had formed during the 1891 Convention, Charles Kingston now took the opportunity to break with States-righters from the South Australian delegation, and support Barton. He pointedly reminded his South Australian colleagues that the Compromise had been proposed by the South Australian delegation at the previous Convention, based on their own model. Like Barton, Kingston referred to an Australian colonial constitution in order to lend support to his arguments. Thus, apart from raising the point that the South Australians had proposed the model that became the Compromise, he specifically reminded his fellow South Australians that the people of their colony had never given any indication that they disapproved of the upper house in that colony not having a power to amend money bills.[185] Again, this was a suggestion that the model being proposed for the Commonwealth was not too far removed from the institutions that voters in the colony were used to. Further, he pointed out that the South Australian delegates had raised no objection to accepting that Compromise during the 1891 Convention.[186] Agreeing with Barton, he said that, if the Compromise was not reinstated, there was little chance of Federation occurring at all.[187] He thus urged delegates to 'gracefully give way' and reinstate the Compromise.[188] Kingston then committed himself publicly to voting with the delegates from New South Wales and Victoria to reinstate the Compromise.[189]

Such a public declaration of support for the Compromise, given that Federation itself was on the line, apparently focused the minds of other delegates as to what was really at stake. The stalemate certainly seemed to have ended following Kingston's speech. Support for reinstatement of the Compromise came from, among others, another South Australian, Patrick Glynn. Glynn told the Convention that he was not prepared to risk achieving Federation over the expression of what was, to him, an entirely 'academic opinion'.[190] McMillan (from NSW)

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[184] *Convention Debates,* 1897, 555-56 (Barton), also at 145. La Nauze describes Barton as speaking 'forcefully' on how failure to reach agreement on one clause would imperil the chances of Federation ever being achieved: La Nauze, above n 3, 145; see also Wise, above n 4, 181; see also *Convention Debates,* 1897, 173, (Barton).
[185] *Convention Debates,* 1897, 173 (Kingston).
[186] *Convention Debates,* 1897, 145 (Kingston).
[187] *Convention Debates,* 1897, 172-73 (Kingston).
[188] Ibid.
[189] *Convention Debates,* 1897, 143 (Kingston), also at 579 (Kingston).
[190] *Convention Debates,* 1897, 143 (Glynn). See also *Convention Debates 1897,* 564 (Brown).

then also said that he supported Kingston in 'the interests of Federation'.[191] When two of the Tasmanian delegates pledged support to reinstatement of the Compromise, a vote was taken.[192]

On a division, the Compromise was reinstated, albeit by a narrow margin.[193] La Nauze attributes the reinstatement of the Compromise during the 1897-98 Convention largely to the efforts of Barton and Kingston.[194] Unfortunately, we have nothing more to examine than the record that shows that a vote was taken and the final numbers. It is thus not possible to know which delegate voted for which position and the precise motivation for each doing so.[195] What we do know is that the Compromise would form the basis for what would become s 53 of the *Constitution*.

VI. Accountability to the Senate: Second and Third Sessions

La Nauze has accurately characterised the debate over the powers of the Senate over money bills as the crisis of the First Session of the 1897-98 Convention.[196] The crisis was only narrowly overcome when the Compromise was reinstated at the urging of the Category 3 delegates.

When the Compromise was put to Australia's colonial parliaments, a predictable pattern of support and opposition emerged, with a division between those in favour of the 'absolute supremacy of the majority, independent of State boundaries', mainly in the larger colonies of Victoria and New South Wales, and those in favour of 'some degree of control by a majority of States', mainly in the smaller colonies.[197] Victoria and New South Wales made clear that their support for Federation was conditional upon the Senate having no power to originate or

[191] *Convention Debates,* 1897, 143 (Glynn). Although arguing that it was reasonable for the States house to be able to tell the Executive that it 'had gone too far' and that the Senate would be ineffectual as a revising chamber unless it had the power of amendment as well as veto: 173. McMillan ultimately decided to vote pragmatically. While he noted his objection to the Compromise, he also said that, for the sake of compromise and the sake of an Australian union, he supported Reid's amendment to reinstate the Compromise of 1891: 146.
[192] Brown and Lewis.
[193] The result was that the reinstatement of the Compromise of 1891 was carried by 25 votes to 23: *Convention Debates,* 1897, 575. The almost even division of votes shows just how split the delegates were on the question. On this point see Aroney, above n 3, 210.
[194] La Nauze, above n 3, 141-42.
[195] There is also nothing in the works of those present that indicates precisely who voted for which position and why. Scholars have not speculated further on this and I do not do so either.
[196] La Nauze, above n 3, 147, 148.
[197] Quick and Garran, above n 4, 186. See also Aroney, above n 3, 183.

to amend money bills.[198] Quick and Garran later noted that the smaller colonies were prepared to concede the Senate's power of amendment provided that the Senate's power of veto over all legislation, including money bills, remained.[199] Ultimately, all colonial parliaments accepted the Compromise in the interests of moving towards Federation.

By the time the Convention reconvened in the Second Session, the Senate's power of veto was largely accepted. The Victorian delegates now focused their efforts on including a deadlock provision.[200] The contest thus shifted to the terms of what would eventually become s 57 of the *Constitution*. The Second and Third Sessions of the 1897-98 Convention were left the task of creating a solution to the resolution of deadlocks. In the next section, I consider how the contest between nationalists and States-righters over the importance of the Senate continued into the discussions on the deadlock mechanism, and what this meant for accountability to the Senate. I am interested in the specific references (albeit limited) that were made to classic arguments about the benefits of accountability to an upper chamber that had been present in Australian colonial politics (discussed in Chapter 3) and to the operation of those constitutions providing models for the new Federal constitution.

A. Second Session: the deadlock mechanism

As noted, when delegates met again (in Sydney in the Spring of 1897) the possibility of deadlocks between two houses, each of which would be elected, loomed large in the minds of many of the delegates. This was particularly so in the minds of the Victorians who (as we saw in Chapter 3) had experienced some of the most extensive deadlocks in Australia over the matter of supply. The general weight of opinion at the Sydney Session favoured including a deadlock provision, irrespective of how likely or unlikely the prospect of disagreement between the two chambers was thought to be.[201]

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[198] Quick and Garran, above n 4, 182-184. See also La Nauze, above n 3, 162-164, 167. For a detailed description of the objections in NSW and the role of George Reid in making those objections, see Wise, above n 4, 141-146, 213, 218, 225, 264-269. For discussion of Victorian opposition see Garran, above n 128, 162.

[199] Quick and Garran, above n 4, 185.

[200] Garran, above n 128, 167. Deakin specifically insisted on a mechanism for the resolution of deadlocks: *Convention Debates,* 1897, 585-586 (Deakin).

[201] Quick and Garran, above n 4, 186, 189, 190; La Nauze, above n 3, 187; *Convention Debates,* 1897, 663 (Isaacs); 790 (Higgins). La Nauze has described the resolution of deadlocks as being a question that was foremost in the minds of the Victorian delegates in particular: La Nauze, above n 3, 158. For a more general discussion of the debate over the deadlock provision see JE Richardson, 'Federal Deadlocks: Origin and Operation of Section 57' (1962) *Tasmania University Law Review* 706, 716-731; BJ Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in P Weller and D Jaensch (ed), *Responsible Government in Australia* (1980, Drummond Publishing), 8-9.

Bernard Wise, a former Attorney-General in the Parkes' Ministry and a delegate for New South Wales during the 1897-98 Convention,[202] had already reminded delegates during the First Session that deadlocks were the price to be paid for 'constitutional freedom, and could only be avoided under a despotism!'[203] It was an implicit condition, however, of the larger colonies accepting that the Senate would retain a power to veto money bills that there would be a safeguard against the indefinite blocking of supply.[204] These delegates were keen to ensure that the Senate would face a clear political consequence if it choose to block government legislation, including supply bills.[205]

At the commencement of debate on the issue, John Quick from Victoria neatly summed up for delegates the issue the Convention now had to resolve, that of having created 'two houses which are practically co-ordinate, with the exception of equal control over money bills' and of a 'senate the like of which will not be found in any constitution that is in existence, or has ever been in existence in the world.[206] The consequence was that provision now needed to be made for 'great, important, probably historical, occasions when those co-ordinate houses may be brought into serious conflict'. Quick went on:

> 'Now, in an ordinary constitution, where we have an upper house not elected by the people, or not elected on the same basis as the lower house, that second chamber would be disposed to yield to the pressure of the lower chamber elected upon a popular basis; but here, where we are creating a senate which will feel the sap of popular election in its veins, that senate will probably feel stronger than a senate or upper chamber which is elected only on a partial franchise, and, consequently, we ought to make provision for the adjustment of disputes in great emergencies.'[207]

In the context of consideration of the deadlock mechanism, discussions once again turned to how and when political accountability should be rendered to the Senate. The candidates fell

[202] And later author of a leading text on the making of the *Constitution:* see Wise, above n 4.
[203] Wise, above n 4, 248.
[204] La Nauze, above n 3, 188.
[205] Quick and Garran, above n 4, 189; La Nauze, above n 3, 188. Quick and Garran have described the position of nationalists and states-righters in this debate as being even more intractable than in the one dealing with the Senate's power to amend money bills (it took up 5 out of 13 sitting days), noting that the debate over deadlocks would become the 'longest and most important debate' of the Session: Quick and Garran, above n 4, 675. It took two days of full debate to determine whether there should even be a debate about the form of the deadlock mechanism at all: ibid, 189, 192.
[206] *Convention Debates,* 1897*,* 552 (Quick). Quick was a minister in the Giles-Deakin Ministry. He published a draft constitution for Federation and of course became co-author of the leading text on the Constitution with Robert Garran.
[207] *Convention Debates,* 1897*,* 552 (Quick).

into a similar pattern of division to that of earlier debates on the Senate's power over money bills, with the nationalists (Category 1) now in favour of a deadlock mechanism that would resolve any conflict mainly in favour of the views of the House of Representatives. This meant including a mechanism that would result in a political sanction being applied to members of the Senate in the event of the Senate insisting on using its power of veto. The States-righters (Category 2) wanted to ensure that any deadlock mechanism did not undermine the ability of the Senate to use its power of veto.

Debate began on what the deadlock mechanism should look like. Two mechanisms were proposed, including a dissolution of the two parliamentary chambers, followed by a joint sitting of both newly-elected houses, or a referendum.[208] The nationalists supported the double dissolution followed by a joint sitting, arguing that the Senate should be asked to face the same political consequence as members of the House of Representatives: a fresh election.[209] Wise said that a failure to include such a mechanism would place:

> 'it in the power of the states to dissolve the house containing the representatives of the people, instead of putting it in the power of the representatives of the people to dissolve the body composed of the representatives of the states. While I am willing to agree to a federal compact which will recognise and balance the interests upon either side, am I bound to submit to an arrangement which will put it in the power of the representatives of the states – that is, in the power of a minority – to force the representatives of the great body of the people to go to the country?'[210]

Interestingly, some of the States-righters also agreed that the Senate had to face political consequences for its decisions, acknowledging that this would strengthen political accountability in the Federal system.[211] In the spirit of these concessions, some of the nationalists now also referred to classic arguments on the role of upper chambers, saying that

[208] Quick and Garran, above n 4, 191-92.
[209] Quick and Garran, above n 4, 191. This group of delegates argued that a referendum for the resolution of deadlocks would completely undermine the political responsibility of a ministry to parliament – since the members of the Senate would be able to avoid a loss of their own office under such a model, and also because responsible ministers would be able to defer to the opinion of the electorate: ibid. See, for example, *Convention Debates,* 1897, 575-76, 889 (O'Connor); 596 (Symon); 643 (Moore), 663 (Isaacs); 823 (Deakin). Others who sided with them on this debate included 876-77 (Wise), 622-24, 906 (Barton) and 870 (Kingston); cf 606 (Trenwith).
[210] *Convention Debates,* 1897, 757 (Wise).
[211] *Convention Debates,* 1897, 791 (Cockburn). cf *Convention Debates,* 1897, 792-3 (Baker).

the importance of a second chamber was to 'to prevent the one chamber feeling the deterioration which otherwise follows the sense of irresponsible power'.[212]

Despite this move toward compromise, other States-righters were not so keen on a double dissolution mechanism, arguing that it would enable the House of Representatives to constantly threaten the Senate with dissolution and thereby weaken it.[213] Having fought so hard to ensure the power of the Senate to at least veto all legislation (including money bills), they were not about to make further concessions and enable the House of Representatives to dominate the Senate by threat of dissolution.[214] The Convention eventually resolved to include a double dissolution mechanism followed by a joint sitting of the two houses, the mechanism which had also been adopted in South Australia. Again, apart from the fact that a vote was taken, there is no evidence of the particular motivations of delegates on the vote itself. But double dissolution mechanisms were already a feature of the two Australian constitutions with elected upper houses, and there was a general acceptance from all delegates that Senators should face some political consequence for exercising their power of veto.

The next question became whether to adopt a majority vote at the joint sitting and, if so, what majority would be considered sufficient. This question also divided delegates along familiar lines, with delegates from Victoria and New South Wales advocating for a simple majority of both houses (the thinking being that the numbers would fall in favour of the majority which, it was assumed, would support the ministry) and the will of the House of Representatives at such a joint sitting) and delegates from the smaller colonies seeking a greater majority.[215] The solution adopted was a simultaneous dissolution of both houses followed by resolution by a three-fifths majority at the joint sitting.[216] By and large, delegates seemed keen not to water down the power of the Senate. The Senate, however, would also have to know that, in choosing to block any measure passed by the House of Representatives, it would be politically accountable to voters.

[212] *Convention Debates,* 1897, 790 (Higgins).
[213] Quick and Garran, above n 4, 191. See, for example, *Convention Debates,* 1897, 558-59 (Downer) and 829, 832 (Symon), who argued this mechanism would make the Executive responsible only to the House of Representatives.
[214] See for example *Convention Debates,* 1897, 639-640 (Dobson).
[215] Quick and Garran, above n 4, 192.
[216] Quick and Garran, above n 4, 192, 193. Quick and Garran say that this was again done as part of compromise: ibid, 190.

Garran later described the proposal of the double dissolution, followed by a joint sitting, as the real achievement of the Second Session.[217] With the proposal in place, the Convention was adjourned to the following January, when the question of the appropriate deadlock mechanism would have to be finally resolved.

Henry Dobson, a member of the House of Assembly for Tasmania, predicted that 'we shall get very tired if we sit five or six weeks in Melbourne during the hot summer weather'.[218] Reading through the record from the Third Session and debates on the deadlock provision, it appears that Dobson's prediction was correct.[219] Thus, through the heat of an Australian summer, the final debates regarding the nature of political accountability of the Executive to the Senate took place.

B. Third Session: the deadlock mechanism

Although the final Session of the Convention debated each clause of the proposed draft constitution, the record reveals that the deadlock provision had become the focus of discussions. The Convention began with Wise again reminding delegates that a deadlock provision would need to be included to ensure the passage of an approval draft through the Victorian and New South Wales' Parliaments. In the ensuing debate, Victoria's constitutional deadlocks were clearly fresh in the minds of delegates. Neither the Victorians nor their New South Wales counterparts were willing to support any draft unless it dealt with how to resolve deadlocks between the House of Representatives and the Senate. The experience of the Australian delegates of their own constitutions was mentioned early on in the discussions, with Wise stating that:

> 'the ghost of dead Victorian controversies is still alive and walking, and it has walked outside the limits of this colony into New South Wales. I do not hesitate to declare, as I did in Sydney, my deliberate opinion that unless we make this concession to the popular opinion, even though we may think it popular ignorance, on the question involved in the second sub-section, we will very seriously damage the prospects of the Bill, if we do not altogether destroy our ability to recommend it to the electors. I never made use of an expression of this kind at any period of the debates before. I have studiously refrained from saying anything of the kind. But I do believe that this is the most critical part of the Bill so far as the opinion of the New South Wales

[217] Quick and Garran, above n 4, 193.
[218] *Convention Debates,* 1897, 1051 (Dobson),
[219] La Nauze, above n 3, 203.

> voter is concerned, and I trust the committee will do, as I believe they intended to do by their last vote, adhere strictly to the compromise arrived at in Sydney.'[220]

Irrespective of how unlikely deadlocks were thought to be by some other delegates, provision for a resolution of conflicts between the House of Representatives and the Senate would definitely be required in any draft produced by the Convention.[221] As noted, most delegates reached some consensus on the idea that, if the Executive was to be politically accountable to the Senate, then the Senate would have to be politically accountable to the electors.

Delegates from the smaller colonies now made clear their preference was for a consecutive dissolution mechanism, in which there would first be a dissolution of the House of Representatives, followed by an election for that chamber.[222] Only if the Senate then chose to oppose new legislation approved by the newly-elected House would a dissolution of the Senate occur. This formula followed the dissolution provision in place in the Victorian Constitution at the time.[223] The Victorian delegates were having none of it, having already learned first-hand how ineffective a mechanism a consecutive dissolution had been in dissuading the Council there from using its power of veto. Accordingly, it was mainly Victorian delegates, with support from delegates from New South Wales, who argued instead for a double dissolution, which would require the immediate dissolution of both chambers.[224] They made clear that, in the interests of a system of political accountability, the consequences for the Senate had to be equal to those faced by the House of Representatives in the event of a deadlock, including the immediacy of the loss of office of Senators.[225] After much pulling and pushing, the agreement reached in the Second Session of a simultaneous double dissolution followed by a joint sitting and a three-fifths majority, was ultimately adopted.

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[220] *Convention Debates,* 1898, 2135 (Wise).

[221] Quick and Garran, above n 4, 203. La Nauze says that there appeared to be a realisation from many of the delegates that the sittings in Adelaide and Sydney (First and Second Sessions) had already canvassed pretty much every possible perspective about the potential reasons for and methods of resolving deadlocks: La Nauze, above n 3, 217. Most of the arguments in the Third Session accordingly reflect familiar arguments from the earlier Conventions: see, for example, *Convention Debates,* 1898, 2108 (Barton).

[222] *Convention Debates,* 1898, 2106 (Symon); Quick and Garran, above n 4, 203-204 and La Nauze, above n 3, 217.

[223] The point is that those in favour of a consecutive dissolution emphasised that simultaneous dissolution had the potential to undermine the Senate's power – whereas many of the delegates from the larger colonies of Victoria and New South Wales favoured a simultaneous dissolution mechanism: Quick and Garran, above n 4, 203.

[224] Ibid.

[225] A subsequent dissolution mechanism was thought to penalise the House of Representatives more, whereas a double dissolution mechanism was though to penalise both houses for failing to reach agreement: *Convention Debates,* 1898*,* 2109-2110, 2111 (Forrest); 2108 (Barton); 2124 (Kingston); 2126 (Trenwith); 2139 (Reid).

By March 1898 the Convention had done its work and a draft was ready to be considered by the colonial parliaments and (with their approval) to be put to the Australian people. The final Constitution Bill put to the people was one in which the Executive, commanding a majority of the vote in the House of Representatives, would alone be responsible for the form (origination and amendment) of money bills.[226] Laws dealing with taxation or appropriation needed the approval of both chambers of the Parliament, with the Senate retaining the ultimate power to approve or reject such legislation. The Senate was prevented from amending three types of money bills: laws imposing taxation; appropriations for the ordinary annual services of the government; and any bill which increased charges or burdens on the people. Following the South Australian model, the upper house could make suggestions about the form of money bills but, if the House of Representatives chose not to adopt those suggestions, then the Senate would have to come 'face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands'.[227] The draft also contained what would become s 57 of the *Constitution*: a double dissolution, followed by a joint sitting which required a three fifths majority for the passage of any disputed legislation. The inclusion of the deadlock provision for a double dissolution meant that there would be a political consequence for any Senate which used its power of veto.[228]

VII. Conclusion

Long after the Conventions, Wise observed that the 'composition of the Senate subverted the democratic principle of majority rule', since 'every measure must be agreed to by both Houses'.[229] Nonetheless, he acknowledged that the Senate's power of veto was the price that

[226] Quick and Garran, above n 4, 269-270. See Quick and Garran for a summary of the votes on the Bill. In 1898, referendums on the Commonwealth Constitution Bill were held in New South Wales, South Australia, Tasmania, and Victoria. A majority of 'yes' votes was recorded in each colony but in New South Wales the enabling legislation required a quota of 80 000. This was not achieved. In New South Wales 71,595 of eligible voters voted in favour of the Bill, with 66,228 against. In Victoria the vote was Yes – 100, 520 and No – 22, 090. In South Australia the vote was Yes – 35, 800 and No – 17,320. In Tasmania the vote was Yes – 11,797 and No – 2,716. In 1899, as a result of amendments to the Constitution recommended by New South Wales, the colonies organised a second round of referendums. This time New South Wales required only a simple majority of 'yes' votes. Queensland also joined the process. Majorities were achieved in all colonies. The results of the 1899 referendums were: New South Wales – Yes – 107,420 and No – 82,741; Victoria – Yes 152 653 and No – 9 805; Queensland – Yes – 38,488 and No – 30, 996; Tasmania – Yes – 13,437 and No – 791. By 1900, Western Australia had still not taken steps to hold a referendum. In protest, residents of the Eastern Goldfields took steps to form a separate colony. Finally, on 31 July 1900, when the Commonwealth Constitution Bill had already been enacted by the British Parliament, a referendum was held in which a large majority there voted in favour of Federation (Yes – 44 800 and No – 19, 691.

[227] Quick and Garran, above n 4, 671-672.

[228] Quick and Garran, above n 4, 674.

[229] Wise, above n 4, 239.

had to be paid to achieve Federation.[230] The history presented to us by the Conventions, and of the eventual compromise reached on the powers of the Senate, suggests that the framers understood that the Executive would owe political accountability to two masters, just by different means.

The drafters of the *Constitution* designed a framework of accountability based on the dual concerns of federalism and political accountability. As noted in Chapter 1, the extent to which accountability to the Senate was designed to address federal concerns has been extensively examined in prior scholarship. My task here has been to expose the extent to which the aims of good government and political accountability under responsible government also formed an important basis on which to cement a line of accountability to the Senate as well. Further, I have uncovered the extent to which appeals to the framers' familiarity with systems of dual accountability under Australia's own colonial constitutions became relevant during the Conventions.

The examination of the Convention Debates in this chapter demonstrates a number of key matters. Firstly, that responsible government was a flexible concept, in a state of flux at the time of the Conventions. This has since been acknowledged by leading scholars including Loughlin.[231] Secondly, the experience of Australia's colonial parliaments was important in assisting the framers to understand the potential benefits and pitfalls of a line of accountability to an elected upper house. Barton, in particular, reminded delegates that relatively strong upper chambers were a feature of Australia's bicameral parliaments under responsible government. The importance of Australia's colonial constitutions to the framers is also consistent with views on Australian bicameralism of leading commentators over a century later.[232] As Stone has noted:

> 'the [Australian] colonial upper houses were an important influence on the design of the Australian Senate … and have assisted the maintenance of a culture of strong bicameralism which has supported a major and growing Senate.'[233]

[230] Ibid, 241.
[231] M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 48-51.
[232] These goals existed in unitary bicameral systems as part of goals underpinning political accountability of the executive to parliament. On this point see Uhr, above n 2, 14; also Brennan and Lomasky and, above n 2, 214-15.
[233] Stone, above n 8, 268. For other authors who support this view of the importance of Australia's colonial constitutions to the framers during the Convention Debates, see Chapter 1. They include: Aroney, above n 3, 70; Deakin, above n 39, 145-46; G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional*

Aroney too has emphasised that many of the people involved in the constitutional conflicts that had occurred in each Australian colony went on to become key delegates during the Conventions, and that they drew upon their own specific experience of political accountability, including accountability to upper chambers, based upon traditions of political accountability with which they were already 'intimately familiar'.[234] While many delegates referred to those colonial constitutions, it was leading figures such as Griffith, Barton and Kingston who referred to the flexibility of the concept of responsible government as well as dual accountability under Australia's colonial constitutions to urge the extremes of the nationalists (Category 1) and the States-righters (Category 2) to reach a compromise. Their argument was that responsible government could accommodate dual accountability, and it had already done so under Australia's unitary constitutions. Thus, while federalism undoubtedly formed a key motivation for the inclusion of a line of accountability to the Senate, the ideals of responsible government itself, and the system of political accountability it had brought to Australia's bicameral parliamentary systems, also provided an important reason for granting the Senate a power of veto of all legislation. My analysis adds a further dimension to the work of authors such as Aroney and Stone to date, building upon their respective arguments about the key influences on the framing of the *Constitution* and the powers of the Senate.

The next two chapters examine how the goals of political accountability in a Federation have been recognised by the High Court. Specifically, I consider what the High Court has said about when and why the Senate has a right to exercise oversight of the Executive, particularly in matters of finance.[235] What is remarkable is the extent to which ideas about dual accountability in Australia's pre-Federation history examined in Part II have since been used by the High Court in its decisions on the accountability of the Executive to the Senate. We will also see that the Court has relied upon both federal concerns and concerns based on the goals of accountability to upper houses more generally to justify its conclusions regarding the need for the Executive to account to the Senate for spending. In doing so, it has specifically referred to theories on the benefits of political accountability present in Australia before Federation, as well as to Australia's constitutional history of parliamentary control of finance, including

Analysis (Melbourne University Press, 1983), 72; Aroney et al, above n 48, 407; B Galligan, *Federal Republic* (Cambridge, Cambridge University Press, 1995), 71.

[234] N Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890 – 1901' (2002) 30(2) *Federal Law Review* 265; J Allan and N Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245, 262.

[235] See Aroney et al above n 48, 416; Appleby and McDonald, above n 11, 270.

parliamentary practices on the prior appropriation of funds as part of the principle of parliamentary supremacy, to inform its jurisprudence on the powers of the Executive to spend.

PART III

THE HIGH COURT'S APPROACH TO POLITICAL ACCOUNTABILITY TO THE SENATE

CHAPTER 5: THE COURT'S APPROACH PRIOR TO *PAPE* AND *WILLIAMS*

I. Introduction

Part I of the thesis considered the intellectual and institutional context that shaped the framers' ideas of political accountability at the Conventions. Part II discussed how the framers used their own experience of dual accountability in Australia's colonial parliamentary systems to devise a system of dual accountability for the *Constitution*. I concluded that accountability concerns were as significant as federalism to the framers in devising the powers of the Senate to hold the Executive to account. I now consider the continuing relevance of Australia's own constitutional history of dual accountability to the Court's interpretation of accountability to the Senate, arguing that the dominant approach the Court has taken to accountability to the Senate is supported by the pre-Federation history explored in Parts I and II of the thesis.

In this Part (Chapters 5 and 6) I argue that the High Court has adopted what have been called 'accountability concerns' to inform its jurisprudence on the need for the Commonwealth Executive to remain accountable to the Senate.[1] These concerns include the role of upper houses in upholding the principle of parliamentary control of public finance as part of responsible government, and that upper chambers provide further opportunities for review and debate of legislation. As discussed in Chapter 3, these concerns were very real in Australia's pre-Federation experience of bicameralism. They made their way into the Conventions when the framers were considering how to frame the accountability of the Commonwealth Executive to the Senate. They have since been employed by the High Court.

[1] Other authors have adopted this classification and I adopt it here to continue the placement of my analysis within the current literature: see G Appleby and S McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 263-270; S Chordia, A Lynch and G Williams, 'Williams v Commonwealth [No 2]' (Pt 1) (2015) 39 *Melbourne University Law Review* 306, 307-08. Also D Hume, A Lynch and G Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41 *Federal Law Review* 71; S Chordia, A Lynch and G Williams, 'Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism' (2013) 37(1) *Melbourne University Law Review* 230. See further sources listed in footnote 11 below. I explained in Chapter 1 why the anlaysis has been divided between two chapters.

In this chapter, I consider the extent to which the Court used accountability concerns prior to the its decisions in *Pape*[2] in 2009 and *Williams*[3] in 2012. The analysis here provides the background for the Court's seminal decisions in each of those cases, explaining why neither of the decisions represented a break from the Court's previous dominant approach on accountability to the Senate. In Chapter 6 I examine the use of accountability concerns in *Pape* and *Williams* (and subsequent decisions) and the ways accountability to the Senate, particularly in matters of finance, have gained yet further importance in the reasoning of the Court. I begin here by recapping the existing literature on the Court's reasoning on why the Executive is politically accountable to the Senate to explain where my research fits into existing scholarship and what my analysis adds.

My object in this and the following chapter is to examine the Court's approach, mapping out the doctrine employed by the Court and the sources it has relied on to establish that doctrine. I observe what the Court has said about the need for accountability to the Senate and what it has based that approach on, highlighting where the Court has referred to constitutional history in determining that the Executive is accountable to the Senate. I do not seek to make a strongly qualitative assessment of the Court's reliance upon constitutional history in interpreting the requirement that the Executive to remain accountable to the Senate in matters of finance. In particular, as noted at the outset of the thesis, I do not assume a specific position in ongoing debates about the attractions of any particular methodology of constitutional interpretation. In this respect, those debates are a general background, rather than central to, my research question.

Complex questions about the appropriate approach to constitutional interpretation would require a detailed focus on that question alone. Although I observe the Court's use of constitutional history, this thesis does not specifically advocate the adoption by the High Court of an originalist approach to constitutional interpretation.[4] There are a few reasons that it would not be appropriate to enter into such an examination in the present work. Apart from the

[2] *Pape v Commissioner of Taxation* (2009) 238 CLR 1. (*Pape*).
[3] *Williams v Commonwealth* (2012) 248 CLR 156. (*Williams*).
[4] In essence, originalism means arguing that interpretation of the *Constitution* should adhere to its 'original intent' or the original understanding of the text: G Williams, S Brennan and A Lynch, *Blackshield and Williams, Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6th ed, 2014), 188. For a recent detailed discussion of 'originalism' and its limited relevance and use in Australia see J Goldsworthy, 'Originalism in Australia' DPCE Online Journal, 2017/3, available at https://research.monash.edu/en/publications/originalism-in-australia, accessed on 17 February 2020; also J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1,

immense complexity of questions surrounding 'appropriate methodology' in constitutional interpretation, both the High Court and leading constitutional law scholars have highlighted that such questions are of limited interest and relevance in the Australian context.[5]

In Australia, the overwhelming view in constitutional law scholarship is that the Court's approach to interpretation has been one of 'textual originalism', with the Court using the text of the constitutional document, supplemented by its understanding of what reasonable persons living at the time of its adoption would have understood the ordinary meaning of the text to be.[6] The High Court in particular has made clear that it has little interest in the taxonomical debates that have mostly troubled the legal academy.[7] The Court has told us that it will rely on what it regards as 'historical facts' in interpreting the *Constitution*, including Australia's colonial constitutional history and political theory underpinning fundamental constitutional doctrines that have been incorporated into the *Constitution*, including the doctrine of responsible government and the principle of parliamentary control of finance.[8] No

[5] G Williams, S Brennan and A Lynch, above n 4, 188; also J Goldsworthy, above note 4, 21. Professor Goldsworthy has detailed how many of the arguments against originalism in the United States have also petered out there over time: see J Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 23 *Melbourne University Law Review* 677, 695-697.

[6] J Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 324-5. Kirk describes how textualism has been used in Australia as a form of originalism, even before the Court's decision in *Cole v Whitfield* (1988) 165 CLR 360 (*Cole v Whitfield*): ibid, 329; see also H Burmester 'The Convention Debates and the Interpretation of the Constitution' in G Craven (ed), *The Convention Debates 1891-1891: Commentaries. Indices and Guide* (1986) 25, 30 on this approach Professor Goldsworthy has also pointed out that the High Court has been naturally guided by 'traditional principles of statutory interpretation that would be called originalist': J Goldsworthy, above n 4, 607. Further support for this can be found in JD Heydon, 'Theories of Constitutional Interpretation: a taxonomy', *Bar News*, Winter 2007, 12; P Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: the formalist/functionalist debate' (2005). 8(1) *Constitutional Law and Policy Review* 1; G Williams, S Brennan and A Lynch, above n 4, 188; S Gageler, 'Beyond the text: a vision of the structure and function of the Constitution' (2009) *Bar News*, Winter, 30.

[7] The key opponent of originalism in Australia on the Court has been Justice Kirby. Kirby argued that the *Constitution* should not be bound by the 'dead hand' of the past: see M Kirby. 'Constitutional Interpretation and Original Intent: A form of Ancestor Worship?'' (2000) 24 *Melbourne University Law Review* 1; Professor Goldsworthy has highlighted how little of Kirby's objections to originalism make sense, including pointing out that Kirby eschews use of the past and yet frequently used 'historical facts' when he sees fit to do so: see J Goldsworthy, above note 5. Goldsworthy notes that the very precedents that Kirby relies on were also decided by judges who used textual originalism to interpret the *Constitution*. In my analysis of his Honour's dissenting judgment in *Combet v Commonwealth* (2005) 224 CLR 494 (*Combet*) later in this chapter, we also see his Honour using history and political theory to interpret the *Constitution*. See also Kirby's own statements on the relevance of history to interpreting the *Constitution* in M Kirby, 'Living with Legal History in the Courts' (2003) *Australian Journal of Legal History* 17, 19, 20, 21, 26. Heydon has countered most of the arguments against using history in constitutional interpretation too as reflecting too limited a view of constitutional interpretation: see JD Heydon, above n 6, 20-26. See also J Goldsworthy, above note 4, 17; J Goldsworthy, above note 5, 692; J Kirk, above n 6, 333; S Puttick, 'All Embracing Approaches to Constitutional Interpretation and "Moderate Originalism" (2017) 42 *University of Western Australia Law Review* 30.

[8] R French, 'Interpreting the Constitution – Words, History and Change', (2014) 40(1) *Monash University Law Review* 29, 40. As French points out, the Court always looked to history to provide a background against which to view the Constitution: at 41. It also always allowed Counsel to refer to secondary materials which explained

matter how critical some legal historians have been of the Court's understanding or use of 'historical facts', such criticism has not yet deterred the Court from adopting this approach and no change of mind appears to be on the horizon at present.[9]

Leading commentators, as well as members of the Court, have pointed to the extensive evidence that the Court has always relied on constitutional history to support its understanding of the purpose of constitutional provisions.[10] In its seminal decision on responsible government in the *Engineers' Case*[11] the Court accepted that the *Constitution* had to be interpreted against its 'historical background'[12] and 'in the light of the circumstances in which it was made.'[13] In *Cole v Whitfield*[14] the whole Court expressly referred to the Convention Debates and said that the purpose of referring to such historical records included an examination of -

> 'the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.'[15]

That the constitutional text cannot be understood in the absence of the history that led to its existence has been neatly described by McHugh J in the following terms -

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some of the history, including Quick and Garran's annotated Constitution: French at 41. Professor Sawer has pointed to this use of a secondary sources of history by the Court at a time when the Court had eschewed a reluctance to even refer to the Convention Debates: G Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 22, n 27. Professor Goldsworthy has highlighted the Court's constant use of the broader political and historical background to the *Constitution* in constitutional interpretation: see J Goldsworthy, above note 4, 8-15.

[9] For a critique of the Court's approach to history see H Irving, 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95; H Irving, 'Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning' (2015) 84 *Fordham Law Review* 957.

[10] PH Lane. *The Australian Federal System,* (2nd ed, Law Book Co, 1979), 1113-14; J Goldsworthy, above note 4, 8-15: Goldsworthy argues that the High Court has moved to placing even greater emphasis on history than it previously has: at 15; this is supported by J Thomson, "Constitutional Interpretation: History and the High Court" A Bibliographical Survey', (1982) 5 *University of New South Wales Law Journal* 309, 310 and ns 23-27; also Heydon, above n 6, 12, citing Griffith CJ, Barton and O'Connor in *Tasmania v Commonwealth* (1904) 1 CLR 32 and *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087; Isaacs J in *Evans v Williams* (1910) 11 CLR 550, 571; Isaacs and Rich JJ in *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680, 695; Knox CJ, Isaacs, Rich and Starke JJ in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152; Barwick CJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 17 saying that in the case of ambiguity 'resort may be had to the history of the colonies'; see also Gibbs J who said that regard could be had to the 'state of things existing when [the *Constitution*] was passed and therefore to historical facts' (at 47); Aicken J in *Attorney-General (Cth) v T&G Mutual Life Society Ltd* (1978) 144 CLR 161, 187 (finding that regard to be had to 'historical facts as providing background against which to view the *Constitution*'; Stephen J in *Watson v Lee* (1979) 144 CLR 374, 399.

[11] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers*').

[12] Heydon, above n 6, 26.

[13] *Engineers*, 152.

[14] *Cole v Whitfield,* above n 6.

[15] *Cole v Whitfield*, 385.

> 'The true meaning of a legal text almost always depends on a background of concepts, principles, practices. Facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture'.[16]

In spite of the objections of the opponents of originalism, the Court has clearly asserted that it will continue to use history in its own fashion as an aid to interpretation in the future, while not confining itself to any particular approach to constitutional interpretation. It has reserved the right to consult such materials, including historical records, that it regards as relevant to interpreting any specific question it is asked in any given case. In a unanimous judgment in 2013 the Court emphatically eschewed any 'single all-embracing theory of constitutional interpretation,[17] adding that -

> 'Debates cast in terms like "originalism" and "original intent" (evidently intended to stand in opposition to "contemporary meaning" with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.'[18]

In an earlier decision, Gummow J had already observed that constitutional issues 'are too complex and diverse' to be resolved by any one theory of constitutional interpretation.[19] French and Heydon have more recently reiterated that they regard debates over taxonomy as being ones of interest primarily to the legal academy, adding very little by way of illumination to the actual business of the Court in interpreting the *Constitution*.[20] In totality, it appears that the dominant view expressed by both leading constitutional law scholars and members of the Court is that each interpretive problem the Court that the Court will face will will have its own 'textual, contextual, purposive and historical dimensions.'[21] This has led a French to conclude that -

> 'The application of the methods of statutory interpretation to constitutional interpretation defines no narrowly prescriptive methodology but looks to mechanism which are at hand to enable the court to respond to a variety of interpretative questions. A commitment to the use of those methods does not require adherence to any of the 'isms' used to designate what are called, perhaps rather grandly, theories of constitutional interpretation. In their application to the

[16] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196.
[17] *Commonwealth v ACT* (2013) 250 CLR 441, 455.
[18] Ibid.
[19] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75.
[20] See the criticism in this respect by French, above n 8, 31, 33, 43; Heydon. above n 6; G Williams, S Brennan and A Lynch, above note 4,182; D Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State Law Journal* 1085, 1103.
[21] French, above note 8, 33.

> *Constitution*, they require attention to be paid to the nature and content of the text, its drafting history as illustrated by the successive drafts at the Conventions, as well as the informed commentaries of those who were involved in, or close, to, the drafting process. Historical facts of the time maybe be relevant to an understanding of the purpose of the words that, taken out of context, might mislead.'[22]

That Australia's 'colonial constitutional history' remains relevant in determining the scope of doctrines like responsible government, and in determining the extent of the Executive power of the Commonwealth, has even more recently been recognised by Justice Gageler.[23] With so many leading figures of the Court advocating for the continued use of constitutional history to constitutional interpretation, it seems that the Court's approach to the use of constitutional history is likely to continue, in spite of the opposition of a few.

In a recent article on the Executive power of the Commonwealth, Professor Gerangelos summarised how much of the High Court's approach to constitutional interpretation lends itself to an interpretive methodology that might be labelled the 'historical constitutional approach.[24] This approach is that -

> 'constitutional arrangements that have had a continuing history, whether from the distant or recent past, and in which change or reform are inherent, constitute legitimate and necessary sources of current constitutional law and principle.'[25]

As Gerangelos recognises, this reflects an understanding that a constitution, made up of laws, conventions and usages that are determined by reference to the political and constitutional history of a polity.[26] This approach represents an acceptance by the Court that the *Constitution* needs to be understood by reference to the 'historical sources and traditional conceptions'[27] that it impliedly incorporates, even though they 'pre-date it and evolve independently of it.'[28] Resort to 'historical sources and traditional conceptions' to interpret the *Constitution* is 'very

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[22] French, above note 8, 43.
[23] *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* (2016) 257 CLR 42, [119], [138]. [140].
[24] P Geranagelos, 'Section 61 of the *Commonwealth Constitution* and an 'Historical Constitutional Approach': An Excurses on Justice Gageler's Reasoning in the M68 Case' (2018) 43 (2) *University of Western Australia Law Review* 103, referring to JWF Allison, *The English Historical Constitution* (Cambridge University Press, 2007).
[25] Geranagelos. above n 24, 104.
[26] Ibid.
[27] Particularly to the political and constitutional context relating to the establishment of the Commonwealth and the Convention Debates: Geranagelos, above n 24, 120.
[28] P Geranagelos, above n 24, 112.

much part of the very tradition' from which the Constitution was derived,[29] including in interpreting the requirements of 'responsible government adapted to the particular Australian constitutional establishment of a federal system.'[30]

Some supporters of non-originalist approaches to interpretation might continue to suggest that the Court should draw on more 'contemporary sources', such as contemporary discussions of accountability of the Executive to the Senate, including the influence of more recent changes to the Australian democratic system.[31] Such arguments generally fail to define a rationale for reference to non-traditional sources of law or provide limitations or guidance to what 'sources' the Court should take into account. As tempting as it may be to refer to sources that are neither primary or secondary sources of law, we would do well to adopt the cautions of leading constitutional law scholars and members of the Court against the use of a myriad of new and loosely defined records, since discounting too far the traditional sources that provide legally discernable principles can lead all too quickly to the danger of supplanting those definitions with modern sounding

> 'but vague and politically-charged definitional criteria, often subjective, "amorphous" and potentially self-defining'.[32]

The caution provided to us by scholarship on currently limiting the sources the Court might take into account in determining cases (limiting to those the Court has traditionally used as primary and secondary sources of law) appear well considered and should not be ignored without rigorous examination and further consideration of the consequences of expanding the relevant 'record'.[33] This might be a question of interest to future researchers, in spite of the

[29] Geranagelos, above n 24, 113; citing B Selway on the use of Imperial and colonial history to understand the *Constitution*: B Selway, 'All at Sea – Constitutional Assumptions and the Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495, 505.

[30] Geranagelos, above n 24, 113. See also C Saunders, 'The Concept of the Crown' (2015) 38 *Melbourne University Law Review* 873, 876.

[31] Such as voting methods developed in the 20th century and the alleged growing power and influence of political parties. For an examination of these changes see B Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses' (2002) 37(2) *Australian Journal of Political Science* 267. For detailed discussions of mechanisms of accountability in government generally see sources cited in Chapter 1, footnote 6.

[32] Geranagelos, above n 24, 109. This reflects Professor's Goldsworthy's concerns of the proponents of a non-originalist approach to constitutional interpretation as well: see J Goldsworthy, above n 4, 75 and in *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 (*Williams 2*), 468-9.

[33] Professor Irving has even applied a similar caveat to the Court's use of secondary histories by the Court: see H Irving, sources cited at above n 9.

Court's current warnings that it is not interested in being drawn into the academic debates on interpretive methodology.

II. Existing literature

Chapter 1 fitted my analysis within the broader literature on the Executive power of the Commonwealth.[34] As explained there, an extensive literature already exists on how federal concerns have played an important role in decisions of the Court that have mandated accountability to the Senate. The literature dealing with federal concerns focuses on the degree to which federalism has influenced the way members of the Court read the *Constitution* in cases dealing with the Executive's spending power. It examines both the substantive conceptions of federalism that underpinned some of the Court's judgments as well as certain 'federalism-protecting interpretive choices' that are observable in various judgments.[35] The existing literature compares the interpretive methodology of the Court in *Williams* with the Court's approach in its seminal decision on responsible government and federalism, the *Engineers' Case*,[36] a decision that has been roundly criticised over many decades as having favoured responsible government at the expense of federalism.[37] The recent scholarship on the role of federalism in the Court's interpretive methodology argues that the approach of the Court in *Williams* marked a significant shift from the approach in *Engineers'* and in the Court's understanding of federalism, and that the 'federalism-protecting interpretive choices' made in *Williams* were used by the Court to restrict the Executive's spending power.[38]

My purpose is to add to this detailed and considered work on the role federal concerns have played in the Court's interpretive methodology by now focusing on the other strand of reasoning that has featured in the Court's reasoning on why the Executive is accountable to the Senate.[39] As noted, these have been labelled 'accountability concerns'.[40] I use that term

[34] See Chapter 1.
[35] Hume, Lynch and Williams, above n 1, 73.
[36] *Engineers*, above n 11.
[37] Hume, Lynch and Williams, above n 1; N Aroney, 'Constitutional Choices in the WorkChoices Case, or what exactly is wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1. For general criticism of the Court's approach to interpretation in the case see G Craven, 'Cracks in the facade of literalism: Is there an Engineer in the House?' (1991-1992) 18 *Melbourne University Law Review* 540; G Craven, 'After literalism, what?' (1991-1992) 18 *Melbourne University Law Review* 874; G Craven, 'The Crisis of Constitutional Literlism in Australia' (1992) 30 *Alberta Law Review* 492.
[38] Hume, Lynch and Williams, above n 1, 73; Appleby and McDonald, above n 1, 263-270 and S Chordia and A Lynch (2014) 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (Pt 1) (2014) 33 *University of Queensland Law Law Journal* 83, 93-101.
[39] Following the approach of Hume, Lynch and Williams, above n 1, 73.
[40] See above n 1.

throughout this and following chapters to encompass these concerns of parliamentary control of finance and the role of an upper house as a chamber of review. I am interested in the manner in which the Court has deployed accountability concerns in making certain accountability-protecting interpretive choices. As discussed in Chapter 1, these concerns have been recognised as forming part of the reasoning that has led the Court to conclude that the Executive is accountable to the Senate.[41]

What emerges in the decisions analysed in this chapter on the Court's use of accountability concerns is that, in the lead-up to *Williams*, the Court had made clear that the principle of parliamentary control of finance provided a reason for the Court to protect accountability to the Senate. The Court also referred to the perceived benefits of upper chambers acting as houses of review and deliberation more generally and rendering ministries accountable to upper houses in Australia's parliamentary systems. In this respect, the reasoning in *Williams,* it will be shown, did not mark a huge shift in the Court's understanding of accountability to the Senate from its dominant approach, although it did mark a shift from the majority approach in *Combet v Commonwealth*.[42]

My purpose in this and the following chapter is not to analyse all of the many factors on which the Court relied in each and every case to reach its conclusions.[43] My purpose is more specific, tailored to the matter of interest to this thesis: considering the degree to which accountability concerns influenced the Court's interpretation of the powers of the Senate to call the Executive to account.

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[41] In Hume, Lynch and Williams, above n 1, 71, 91; Chordia and Lynch, above n 38, 106, 107; G Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the Williams Case' (Pt 2) (2013) 39 *Monash University Law Review* 348, 365, 368, 381-82; D Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrins of Responsible Government and Rule of Law' (2010) 28(2) *University of Tasmania Law Review* 145, 145, 147; Appleby and McDonald, above n 1, 262-272, 273; P Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97, 100, 101, 114, 119, 122; N Aroney et al, *The Constitution of the Commonwealth of Australia: history, principle and interpretation* (Cambridge University Press, 2015), 428, 429, 463, 472, 474-75, 481; A Twomey, 'Post-*Williams* Expenditure: When can the Commonwealth and the States Spend Public Money Without Parliamentary Authorisation?' (Pt 1) (2014) 33 *University of Queensland Law Law Journal* 9, 12, 19, 20.

[42] *Combet,* above n 7. I discuss this below at IV.

[43] In this respect, I adopt the approach taken by Hume, Lynch and Williams, who have already analysed how the second strand of the reasoning in *Williams* (federal concerns) was used by members of the Court to restrict the Executive's spending power. I adopt that approach, focusing now on the second strand of reasoning of accountability concerns: see Hume, Lynch and Williams, above n 1, 73.

III. Structure of the analysis

I approach my analysis of the use made by the Court of accountability concerns in both this chapter and the next by grouping judgments into the two approaches apparent in the Court's interpretation on how Executive accountability to the Senate operates. As noted, this chapter focuses on the approach of the Court prior to *Pape* and *Williams*, with Chapter 6 examining the judgments in *Pape*, *Williams* and subsequent judgments.

The first category, which I have called the 'broad approach', includes those judgments in which members of the Court emphasised the Senate as an upper house with an important role to play in reviewing legislation and in controlling the finances of the Commonwealth.[44] I conclude that the weight of judgments of members of the Court fell within this approach. What is noteworthy about judgments falling within the broad approach is that parts of Australia's colonial constitutional history already comprehended the operation of fundamental doctrines of accountability under the *Constitution*, including the doctrine of responsible government and the operation of the principle of parliamentary control of finance. Moreover, the Court has accepted the relevance and use of the Convention Debates as an aid to constitutional interpretation for some time now, and many judgments within this approach explicitly refer to the Convention Debates.[45] Others justices have gone beyond this record, referring to what they regard as relevant constitutional history, including Australian colonial constitutional history. Judgments falling within the broad approach also rely on political theory regarding the role of accountability to upper chambers. These concepts, too, were already present in Australia's colonial constitutional history and were raised during the Conventions (as discussed in Chapters 3 and 4) to justify the need for accountability to the Senate. In High Court judgments that adopt the broad approach, we see a reiteration of these concepts.

In contrast to the broad approach, a second approach appears in one decision of the Court: in the judgments of the majority in *Combet*. I argue that the majority judgments in *Combet* place

[44] This category includes cases involving the Court's interpretation of the Executive's power to engage in spending, including its decisions in the *Wooltops Case* (*Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421), the *AAP Case* (*Victoria v Commonwealth* (1975) 134 CLR 338) and *Combet*; as also in the following cases considered in Chapter 6: *Pape*, *Williams, Williams v Commonwealth* (2014) 252 CLR 416 and *Wilkie v Commonwealth* (2017) 349 ALR 1.

[45] This was discussed in Chapter 1. See *Cole v Whitfield* (1988) 165 CLR 360; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; see also Irving above n 9, (2013) and Irving 2015, above n 9, C McCamish, 'The Use of Historical Materials in Interpreting the Commonwealth Constitution' (1996) 70 *Australian Law Journal* 638; E Campbell, 'Lawyers' Uses of History' (1968) 6 *University of Queensland Law Journal* 1.

reliance on the Diceyan notion of accountability owed solely to a lower chamber.[46] The majority judgments in *Combet* have already been criticised on the extent to which they undermined Australian federalism.[47] Lindell and Appleby have each argued that they also undermined the principle of parliamentary control of finance and the doctrine of responsible government.[48] I support that view, arguing that part of that failure to recognise accountability concerns in *Combet* is due to the extent to which the majority ignored the nature of dual accountability as part of Australia's parliamentary systems. The majority judgments in *Combet* do not sit comfortably with the long history of strong bicameralism in Australia or with the political theory that has traditionally underpinned goals of dual accountability. I refer to the approach taken by the majority in *Combet* as the 'narrow approach'. Since the narrow approach is represented in one decision only, it is convenient to set out this approach first before returning to compare and contrast (in this and the next chapter) how decisions falling within the broad approach have instead emphasised ideas that protect the Australian constitutional tradition of accountability to upper houses, including in matters of finance.

IV. The narrow approach

In 2005 Greg Combet, then Secretary of the Australian Council of Trade Unions, commenced proceedings in the High Court to challenge the Howard Government's use of public funds to advertise its new Work Choices legislation.[49] The funding for the advertisements was drawn out of public funds. Combet challenged the spending, arguing that the public funds used to advertise Work Choices had not been validly appropriated by law. A majority rejected Combet's challenge.[50] Before turning to the specific arguments in *Combet,* it is necessary to briefly consider the Court's decision in *New South Wales v Bardolph,*[51] a precedent of the Court on the operation of responsible government that, as will be discussed below, was thought to

[46] Dicey's approach was discussed in Chapter 2. This interpretation is that the doctrine of responsible government involves political accountability (particularly in matters of finance) solely to a lower parliamentary chamber.

[47] Hume, Lynch and Williams, above n 1, 74, 83, 86, 89.

[48] G Appleby (2009) above n 41, 102, 122, 132; G Lindell, 'The *Combet* Case and the Appropriations of Taxpayers' Funds for Political Advertising - An Erosion of Fundamental Principles?' (Pt 3) (2007) 66 *The Australian Journal of Public Administration* 307, 314, 322. I discuss the authors' views in more detail below.

[49] Work Choices was part of the Howard Government's reform of industrial relations laws. In July 2005, the Government entered into contracts for the purpose of advertising the proposed reforms. Combet challenged the spending under those contracts.

[50] Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, finding that the expenditure had been authorised by an appropriation passed by the Parliament. Their Honours' reasons are discussed below in Sub-section B. McHugh J and Kirby J dissented. Their Honours' dissenting opinions discussed below at V.C.2. For a more detailed discussion of the findings in the case see the excellent summary in Lindell, above n 48, 308-311.

[51] *New South Wales v Bardolph* (1934) 52 CLR 455 (*Bardolph*).

support the view that accountability was owed solely to a lower chamber. The approach in *Combet* certainly appeared to follow *Bardolph* (in effect) in favouring accountability solely to a lower chamber.

A. *Bardolph* and accountability to a lower house

In *Bardolph* the High Court had to consider whether the Executive of New South Wales was politically responsible solely to the lower house of the New South Wales Parliament, or whether such accountability was owed to the Legislative Council as well. Individual justices in the case took the view that political accountability was owed by an executive solely to a lower house in matters of finance under the principles of responsible government.[52]

At first instance in the High Court, Evatt J found that the Executive of NSW did not have to point to 'a clear reference to payments under the particular contract … contained in an Act of Parliament' in order for spending to be valid.[53] Evatt J cited Durell's work on the operation of the British Constitution in support, finding that the operation of responsible government worked on the premise of delegation of responsibility by parliament to the executive, the only restriction being the overall control parliament retained over spending through the appropriations process.[54] He added that political accountability was owed to the upper house in the case of 'illegality' although, since his Honour offered no further explanation of what he meant by that word, whether he contemplated any accountability to an upper house in matters of finance cannot be drawn from his judgment.[55]

On appeal, similar statements on accountability to the lower house in matters of finance were made by Dixon J, with his Honour concluding that it was the 'function of the executive, not parliament, to make contracts on behalf of the Crown'.[56] This was because the:

[52] The facts of *Bardolph* are not particularly relevant for present purposes. The NSW Labor Government had entered into a contract for weekly insertions of Tourist Bureau advertisements to be placed in the newspaper operated by *Bardolph*. When the new Government came into power it sought to overturn the contract on the basis that there was no statutory authority or authority by Order in Council or Executive Minute for the Labor Government to have contracted for the spending. Twomey says that the Commonwealth had revived its 'aspirational view' in *Bardolph* that the Executive had power to enter contracts without any statutory authority: see Twomey, above n 41, 17.

[53] *Bardolph*, 508 (Evatt J).

[54] *Bardolph*, 508 (Evatt J), citing Durell's work on British parliamentary practice on appropriations: see AJV Durell, *The Principles and Practice of the System of Control over Parliamentary Grants, Vol 2* (1917), 20, 21.

[55] *Bardolph*, 508 (Evatt J).

[56] *Bardolph*, 504 (Dixon J), with whom Gavan Duffy J agreed.

> 'Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys.'[57]

Dixon J said that the principles of responsible government did not:

> 'disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.'[58]

Although Dixon J did not clearly say that the NSW Executive was not politically accountable to the upper house, his Honour's reasoning did appear to proceed on the basis that prior parliamentary approval was not required because it was assumed that parliament would approve any spending undertaken by the executive. This suggests that only the lower chamber, of which a ministry would have control, needed to approve spending. In this respect, his Honour's interpretation of responsible government stands in contrast with the requirements imposed by the Court in its earlier decision in *Wooltops*[59] under the *Constitution*. As will be discussed shortly, in *Wooltops* the Court relied on the principles of responsible government and parliamentary control of finance to find that the Commonwealth Executive required prior parliamentary approval for all spending from *both* parliamentary chambers.[60] The statements in *Bardolph* also contrast with the position that had been taken on the need for prior parliamentary approval of spending from upper chambers in Australia's colonial parliaments discussed in Chapter 3. *Bardolph* nonetheless has been argued as having appeared to stand for the proposition that, under a system of responsible government, accountability in matters of finance was owed only to a lower house.[61] Thus, the only authority needed to approve spending undertaken pursuant to a contract entered into by the NSW Executive was an appropriation Act made before or subsequent to the spending being contracted for, such approval to come from the lower house. As set out in Chapter 3, when governments in the Australian colonies attempted to undertake spending without parliamentary approval, conflict with the upper house was the result. The point had ultimately been won by upper chambers. *Bardolph* contradicted this history or, at least, appeared to contradict the principle of dual accountability.

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[57] Ibid.
[58] *Bardolph*, 504 (Dixon J).
[59] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421. ('*Wooltops*').
[60] See below at V.A.
[61] See also Chordia and Lynch, above n 38, 84.

Although agreeing on the outcome in the case, the judgment of Starke J in *Bardolph* was more couched, both as to the question of the authority of the NSW Executive to contract without prior parliamentary approval and on the idea that parliamentary control of finance involved accountability to a lower house alone. His Honour found that that the 'nature and extent of the Executive's authority' could be defined by 'constitutional practice or express instructions, or inferred from the nature of the office or the duties entrusted to the particular officer or servant'.[62] As a result, a combination of the character of the transaction and also of constitutional practice had to be considered by the Court in determining the validity of the action taken by the NSW Executive in entering into the specific contract.[63] He also warned that not every contract made by an officer of the Crown would bind it, and that the contracts that could bind the Crown were limited to those that were 'within the authority delegated [by parliament] to that officer or servant'.[64] Importantly, Starke J warned that the reason for the inclusion of such a rule was that, 'while it might not destroy Parliamentary control over the amount and manner of expenditure of public money, it would seriously weaken that control.'[65] This idea, that a clear delegation by parliament to the executive must have been *already* in place, would become a key theme in both *Pape* and *Williams* to justify accountability to the Senate in matters of finance, including the need for specific statutory authorisation for the sums to be spent prior to the spending being contracted for.[66]

Twomey has noted that the difficulty with drawing any conclusions of relevance to the operation of the *Constitution* from the decision in *Bardolph* is that the case involved the interpretation of a unitary constitution, that of New South Wales.[67] As such, its application and significance to the *Constitution* was not certain.[68] This limitation of the applicability of the findings in *Bardolph* has also been acknowledged by the Court.[69] Although scholarship exists

[62] *Bardolph*, 502 (Starke J).
[63] Ibid. Starke J reasoned that the contract in question in the case was 'not controversial' since it was a contract 'providing for the carrying on of the ordinary activities or functions of government'. His Honour did warn that each contract had to be considered 'in relation to its own facts'.
[64] *Bardolph*, 502 (Starke J).
[65] *Bardolph*, 502 (Starke J).
[66] Discussed in Chapter 6.
[67] See Twomey, above n 41, 19, 22. That the spending in that case was characterised as being for the 'ordinary annual services of the government', and the problems associated with characterising the purpose of expenditure, is beyond the scope of the present work. For a detailed discussion of this problem see E Campbell, 'Federal Contract Law' (1970) 44 *Australian Law Journal* 580; E Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14; E Campbell, 'The Federal Spending Power Constitutuional Limitations' (1968) 8(4) *Western Australian Law Review* 443.
[68] Twomey, above n 41, 19, 22; see also Chordia and Lynch, above n 38, 99-100.
[69] By French CJ in both *Pape* and *Williams.* His Honour's views in those cases are discussed in Chapter 6.

on the effect of *Bardolph* and its relevance to the Crown's capacities to contract generally, the literature to date has not specifically emphasised the impact of *Bardolph* and its relevance to the operation of accountability to an upper chamber.[70] Thus, by the time *Combet* was decided in 2005, the only prior decision of the Court that had examined accountability of the Executive to the Senate for spending pursuant to a contract under the *Constitution* was its decision in *Wooltops*.[71] The case is discussed in detail below as an example of the broad approach. In *Wooltops,* the Court determined that both an appropriation of funds together with specific statutory approval were necessary to support spending by the Executive. The difficulty was that, because of the findings in *Bardolph* on accountability to the lower house in matters of finance, the waters had been muddied somewhat on the requirements of responsible government and parliamentary control of finance, including whether upper houses need to approve spending and whether such approval needed to be made in advance of the expenditure being committed to.[72]

Wooltops was not considered by the Court in *Combet*. This appears to be because the majority in *Combet* approached the spending under challenge by determining whether it was supported by an appropriation already made by the Commonwealth Parliament (that is, on the basis that an appropriation of funds alone was capable of supporting the spending).[73] Thus, no specific issue about the extent of Executive power under s 61 of the *Constitution* (particularly as a source of spending power) nor many of the issues raised in *Wooltops* (and later in *Williams*) were canvassed in *Combet*. Even though references to *Bardolph* in the decision are perfunctory, what is noticeable from the majority judgments in *Combet* is that they appear to proceed largely on the reasoning in *Bardolph*: namely, that accountability in matters of finance is owed to the lower house under the principles of responsible government. What is also striking about the majority's approach in *Combet* is the almost entire absence of reference to pre-Federation Australian constitutional history and parliamentary practice. In this respect, the approach of the majority in *Combet* reflects the approach to responsible government and accountability to an

[70] See articles by E Campbell above n 57; also Twomey, above n 41; A Twomey, 'Fundamental Common Law Principles as Limitations Upon Legislative Power' (2009) 9(1) *Oxford University Commonwealth Law Journal* 47; Appleby and McDonald, above n 1, 271.

[71] The case and its effect is discussed below at V.A.

[72] As noted, *Bardolph* had raised the suggestion that a subsequent appropriation of funds by parliament would be adequate to support spending under the requirements of responsible government. *Bardolph* also suggested that support for spending could take the form of an appropriation of funds alone, without the need for any separate statutory authorisation. In Chapter 6, I discuss how the Court determined in its decision in *Pape* (approved in *Williams*) that an appropriation of funds alone is not sufficient to support spending by the Commonwealth Executive absent specific statutory authority.

[73] Discussed below at B.

upper house that had been taken in *Bardolph*, with members of the Court preferring assertions from British parliamentary practice about the operation of accountability in matters of finance rather than taking into account Australian experience on the point.

In the next section, I consider the approach of the majority in *Combet*. I suggest that the majority judgments in *Combet* emphasised an assumed British parliamentary practice as being applicable to the *Constitution* without alteration, and at the expense of considering Australia's constitutional history of dual accountability that was adapted by the framers to the *Constitution* as part of the existence of the Senate's power of veto over financial legislation.

B. The majority judgments in *Combet*

The majority judgments in *Combet* acknowledged that some constitutional history and parliamentary practice was relevant to the Court's findings. For example, Chief Justice Gleeson said:

> 'The Constitution, consistently with the background of constitutional history and parliamentary practice with which the framers were familiar, reserves to the Parliament, and especially the House of Representatives, the power associated with control of funding through appropriation. It is for Parliament, consistently with the Constitution, to decide how it exercises that control.'[74]

This reflected the full extent of the consideration of history in his Honour's judgment. Ultimately, Gleeson CJ found that, since the Commonwealth Parliament had now set down the process by which approvals for spending occurred, it was not for the Court to question how Parliament went about exercising its power of oversight.[75]

The other justices in the majority (Gummow, Hayne, Callinan and Heydon JJ) referred to the history provided in the Convention Debates on s 53 of the *Constitution* to find that the Executive had the responsibility for initiating money bills.[76] Their Honours said that the *Constitution* provided for 'what, in 1903, was said in relation to the House of Commons to be "a comprehensive and continuous guardianship *over the whole finance*" of the Commonwealth.'[77] However, 'the manner of exercising that guardianship, within the relevant

[74] *Combet*, [5] (Gleeson CJ).
[75] *Combet*, [26] [27] (Gleeson CJ); Gleeson was supported in this finding by the other justices in the majority: *Combet*, [142] (Gummow, Hayne, Callinan and Heydon JJ).
[76] *Combet*, [143] (Gummow, Hayne, Callinan and Heydon JJ).
[77] My emphasis. *Combet*, [159] (Gummow, Hayne, Callinan and Heydon JJ). The reference made by their Honours was to a text on British constitutional practice (Redlich, *The Procedure of the House of Commons*, (1908), vol 3, 170).

constitutional limits, is to be determined by the Parliament', not by the Court.[78] The relevant constitutional practice since the mid-1980s was said to be that the Executive specified the 'amount that may be spent rather than further define the purposes or activities for which it may be spent.'[79] Tested by reference to that framework, the majority found the spending had been authorised by the appropriation relied on by the Executive in the case. Ultimately, their Honours *assumed* that the procedures Parliament had set down conformed with the provisions of the *Constitution*. This assumption was easy to make if one considers that political accountability in matters of finance was viewed by the majority as being almost entirely a matter for the House of Representatives.[80]

C. The majority judgments in *Combet* and accountability concerns

The judgments in *Combet* provide a good example of how minds can differ on what constitutes relevant constitutional history. As noted, the majority judgments did not seek to avoid referring to history altogether. Rather, references to any history in the majority judgments in *Combet* were limited to assertions of British parliamentary practice and assumptions that such practice was adopted without any modification under the *Constitution*. The history referred to by the majority accorded better with the operation of the British Constitution.[81] What appears in the majority judgments are references primarily to the history of the British Constitution, including an assumption regarding the operation of political accountability under it solely to the lower parliamentary chamber. Although the majority judgments in *Combet* did not say that the Executive was not accountable to the Senate, the difficulty is that the effect of the judgments (through an absence of intervention by the Court) was to favour a strong parliamentary Executive with power to implement government policy based on the assumption that political accountability was owed by the Executive to the House of Representatives alone in questions of finance.[82]

While there is no denying that key principles (like the principle of parliamentary control of finance) were part of British constitutional practice (considered in Chapter 3), it is not likely that Australian constitutions (including the *Constitution*) adopted the idea of accountability

[78] *Combet*, [159] (Gummow, Hayne, Callinan and Heydon JJ).
[79] *Combet*, [161] (Gummow, Hayne, Callinan and Heydon JJ).
[80] I discuss the effect of the majority judgments in this respect below at C.
[81] Or at least accorded better with the Diceyan notion of accountability solely to the lower house alleged to be in operation under the British Constitution.
[82] Appleby, above n 48, 102; Lindell, above n 48, 308-311. Lindell concluded that the reality following *Combet* was that Parliament was gradually losing control of funds; Appleby also supports this view: Appleby, above n 48, 111.

solely to lower chambers in matters of finance. In Chapter 4, I argued that the form of dual accountability with which the framers were most familiar under Australian constitutions became a feature of the *Constitution*. Unfortunately, the judgments of the majority in *Combet* relied on assertions of British parliamentary practice rather than consideration of more relevant Australian constitutional history and parliamentary practice in Australia, including on parliamentary control of appropriations. Before returning to the negative impacts for responsible government from the majority's approach in *Combet*, I need to state two caveats about my criticism of their Honours' approach.

The first caveat is that the majority judgments in *Combet* reflect a much more complex question regarding the appropriate role of a constitutional court, particularly the extent to which the Court should intervene at all in prescribing the extent of control the Commonwealth Parliament must exercise over the Executive, including over finance. As will be discussed in Chapter 6, this is a question that continues to concern members of the Court.[83] In *Combet,* the majority did not specifically reject the idea that the Senate's approval for any appropriation of funds was required. They did find, as noted, that the question of the degree of oversight over appropriations was entirely a matter for the Parliament, not the Court.[84] For the majority, the issue was a political, not a legal, question. It followed that it was not for the Court to intervene and strike down the spending in the case. As noted in Chapter 1, the appropriateness of the Court's intervention in what it regards as political maters is beyond the scope of my work.[85] What can be briefly observed is that, as Ziegert has noted, 'if Parliament's ability to supervise the Executive diminishes, judicial oversight becomes all the more important.'[86] Chordia and Lynch support this, saying that, in the face of:

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[83] In Chapter 6 I consider how this concern was expressed by both Hayne J and Kiefel J in *Williams*.

[84] *Combet*, [5], [12] (Gleeson CJ); [160] (Gummow, Hayne, Callinan and Heydon JJ). Such questions were viewed as being political, not legal questions. As such, the question was said to be outside the appropriate oversight to be exercised by a constitutional court: *Combet*, [5], [12] (Gleeson CJ); [160] (Gummow, Hayne, Callinan and Heydon JJ). See also above n 48.

[85] See Chapter 1 at p. 2. 4, 6-7. For a detailed examination of the questionable division of matters of law and matters of politics, see M Zamboni, *Law and Politics* (Springer, 2008). For a critique of the Court's political choice in choosing not to intervene in the case, see Lindell, above n 48, 317-318; G Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 37. Winterton considered the extremely close relationship between law and politics under the doctrine of responsible government, including the difficulties of drawing any clear lines between matters of law and matters of politics under the doctrine.

[86] L Ziegert, 'Does the Public Purse have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*' (2006) 28 *Sydney Law Review* 387, 399, citing Sir Gerard Brennan's observations in G Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9 *Bond Law Review* 136, 144.

> 'historical perspectives and the manner in which the Court has, even in the post-Engineers era, been required to demarcate the limits of power, the conclusion that the proper role of the Court is to leave this issue almost entirely to the political process is a difficult one to accept … the Court's proper function must be to determine the implied and express limitations on Commonwealth power … '.[87]

The second caveat is that *Combet* was argued on the basis that the spending was not supported by the appropriation relied on by the Executive. In other words, argument from all sides proceeded on the basis that ss 81 and 83 of the *Constitution* could be a source of Executive spending power. In *Pape*, the Court would unequivocally reject this proposition.[88] As a result, the majority justices in *Combet* appear to have directed their minds solely to a question of construction, determining whether the spending was supported by the relevant appropriation. This approach arguably did not prompt any specific consideration of principles regarding accountability to the Senate, including in matters of finance included in the *Constitution* itself. As will be discussed in Chapter 6, the Court's later judgments were not constrained by a narrow question of construction.

There is already literature on the possibility that the majority's decision in *Combet* undermined Australian federalism.[89] Federal concerns not being the focus of my work I do not repeat the detailed concerns of those authors here. Rather, focusing on the matter of interest to my thesis, the effect on accountability concerns by the majority's approach, I note that Lindell and Appleby have each criticised the majority's decision on the basis that it also undermined parliamentary control of finance and responsible government.[90] Appleby argued that the reasoning of the majority signalled 'tacit approval of complete parliamentary abdication of the

[87] Chordia and Lynch, above n 38, 102.
[88] Considered in Chapter 6. The focus in *Combet* thus concerned whether or not the spending was supported by an appropriation under the old view that ss 81 and 83 of the *Constitution* provided the source of the Executive's power to spend, which proposition the Court would clearly reject in *Pape*. Section 81 of the *Constitution* provides *'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.'* Section 83 provides (relevantly) *'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.'*
[89] Chordia and Lynch, above n 38, 83.
[90] Appleby, above n 48, 102, 122, 132; Lindell, above n 48, 314, 322. Appleby has argued that the joint judgment in *Combet* went so far as to authorise appropriations for 'outcomes' which did not restrict the Executive, at least insofar as the purposes stated by Parliament in the appropriation legislation did not have to be binding on the Executive: Appleby, above n 48, 101.

substance of the appropriation process to the Executive.'[91] The result of the majority's reasoning was that:

> 'Rather than the executive recommending the purposes of the appropriation and it being approved and appropriated by Parliament, Parliament will appropriate an amount of funds to be used for the purposes subsequently determined by the executive.'[92]

Appleby and McDonald have documented that, even in Britain, the 'rise of the Parliament in British history has meant that the Executive acting alone (that is, without statutory or constitutional authority) cannot lawfully act in certain ways', and that these limitations were driven by principles such as 'responsible government, accountability and the rule of law'.[93] Appleby has argued that, in Australia (particularly following the decision in *Pape*), the role to be played by Parliament in authorising spending is based on more than just a *convention* of responsible government: such authorisation is mandated by ss 81 and 83 of the *Constitution*.[94] The decision in *Pape* supports this.[95] Lindell had previously criticised the majority's approach on much the same basis, including that the majority's approach failed to appreciate that the case was not about whether or not the Parliament 'could have' authorised the contested expenditure; rather, *Combet* was a case that should have demonstrated that:

> 'explicit authorisation was needed to show that parliament intended to authorise that expenditure. In essence, the principle at play … is that the onus should have been on the parliament to specifically authorize, rather than specifically prevent, this kind of controversial expenditure …'.[96]

Appleby has also endorsed Lindell's position on the basis that both the 'history and objective' behind s 81 of the *Constitution* demonstrate that the purposes for which appropriations are made must be intended by Parliament.[97] By failing to appreciate the effect that the lack of a prior authorisation could have on parliamentary control of spending, the majority's approach undermined that principle of control. As Lindell put it, the approach in *Combet* followed 'a

[91] Appleby, above n 48, 102.
[92] Appleby, above n 48, 102.
[93] Appleby and McDonald, above n 1, 255. See also Appleby, above n 48, 95, 97-103.
[94] Appleby, above n 48, 121.
[95] Examined in Chapter 6.
[96] Lindell, above n 48, 315.
[97] Appleby, above n 48, 122; Lindell, above n 48, 316-317. In addition to this criticism of the need to obtain prior parliamentary approval for spending, Lindell has also pointed out that the form of the appropriation in *Combet* looked very much like an appropriation in blank, which the Court had already clearly determined was not sufficient to authorise an expenditure of funds under ss 81 and 83 of the *Constitution* in its decision in *Brown v West* (1990) 169 CLR 195: Lindell, above n 48, 309, 316-317.

minimalist approach to the question of compliance with important constitutional principles which were designed to curb such abuse.'[98] That abuse:

> 'has a much greater political chance of being prevented if the government has the task of securing explicit parliamentary authority to undertake the expenditure. Such authority has the potential to attract public attention and debate and also needs to gain the approval of the Senate.'[99]

This accountability to the Senate (in addition to any accountability to the House of Representatives), based on the principle of parliamentary control of finance, is the point of interest to my thesis. The majority judgments recognised the principle of parliamentary control of finance, yet they treated the question of enforcement of such control as entirely a matter for the Parliament, not the Court. As Appleby and Lindell have highlighted, the inclusion of ss 81 and 83 in the *Constitution*, and the principle of parliamentary control of finance embodied in those provisions, actually indicates that such concerns are a matter for the Court as part of enforcing the *Constitution*. Taking into account the long history in Australia of attempts by ministries to act without prior parliamentary approval, and the objections taken to such action (set out in Chapter 3), the inclusion of the principle of parliamentary control of finance in the *Constitution* supports Appleby and Lindell's conclusions on the need for prior parliamentary approval of spending.

As Appleby has ultimately concluded, what is most striking about the majority judgments in *Combet* is the extent to which they emphasised the operation of political accountability of the Executive to the House of Representatives, passing control of public funds to the lower house.[100] Thus, although the majority did not specifically reject the idea that the Senate's approval for any appropriation of funds was required, the approach of the majority in *Combet* has been described as having emphasised the role of the House of Representatives in approving spending by the Executive as part of the requirements of responsible government but, at the same time, placing limited importance on the role of the Senate in exercising any scrutiny of appropriations.[101] Appleby has argued that the majority's view that no distinct line of political

[98] Lindell, above n 48, 322.
[99] Ibid, 321.
[100] Appleby, above n 48, 99, 102, citing *Combet*, [4], [5] (Gleeson CJ); [160] (Gummow, Hayne, Callinan and Heydon JJ).
[101] Appleby, above n 48, 99. As noted above, the majority found that the question of the degree of oversight over appropriations was entirely a matter for the Parliament, not the Court: see *Combet*, [5], [12] (Gleeson CJ); [160] (Gummow, Hayne, Callinan and Heydon JJ).

accountability is owed to the Senate sits at odds with the importance of the Senate's scrutiny of spending as part of general considerations of review of legislation in a bicameral parliament.[102] In this respect, the approach in *Combet* is similar to the one taken in *Bardolph*, albeit in the context of a unitary constitution in that case. I add that Appleby's argument is supported by the history in Chapters 3 and 4 of this thesis. Together, they concluded that the Senate was given oversight of finance based on general considerations of the role of an upper house in review of legislation in a bicameral parliament, as well as the exercise of a degree of superintendence over finance. The Senate was given such a role partly because upper houses in Australia had always adopted this function. When the *Constitution* was created, the framers adapted those systems of dual accountability with which they were most familiar to the *Constitution*.

Apart from the difficulties for responsible government from the majority's approach, I add that the absence from the majority's approach of any particular discussion of relevant pre-Federation Australian constitutional history and parliamentary practice, as well as the absence of consideration given to goals of dual political accountability in bicameral systems more generally, affected their Honours' interpretation of whether accountability to the Senate needed to be protected by the Court. Since these ideas were present in Australian colonial constitutional history and parliamentary practice and, in turn, made their way into the Conventions and the *Constitution*, it would not be unreasonable to expect some consideration of accountability concerns (of parliamentary control of finance and the role of the upper chamber as a house of review) to have been taken into account. Instead, in order to reach their conclusion for non-intervention, the majority judgments in *Combet* used statements of principle and history which were either perfunctory, assumptive or more appropriate to the operation of the British Constitution.[103] The conception of accountability as owed solely to a lower house sits at odds with the history of dual accountability in Australia's bicameral parliaments and with the compromise adopted during the Conventions on the necessity for accountability to the Senate based on concerns of federalism and parliamentary control of finance and review of legislation more generally.

[102] Ibid, 99.

[103] Even this view of political accountability under the British Constitution must be doubted. As discussed in Chapter 2, leading authors like Erskine May did not offer such a straightforward view of accountability under the British Constitution at this time. McHugh J in *Combet* also noted that the British Constitution most likely had a system of dual accountability. I discuss McHugh's recognition of this in *Combet* at V.C.2 below.

In summary, although the majority judgments in *Combet* did not say that the Executive was not accountable to the Senate, the effect of the judgments was that they favoured the assumption that political accountability was owed by the Executive to the House of Representatives alone in questions of finance.[104] No consideration was given by the majority to the purpose of accountability to the Senate.[105] No detailed consideration was provided by their Honours to the role of the Senate to act as a house of review, a house that had an important role to play in controlling spending by government.[106] As discussed in Chapter 3, dual accountability was a feature of bicameralism in Australia's unitary parliaments, before federalism ever entered the constitutional picture. It was likely adapted for use in the *Constitution*.

Lindell has concluded that not only federalism was undermined by the approach of the majority in *Combet*: the principle of responsible government in the form of parliamentary control of finance was potentially undermined too.[107] This must be correct. It is supported by the history of dual accountability discussed in Chapters 3 and 4 of this thesis. Chapter 4 revealed that delegates to the Conventions conceived of accountability to the Senate based on concerns based on the goals of dual accountability, including parliamentary control of finance and acting as a second chamber of review. In *Combet*, the majority simply said that the 'political process' of appropriations was a sufficient basis to provide opportunities for review of spending 'in addition to the established parliamentary process of appropriations', since that process had been approved by Parliament. They conceived of such accountability being owed to the House of Representatives. To this extent, the majority's position sits at odds with the Convention Debates and with the history that influenced the framers in the Conventions. As I will discuss, the majority's approach in *Combet* stands largely alone in the Court's approach to accountability of the Executive to the Senate, particularly with respect to parliamentary control of finance.

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[104] Appleby, above n 48, 102; Lindell, above n 48, 308-311. Lindell concluded that the reality following *Combet* was that Parliament was gradually losing control of funds; Applebly also supports this view: Appleby, above n 48, 111.

[105] Appleby, above n 48, 99. Chordia and Lynch have criticised the majority judgments in *Combet* as having favoured responsible government at the expense of federalism, with the role to be played by the Senate in the appropriations process being de-emphasised: Chordia and Lynch, above n 38, 83.

[106] As leading authors have argued, this dual accountability was a feature of the constitutional system most likely adopted by the framers: Hume, Lynch and Williams, above n 1, 71, 91; Chordia and Lynch, above n 38, 106, 107; Lindell, above n 48, 365, 368, 381-82; Kerr, above n 11; Appleby and McDonald, above n 1, 262-272, 273; Gerangelos, above n 41, 100, 101, 114, 119, 122; Aroney et al, above n 41, 428, 429, 463, 472, 474-75, 481; Twomey, above n 41, 12, 19, 20.

[107] Lindell, above n 48, 308, 316.

For the remainder of this chapter (and in Chapter 6), I analyse the other judgments of members of the Court that have considered accountability concerns to justify accountability to the Senate. This broad approach to political accountability found considerable support in judgments of the Court even before it secured a beachhead in *Pape* and *Williams*.

As will be discussed in Part V below, an entire constitutional framework that provided for dual accountability arguably applied to the spending under challenge in *Combet*. Further, the only way to properly understand the operation of that framework is to recognise the constitutional history and parliamentary practice that informed relevant constitutional provisions, including parliamentary control of finance by upper houses. What is striking about the reasoning of the majority in *Combet* is the extent to which their Honours avoided referring to relevant Australian pre-Federation history and practice that evidenced a history of constitutions in which two parliamentary chambers were able to call the Executive to account, including in financial matters. Instead, the majority relied on an assertion of the wholesale adoption of an assumed British parliamentary practice on the approval of spending as being analogous to the system adopted by the framers for the *Constitution*. It is unlikely that the *Constitution* ever adopted the British model of responsible government and accountability solely to a lower house.[108] If the Court accepts that the history presented to us in the Conventions is relevant to informing its interpretation of the *Constitution*, then one wonders why even this limited history was left out of the reasoning in the majority judgments, let alone why an assertion of British history was added and potentially relevant Australian constitutional history was then left out.

As I will discuss later in this chapter, what is noticeable in the dissenting opinions of the minority justices (McHugh J and Kirby J) is the extent to which their Honours referred to the history of the relevant constitutional provisions to reach a different conclusion to the majority on the question of accountability to the Senate.[109] I argue that part of the reason the dissenting justices reached that different conclusion was that their Honours took into account Australian constitutional history, including the record presented in the Convention Debates on accountability to the Senate based on goals of accountability to upper chambers that had long been a feature of Australian constitutional practice.

[108] My reasons for this view were considered in Chapter 2, particularly given Erskine May's detailed history of conflicts between the Commons and the Lords during the 19th century in Great Britain. McHugh J in *Combet* also noted that the British Constitution most likely had a system of dual accountability too. I discuss McHugh's recognition of this in *Combet* at V.C.2 below.

[109] Their Honours' respective approaches in *Combet* are discussed below at V.C.2.

V. The broad approach

In contrast to the narrow approach, the greater weight of authority from the Court on the operation of accountability of the Executive to the Senate falls within the broad approach to accountability. As noted above, this approach is characterised by those judgments in which members of the Court emphasised the role of the Senate by reference to accountability concerns, including the Senate's role as an upper house with an important role to play as a house of review and as part of ensuring parliamentary control of finance.[110]

The remainder of this chapter considers judgments in which the Court adopted the broad approach prior to *Pape* and *Williams*. Apart from protecting political accountability to the Senate, what is notable from judgments falling within the broad approach is their more detailed exploration and reliance on Australian constitutional history and parliamentary practice. The judgments rely on accountability concerns present in Australia's colonial history (considered in Chapter 3) and mentioned during the Conventions (dealt with in Chapter 4).

A. *Wooltops* – an early example

As noted above, the earliest decision in which the Court considered the Executive's accountability to the Senate in matters of finance was in *Wooltops*.[111] In that decision, the Court imposed a requirement that all spending needed the approval of the Senate through both an appropriation of funds and separate legislative approval to support the spending.[112] Of present interest is the use made by members of the Court of their version of relevant Australian constitutional history and parliamentary practice to impose these conditions as part of the requirements of responsible government under the *Constitution*.

The use of federal concerns in *Wooltops* has been discussed extensively elsewhere and is not the focus of this work.[113] The case has also been analysed for its general description of the Executive power in s 61 of the *Constitution*[114] and its relevance to the ideas of the Crown's capacities (to contract) generally.[115] As discussed in Chapter 1, none of this literature focuses

[110] See above n p. 185, 187.
[111] See above p. 190-191.
[112] *Wooltops*, 432 (Knox CJ and Gavan Duffy JJ); 453-454 (Higgins J); 459-461 (Starke J); 441-443, 445, 447-448 (Isaacs J).
[113] See the discussion in Chapter 1 on the scope of work on federal concerns and also the discussion above on this scholarship.
[114] See for example R French, 'The Executive Power' (2010) *Constitutional Law and Policy Review* 5; Gerangelos, above n 41; A Twomey, 'Pushing the Boundaries of Executive Power' (2010) 34(1) *Melbourne University Law Review* 313.
[115] For example, works by E Campbell, above n 57.

(nor does it have to) on the specific aspect I am interested in: the decision's relevance to what have been labelled accountability concerns.[116]

Wooltops dealt with the power of the Executive to spend public moneys in reliance on s 61 of the *Constitution*. The Executive had sought to support its spending under an agreement entered into with a company under which authority was granted to the company to sell wool tops in return for a share of the profits.[117] One of the questions for the Court's consideration was the extent of the Executive's power to spend in reliance on s 61 of the *Constitution* in the absence of a prior Commonwealth Act approving the spending.[118]

It had been conceded by the Commonwealth that no legislation had authorised the spending undertaken and that the contract did not fall within an area of legislative responsibility allocated to the Commonwealth by the *Constitution*.[119] The Court found that the spending had not been authorised by any relevant law of the Commonwealth Parliament and that, in order to be valid, the spending could only have been authorised by a *prior* Act of the Parliament in addition to an appropriation of funds for the purpose.[120]

My analysis focuses on the judgment of Justice Isaacs because it was his Honour who described in detail the importance and operation of the principle of parliamentary control of finance under the *Constitution* as part of the operation of the doctrine of responsible government. This principle, and the constitutional practices that had been applied under it in Australia, led his Honour to the conclusion that specific statutory approval in addition to appropriation of funds was required to support the spending, and that such approval included the approval of *both* parliamentary chambers.

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[116] As to which see Chapter 1, p 2, 4, 6-7 and this chapter, p. 197-200. These include the principle of parliamentary control of finance and the idea of the upper house as a chamber of review.

[117] *Wooltops*, 432.

[118] Section 61 of the Constitution provides: *'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'*

[119] *Wooltops,* 432, 443, 452, 454, 461, 475. It was accepted by the Commonwealth that the regulations did not confer a power on the Executive to enter into such an agreement: *Wooltops*, 452, 461, 475.

[120] Knox CJ and Gavan Duffy J found that the spending was not supported by any relevant legislation: see *Wooltops*, 432 (Knox CJ and Gavan Duffy JJ); Higgins J determined that the spending had not been approved either: 453-454 (Higgins J); Starke J found that the spending was not supported and that parliamentary approval was required for spending (see 459-461 (Starke J). See also 441-443, 445, 447-448 (Isaacs J). All members of the Court (apart from Powers J who did not deliver a judgment) held that the Commonwealth's entry into the agreements was beyond power.

It must be borne in mind that *Wooltops* remains a difficult case to draw any firm conclusions from since even those members of the Court who agreed on the outcome gave differing reasons for finding that the Executive's entry into the agreements was beyond power in the case.[121] No single view of the ambit of Executive power to make agreements commanded the assent of a majority of the Court.[122] Isaacs J nevertheless laid down a blueprint for the requirements of parliamentary control of finance based on his interpretation of the requirements of responsible government, which in turn was founded on his interpretation of applicable constitutional history and parliamentary practice in Australia. It is this aspect of the decision in *Wooltops* that I am most interested in.

1. Use of accountability concerns in *Wooltops*

Isaacs J's' reasons in *Wooltops* emphasised the principle of parliamentary control of finance and what he described as 'constitutional history' to determine that more than an appropriation of funds was required to support the spending in the case. Finding that the agreements under challenge in the case were invalid because the 'law of the Constitution with respect to public finance prohibits such bargains', his Honour said that the manner in which the spending had been undertaken in the case brought 'into action the financial principle of the *Constitution*, namely, control of the public expenditure by parliamentary appropriation.'[123] Control of finance by parliament was described by his Honour as the 'pivot of the Constitution and the keystone of the arch of personal liberty.'[124] Isaacs J went on to describe the relevant history as he saw it:

> 'For centuries under responsible government, as any history will tell us, the insistence of the House of Commons on control of taxation was the basis of popular liberty … In the early years of the nineteenth century a change began, and proceeded until Parliament, though obviously incapable of direct executive action, exercises complete control.'[125]

What emerged from the applicable history, according to his Honour, was 'the general understanding that Parliament is not to be fettered in its discretion as to public expenditure by anything the Executive may do'.[126] Entering into an agreement binding the Crown to pay away

[121] Only Powers J believed that the contracts were supported.
[122] This was recognised by Hayne J in *Williams*, [211]. I discuss Hayne's judgment on this point in Chapter 6.
[123] *Wooltops*, 433 (Isaacs J).
[124] *Wooltops*, 434 (Isaacs J).
[125] *Wooltops*, 449 (Isaacs J).
[126] This interpretation of fettering of the Crown merely by entry into an agreement was questioned by Campbell: see Campbell, sources cited above, n 57. Campbell has argued that there was in a place a principle that

public funds would be such a fettering, one that would seriously weaken 'the control by Parliament over the public Treasury.'[127] In the case of spending by the Executive, Isaacs J said that responsible government required (at the very least) the oversight of a parliament that could approve or reject spending by the Executive through legislation.[128] As discussed above, no such account of relevant history appeared in the Court's account of the history of parliamentary control of finance in Australia twelve years later when *Bardolph* was decided by the Court.[129]

Isaacs J referred to no particular source to support his version of parliamentary practice in Australia which he said had been applied to the *Constitution*.[130] He had been a Victorian Parliamentarian who, along with other delegates at the Conventions, was well aware of the conflicts with the upper house in that colony. During the Conventions he and his fellow Victorians had resisted attempts by States-righters to render the Executive accountable to the Senate.[131] By the time *Wooltops* was determined, however, his Honour clearly interpreted the principles of responsible government as protecting accountability to the Senate. This makes sense considering that Isaacs would have witnessed the compromise made on accountability to the Senate during the Conventions, including acceptance of the Senate's power of veto under s 53. What is striking about Isaacs' assertion of applicable Australian parliamentary practice (as discussed in Chapter 3) is the extent to which it arguably reflects Victorian parliamentary practice on the need for prior parliamentary approval of expenditure that had emanated from the conflicts in Victoria on this issue.

Isaacs' J's reasoning in *Wooltops* was that responsible government, and conventions derived from practice as part of that principle applied in Australia, resulted in the imposition of a requirement that any spending undertaken by the Executive required the approval of a parliament to which the Executive was politically accountable. Further, any commitment to the expenditure of funds by a ministry *before* approval by two parliamentary chambers followed from constitutional and parliamentary practice in Australia. Such accountability required not just control of monies through the appropriations process but also 'the necessity for control

agreements with the Crown were subject to an implied condition that the agreement could only be enforced if the parliament approved the spending at some future point in time.

[127] *Wooltops*, 450 (Isaacs J).

[128] Ibid.

[129] As discussed above at IV.A.

[130] In *Combet* McHugh J suggested that there was in place at this time a relevant practice in both British and Australian constitutions that required specific prior parliamentary approval for all new spending and that it was this practice that Isaacs was referring to in *Wooltops*: on this see McHugh J's comments in *Combet*, [47] (McHugh J), discussed further below at V.C.2.

[131] This was discussed in Chapter 4.

over the actual expenditure of the sums appropriated'.[132] This in turn required the passage of ordinary legislation in addition to the appropriation of funds for the purpose.[133] Thus, Isaacs's justification for the need for ordinary legislation in addition to an appropriation of funds appears to have been based on his interpretation that parliamentary practice under responsible government in Australia meant that entering into an agreement was an impermissible fettering of parliament's control of finance.[134] This is the point that Lindell and Appleby have each made and is supported by what the upper house in Victoria had objected to during the constitutional conflicts in that colony (considered in Chapter 3).

His Honour also specifically referred to the 'long constitutional history' that led to the enactment of s 53 of the *Constitution.*[135] That reference does not make clear precisely the 'history' his Honour had in mind. What his Honour did following his reference to this 'history' was to impose a requirement that ordinary legislation in addition to an appropriation of funds needed to have been passed in order for spending undertaken by the Executive to be valid.[136] Either his Honour had in mind at this part of his judgment was the discussion during the Conventions on dual accountability, or the conflicts that preceded the Conventions in Australia's colonial parliaments on the need for accountability to upper chambers there. All that can be said with certainty is that accountability concerns, founded in Isaacs' version of constitutional history and practice of control of finance in Australia, provided him with a reason for the imposition of the requirement of the passage of ordinary legislation to support spending prior to the Executive committing to any expenditure. This is how McHugh J interpreted Isaacs' (and the Court's findings in *Wooltops)* in his dissenting opinion in *Combet*.[137] It is supported by the constitutional history set out in Chapter 3.

2. Impact of the reasoning in *Wooltops*

Contrary to the view Isaacs took in *Wooltops*, Appleby and McDonald maintain that nothing in responsible government under the British Constitution required a prior appropriation of funds for a purpose in order to validate a contract entered into with the Executive.[138] Kiefel J

[132] *Wooltops,* 449 (Isaacs J), also at 433, 455, 460-461.
[133] *Wooltops,* 438-439, 446-451 (Isaacs J).
[134] Of course, members of the Court in the later decision in *Bardolph* referred to no such constitutional practice under responsible government applicable to the NSW Constitution (see above at IV.A). It is not clear why this was not taken into account in *Bardolph*.
[135] *Wooltops,* 464 (Isaacs J).
[136] *Wooltops,* 465-66 (Isaacs J).
[137] *Combet*, [47] (McHugh J), discussed below at V.C.2.
[138] Ibid.

has also made this point in *Williams*.[139]. Isaacs' view of the requirements of responsible government in *Wooltops* has thus been criticised as failing to understand that responsible government in Britain had operated without the need for anything other than an appropriation (even a subsequent appropriation) of funds.[140] His Honour's reasoning indicates, however, that he had regard not just to British practice on the matter but also Australian practice. As discussed in Chapter 3, such practice appears to have included prior parliamentary approval of spending. This had occupied much focus during the constitutional conflicts in each colony, and particularly in Isaacs' own colony of Victoria. It would not be surprising if what Waugh has described as the 'indelible imprint' of those conflicts continued to occupy Isaacs' mind as of one of the framers of the *Constitution*, particularly because Isaacs and his fellow nationalists had lost the very battle over accountability to the Senate in matters of finance during the Conventions. Isaacs must have appreciated the nature of dual accountability, since he and his fellow Victorians had worked so hard during the Conventions to defeat it. Ultimately, Isaacs' version of constitutional history and parliamentary practice in *Wooltops* appears to accommodate much of the concern that had existed in Australia's pre-Federation constitutional history of the need for two parliamentary chambers to approve spending. As Chapter 3 reveals, it seems that Australian parliamentarians had generally insisted on this approval to be granted before a ministry committed to spending public monies.

Isaacs' blueprint went on to become particularly relevant in the reasoning of several members of the Court in *Williams*.[141] As Twomey notes, Isaacs J's reasoning based on the principle of parliamentary control of finance has now found 'particular favour' in the Court's decisions in *Pape* and *Williams*.[142] Apart from prior approval through the appropriations process, the idea that Parliament required ordinary legislation as part of the requirements of responsible government and parliamentary control of finance, which themselves necessitated *ongoing*

[139] I discuss her Honour's views in *Williams* in more detail in Chapter 6. In summary, Kiefel J found that the principles of responsible government did not justify the conclusion drawn in *Wooltops* on this point: *Williams*, [580] (Kiefel J). Professor Saunders description of responsible government likewise makes no provision for specific accountability to take this form; finding only that it is critical to the capacity of the legislature to hold the Executive to account and that the 'potential for appropriation to be refused underpins the central design feature of responsible government': see C Saunders, *The Constitution of Australia: A Contextual Analysis* (Oxford and Portland, 2011), 133.

[140] Appleby and McDonald, above n 1, 271, citing AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 202–5.

[141] For the use of Isaacs' reasoning in *Williams,* see Chapter 6 and Chordia, Lynch and Williams (2013), above n 1, 210, citing Transcript of Proceedings, Williams v Commonwealth [2011] HCA Trans 199 (10 August 2011) 4436-657 (Mr Sofronoff). The authors note that it was the Solicitor-General for Queensland who made the argument that Executive action generally required prior statutory authority.

[142] Twomey, above n 41, 17.

oversight of funds appropriated, has been supported in subsequent judgments of members of the Court.[143]

Chordia and Lynch have argued that a good deal of the justification in *Wooltops* for requiring statutory authorisation in addition to an appropriation of funds was likely to have been based on federal concerns, ensuring that the Commonwealth remained confined to its sphere of legislative and political responsibility within the federation.[144] Isaacs J's reasoning also makes clear that it was based, in part, on concerns relating to the operation of the principle of responsible government itself, particularly the principle of parliamentary control of finance as that principle had been practised in Australia.

The requirement of separate and prior statutory approval for new spending from *Wooltops* formed the basis on which McHugh J in *Combet* concluded that the spending under challenge there was not supported by the appropriation relied on by the Commonwealth in that case.[145] The overriding explanation for the requirement imposed in *Wooltops* (and by McHugh J in *Combet*) seems to be, as Lindell has suggested, that it is for the Executive to *obtain* approval from Parliament to spend moneys, not for Parliament to disapprove the spending once it is made.[146] As I discuss in Chapter 6, this reasoning was taken up in both *Pape* and *Williams,* with the idea that control of spending required not just control of monies through the appropriations process but also 'the necessity for control over the actual expenditure of the sums appropriated' through the passage of ordinary legislation.[147] The 1929 Royal Commission on the Constitution expressed similar ideas regarding control of finance, finding that:

> 'The Executive has no power to enter into contracts, *except such as are authorised by Parliament* ... The Commonwealth Parliament is limited to the powers conferred on it under the Constitution, and therefore cannot authorize a contract except in the exercise of those powers.'[148]

[143] This point was picked up by Stephen J in the *AAP Case* (discussed below at V.B.1) and also Hayne J in *Williams,* [223], discussed in Chapter 6.
[144] Chordia and Lynch, above n 38, 93-101.
[145] *Combet*, [47] (McHugh J), interpreting this as the basis on which the Court determined this requirement in *Wooltops*. Discussed below at V.C.2.
[146] Lindell, above n 48, 315. Discussed above at IV.C.
[147] *Wooltops,* 438-439, 449, (Isaacs J), also 433, 446-451, 455, 460-461.
[148] Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (Commonwealth Government Printer, 1929), 49.

Lindell has drawn attention to the Commission's findings on this point.[149] Twomey has also pointed out that this interpretation is 'fascinatingly close' to the position the Court would take to the required process of approval in both *Pape* and *Williams*.[150]

Overall, it appears that the explanation for the requirement in *Wooltops* for the imposition of the requirement of legislation approved by both chambers in addition to an appropriation of funds derived from an understanding of the importance of parliamentary control of finance to the operation of responsible government and on a recognition that Australian constitutional and parliamentary practice had required prior approval of spending by two parliamentary chambers. By the time *Williams* was decided, a majority of the Court would agree with this interpretation.

B. Further judgments on accountability to the Senate: after *Wooltops* and prior to *Pape*

In the five decades following *Wooltops,* the Court found seven further occasions to consider accountability to an upper house. On one occasion, the Court considered accountability to the Senate generally.[151] On another, it considered accountability of governments in bicameral systems in Australia under responsible government.[152] On the other five occasions, the Court was asked to consider the nature of accountability of the Executive to the Senate for spending public monies.[153] Each of these seven cases provides an example of the adoption by the Court of the broad approach. In this section, I analyse these decisions, setting out the series of judgments following *Wooltops* and before *Pape* and *Williams* that adopted the broad approach. I outline the use made by members of accountability concerns in these judgments. A series of other cases heard by the Court dealt with the operation of ss 81 and 83 of the *Constitution*, although most of them involved concerns more relevant to the division of executive power between the Commonwealth and the States.[154] They relate to the use of federal concerns (including the federal division of power) and have been discussed extensively elsewhere in the context of that literature.[155] They are beyond the scope of the present work.

[149] Lindell, above n 48, 366.
[150] Twomey, above n 41, 17.
[151] In *Victoria v Commonwealth* (1975) 134 CLR 81. (*PMA Case*).
[152] *Egan v Wills* (1998) 195 CLR 425. (*Egan*).
[153] For a list of these cases see above, n 14.
[154] Including the *Pharmaceutical Benefits Case* (1945) 71 CLR 237; *Barton v Commonwealth* (1974) 131 CLR 477; *Davis v Commonwealth* (1988) 166 CLR 79; *Brown v West* (1990) 169 CLR 195 and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.
[155] See the discussion on these cases in Appleby, above n 48, 118-121 under 'federal concerns'; also Hume, Lynch and Williams, above n 1; Chordia and Lynch, above n 38; J Allan and N Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

1. Decisions in 1975

(i). The PMA Case and the AAP Case

In 1975 the Court considered the question of political accountability to the Senate in the *PMA Case,* a key case dealing with the operation of s 57 of the *Constitution.*[156] Some members of that Court also considered the implications of s 53 of the *Constitution*. As discussed in Chapter 4, these provisions were the product of the extended discussion during the Conventions on the powers of the Senate to deal with money bills and the resolution of deadlocks. Some of the justices in the *PMA Case* discussed the role of upper chambers as houses of review to explain why the Senate was an important legislative chamber in its own right.

The salient facts in the *PMA Case* were that the State of Victoria filed proceedings in the High Court seeking a declaration that the Petroleum and Minerals Authority Bill ('the PMA Bill') was not a 'proposed law' within the meaning and operation of s 57 of the *Constitution* because the Senate could not have been regarded as having 'failed' to pass it within the meaning of s 57(1).[157] Rather, all the Senate had resolved to do was to adjourn consideration of the PMA Bill, failing to trigger the pre-condition in s 57(1) of 'failing to consider' the Bill.[158]

Three members of the Court relied on their interpretation of Australian constitutional history and the goals of accountability to an upper house (as a second chamber of review) in rejecting the Commonwealth's argument that the Senate was required to pass legislation that had the approval of the House of Representatives. A majority[159] agreed with Victoria's argument that the Senate could not have been regarded as having 'failed to pass' the PMA Bill simply on the basis that it had adjourned it for further consideration.[160] Each of Barwick CJ, Gibbs J and Stephen J found that a significant role had been given to the Senate by the *Constitution* to

[156] The *PMA Case*. The Court's related decision in *Cormack v Cope* (1974) 131 CLR 432 does not deal with accountability to the Senate and is not considered here for that reason.
[157] Rendering the passage of the Bill in a subsequent joint sitting of both chambers under the section invalid.
[158] The PMA Bill had only just been passed by the House of Representatives on 12 December 1973. When the Bill was introduced to the Senate on 13 December, the Senate resolved that debate should be resumed to the first day of sitting in February 1974. The Senate then went into recess for the summer vacation. On 14 February 1974, the Governor-General prorogued Parliament until 28 February 1974. On 7 March, the House of Representatives resolved to request that the Senate resume its consideration of the Bill, which the Senate did on 19 March 1974. That day, the Senate rejected a motion for a Second Reading of the Bill. The House of Representatives again passed the Bill on 8 April 1974 and sent it back to the Senate that day. The Senate rejected the Bill on 10 April, passing a motion for a 6-month deferral of the Bill's consideration.
[159] Barwick CJ, Gibbs, Stephen and Mason JJ.
[160] *PMA Case,* 123-125, 148, 154-155, 172-175, 187-188.

review legislation and that it followed that the Senate had to be allowed sufficient time in which to consider legislation presented to it in order to undertake its function of review.[161]

The Chief Justice referred to the development of ss 53 and 57 during the Conventions to find that the role of the Senate was to act as a house of review, designed to represent a different set of interests to those represented in the House of Representatives. Barwick CJ said that s 53 of the *Constitution* made clear that the Senate occupied a position of equal legislative power under the *Constitution* (save that it could not originate or amend money bills).[162] Responding to a submission by the Commonwealth that the purpose of s 57 was to enable the will of the House of Representatives 'always, and, indeed inevitably, to prevail', the Chief Justice said:

> 'It seems to me that this submission is untenable. The Senate is a part of the Parliament and, except as to laws appropriating revenue or money for the ordinary annual services of the Government or imposing taxation, is co-equal with the House of Representatives. Bills may originate and do originate in the Senate. Section 53 of the Constitution makes it abundantly clear that the Senate is to have equal powers with the House of Representatives in respect of all laws other than those specifically excepted. The only limitations as to the equality of the powers of the Senate with those of the House of Representatives are those imposed by the first three paragraphs of that section, to the terms of which the limitations must be confined.'[163]

Referring again to the Convention Debates his Honour said that they revealed that the purpose of s 57 was, *inter alia*, to 'secure the view of the absolute majority of the total number of the members of both Houses, which may or may not represent the will of the House of Representatives.'[164] Confirming this, he went on to say that the Senate was intended to consider proposed laws

> 'from a point of view different from that which the House of Representatives may take. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.'[165]

Barwick CJ reasoned that, the fact that the Executive could dominate the House of Representatives and, at times, the Senate, did not mean that the *Constitution* should be

[161] *PMA Case,* 119-120, 155-162 (Barwick CJ); 182-183 (Gibbs J).
[162] *PMA Case,* 121 (Barwick CJ).
[163] *PMA Case,* 121 (Barwick CJ).
[164] *PMA Case,* 126 (Barwick CJ).
[165] *PMA Case,* 122 (Barwick CJ).

> 'read as if laws ought to be passed by the Senate without debate, or as if the House of Representatives may in any respect command the Senate in relation to a Bill. Thus, in approaching the meaning of the word "fails" in s. 57, it must be borne in mind that the Senate is both entitled and bound to consider a proposed law and to have a proper opportunity for debate and that its concurrence, apart from the provisions of s. 57, is indispensable to a valid act of the Parliament.'[166]

His Honour thus found that the Senate's function was to act as a 'house of review', playing an important and distinct role in the Parliament.[167]

What is notable about Barwick CJ's reasoning are his references to the Convention Debates to assist him in understanding the role of the Senate, a position taken by his Honour long before the Court accepted the use of limited historical materials as an aid to constitutional interpretation.[168] Barwick CJ used the record to understand that the Senate had been set up as a house of (almost) co-ordinate legislative power, fulfilling a function as an upper house to review legislation. One also finds in the judgment the germ of the idea that Barwick was later to express in his advice to the Governor-General, Sir John Kerr, on the dismissal of the Whitlam Government in 1975: that the Senate possessed equal legislative power to the House of Representatives insofar as it possessed a power of veto over all legislation, including supply. This, and the more controversial part of his advice (that, the consequence of a denial of supply by the Senate was that the Government should resign, or it could be dismissed by the Governor-General) are discussed below in Part (ii).

Gibbs J also discussed the role of the Senate as a chamber of review. Adopting a similar approach to Barwick CJ, his Honour said:

> 'Under the Constitution the Senate does not occupy a subordinate place in the exercise of legislative power. It is an essential part of the Parliament in which the legislative power of the Commonwealth is vested.'[169]

After discussing the effect of s 53, his Honour described the Senate's role as an upper house in a bicameral parliament:

> 'The power of the Senate to reject a proposed law – a power implicit in its position as one of the chambers of a bicameral legislature – is left untouched by s 53 so that the Senate may reject

[166] Ibid.
[167] Ibid.
[168] As previously noted (in Chapter 1 and above), this did not occur until the Court's decision in *Cole v Whitfield* (1988) 165 CLR 360.
[169] *PMA Case,* 144 (Gibbs J).

> any proposed law, even one which it cannot amend. Moreover, under the Constitution the House of Representatives has no power to control the Senate in the exercise of its functions and in particular cannot compel the Senate to give immediate or prompt consideration to any particular measure.'[170]

Rejecting the argument that the Senate had failed to deal with the PMA Bill within the meaning of s 57, his Honour said that:

> 'to require the Senate to dispose of a Bill at the first available opportunity would in some circumstances constrain the Senate to depart from its normal procedures and to curtail proper debate, and, as I have said, the House of Representatives has no power to put the Senate in that position.'[171]

Gibbs J then went on to refer at length to the role (and right) of the Senate to engage in review and debate of proposed legislation:

> 'Although it is no doubt correct to say that s. 57 is concerned with the refusal or neglect of the Senate to give effect to the will of the House of Representatives in law making … the section does not take as the criterion for its application the fact that the Senate has simply failed to bow to the will of the House. Even if the section acknowledges that "ultimately the will of the House is most likely to prevail" … nothing in the section favours the notion that the House of Representatives can require the Senate to treat as urgent any Bill that the House happens to think ought to be treated urgently, or that the view of the Government or of the House of Representatives as to when a Bill should be passed should be treated as decisive.'[172]

It followed that the House of Representatives could not compel the Senate to give immediate or prompt consideration to any particular measure.[173] The Senate had a right (and potentially a duty) 'to consider and properly debate any proposed law that comes before it.'[174]

Gibbs' analysis makes clear that the Senate house was designed to play a function of legislative review that could not be overborne by the wishes of a lower house. Much in his judgment accords with the history set out in Chapter 3 on the role of upper chambers. It also reflects discussions on the role of the Senate during the Conventions (discussed in Chapter 4) as a house of review.

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[170] Ibid.
[171] *PMA Case,* 148 (Gibbs J).
[172] *PMA Case,* 150 (Gibbs J).
[173] *PMA Case,* 143-144 (Gibbs J). Although his Honour accepted that the Senate could, by using 'dilatory tactics' prevent the passage of a proposed law without formally rejecting it. His Honour said that s 57 was created specifically to deal with such an occurrence.
[174] *PMA Case,* 148, 150 (Gibbs J).

Of all of the judgments in the case dealing with the function of the Senate as a chamber of review, it was Stephen J's who relied most clearly on the Convention Debates to reach the conclusion that the Senate was not designed to bend to the will of the House of Representatives. Rejecting the contention that the purpose of s 57 was to ensure that 'the will of the House should prevail, and should do so with as little delay as possible',[175] Stephen J recognised the Senate's equality with the House of Representatives and its 'right freely to request amendments' to money bills or 'to reject outright' such bills.[176] He explicitly recognised the relevance of the record of the discussions during the Conventions to find that the equality of power afforded to the Senate by s 53 of course raised the 'spectre of legislative deadlock, which had been a familiar phenomenon in colonial bicameral legislatures'.[177] The purpose of s 57 was to break such a deadlock.[178] Relying on the Convention Debates, Stephen J made the following observation:

> 'Few, if any, of the provisions of the Constitution occasioned so much debate as did s 57. It is clearly an extraordinary provision, a measure of last resort, introducing the unusual concepts of dissolution of an upper House and of temporary abandonment of the bicameral system, and this for the purpose of resolving disputes *between the two plenipotent chambers*. *It would be a distortion of the history of the Constitutional Conventions* to regard that solution which s 57 represents as involving no more than the simple and categorical remedy now suggested on behalf of the Commonwealth, that the will of the House should prevail and should do so without delay … No less an authority than Barton J, with his unique understanding of what were the problems with which the various parts of the Constitution were intended to deal, has described the Constitution as designing the Senate "to be a House of greater power than any ordinary second chamber" …'[179]

His Honour then referred to both federal *and* accountability concerns (in the form of a second chamber of debate) in rejecting the Commonwealth's argument on the meaning of 'fail to pass' in s 57(1):

> 'The meaning of "fails to pass", when applied to the Senate, a high deliberative chamber entrusted with very extensive legislative powers, presents no ambiguity once the erroneous notion that it is inherently inferior to the House is discarded. To regard it as under threat of double dissolution whenever it seeks to apply to proposed laws coming before it from the House

[175] *PMA Case,* 167 (Stephen J).
[176] *PMA Case,* 168 (Stephen J).
[177] *PMA Case,* 168 (Stephen J).
[178] Ibid.
[179] PMA Case, 169 (Stephen J), citing Barton J in *Osborne v The Commonwealth* (1911) 12 CLR 321, 353.

> the proper processes of deliberative debate characteristic of parliamentary government is not only to deny to senators the opportunity of fulfilling the responsibilities of their office but also to render illusory an important feature of the federal compact to which the Commonwealth and Constitution owe their origin.'[180]

His Honour's conclusion relied on the function of an upper house as a chamber of review:

> 'Once the notion be rejected that a responsible deliberative chamber in a bicameral system should be required to abdicate its responsibilities of debate and consideration of proposed laws at the behest of its co-equal lower chamber, then the Senate's conduct can be seen to contain no element of calculated procrastination.'[181]

Ultimately, Stephen J concluded that if the Court did not protect the rights of the Senate to deliberation of legislation, it

> 'would very seriously prejudice the effective functioning of the Senate as a second chamber and would be, to a not inconsiderable degree, destructive of the function of the Senate as an integral part of the bicameral system created by the Constitution.'[182]

Stephen J thus referred the function of review played by an upper house in a bicameral parliament. It followed that there could not be a 'failure' to pass a bill simply because the Senate did not pass legislation with 'all possible speed'.[183] His Honour used the history presented in the Convention Debates to understand the Senate's equal place in the legislature; it followed from that equality that the Senate had to be provided with sufficient time to carry out its role of review.[184]

In another decision handed down the same year as the *PMA Case*, his Honour referred to another accountability concern militating in favour of accountability to the Senate: the principle of parliamentary control of finance. In the *AAP Case,*[185] Stephen J picked up the point Isaacs J

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[180] *PMA Case,* 170 (Stephen J).
[181] *PMA Case,* 172 (Stephen J).
[182] *PMA Case,* 175 (Stephen J).
[183] Ibid.
[184] Mason J agreed that the Senate had equal legislative power with the House of Representatives, save for the exceptions provided for in s 53: *PMA Case,* 185-86 (Mason J). Since his Honour did not use refer to constitutional history or the role of review of an upper chamber, I do not set out his reasons in any detail.
[185] *Victoria v Commonwealth* (1975) 134 CLR 338 (the *AAP Case*). The facts of the case are not directly relevant to this thesis. In summary, the case examined the extent of the Executive's power to spend in reliance on s 81, s 61 and the incidental power in s 51 (xxxix). The *Appropriation Act (No 1) 1974-1975* provided for certain sums to be appropriated to the Australian Assistance Plan (AAP) to enable grants to be made to Regional Councils for Social Development. Victoria argued that the Commonwealth did not have the Constitutional power to appropriate these sums. Three of the seven members of the Court (McTiernan, Jacobs and Murphy JJ) held that the AAP was valid. Stephen J said that the States did not possess the necessary standing to impugn an appropriation. Victoria's challenge was unsuccessful as a result.

had made in *Wooltops*: that there is a difference between parliamentary support for an appropriation of funds and the requirement that Parliament retains ongoing control of the use of funds so appropriated.[186] According to his Honour, appropriations represented but 'one aspect of the legislature's control over the Executive arm of government in matters financial, that concerned the expenditure of government revenue as distinct from the raising of that revenue.'[187] This time Stephen J said that the history of the principle of parliamentary control of finance formed the basis on which s 83 of the *Constitution* had been founded. His Honour described changes in constitutional practice (as he saw them) which meant that the role of deliberation (through opportunities for scrutiny by opposition parties) had become even more significant over time:

> 'The exercise of this control has long been regarded as a fundamental principle of parliamentary democracy on which is said to be grounded "the whole law of finance, and consequently the whole British constitution" … however the present importance of appropriation by Parliament, when the Crown and the executive have come to represent the same forces as control a majority in the lower house, may be rather different from what it formerly was and may now lie principally in the opportunity which it affords for criticism by the Opposition and for scrutiny by the public.'[188]

He argued that opportunities for debate in Parliament had only gained importance as part of the principle of parliamentary control of finance over time, because the strength of the Executive had grown.

Stephen J did not have to consider specifically the role the Senate might play in this process because he ultimately determined the case on the basis that the appellants lacked standing to challenge the appropriation and was therefore not required to consider this matter in any detail.[189] Another reason that his Honour did not in *AAP* have to consider accountability to the Senate was because the focus there was on whether the Executive was spending moneys within the sphere of responsibility allocated to the Commonwealth by the *Constitution;* that is, within

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[186] Noting that an appropriation was just 'the taking of the first step in the expenditure of moneys on a particular purpose.': *AAP Case*, 386 (Stephen J), referring to Isaacs J in *Wooltops*, 224. This idea was picked up again by Hayne J in *Williams* (discussed in Chapter 6).

[187] *AAP Case*, 386 (Stephen J).

[188] *AAP Case,* 384 (Stephen J).

[189] *AAP Case*, 384, 390 (Stephen J). The decision in *AAP* is a difficult case to draw any firm conclusions from, in part because the basis for the failure of the application was determined by the question of standing but also because the Court was divided in its reasons on the question of validity anyway. The difficulty in finding a common view holds true for both the majority (Barwick CJ, Gibbs J, Stephen J and Mason J) as well as the minority judgments (McTiernan J, Jacobs J and Murphy J (in the minority): see *AAP Case*, 366, 390).

a division of power allocated to the Commonwealth.[190] Since this is a question that essentially goes to federal concerns about the division of executive power in Australia between the Commonwealth and the States, it is hardly surprising that the Court directed its attention to that question rather than focusing on questions of accountability to the Senate as such.[191]

These statements from three members of the Court in the *PMA Case* and from Stephen J in *AAP* suggest that the Court regarded the Senate as a house of co-ordinate legislative power, playing an important function of review as an upper chamber. Stephen J confirmed its power to block financial legislation. The issue of the Senate's power to use its power of veto was about to be put to the test in what remains to this day one of the most politically controversial decisions in Australia: the dismissal of the Whitlam Government by the Governor-General in November 1975.

(ii). Barwick and Kerr on accountability to the Senate in 1975

There is no way to consider political accountability to the Senate in matters of finance without some discussion of the constitutional crisis over supply of 1975. As briefly noted above, Barwick affirmed the views he had expressed earlier in the *PMA Case* on the role of the Senate in the opinion he provided to the Governor-General, Sir John Kerr in 1975 on the dismissal of the Whitlam Ministry. It is worth taking a moment to consider his Honour's extra-curial opinion to Kerr because of what it reveals about Barwick's understanding of the operation of dual political accountability under the *Constitution*. Apart from Barwick's advice, I also consider Kerr's opinion on the role of the Senate and the effect of a denial of supply. Both opinions provide us with an understanding that Australia's constitutional history, and the *Constitution* it produced, differed from the British model. Both Barwick and Kerr considered some of the differences in Australian constitutional history that led to differences in the *Constitution*, yet they simultaneously ignored relevant Australian constitutional history and parliamentary practice on what followed a denial of supply by an upper chamber. In insisting

[190] On this approach to the division of power in Australia see the detailed analysis provided by Aroney et al, above n 41. The authors said that the judgments in *AAP* do confirm that, under responsible government, Executive power is generally regarded as following legislative power: ibid, 463 This is principally a matter that goes directly to federal concerns and had been extensively examined on this basis elsewhere. As Chordia, Lynch and Williams have pointed out, *AAP* was decided on the false assumption that the Executive spending power was to be found in ss 81 and 83 of the *Constitution*. As a result, the Court in AAP wrongly focused on determining the meaning of the 'purposes of the Commonwealth' in s 81, rather than defining the scope and limit of Executive power under s 61. *AAP* must now be read in light of *Pape*, where it was decided that the source of the Executive spending power must be found somewhere other than ss 81 and 83 (discussed in Chapter 6): see Chordia, Lynch and Williams (2013), above n 1.

[191] The issue of accountability to the Senate based on accountability concerns was a second order issue in the case.

that the Senate's power to veto supply left the Whitlam Government in an analogous position to a British ministry that had lost the confidence of the Commons, both Barwick and Kerr attempted to apply an analogy that did not make sense in the Australian context. I support the views of leading authors who have argued that, in diverging from Australian constitutional and parliamentary history on the consequences of a denial of supply by an upper house, Barwick and Kerr fell into error in this respect.[192] Barwick's and Kerr's views on the power of the Senate to deny supply are nonetheless very interesting because of their reliance on Australian constitutional history and their use of accountability concerns (particularly parliamentary control of finance) to insist on the Senate's role as an independent house of review with a constitutional right to exercise a power of veto.

BARWICK'S OPINION TO KERR

Barwick's premise in his advice to Kerr was that the Whitlam Government had decided to govern 'in the absence of supply'.[193] He advised Kerr that a government which was not able to obtain supply from the Senate should advise the Governor-General of such and resign.[194] Barwick drew on the record of the Debates to support the Senate's power of veto, finding that:

> 'The Constitution of Australia is a federal Constitution which embodies the principle of Ministerial responsibility. The Parliament consists of two Houses, the House of Representatives and the Senate, each popularly elected, and each with the same legislative power, with the one exception that the Senate may not originate nor amend a money bill.
>
> Two relevant Constitutional consequences flow from the structure of the Parliament. First, *the Senate has constitutional power to refuse to pass a money bill; it has power to refuse supply to the Government of the day*. Secondly, a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of Government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign. If, being unable to secure supply, he refuses to take either course, Your Excellency has constitutional authority to withdraw his Commission as Prime Minister.'[195]

[192] See the discussion on this point below.

[193] G Barwick, *Sir John did his duty* (Serendip Publications, 1983), ix-x. As is well known, Kerr (controversially) sought the advice of Barwick. On this controversy, see J Hocking, *The Dismissal Dosier: Everything you were never meant to know about November 1975* (Melbourne University Press, 2015), 29, 33-34 citing G Barwick, *A Radical Tory: Reflections and Recollections* (Federation Press, 1995), 298. Debates about the appropriateness of Barwick providing advice to the Governor-General are beyond the scope of this thesis. For analysis of that issue see G Sawer, *Federation Under Strain* (Melbourne Univesity Press, 1977), 157; G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional Analysis* (Melbourne University Press, 1983), 36-7.

[194] Opinion of G Barwick, 10 November 1975: reprinted in Barwick, above n 163, 81-82.

[195] My emphasis. Barwick, above n 163, 31, 38, 63.

The first of these constitutional consequences had already been discussed by each of Barwick CJ, Gibbs J and Stephen J in the *PMA Case*. Their Honours had reached the conclusion that the Senate clearly had a power of veto. That interpretation has since received further support in the High Court.[196] The history examined in Chapters 3 and 4 supports this view.

The second proposition in Barwick's advice, however, being the consequence that should attend a denial of supply, is less easy to support. As discussed in Chapters 3 and 4, part of the explanation for the consequence that attends a denial of supply by the Senate (as an elected upper chamber) can be found in the consequences that had attended denial of supply by colonial upper houses, consequences that the framers of the *Constitution* were all too familiar with and referred to during the Conventions. It is with respect to this second proposition that Barwick's analysis of the operation of the *Constitution* loses its footing with Australian constitutional history and relies instead on an assumption of an analogy with the operation of the British Constitution. I analyse how the simultaneous adoption and rejection of Australian constitutional history and parliamentary practice led Barwick to each of the two propositions.

Firstly, Barwick acknowledged that some analogies could not be drawn between the *Constitution* and the British Constitution, including that:

> 'There is no analogy in respect of a Prime Minister's duty between the situation of the Parliament under the federal Constitution of Australia and the relationship between the House of Commons, a popularly elected body, and the House of Lords, a non-elected body, in the unitary form of Government functioning in the United Kingdom. Under that system, a Government having the confidence of the House of Commons can secure supply, despite a recalcitrant House of Lords. But it is otherwise under our federal Constitution. The Government having the confidence of the House of Representatives but not that of the Senate, both elected Houses, cannot secure supply to the Crown.'[197]

He also recognised that the 'fundamental principle' of responsible government was that real control of the Executive was exercised through controlling the 'power of the purse', such control of funds being part of the system of parliamentary democracy embedded in the *Constitution*, and the 'bulwark of democracy'.[198] Thus, supply needed to be obtained from

[196] See the cases discussed below at V.C and the discussion on *Pape* and *Williams* in Chapter 6.
[197] Barwick, above n 163, 81-82.
[198] Barwick, above n 163, 18, 19, 21. See also LJM Cooray, *Conventions, the Australian Constitution and the Future* (Sydney, Legal Books, 1979), 68.

Parliament as a whole, which included the Senate.[199] To the extent that any conflict arose between the operation of any political convention that had been alleged to have developed since Federation (which had been alleged by Whitlam and his supporters to the effect that the Senate must approve supply) and the presumption that the Executive was politically responsible to the lower house alone in matters of finance, Barwick said that the express terms of s 53 of the *Constitution* overrode any such convention. That is, the alleged convention had to be moderated by the operation of the Senate's power to block supply under the terms of s 53.[200] As leading authors have pointed out, there was support for this view in the *PMA Case*.[201] It has since been supported by the High Court.[202] Barwick's opinion on this point received support in 1975.[203] It was also questioned at the time.[204] Some of that criticism of Barwick's opinion relied on the idea of an upper house being able to reject supply as an entirely novel proposition in the

[199] Barwick, above n 163, 23.

[200] Ibid, 44.

[201] Aroney et al, above n 41, 413, 415, citing *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 420 in support. See also G Moens, RD Lumb and J Trone, *The Constitution of the Commonwealth of Australia* (LexisNexis Butterworths Australia, 8th ed, 2012) 234 (440) on this point.

[202] Discussed below at V.C.

[203] See W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, Maxwell, 1910), referring to s 53 and finding that it operated as a 'check' on a ministry. Harrison Moore said that the Senate might in 'an extreme case' refuse to pass supply and 'thereby force a dissolution or a change of ministry' – being a condition 'recognized by the Constitution'. See also JE Richardson, 'The Legislative Power of the Senate in Respect of Money Bills' (1976) 50 *The Australian Law Journal* 273, who also disagreed with interpretations at the time that said the Senate had no power of veto over money bills. Lane also supports this interpretation: PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed ed, 1997), 411, 413, 414, 419. Barwick made this argument himself: Barwick, above n 162, 81, also at x, 2, 9, 14-15, 42, 55, 61, 66. Aroney, Gerangelos, Murray and Stellios also refer to the existence of this view of the Senate's power to veto supply in 1975: see Aroney et al, above n 41, 416-17. For other opinions in 1975 supporting the principle that the Senate has the power to deny supply see extracts from newspapers reproduced in J Kerr, *Matters for Judgment* (McMillan, 1978), 247-249, 256-257, 272-3, also letter from Sir Norman Cowper to the *Sydney Morning Herald* on 29 October 1975 (reprinted at 286) and opinion of Professor West (reprinted at 351).

[204] See opinion by Sir Richard Eggleston, reprinted in G Evans, *Labor and the Constitution 1972-1975* (Heinemann, 1977), 297-301. Eggleston's opinion relies on the views of nationalists during the Convention Debates (as discussed in Chapter 4, the nationalists wanted in matters of finance to be owed solely to the House of Representatives): see Eggleston's opinion reprinted in C Saunders and C Howard, 'The Blocking of the Budget and the Dismissal of the Government' in G Evans (ed), *Labor and the Constitution 1972-1975* (Heinemann, 1977), 299. Howard and Saunders support Eggleston's view: see ibid, 252, 257, 261, 274. For a summary of the various positions taken by Eggleston and others on the unlawfulness of the dismissal of the Whitlam Ministry, see the excellent summary in Cooray, above n 168, 114-117; Sawer, above n 163, 113-117. Sawer explains why Eggleston's interpretation could not be correct. He argued that the idea that the Executive could be responsible to two chambers was incorrect because, used in this context, 'responsible' was a word without legal meaning; its meaning only being provided by the conventions of responsible government and that under them it is not possible for a government to be responsible to two houses: see ibid, 171. Given the history explored in Chapter 4, this seems to be incorrect – since the issue of dual accountability was a matter delegates had turned their attention to specifically. Whitlam relied on Sawer's opinion to support his position: see letter from Sawer to the *Sydney Morning Herald* and *The Age*, cited in G Whitlam, *The Truth of the Matter* (Ringwood, 1978), 127-28, Whitlam arguing that Kerr had failed to take into account 'responsible government' to the point of ignoring it completely.

Australian context.[205] As Chapter 3 reveals, and as Professor Lane noted long ago, the idea of an upper house refusing supply was anything but novel in Australia, since each of Australia's colonial upper houses enjoyed and, in some instances, had used such a power.[206] In fact, as discussed in Chapter 4, it was the impact that constitutional deadlocks, including deadlocks over supply, had on the minds of delegates to the Conventions which prompted the inclusion of the deadlock mechanism in s 57. As the analysis in Chapter 4 revealed, the question that occupied the minds of delegates during the Conventions had not been the power of the Senate to deny supply, since the focus of argument had been about the Senate's powers of amendment of money bills. By 1975, however, the idea of an upper house's power to block supply had become a source of controversy, apparently because of a convention that was alleged to have developed that the Senate would not block supply. Barwick's advice on this point demonstrates an understanding of the operation of the powers of the Senate, including the power to deny supply to a government (under s 53) as part of what the elected Senate had been granted. Thus far, Barwick's appreciation of the differences between the British Constitution and the *Constitution* is reasonably uncontestable. However, when he advised Kerr on the *consequence* that should follow a refusal by the Senate to grant supply, his advice lost its connection with Australian constitutional history.

In Chapter 3 I considered how denials of supply by upper chambers in Australia's colonial parliaments had not resulted in immediate loss of office of ministries that still had control of their lower house. In fact, the ability of ministries to continue in office following a denial of supply by upper chambers was part of the reason that Victoria had experienced protracted deadlocks over supply. In some instances, ministries had chosen to resign and go to the electors – and Governors had not taken the step of immediately dismissing ministries from office. Despite this history, and the evidence of the framers' understanding of the consequences of a

[205] See for example BJ Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in P Weller and D Jaensch (ed), *Responsible Government in Australia* (1980, Vic Drummond Publishing), 2; BJ Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution' (1980) 18 *Journal of Commonwealth and Comparative Politics* 247, 248, 249, 257. Galligan argued that Kerr was 'breaking new ground' in making an executive responsible to both houses of a parliament: 257. As discussed in Chapter 4, making the Executive accountable to two chambers appears to be what the framers of the *Constitution* did.

[206] See Lane, above n 203, 415. The use of this power by Australia's colonial upper houses was discussed in Chapter 3. Lane's view is consistent with the history examined in Chapter 3. His point is that the mechanism of denial of supply had been used in colonial constitutions to bring those executives to account, not necessarily with the immediate consequence of immediate loss of office. Stone has also pointed out the relevant Australian colonial constitutional history on this point: see Stone, above n 31, 268. Allan and Aroney have argued that, although Westminster systems recognise the dominance of the lower chamber in initiating and crafting supply legislation, such systems always recognised the ability of the upper house to block supply: Allan and Aroney, above n 125, 262.

denial of supply revealed during the Conventions, Barwick reasoned that the principle of parliamentary control of finance and the Senate's power of veto ultimately gave the Senate the power to bring down a government, with *immediate* consequences. In doing so, he applied an analogy to the British Constitution, saying that a government that could not obtain supply from the Senate found itself in the same position as a government in Great Britain that could not obtain supply from the House of Commons.[207] According to Barwick, the consequence that should follow a denial of supply by the Senate was that the Governor-General was empowered to remove a government that still commanded the support of the House of Representatives.[208] A failure by the Senate to approve supply was treated by Barwick as the 'expression by Parliament' that it did not wish to retain the present ministry to advise the Governor-General.[209] For Barwick, it followed that the Senate had constitutional power to bring down a government which had control of the House of Representatives.[210] The problem is that these constitutions are not analogous. As leading scholars have pointed out, in the case of the British Constitution, a denial of supply by the House of Lords had no effect in ending a ministry.[211] A government that lost the confidence of the House of Commons on a supply bill lost office immediately, because a refusal by the Commons to pass a supply bill amounted to a vote of no confidence in the government.[212] In Australia, a denial of supply by the House of Representatives has the same effect. But a denial of supply by the Senate does not amount to a vote of no confidence in the government and will not result in an immediate loss of office by a government which otherwise has the support of the House of Representatives.[213] Despite this key difference, Barwick reasoned that Whitlam's Government found itself in an analogous position to an executive in Britain that had lost command of the House of Commons.[214]

This reasoning appears to be a misunderstanding of the effect of a denial of supply by the Senate.[215] It was criticised at the time on this basis.[216] The criticism remains relevant to this

[207] Barwick, above n 163, 25.
[208] Ibid. See also Cooray, above n 168, 73.
[209] Barwick, above n 163, 24-25.
[210] Ibid, 62.
[211] Aroney, et al above n 11, 413, 414; Chordia and Lynch, above n 38, 97.
[212] Ibid.
[213] Aroney, et al above n 11, 413, 414; Chordia and Lynch, above n 38, 97.
[214] Barwick, above n 163, 86; Cooray, above n 168, 156-57.
[215] Aroney, et al above n 11, 416-417.
[216] Including by Whitlam. See footnote 174 above; including Whitlam, above n 174, 135; see also B Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995), 72; G Winterton, '1975: The Dismissal of the Whitlam Government' in H Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Federation Press, 2003), 245.

day. The analysis of the operation of Australia's colonial constitutions that gave upper houses a power of veto over money bills, and the adaption of those models during the Conventions (discussed in Chapters 3 and 4), supports this literature. According to Barwick, an immediate loss of office was the result that must follow because the Senate had been given the power to deny a government supply under s 53 of the *Constitution*. That this power replicated Australia's colonial constitutions in which no such consequence followed a denial of supply was ignored.

Although the Senate may have a power to deny supply, the consequences that should follow such a denial are entirely different to the consequences that follow a denial by the House of Commons. As Aroney, Gerangelos, Murray and Stellios have suggested, the consequence that should follow as a result of such a denial of supply by the Senate are still far from settled to this day, but they most likely do not include an immediate loss of office.[217] The deadlock mechanism in s 57 which can be used in the event of supply deadlocks makes more sense if one considers that the mere denial of supply by the Senate would not result in the Executive immediately losing office. By not considering the consequences for denial of supply under the constitutional systems the Senate's power of veto had been modelled on in Australia's colonial constitutions, Barwick either missed or chose to ignore this key difference. The advice demonstrates what occurs when one attempts to apply analogies between the British and Australian constitutional systems too closely, without taking into account the key differences in the history of constituional and parliamentary practice of Australian constitutions and their relevance to framers in forming the *Constitution*.

Barwick ultimately appeared to rely on what he described as the 'paramount principle' that Parliament had to be able to control finance to justify his conclusion on the need for dismissal:

> 'it is much more important to maintain a constant control by the Parliament of the executive government than it is to make the life of the ministry more comfortable and more secure. The annual opportunity of the Parliament to evaluate the policies and performance of the executive government is so fundamental … a feature of our system of government that it should not be foregone or in any wise compromised. At the very lowest, there must remain the ability to bring down a government which by its ineptitude or the pursuit of unacceptable policies has completely forfeited the confidence of the electorate. To give the executive government a fixed

[217] Aroney, et al above n 11, 416.

> term of office, freed of the control of Parliament during that time, would … be to remove a bulwark of democracy.'[218]

What emerges from this passage is that Barwick most likely reached a political judgment regarding the situation in which the Whitlam Government found itself: that it had become dysfunctional and that the Senate appeared to be the only chamber that could hold it to account by removing it from office. One might argue that, under responsible government, it is for the popular vote expressed through the will of the House of Representatives that makes the decision (even in Australia) to remove a ministry from office. In Barwick's view, the Senate's power to block supply gave this power to the Senate as well. Unfortunately, this idea of immediate loss of office has no precedent in Australia's constitutional history, including the colonial history that influenced the making of the *Constitution*.

Barwick's view on the consequences that attend a denial of supply by the Senate has not been supported by the High Court.[219] Aroney, Geranegelos, Murray and Stellios have offered a much more mediated opinion on the consequences of a denial of supply. Their view is supported by Chapter 3's findings on the operation of the denial of supply by upper chambers in the Australian colonies and by the contributions of the framers during the Conventions, all of which suggest that the House of Representatives would be the chamber with the power to bring down a government through a vote of no confidence.[220] I discuss the views of the authors in detail below.[221]

KERR'S OPINON ON ACCOUNTABILITY TO THE SENATE

Even though any consideration of Sir John Kerr's position on the dimissal of the Whitlam Government takes us outside judicial opinion of members of the High Court,[222] it is worth considering because of how much Kerr's reasoning has now been reflected in the position taken by the Court in both *Pape* and *Williams* on the importance of the principle of parliamentary control of finance to protect accountability of the Executive to the Senate based on that principle.

Like Barwick, Kerr ultimately relied on the principle of parliamentary control of finance to justify his conclusion on the power of the Senate to block supply. He understood that the power

[218] Barwick, above n 163, 26-27.
[219] In *Williams* it was rejected. I consider this in Chapter 6.
[220] Discussed below at p. 229.
[221] At (ii) below.
[222] Although Kerr had been Chief Justice of New South Wales.

of an upper house to block supply had formed part of Australia's colonial constititutional history, and that it had made its way into the *Constitution*.[223] Kerr agreed with Barwick on the consequences that should follow denial of supply by an upper chamber. I am interested in Kerr's understanding of Australian constitutional history – and how he used it to reach this result.

Kerr referred to the many previous instances in Australian colonial constitutions in which upper houses rejected supply in order to support his opinion that the Senate had obtained the same power during the Conventions.[224] Thus, Kerr appreciated the relevance of the powers of veto under those constitutions to the powers granted to the Senate by the *Constitution*. What Kerr did not refer to is the consequence that attended a denial of supply under those colonial constitutions. It is here that Kerr's divergence from Australian constitutional history begins.

As discussed in Chapter 3, denials of supply by upper chambers had not resulted in an immediate loss of office by ministries with command of their lower houses. The potential for longstanding conflicts between lower and upper chambers (because the ministry had not lost office) had been a motivating factor during the Conventions for the inclusion of s 57's deadlock provision (see Chapter 4). The partial consideration of Australian history on denials of supply by upper houses in Australian constitutional history is arguably part of the difficulty with Kerr's reasoning.

So much for the flawed part of the reasoning on the operation of Australian constitutions in Kerr's opinion. The remainder of Kerr's understanding of the *Constitution* reveals a good deal of what the High Court has now accepted as the correct understanding of the role of the Senate. To begin with, Kerr found that the Senate had a power to block supply under s 53 of the *Constitution* which could not be overridden by any political convention (agreeing with Barwick on this point).[225] He emphasised the importance of parliamentary control of finance under responsible government to support the Senate's right to block supply. In a statement of his reasons for dismissing the Whitlam Government, Kerr referred to denial by upper houses of supply under systems of responsible government in Australia and went on to refer explicitly to the twin considerations of federalism *and* responsible government as having provided the basis for the Senate's role as an equal legislative chamber:

[223] Kerr's views on this are discussed below.
[224] Kerr, above n 173, 246, 247, 251, 252, 253, 254, 278, 289, 395, 407.
[225] Kerr, above n 173, 312, 313-320, noting Menzies' previous views on the point in support, Robert Ellicott's opinion with approval as well as Richardson above n, 172 and Professor DP O'Connell: all extracted in Kerr, above n 173, 313-314.

> 'Parliamentary control of appropriation … is a fundamental feature of our system of responsible government. In consequence it has been generally accepted that a government which has been denied supply by the Parliament cannot govern. So much at least in cases where a ministry is refused supply by a popularly elected Lower House. In other systems where an Upper House is denied the right to reject a money bill denial of supply can occur only at the insistence of the Lower House. When, however, an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply – it is a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of government will continue to be provided. The Constitution combines the two elements of responsible government and federalism.
>
> The Senate is, like the House, a popularly elected chamber. It was designed to provide representation by the States, not by electorates, as was given by s 53, equal power with the House with respect to proposed laws … It was denied power to originate or amend appropriation bills but was left with power to reject them or defer consideration of them. The Senate accordingly has the power and has exercised the power to refuse to grant supply to the Government. The Government stands in the position that it has been denied supply by the Parliament with all the consequences which flow from that fact.
>
> There have been public discussions about whether there is a convention deriving from the principles of responsible government that the Senate must not under any circumstances exercise the power to reject an appropriation bill. The Constitution must prevail over any convention because, in the question how far the conventions of responsible government have been grafted on to the federal compact, the Constitution itself must in the end control the situation.'[226]

Kerr cited the opinions of the majority justices in the *PMA Case* on the operation of s 53 in support of his position,[227] before stating that

> 'Where two Houses hold the purse strings, a government must gain approval of both houses to obtain supply.'[228]

[226] Reprinted in Moens, Lumb and Trone, above n 171, 233 (440). For Kerr's reasons on why he dismissed the Whitlam Government see Kerr, above n 173, 126-129 (setting out previous instances in State Constitutions in which upper houses had rejected supply), also at 246, 247, 251, 252, 253, 254, 278, 289, 395, 407.
[227] Also citing Sawer in support of his position: Kerr, above n 173, including opinions of the majority justices in the *PMA Case*: ibid, 318-319, 322-23.
[228] Kerr, above n 173, 328.

That both chambers 'held the purse strings' in the Australian parliaments, Kerr admitted. That denials of supply by those upper houses had not resulted in immediate loss of office, however, he omitted.

Although Kerr specifically rejected the idea that the Senate had the same constitutional role as the House of Lords he, like Barwick, merged the question of the s 53 power of the Senate to deny supply with the question of the *consequences* which should be imposed by the Vice-Regal representative following such a denial, effectively treating the *Constitution* and the British Constitution as being directly analogous in this respect.[229] A better solution to this complex question has now been proffered by Aroney, Gerangelos, Murray and Stellios as follows:

> 'is it not more correct to say that the principle of responsible government remains unaltered in its main feature, with the qualification under the Commonwealth Constitution that the Senate can bring down a government by the denial of Supply on grounds *other than that it is the ultimate expression of lack of confidence*? In other words, the government must eventually fall because it simply cannot continue to fund its operations when appropriated funds run out. Only when such a point is reached must it resign, advise an election, or face dismissal if it seeks to use funds in breach of the Constitution. In short, the government must resign or face dismissal, not by the mere fact of the denial of Supply, but rather on the ground that it cannot continue to govern legally. Such a view seems the most consistent with responsible government and yet accommodating of the Senate's very considerable power.'[230]

This summary is much closer to the position ministries in colonial Australia found themselves in during their constitutional deadlocks over supply. It reflects the political reality that faced ministries which had been denied supply by upper houses. The authors' suggestion is supported by the position taken by upper chambers during colonial disputes over the ability of ministries to spend public moneys without prior parliamentary sanction. The ability to govern without sufficient funds also reflects the pragmatic concern Munro put to Griffith during the Conventions.[231] In this instance, taking into consideration Australian colonial history on the point would have gone a long way to explaining to the protagonists in the 1975 constitutional crisis why the ultimate consequence that might follow a denial of supply by the Senate might

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[229] Ibid, 350.

[230] Emphasis in original. Aroney et al above n 41, 417; see also J Crowe and S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2012), 67 who have taken the same view. For the full reprint of Kerr's written reasons see Kerr, above n 173, 360-364. Kerr refers to responsible government as including the requirement of parliamentary supremacy over appropriations.

[231] See Chapter 4 at p. 146-147.

be one that required an election, but not one that prompted the need for the Vice-Regal representative to immediately dismiss a ministry that still enjoyed the support of the House of Representatives.

Credit must be given to Barwick and Kerr in understanding why the Executive was politically accountable to the Senate. As noted, this view was not in vogue in some political circles at the time. In 1959, the Report of the Joint Committee on Constitutional Review was firmly of the view that political accountability should be owed by the Executive to the House of Representatives alone.[232] But even that Committee (of which Whitlam was a member) had acknowledged that the powers of the Senate to deny supply were arguably greater than the powers which had been held by Australia's colonial upper houses.[233] Whitlam and his then Attorney-General, Lionel Murphy, in opposition in 1972, had each expressed the view that the Senate had power to deny supply when they acted to subject the then McMahon Ministry to its exercise.[234] Even after his dismissal, Whitlam continued to acknowledge the Senate's power to block supply.[235]

Overall, both Barwick and Kerr appreciated that the *Constitution* was not a direct replica of the British model, with the Senate playing an important and powerful role in governance, including its power of veto of supply. Both relied on the principle of parliamentary control of finance as a key reason in their respective opinions to justify their position on the appropriateness of the Whitlam Government's dimissal. Unfortunately, their references to potentially relevant history were incomplete in one important respect: the consequence of a denial of supply by the Senate.

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[232] Australian Commonwealth, *Joint Standing Committee on Constitutional Review* (1959, AGPS, Canberra), 22, 23, 27 (also available at https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=report_register/bycomlist.asp?id=140, accessed on 19 August 2019.

[233] Ibid, 22. The final recommendation of the Committee was that the powers of the Senate to refuse supply had to be abolished to allow an Executive with command of the House of Representatives the ability to govern by ensuring the 'precedence of national interests over other interests.': ibid, 27.

[234] See Lionel Murphy to the Senate on 18 June 1970: 'the Senate has power to refuse its concurrence to any financial measure.', reprinted in Kerr, above n 173, 321. See also Lane, above n 203, 414 citing Whitlam's address to the House of Representatives in June 1970 in which he stated that any government defeated on a major taxation bill should resign; that the bill would be defeated in the Senate by the Labor party (then in Opposition) and the government should then resign. See also Whitlam's advice of 30 September 1974 to Kerr that 'the Senate had legal power to reject the Appropriation Bills.'" (reprinted in Kerr, above n 173. 251). The previous reliance by Whitlam and Murphy on the power of the Senate to block supply was noted by Fraser on 16 October 1975 to the House of Representatives: reprinted in Kerr, above n 173, 275-276, 320, 321, 328. Also Cooray in Cooray, above n 168, 114, 149, noting the irony that it was Whitlam in opposition who had attempted to deny supply to a sitting government for the first time since Federation; Sawer also notes this: see Sawer, above n 162, 42, 125.

[235] Commonwealth of Australia, *Official Record of the Debates of the Australian Constitutional Convention Perth 1977, Special Report of Standing Committee D, 5782/79, The Senate and Supply*, Parliamentary Paper No 5782/79 (1979).

As Aroney, Gerenagelos, Stellios and Murray have clarified, this is the more problematic part of Barwick's view, applying the same consequences of a denial of supply under the British Constitution to the *Constitution*, thereby creating a false analogy that a denial of supply by the Senate amounted to the same thing as such a denial by the House of Commons.[236] Barwick and Kerr's views offer a glimpse of at least some appreciation in Australia at the time of the differences between the Australian Senate and the British House of Lords. Regrettably, both Barwick and Kerr failed to distinguish some of the key differences between the operation of the two constitutions. This appears to have been accomplished by taking into account only some of the potentially relevant history of Australian constitutions.

Over the ensuing decades, Kerr's and Barwick's view of the Senate's powers gained further support in the Court and in scholarship. Following the 1975 dismissal, the academic world began to understand that the idea that the Executive was accountable to the Senate involved a different form of accountability to that which applied under the British Constitution.[237] This meant that accountability under the *Constitution* could not be explained by 'a simplistic and doctrinaire analogy with the relation of the British government to the House of Commons.'[238]

Some doubt remained in political circles on the Senate's power of veto of supply when, in 1988, the Constitutional Commission could not reach agreement on the power of the Senate to deny supply. The Report found that the question of political accountability of the Executive to the Senate had not been resolved by the framers.[239] The analysis in Chapter 4 suggests that it was, if by a narrow margin when a vote was taken on the Compromise. Further, the power of the Senate to veto all legislation, including money bills, was not much contested during the Conventions, the power of amendment forming the focus of the contest. The Commission did report on a 'dominant view' by 1988 that the Senate had a power of veto over all bills (including money bills).[240] It also said that it regarded as a feature of all constitutions modelled on the British system of responsible government that parliament controls finance.[241] Whether

[236] Aroney et al, above n 41, 413- 416.
[237] Sawer, above n 163, 159.
[238] Ibid, 159.
[239] *Final Report of the Constitutional Commission*, (Australian Government Publishing Service, 1988), 90-92. The Committee relied on Galligan's work (citing Galligan, above n 173, 1-10) to find that the framers of the *Constitution* did not resolve the tension between responsible government and the power of the Senate. As noted above (at ff 181) there are difficulties with Galligan's interpretation of the Convention Debates on this issue.
[240] Ibid.
[241] The Commission expressed no view on how the question should be resolved and made no recommendations for the amendment of either ss 53 or 57.

'parliament' here meant the Senate as well as the House of Representatives, however, was not made clear.

In the decades following the dismissal of the Whitlam Government, the role of the Senate and the importance of parliamentary control of finance went on to find firmer footing in constitutional doctrine. In the next section, I examine High Court judgments on this point following on from the *PMA Case* in the lead up to the seminal decisions of the Court in *Pape* and *Williams.* I am interested in the Court's statements on the doctrine of responsible government and how it operated to create accountability to upper chambers.

C. The broad approach gains further support

In *Wooltops* and the *PMA Case,* members of the Court used Australian constitutional history to recognise that the Senate as a chamber must, along with the House of Representatives, exercise oversight and control of spending by the Executive. They also used it to treat the Senate as an important second chamber of review.

The Court's use of this history gained further momentum during the latter part of the 20th century. In its leading decision on responsible government in *Egan v Wills,*[242] it began to rely much more clearly on constitutional history to reach conclusions about the operation of political accountability to upper chambers. In looking back, the Court found that goals that had underpinned dual accountability in Australia's bicameral parliaments prior to Federation continued to be relevant to the operation of constitutions. *Egan* was decided only six years after the Court had accepted the relevance and use of the Convention Debates and a limited range of other historical materials in interpreting the *Constitution*.[243] Members of the Court in *Egan* went beyond the record of the Conventions, however, going further back into the operation of Australia's colonial constitutions to inform their opinion on why responsible government entailed accountability to an upper house.

The judgments in *Egan* elucidate the Court's views on the existence of accountability to an upper house in a unitary constitution operating under responsible government.[244] *Egan* is therefore a case that tells us something about how accountability concerns, in the form of protecting the role of the upper chamber as a chamber of review, were used in a unitary bicameral system. The point is that in no way can the result in *Egan* be attributed to federal

[242] See above n 122.
[243] See Chapter 1 and above n 15.
[244] A Twomey, *The Constitution of New South Wales* (Federation Press, 2004), 28-30.

concerns.[245] If the Court could determine (as it did in *Egan*) that an upper house under a unitary constitution was entitled to enforce accountability to it based on principles of responsible government, how much more likely would it become that the Court would recognise such accountability once the dual considerations under the *Constitution* of responsible government and federalism were added together?[246] The answer to this question would eventually be provided by the Court in *Pape* and *Williams*.[247] Before considering those cases (in Chapter 6) it is necessary to consider what *Egan* told us about why accountability to upper chambers is protected under the principles of responsible government in Australia.

1. *Egan*: accountability to an upper house under responsible government

In 1996 the Treasurer of the NSW State Government, Legislative Councillor Michael Egan, had been called on by the Legislative Council to produce certain documents. He refused to do so, since the Cabinet had previously agreed that such requests should be declined. Councillors passed one resolution charging Egan with contempt and another suspending him from the Council. He was then forcibly removed to the street. Egan sought a declaration to invalidate the two resolutions (claiming he was not in contempt of the Council) and that his removal amounted to a trespass against the person. Part of what the High Court had to determine was whether the Council had a power to demand the production of documents as part of its ability to call the ministry to account to it.[248]

The Court addressed the role played by an upper chamber in a bicameral parliament under responsible government. Members of the Court used accountability concerns based on the role of an upper chamber to explain that systems of responsible government in Australia had always included accountability to an upper house.[249]

Discussing the 'functions of the Legislative Council' under the New South Wales' Constitution, Gaudron, Gummow and Hayne JJ said that it was 'desirable to make some reference to history' to determine what those functions were.[250] In the course of describing that history, their Honours also referred to political theory, finding that:

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[245] Ibid, 28-30.

[246] Ibid. See also Chordia and Lynch, above n 38, 89 noting that the ramifications of the decision on the *Constitution* were unclear because *Egan* involved the interpretation of a unitary constitution.

[247] I discuss the findings in the cases in Chapter 6.

[248] For a more detailed description of the facts and issues in the case see G Carney, 'Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government' in G Winterton (ed), *State Constitutional Landmarks* (2006, Federation Press).

[249] Including Gaudron, Gummow and Hayne JJ, McHugh J and Kirby J.

[250] *Egan,* [35] (Gaudron, Gummow and Hayne JJ).

> 'A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament". The point was made by Mill, writing in 1861, who spoke of the task of the legislature "to watch and control the government: to throw the light of publicity on its acts". It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government".'[251]

Since Ministers could be members of either House of a bicameral legislature, their Honours found that Ministers should also be 'liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government.'[252] Referring again to J.S. Mill's analysis of upper chambers, their Honours considered that Mill's idea of 'the object of responsible government' was achieved by 'a state of affairs' in which the executive controls the lower, but not usually the upper, chamber of the parliament.[253] Their Honours' conclusion re-iterated the importance of an upper house's 'superintendence' of the Executive, referring once again to the 'history' of accountability of executive action in New South Wales, particularly accountability in matters of finance:

> 'The arrangements made for New South Wales for the period following 1855 provided the elements of what now should be identified as a system of responsible government. There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money. The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.'[254]

Twomey has supported their Honours' interpretation of the history and operation of responsible government in New South Wales as providing a role for the Council to supervise the conduct

[251] *Egan,* [42] (Gaudron, Gummow and Hayne JJ).
[252] *Egan,* [45] (Gaudron, Gummow and Hayne JJ).
[253] Ibid.
[254] *Egan,* [46] (Gaudron, Gummow and Hayne JJ).

of the Executive.[255] Their Honours' used both their interpretation of history and political theory to inform themselves as to the operation of responsible government in New South Wales.

McHugh J also referred to the role of an upper chamber to find that it was a function of an upper house to examine the conduct of an executive to determine whether that conduct should be the 'subject of criticism, control or both'.[256] Dealing with the introduction of responsible government to New South Wales, his Honour referred to evidence that the Imperial Parliament intended the Constitution of New South Wales to operate under the principles of responsible government.[257] His Honour found that the New South Wales Parliament had a 'criticising and controlling power' to exercise over executive action and noted that this function accorded with J.S. Mill's argument that the role of the legislature in a system of representative government is "to watch and control the government".'[258] McHugh J concluded:

> 'It is true, of course, that governments are made and broken in the lower House of Parliament in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances.'[259]

It followed that:

> 'The right of any legislative chamber under the Westminster system to control its business has existed for so long that it must be regarded as an essential part of its procedure which inheres in the very notion of a legislative chamber under that system. If the Legislative Council wishes to conduct its business by asking questions of Ministers of the Crown present in that Chamber, I can see nothing in parliamentary history that would deny it that right. Indeed, the whole history of parliamentary procedure supports it.'[260]

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[255] Twomey, above n 244, 166.
[256] *Egan*, [93] (McHugh J).
[257] *Egan*, [96] (McHugh J), citing J Ward, 'The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856', (1978) 63 *Journal of the Royal Australian Historical Society* 221, 223-224; also citing ACV Melbourne, *Early Constitutional Development in Australia* (1963), 423-424 and *The New South Wales Parliamentary Handbook*, 7th ed (1903), 200.
[258] *Egan*, [100] (McHugh J), citing JS Mill, *Considerations on Representative Government* (1861), 104.
[259] *Egan*, [103] (McHugh J).
[260] *Egan*, [107] (McHugh J).

Both history and theory were used to inform his Honour on whether the upper house was entitled to call *Egan* to account to it. Kirby J also referred to the role of upper chambers as houses of review to find that the Council was entitled to insist on the production of documents. His honour described the issue raised by the case as being of 'high constitutional importance', since the Court was being asked to 'define the extent to which the Executive Government of a State is accountable to a democratically elected chamber of a Parliament and to the rule of law itself.'[261] Kirby J then specifically rejected an argument by Egan that the Constitution of New South Wales allowed any appropriation for the ordinary annual services of the government to be presented to the Governor over the objection of the Council, saying that:

> 'the Council is an essential chamber with large legislative powers. The notion that it "participates in legislation" in some subordinate way or that it must simply respond to legislation presented by the Executive Government is completely inconsistent with the constitutional functions which it enjoys.'[262]

His Honour extended this reasoning on the function of an upper house to the role of the Senate in his dissenting opinion in *Combet*.[263] In *Egan*, he rejected the argument that 'responsible government' meant no more than that the Crown's representative acted on the advice of the Ministers and that the Ministers enjoyed the confidence of the Lower House of Parliament or that 'the Executive Government was not accountable to the Council and that a member of that Government sitting in the Council could not be obliged to hand over official documents'.[264] Kirby J found that such an argument appeared to be 'an attempt to put the Executive Government above Parliament, comprising as it does, two Houses'[265] and that:

> 'It is by such scrutiny that the system of government established by the Constitution Act and envisaged by the Australian Constitution permits effective public debate, facilitates the democratic choice of the members of the chambers and allows periodic judgment of the government by the electors. The suggestion that only the Lower House has the power to extract documentary information from the Executive Government … involves a view of the accountability of the Executive Government to Parliament, including the Council, which is

[261] *Egan*, [114] (Kirby J).
[262] *Egan*, [149] (Kirby J).
[263] Discussed below at 2.
[264] *Egan*, [153] (Kirby J), citing *Egan v Willis and Cahill* (1996) 40 NSWLR 650, 665 (Gleeson CJ); 677 (Mahoney P).
[265] *Egan*, [154] (Kirby J). cf Twomey who has argued that Kirby J made a mistake here by referring to two houses, arguing that the Executive is responsible to the lower house only: see Twomey, above n 244, 165.

> alien to the system of government which the Constitution Act establishes and the Australian Constitution envisages.'[266]

Rejecting Egan's argument that, because the principles of responsible government operated on the basis that governments were determined by the majority of the vote in the lower chamber, there could be no accountability of an executive to an upper chamber, Kirby J said that:

> 'The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament.'[267]

In *Egan* the Court clearly laid down that a unitary constitution operating under the principles of responsible government provided for accountability of a ministry to two parliamentary chambers. The Court had relied on accountability concerns in the form of the role of an upper house as a chamber of review to reach this conclusion, finding that the upper house in New South Wales played a distinct role in holding a ministry to account. Mention had also been made of the principle of parliamentary control of finance. Two of the members of the Court went on to apply the reasoning in *Egan* to the operation of accountability to the *Constitution*. In contrast to the opinions of the majority in *Combet*, the dissenting opinions of McHugh J and Kirby J in that case each relied on the role of an upper chamber as well as the principle of parliamentary control of finance to justify their conclusion that the Senate had to be afforded an appropriate opportunity to review spending by the Executive.[268] In Chapter 6, I consider how the requirements of parliamentary control of finance became a key part of the reasoning of members of the Court in both *Pape* and *Williams*. For now, I examine their Honours' respective reasons in *Combet* for insisting that the *Constitution* required the Court to protect accountability to the Senate.

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[266] *Egan,* [154] (Kirby J), citing Lumb, *The Constitutions of the Australian States*, 5th ed (1991), 65-70 and Parker, "Responsible Government in Australia" in Weller and Jaensch, above n 175, Ch 2 and J Uhr, *Deliberative Democracy in Australia* (1998), Ch 7.

[267] *Egan*, [155] (Kirby J). Callinan J said that the 'Legislative Council as a popularly elected House of Parliament and part of the legislature of the State may on occasions need to see certain documents in order to carry out its legislative and other roles effectively.': *Egan*, [185] (Callinan J).

[268] Discussed below at 2.

2. Dissenting opinions in *Combet*: the Senate and accountability concerns

The dissenting opinions of McHugh J and Kirby J in *Combet* offer us an insight into how the principle of parliamentary control of finance could be used to justify accountability to the Senate. Both judges interpreted Australian colonial history and the Convention Debates to inform themselves as to why the Senate had been given oversight (along with the House of Representatives) of the Executive, particularly in matters of finance. The effect of the two dissenting opinions in *Combet* was to emphasise that the *Constitution* had embedded the idea of dual accountability, partly to represent State interests, but also as part of incorporating responsible government in the form of the principle of parliamentary control of finance as it had been practised in Australia.

McHugh J referred to 'history' to explain that it was a 'fundamental rule of the constitutional law of the Anglo-Australian peoples' that the 'Crown cannot expend money without the authorisation of Parliament.'[269] Acknowledging the existence of what his Honour labelled as a 'widely accepted convention that control over money Bills essentially belonged to the popularly elected lower House of Parliament from which the government was formed', his Honour added that this practice had made its way into ss 53, 81 and 83 of the *Constitution*.[270] McHugh J referred specifically to the Convention Debates, saying that

> 'These … sections did not give full effect to the convention that control over money Bills belongs to the popularly elected House where the government is formed. That is because of a compromise made at the 1897 Adelaide Convention. Delegates from South Australia, Western Australia and Tasmania insisted on equal voting rights for the Senate in respect of all legislation passed by the Parliament. In the end, they gave way in respect of money Bills to the extent provided for in s 53. Their compromise in respect of the "ordinary annual services" of the government reflected a convention that was then current in the United Kingdom and in the colonies of Australia.'[271]

This provided a recognition of the compromise reached during the Conventions on the Senate's power of veto over money bills. Matters which led to the compromise on accountability to the Senate (contained in s 53) and to the introduction of s 57 during the Conventions, and the

[269] *Combet*, [44] (McHugh J), citing Maitland, *The Constitutional History of England*, (1908), 247 and the *AAP Case*, 385-386 and *Brown v West* (1990) 169 CLR 195, 205.
[270] *Combet*, [45] (McHugh J).
[271] *Combet*, [46] (McHugh J), citing J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), 138. See also N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 71.

discussions and history (both British and Australian parliamentary history) that led to their incorporation into the *Constitution*, McHugh J described in the following terms:

> 'By the 19th century, the United Kingdom Parliament had adopted a convention that expenditure falling outside the estimates for the ordinary annual expenditure of the government required explicit approval by the Parliament. Thus, expenditures for new purposes not already covered by the existing powers or functions of a department or where the expenditure required authority for more than one year required separate approval by the Parliament. In 1857, after a dispute between the House of Assembly and the Legislative Council in South Australia over the powers of the Council in respect of money Bills, the Council agreed to waive its claim that it could deal with appropriations concerning the ordinary annual expenses of government in South Australia. This convention of the South Australian Parliament … was the basis of the s 53 compromise. But as the events of 1975 showed, although the Senate cannot amend proposed laws appropriating revenue or moneys or imposing taxation, the compromise did not extend to failing to pass or rejecting them. Consequently, at the Constitutional Convention held in Sydney some months later, in 1897, s 57 was inserted in the draft Constitution to resolve deadlocks that might arise as the result of the last paragraph in s 53 … '.[272]

McHugh J said that a convention of parliamentary approval for all expenditure falling outside spending for the ordinary annual services of the government was what Isaacs J (and the Court) had in mind in *Wooltops* as requiring specific (and prior) parliamentary authorisation, including approval from the Senate.[273] Citing Erskine May in support of the proposition that expenditures for new purposes had to be approved through a separate approval of the British Parliament, his Honour found that the requirement for this specific approval by Parliament had indeed formed the basis of the findings of the Court in *Wooltops*.[274] McHugh J noted that Erskine May's work on the history of British parliamentary practice in fact indicated that the British Constitution had involved dual accountability in matters of finance for some time during the 19th century. The analysis in Chapters 2 and 3 supports his Honour's interpretation on this point. His Honour then found that the requirements for control of finance under that *Constitution* did not involve accountability solely to the lower house. The requirement of specific statutory approval for all

[272] *Combet*, [47] (McHugh J).
[273] *Combet*, [47] (McHugh J), citing Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 20th ed (1983), 750.
[274] Ibid.

new spending that McHugh J said formed the basis of the findings in *Wooltops* gained renewed significance since the Court's decision in *Williams*.[275]

Kirby J adopted a similar approach to McHugh J, finding that the issue raised by the case could not be determined solely by reference to the appropriation Act since regard also had to be had to the terms of the *Constitution* and also 'centuries of constitutional history, including in Australia, concerning appropriation and the practice of parliaments, specifically the Federal Parliament, in giving effect to this law and history.'[276]

Referring to ss 53, 81 and 83 of the *Constitution,* his Honour found that it was clear that, in Australia, an appropriation Act must be passed by both houses of the Parliament so as to become a 'law' within the meaning of s 83 of the *Constitution*.[277] Kirby J then explained that the provisions regarding money bills in s 53 and for the resolution of deadlocks in s 57 were 'peculiar to Australia'. It followed that:

> 'no consideration can be given to the meaning of the Appropriation Act in question, the effect of the appropriations there made and the identification of the "purposes" of such appropriations, without close attention to the foregoing constitutional provisions and to the place that they allocate to the Senate.'[278]

Referring to authorities of the Court on the importance of history to constitutional interpretation,[279] his Honour said:

> 'To the extent that the Executive Government seeks to justify expenditures, except where there is "a distinct authorization", it challenges centuries of constitutional history. It departs from the provisions of the Australian Constitution designed to give that history effect. It detracts from the basic purpose of such provisions, being to assure to the people in Parliament the final say about the expenditure of public moneys. It weakens accountability of the Government to the Parliament in all such matters … Behind it stands a principle of comparative strictness required

[275] McHugh J determined that the spending could not be supported on the basis that it had not been authorised by the legislation relied on by the Commonwealth: *Combet*, [81] (McHugh J). The impact of control of finance in *Williams* through a specific statutory approval is discussed in Chapter 6.
[276] *Combet*, [169] (Kirby J), also at [188]-[189].
[277] *Combet*, [227] (Kirby J), citing *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237, 250 and s 53 of the *Constitution*.
[278] *Combet*, [228] (Kirby J).
[279] Including Stephen J in the *AAP Case* and the Court in *Brown v West* (1990) 169 CLR 195, 208.

> by the text of our Constitution, by centuries of history and by policies of good governance to which that text gives effect.'[280]

After considering what he regarded as relevant parliamentary history on the use of appropriations, his Honour supported McHugh J's findings that a convention had emerged in British parliamentary practice adopted by Australian parliaments that all expenditures for new or novel purposes required separate approval by two parliamentary chambers.[281] His Honour said that this practice 'was also reflected in the practice followed from the early days in the Australian colonies', before also noting the compromise reached in South Australia following the conflict of 1857.[282] His Honour's interpretation is supported by the practice in colonial constitutions set out in Chapter 3. The influence of this practice on what became s 53 of the *Constitution* during the Conventions was then acknowledged by his Honour.[283] After outlining that the limited ability of the Senate to amend money bills under that section,[284] he concluded:

> 'Until the Parliament has spoken upon it, it cannot be assumed that legislation to implement the foregoing scheme will be enacted. The Parliament of this country is not a rubber stamp of the Executive Government. As Professor Harrison Moore pointed out in the early days of the Commonwealth, the Senate in Australia is an unusually powerful upper house. It has commonly performed a distinctive function. It is "less easily 'led' by the Government".'[285]

Kirby J ultimately made clear that his finding on the invalidity of the spending under challenge was predicated on both British and Australian constitutional history, and that accountability concerns of control of finance ultimately underpinned responsibility to the Senate:

> 'Parliamentary appropriations cannot be given in blank or with no reference to a purpose. The purpose must either be declared in the Constitution itself or lawfully determined by the Parliament. In the exigencies of modern government, it may be accepted that such purpose can be declared at a level of generality. However, that generality cannot be so vague and meaningless as to negate the significant constitutional consequences that attach to the designation of the appropriation and its purpose. Were this Court to permit a departure from this rule *it would turn its back on the constitutional text, ignore the long struggles that preceded it, impermissibly diminish the role of the Senate, undermine transparency in government,*

[280] *Combet*, [236] (Kirby J).
[281] *Combet*, [240] (Kirby J).
[282] *Combet*, [243] (Kirby J).
[283] Ibid.
[284] *Combet*, [245] (Kirby J).
[285] *Combet*, [252] (Kirby J).

> *diminish the real accountability of the Parliament to the electors* and frustrate the steps taken by successive governments and Parliaments to enhance good governance in the legislative (and specifically financial) processes of the Parliament.'[286]

His Honour used an interpretation of history to reason that governments were accountable to two parliamentary chambers, including in matters of finance. This provided the foundation for the need to retain a line of accountability in financial matters to the Senate.

The approach of the minority justices in *Combet* has been supported by leading authors and has since been used in *Williams*, particularly because the idea the Senate's power of veto under s 53 played a key role in influencing French CJ's determination on the extent of the spending power of the Executive in that case.[287] Lindell has argued that the Chief Justice's reasoning in *Williams* about the history of parliamentary control of finance under the *Constitution* supports the approach taken by McHugh J and Kirby J in *Combet*.[288] He has also recognised (as Professor Harrison-Moore had previously recognised) that the principle of parliamentary control of finance

> 'forms in Australia, as in the United Kingdom, a fundamental mechanism for holding the Executive accountable to the parliament. *It applies with two notable differences between the British and Australian parliaments.* The first is the largely equal financial powers enjoyed by both Houses of the Australian Parliament. This enabled Professor Harrison Moore to point out that the operation of the same principle gave rise to a misconception in Australia because the reference in s83 to "appropriation by law" excluded "the once popular doctrine that money might become legally available for the services of government upon the mere votes of supply by the Lower House". The qualification to the equal financial powers concerns the Senate's power to amend and originate certain money legislation because of the provisions of ss53 and 54 of the constitution.'[289]

Other prominent constitutional law scholars have argued that the approach of the minority in *Combet* supports responsible government.[290] It has also been regarded as supporting Australian federalism.[291] There is much to be said for these arguments. Apart from supporting the goals

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[286] My emphasis. *Combet*, [258] (Kirby J).
[287] On the influence of this reasoning on French CJ in *Williams* see Hume, Lynch and Williams, above n 1, 80; Chordia and Lynch, above n 38, 98.
[288] Lindell, above n 48, 308-309.
[289] Ibid, 309, citing Harrison Moore, above n 173, 522-23. See also Lindell, above n 48, 314.
[290] Lindell, above n 48, 314; A Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government' (2017) on Australian Public Law (website); Appleby, above n 48, 103.
[291] Hume, Lynch and Williams, above n 1, 80; Chordia and Lynch, above n 38, 98.

of dual accountability, by upholding the principle of parliamentary control of finance by two parliamentary chambers and the role of an upper chamber, the approach of the minority in *Combet* supports Australia's own constitutional story of dual accountability.

VI. Conclusion

Throughout the 20th century the High Court principally adopted the broad approach to political accountability to upper houses. Members of the Court used their interpretation of what they regarded as relevant constitutional history and parliamentary practice on appropriations, including the idea of dual accountability (particularly in matters of finance) to inform this approach. The Court consistently emphasised the importance of parliamentary control of finance by *both* chambers under Australia's systems of responsible government and the importance of upper chambers as second chambers of review in ensuring the accountability of the Executive to Parliament. The one exception to this was the majority judgments in *Combet*. Otherwise, upper houses, including the Senate, were described as having a role to play in the review of legislation (including money bills) and enforcing the principle of parliamentary control of finance.

When *Pape* came before the Court in 2009, a decision had to be made: would the Court continue the broad approach, using Australian history and the goals of dual accountability to conceptualise accountability to the Senate, or would the majority approach in *Combet* be supported, favouring accountability of the Executive to the House of Representatives alone and treating accountability under the *Constitution* as directly analogous to the form of executive accountability in the United Kingdom?

CHAPTER 6: THE COURT'S APPROACH IN *PAPE* AND *WILLIAMS*

I. Introduction

By the time Bryan Pape decided to challenge a Commonwealth statute for the payment of tax bonuses to taxpayers in 2009, the High Court had already provided many indications that it viewed the Senate as having an important role as an equal partner in the passage of legislation of the Commonwealth. The previous chapter explored the many instances in which the Court referred to the importance of protecting the principle of parliamentary control of finance, as well as various indications from the Court that the Senate (and other upper chambers) played important roles under Australia's systems of responsible government as chambers of review.

In *Pape*[1] in 2009, the Court gave its clearest indication yet that it regarded parliamentary control of finance as a principle of fundamental importance and was protected under the *Constitution* for that reason. Then, in *Williams*[2] in 2012, the Court confirmed that accountability in financial matters was owed to the Senate as well as to the House of Representatives. In both cases, the Court used accountability concerns in the form of parliamentary control of finance to protect accountability to the Senate. However, as previously noted, *Williams* needs to be considered alongside the Court's findings in *Pape* because the emphasis in *Pape* on parliamentary control of finance formed a key foundation on which the reasoning of the majority in *Williams* was placed.[3] Thus, much of the reasoning in *Williams* on accountability of the Executive to the Senate needs to be understood in light of the reasoning and the findings of the Court in *Pape* on accountability of the Executive to Parliament in financial matters.[4]

[1] *Pape v Commissioner of Taxation* (2009) 238 CLR 1. (*Pape*).
[2] *Williams v Commonwealth* (2012) 248 CLR 156. (*Williams*).
[3] S Chordia, A Lynch and G Williams, 'Williams v Commonwealth [No 2]: Commonwealth Executive Power and Spending After Williams [No 2]' (Pt 1) (2015) 39 *Melbourne University Law Review* 306, 309.
[4] Ibid.

Although it is difficult to isolate strands of reasoning to 'separately applicable propositions'[5] in these cases, I adopt accepted methodology from previous scholarship to focus on how the Court used the principle of parliamentary control of finance to become 'accountability enforcing' in these decisions, and explain how these recent cases evidence a subtle yet important shift from the narrow approach adopted by the majority in *Combet*.[6] I otherwise argue that the approach in *Pape* and *Williams* is a continuation of the Court's broad approach to accountability. I also conclude that the approach adopted most recently in *Pape* and *Williams* more accurately reflects the history of accountability to upper chambers in Australia, including in financial matters, lending further support to the views of authors who argue that Australia's constitutional history of political accountability is different to its British ancestor.[7]

II. *Pape* and parliamentary control of finance

A: *Pape*: Background and key findings

As discussed in the previous chapter, in the lead up to *Pape*, references had been made by some members of the Court to the importance of parliamentary control of finance. Members had recognised that upper houses in Australia were powerful parliamentary chambers with powers to review and to veto all legislation, including supply legislation. These chambers were considered to play a role not just in approving spending by the Executive but also in controlling the way in which funds approved were spent. In *Pape*, the Court put beyond doubt that the principle of parliamentary control of finance had been embedded into the *Constitution*.

In 2009 Bryan Pape, a barrister and legal academic, challenged a Commonwealth statute for the payment of tax bonuses to certain categories of taxpayers. The payments were part of an economic stimulus measure in response to the 2008 Global Financial Crisis.[8] In its decision the

[5] A Twomey, 'Post-*Williams* Expenditure: When can the Commonwealth and the States Spend Public Money Without Parliamentary Authorisation?' (Pt 1) (2014) 33 *University of Queensland Law Law Journal* 9, 11, 18.

[6] *Combet v Commonwealth* (2005) 224 CLR 494. (*Combet*). Twomey, above n 5, 11, 18; D Hume, A Lynch and G Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41 *Federal Law Review* 71, 73; G Appleby and S McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 263-270.

[7] A Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty One Countries* (Yale University Press, 1984), passim; B Stone, 'Bicemeralism and Democracy: the Transformation of Australian State Upper Houses' (Pt 2) (2002) 37 *Australian Journal of Political Science* 267, 268; R Mulgan, 'The Australian Senate as a "House of Review"' (Pt 2) (1996) 31 *Political Science* 191, 196, 198-99, 200; Lane, above n 203, 415.

[8] George Williams has recently published an article on Bryan Pape that explains Pape's background and his motivation for commending the proceedings: see G Williams, 'Bryan Pape and His Legacy to the Law' (2015) 34 *University of Queensland Law Journal* 29. I also had the benefit of a discussion in early 2011 with Mr Pape regarding his arguments in the case. See also B Pape, 'The Use and Abuse of Commonwealth Finance Power' in J Stone (ed), *Upholding the Australian Constitution Volume Seventeen: Proceedings of the Seventeenth*

Court determined that ss 81 and 83 were not a source of spending power for the Executive.[9] To reach this conclusion, almost all members of the Court emphasised that parliamentary control of public finance was a fundamental principle that had been embedded in the *Constitution*.[10] Winterton had previously highlighted that the doctrine of responsible government had originated as the political corollary of parliamentary supremacy over the Executive.[11] In *Pape*, members of the Court explained just how fundamental parliamentary supremacy in the form of parliamentary control of finance was to the doctrine of responsible government incorporated into the *Constitution*.

The Chief Justice in particular dedicated an entire section of his reasons to 'Appropriation and Responsible government – historical background'.[12] After tracing what he regarded as the relevant history of parliamentary appropriation that he recognised had been adopted by the framers, French CJ said that the 'principle that the Executive draws money from Consolidated Revenue only upon statutory authority is central to the idea of responsible government.'[13] This principle was:

> 'imported into the Australian colonies upon their achievement of responsible government. A Consolidated Revenue Fund was established for each of them. The principles operate today in all States and Territories, albeit they are not expressly referred to in all of their Constitutions. They are central to the system of responsible ministerial government which "prior to the establishment of the Commonwealth of Australia in 1901 … had become one of the central characteristics of our polity".'[14]

Conference of the Samuel Griffiths Society (Samuel Griffiths Society), 2005 for further descriptions of Pape and his motivations.

[9] The reasons are discussed in more detail below. In summary, the Court found that ss 81 and 83 were not a source of spending power for the Commonwealth, since the sections regulated with the manner in which power (sourced elsewhere in the *Constitution*) was exercised: *Pape*, [53], [111]-[113] (French CJ); [176], [178], [180], [183]-[184] (Gummow, Crennan and Bell JJ); [283], [296], [320] (Hayne and Kiefel JJ); [600], [607] (Heydon J). This accorded with Professor Campbell's view that s 81 was a limitation on the power of the Executive to spend; not a source of power to spend: see E Campbell, 'Parliamentary Appropriations' (1971) *Adelaide Law Review* 145, 161.

[10] Finding that the principle had been incorporated into ss 81 and 83 of the *Constitution*: *Pape*, [54]-[59], [60], [61-[67], [77], [80] (French CJ); [192], [195] (Gummow, Crennan and Bell JJ); [338] (Hayne and Kiefel JJ).

[11] G Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 434; G Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 36; G Winterton, *Parliament, The Executive and the Governor-General, A Constitutional Analysis* (Melbourne University Press, 1983), 71.

[12] *Pape*, [81] (French CJ).

[13] *Pape*, [58] (French CJ).

[14] *Pape,* [60] (French CJ), citing *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 575 (Mason CJ, Deane, Toohey and Gaudron JJ), 580 (Brennan J), 591 (Dawson J), 597-598 (McHugh J) on the historical roots of ss 81 and 83 from constitutional law and practice on parliamentary control of finance.

Lindell supports this interpretation of the adoption of parliamentary control of finance as a feature of responsible government in the Australian colonies which was ultimately adopted by the framers by ss 81 and 83 of the *Constitution*.[15]

French CJ also said that, although there were some instances in parliamentary practice when governments had spent moneys and received subsequent approval of funds by parliament, the authorities were dubious.[16] His conclusion was that nothing in the relevant history of parliamentary appropriations applicable in Australia suggested any qualification to the principle of prior parliamentary approval as the condition of 'the lawfulness of executive expenditure.'[17] This finding supported the interpretation by Isaacs J in *Wooltops*[18] of parliamentary practice requiring prior statutory approval for spending.[19]

After these general statements on what his Honour regarded as the relevant history of parliamentary appropriations, French CJ also specifically referred to the Convention Debates and the discussions on what would become s 83 of the *Constitution*. Noting that one of the key motivations for the section's inclusion was to prevent the mixing of loan moneys with moneys in the Consolidated Revenue Fund, his Honour referred to the reasoning of Isaacs J in *Wooltops* to find that appropriation is a necessary condition which is subject to other conditions 'derived from statute or otherwise, upon the executive power to spend.'[20] Ultimately, French CJ found that the relevant 'history does not support a view that the requirement for parliamentary appropriation is itself a substantive source of power to expend public money.'[21]

Gummow, Crennan and Bell JJ also emphasised parliamentary control of finance in their reasons, finding that:

> 'Matters of Imperial and colonial history respecting the raising and expenditure of public moneys support these conclusions respecting the power of appropriation conferred by the Constitution. A knowledge of legal history is indispensable to an appreciation of the essential

[15] G Lindell, 'The Combet Case and the Appropriations of Taxpayers' Funds for Political Advertising - An Erosion of Fundamental Principles?' (Pt 3) (2007) 66 The Australian Journal of Public Administration 307, 309.
[16] *Pape*, [61] [64] (French CJ), citing Campbell and AB Keith, *The Constitutional Law of the British Dominions*, (Macmillan, 1933), 244, 245.
[17] *Pape*, [66] (French CJ).
[18] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421. (*Wooltops*).
[19] Isaacs J's reasoning in *Wooltops* on this point was considered in Chapter 5.
[20] *Pape*, [71] (French CJ).
[21] *Pape,* [80] (French CJ).

characteristics of the power of appropriation in the Constitution; it affords an understanding of the setting in which the Constitution was formulated.'[22]

Their Honours recognised that, even before the Court accepted the use of the Convention Debates in constitutional interpretation, some reliance had already been made by the Court on successive draft bills for the *Constitution*.[23] Turning to what their Honours described as 'matters of Imperial and colonial history', they recognised that the history of parliamentary control of finance meant that the approval of one parliamentary chamber alone was not sufficient to approve spending by the Executive.[24] It followed from that relevant history (according to their Honours) that the passage of a parliamentary appropriation for the specific purpose for which funds were designated was a necessary condition of any spending by the Executive.[25]

Hayne and Keifel JJ referred to 'some matters of history' in construing the effect of s 81 of the *Constitution* before concluding that there was no direct analogy between the Australian and British Constitutions.[26] It followed that the Commonwealth Executive was in a different position to the British Executive at the time of Federation, since the Commonwealth was not a government of 'unbounded powers'.[27]

The judgments of French CJ and Gummow and Bell JJ in *Pape* relied on the principle of parliamentary control of finance. Their Honours found that this principle was sourced in what was regarded as part of the applicable constitutional history and parliamentary practice that had made its way into ss 81 and 83 of the *Constitution*. Their Honours each used their interpretation of this history to find that a specific statutory authorisation in addition to an appropriation of funds was required for the Executive to spend public monies. Their Honours later affirmed this position in *Williams*.[28] What is notable is the extent to which their Honours' respective findings on the need for approval of finance by two parliamentary chambers accords with the revelation

[22] *Pape*, [187] (Gummow, Crennan and Bell JJ), referring to Gleeson CJ's comments on the importance of legal history to constitutional interpretation in *Singh v The Commonwealth* (2004) 222 CLR 322, 331-332.
[23] *Pape*, [187] (Gummow, Crennan and Bell JJ), citing *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482, 501-502.
[24] *Pape*, [188], also at [187], [209] (Gummow, Crennan and Bell JJ).
[25] *Pape*, [209] (Gummow, Crennan and Bell JJ).
[26] *Pape*, [298] (Hayne and Kiefel JJ). This history included the drafts of s 81 of the *Constitution*: *Pape*, [299] – [305] (Hayne and Kiefel JJ).
[27] *Pape*, [338] (Hayne and Kiefel JJ).
[28] Discussed below at III.

in Chapter 3 of the importance of the principle of parliamentary control of finance in Australia by upper houses.

The joint judgment of Hayne and Kiefel JJ raised another matter: the difference between Britain's unitary constitution, one which did not have to operate in a federal state, and the Australian *Constitution*. The full effect of this point would not be realised until *Williams*, when a majority would clearly acknowledge the difference between the operation of accountability under the *Constitution* and its British ancestor, deploying principles of both federalism and responsible government to protect accountability to the Senate in financial matters. I return to the ramifications of their Honours' suggestion on the reasoning in *Williams* below.

B: Implications of the reasoning in *Pape*

Reactions to the decision in *Pape* have been mixed. It has attracted substantial criticism of the use of a power 'sourced in nationhood' to support the spending under challenge.[29] Saunders has criticised the decision as conflating 'responsible government' with federalism.[30] Aroney, Gerangelos, Murray and Stellios, however, argue that the approach in *Pape* saw the Court protect a necessary precondition of the exercise of parliamentary oversight, which included oversight by the Senate, as part of the operation of the principle of responsible government under the *Constitution*.[31] Appleby and McDonald support this view, adding that the reasoning in *Pape* is a reflection of responsible government working 'alongside and together with federal concerns' to achieve the accountability of the Executive.[32] They describe the approach as adding a 'federal dimension to responsible government'.[33] The decision in *Pape* is said to embody the Court's understanding that:

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[29] As already noted in Chapter 1, this issue is beyond the scope of my thesis. For critiques of Pape on this issue see A Twomey, 'Pushing the Boundaries of Executive Power' (2010) 34(1) *Melbourne University Law Review* 313; P Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97, 114, 117, 118, 119, 123; D Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrine of Responsible Government and Rule of Law' (2010) 28(2) University of Tasmania Law Review 145; D Kerr, 'Pape v Commissioner of Taxation: Fresh Fields for Federalism?' [311] (2009) 9(2) *QUT Law Journal* 2201; D Kerr, 'Executive power and the theory of its limits: still evolving or finally settled?' (2011) *Constitutional Law and Policy Review* 22; G Appleby and S McDonald, 'The Ramifications of Pape v Federal Commissioner of Taxation for the Spending Powers of the Commonwealth' (2011) 37 *Monash University Law Review* 162, 178-79, 189.

[30] C Saunders, 'The Sources and Scope of Commonwealth Power to Spend' (2009) 20 *Public Law Review* 256, 263.

[31] Aroney, Gerangelos, Murra and Stellios, *The Constitution of the Commonwealth of Australia: history, principle and interpretation* (Cambridge University Press), 2015, 472, 475. See also Gerangelos, above n 30, 122.

[32] Appleby and McDonald, above n 6, 273. The authors explain that the principle of parliamentary supremacy (as part of responsible government) becomes 'federalism enforcing' in this sense.

[33] Ibid, 270.

> 'responsible government under the *Constitution* operates in a system in which a federal Parliament of limited powers is controlled by taxation and expenditure'.[34]

The authors' argument reflects the fact that, during the Convention Debates, responsible government had been balanced against federalism to achieve accountability of the Executive to the Senate.[35] They argue that there can be little doubt that accountability concerns in the form of parliamentary control of finance did play a major part in the reasoning in *Pape*.[36] Twomey supports this finding.[37] As Appleby and McDonald note, the use of federalism and accountability concerns in *Pape* appears to be a question of 'emphasis' more than anything, since both sets of concerns are present in the judgments in the case.[38] I add that the form of accountability the framers devised was one that relied upon dual accountability in matters of finance based on accountability concerns (including parliamentary control of finance). The reasoning on this point was explored in Chapter 4. Federalism provided a further reason during the Debates (in addition to the principle of responsible government as the framers had already experienced it) to create accountability to the Senate. The principles of responsible government as they had been applied in Australia had already been used to create systems of dual accountability, including in matters of finance, under Australia's unitary constitutions. During the Debates, federalism provided an additional reason to continue the Australian practice of dual accountability in matters of finance.

Overall, *Pape* was a reflection of both accountability *and* federal concerns working together under the *Constitution* to ensure accountability to the Senate in matters of finance.[39] This view has the benefit of reflecting the history presented to us by the Convention Debates. In them, delegates provided reasons for accountability to the Senate which contained both ideas about federalism and ideas about the nature of dual accountability under the form of responsible government with which the framers were familiar.

The Court would confirm its commitment to both federalism and accountability concerns in its next decision on spending by the Executive in *Williams*, making clear that it would protect

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[34] Appleby and McDonald, above n 6, 272-73. See also Saunders, above n 30, 263 on this point.
[35] Appleby and McDonald, above n 6, 258-59. Elsewhere Appleby has noted fundamental concerns based on political accountability if spending by the Executive remains unchecked: see G Appleby, 'There Must Be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93, 94, 95, 98, 104.
[36] Appleby, above n 35, 94, 97- 103.
[37] Twomey, above n 29, 314.
[38] Appleby and McDonald, above n 6, 270.
[39] Gerangelos, above n 29, 122; Appleby and McDonald, above n 6, 273.

accountability to the Senate based on both ideas. In *Williams*, members of the Court further differentiated the operation of political accountability under the *Constitution* from its British ancestor, making clear that (in part) the principle of parliamentary control of finance required the Court to protect accountability to the Senate.

III. *Williams* and accountability to the Senate

A: Background and key findings

By the time *Williams* was decided in 2012, the Court had predominantly adopted the broad approach to accountability to the Senate. The difficulty was that a majority in *Combet* in 2005 had suggested that the scope of parliamentary control of finance was a matter for the Parliament, not the Court, to determine. Accountability in matters of finance had appeared to proceed (in the majority's approach in *Combet*) on the assumption that accountability in financial matters was owed by the Executive to the House of Representatives.[40]

In *Williams,* the Court had to determine the Executive's power to spend public monies pursuant to an agreement entered into with Scripture Union Queensland (SUQ) to carry out a school chaplaincy service with the Darling Heights School (the School). Ron Williams was the father of four children who attended the School. The services to be rendered by SUQ to the School were part of a National School Chaplaincy Program (the Program) that had been set up by the Executive. The power to fund the Program the Commonwealth argued was sourced in s 61 of the *Constitution*, and a relevant parliamentary appropriation of the necessary funds had been made by Parliament.[41] Mr Williams objected to the program being provided at the expense of taxpayers and commenced a challenge in the High Court to the Executive's spending on both the agreement and the Program.

A majority in the case determined that, absent a statute of the Parliament authorising the spending (in addition to any appropriation of funds for the purpose), the Executive could only spend moneys pursuant to a contract in one of four ways.[42] The argument of relevance to this

[40] The effect of the majority's approach in this respect was discussed in Chapter 5.

[41] Section 61 provides that *'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'*

[42] *Williams*, [4] (French CJ); [138] (Gummow and Bell JJ); [544] (Crennan J). In summary, the first way was that the spending was supported because it was reasonably necessary for the execution and maintenance of valid laws of the Commonwealth and provisions of the Constitution: *Williams*, [4], [22], (French CJ); [193] (Hayne J); [558] (Kiefel J). The second was that the spending was supported by the prerogative powers of the Commonwealth: *Williams*, [4], [22], [24], [34] (French CJ); [123] (Gummow and Bell JJ); [194] (Hayne J); [582]

thesis (on the issue of accountability to the Senate) was whether the power to spend monies pursuant to the agreement with SUQ was supported by the power conferred on the Executive by s 61 of the *Constitution*.

In support of its submission that its spending was supported by s 61, the Commonwealth argued that the Executive could spend monies on subjects that fell within the scope of the legislative power of the Parliament, even though no legislation had been enacted by the Parliament at the time at which the Executive had contracted to spend.[43] This became known in the case as the 'common assumption' about the Executive power contained in s 61 of the *Constitution*. The common assumption was that the Executive power of the Commonwealth was co-extensive with the legislative power of the Commonwealth Parliament, meaning that spending was supported by s 61 so long as it could have been supported by an Act of Parliament within legislative power.[44] This submission contrasted with the position put by Mr Williams that the power of the Executive to spend was not a power to spend at large. The common assumption was ultimately rejected by a majority who found that spending by the Executive could only be valid where it was already authorised by legislation in addition to an appropriation of funds for the purpose.[45] Two members of the Court (Hayne J and Kiefel J) said this specific issue did not have to be determined in the case, although their Honours also referred to the importance of parliamentary control of finance and the role of the Senate in retaining control of spending.[46]

(Kiefel J); [402] (Heydon J). The third was that the spending was supported by the exercise of a power sourced in nationhood contained in s 61: *Williams*, [4], [22], [34] (French CJ); [194] (Hayne J); [485] (Crennan J); [583] (Kiefel J); [402] (Heydon J). The fourth was that the spending was required to be undertaken for the 'ordinary and well recognised functions of government under s 64 of the *Constitution*': *Williams*, [4], [83] (French CJ).

[43] The Commonwealth argued that the spending could have been supported under any of ss 51, 52 or 122 of the *Constitution*. Specifically, its submission was that the spending under the agreement with SQU could have been authorised by valid legislation which *could have been enacted* pursuant to either s 51(xx) (the corporations power) and/or s 51(xxiiA) (the student benefits power).

[44] This argument was in line with the approach to s 61 that had been suggested by Professor Winterton as forming part of the 'breadth' of Executive power in s 61. For this approach see Winterton, above n 11, 29-30; 40-44. The rejection of the common assumption has been relatively controversial in scholarship: see Gerangelos, above n 29; G Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the Williams Case' (Pt 2) (2013) 39 *Monash University Law Review* 348, 354, 356-360 (describing how applying the common assumption could have worked in the case). Heydon J (in dissent) resolutely put forward his objection to its dismissal in the case: *Williams*, [343], [404] (Heydon J). Heydon J found that the common assumption, and Winterton's approach to the breadth and depth of the power in s 61, was both 'neat' and 'illuminating': [385] and ff 325; also at [340]-341], [404] (Heydon J).

[45] *Williams*, [4] (French CJ); [138] (Gummow and Bell JJ); [544] (Crennan J).

[46] Hayne J said it was not necessary to determine whether the common assumption was correct since the spending could not have been supported by any head of legislative power conferred on the Parliament in any event: [177], [183], [286], [288] (Hayne J). Kiefel J found it unnecessary to determine the matter on the same basis: [569] (Kiefel J). Kiefel J also questioned the wisdom of the Court prescribing the requirement of a prior

B: Use of accountability concerns in *Williams*

In *Williams* the Court once again adopted the use of the principles of parliamentary control of finance (following the broad approach to accountability) to justify rendering the Executive accountable to the Senate.[47] Members of the Court emphasised the principle of parliamentary supremacy, specifically parliamentary control of finance, as forming part of the system of responsible government adopted by the *Constitution*. Relying on both federalism and responsible government, the Court underlined that parliamentary control of finance was exercised by both houses of the Commonwealth Parliament.

French CJ relied on his interpretation of constitutional history to reject the Commonwealth's assertion that the Executive's power to spend was supported so long as the spending fell within one of the allocated heads of the Commonwealth's legislative power. Hume, Lynch and Williams have pointed out that, of all the judgments in *Williams*, his Honour's reasoning has the most significant ramifications for accountability to the Senate based on federal concerns.[48] As the authors have also recognised, his Honour's judgment is also significant for its use of responsible government and the principle of parliamentary control of finance to protect accountability to the Senate.[49]

Referring to the drafting history of s 61 of the *Constitution*, French CJ described the conflict at the Convention Debates surrounding the creation of dual political accountability to both parliamentary chambers.[50] His Honour concluded that the Debates revealed that the framers had created a system of dual accountability.[51] Finding that the 'system of responsible government under the British Constitution was embedded in the federal Constitution' which could not 'now be disturbed without amendment to that Constitution', his Honour referred to Quick and Garran's analysis of the nature of dual accountability under the *Constitution*:

> 'Quick and Garran characterised s 61 as grafting the "modern political institution, known as responsible government" onto the "ancient principle of the Government of England that the

and separate Act to meets the demands of responsible government: [569] (Kiefel J). Her Honour's findings in this respect are discussed in more detail below.

[47] The exception being Heydon J in dissent.

[48] Mainly arising from his Honour's concerns regarding the limitation of the Senate's powers of amendment of money bills under s 53 of the *Constitution,* combined with its power to review all legislation (his Honour's reasons on this point are discussed below). See Hume, Lynch and Williams, above n 6, 80; also S Chordia and A Lynch 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (Pt 1) (2014) 33 *University of Queensland Law Journal* 83, 98.

[49] Hume, Lynch and Williams, above n 6, 91. I discuss these views below at C.

[50] *Williams,* [40] – [57], (French CJ).

[51] *Williams,* [58] (French CJ).

> Executive power is vested in the Crown". The difficulty, as they explained it, was: "in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber".'[52]

His Honour concluded that there was 'no clear evidence of a common understanding, held by the framers of the Constitution, that the Executive power would support acts of the Executive Government of the Commonwealth done without statutory authority provided they dealt with matters within the enumerated legislative powers of the Commonwealth Parliament.'[53] French CJ then explained that parliamentary control of finance, which had to include an acknowledgment of the Senate's limited powers to deal with money bills under s 53 of the *Constitution*, necessarily affected the manner in which control had to be exercised by the Senate over acts of the Executive. In other words, the Senate's limited power to deal with money bills (no power of amendment) required the Executive to have obtained approval of spending by the Senate through more than just a money bill. According to the Chief Justice, adequate control of finance by the bicameral parliament created by the framers required more than just a simple appropriation of funds for the purpose; it required a separate (and prior) Act of Parliament authorising the spending:

> 'A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate. The plaintiff submitted that the requirement of parliamentary appropriation is at best a weak control, particularly given the power of the Executive to advise the Governor-General to specify the purpose of appropriations. The inability of the Senate under s 53 to initiate laws appropriating revenue and its inability to amend proposed laws appropriating revenue for "the ordinary annual services of the Government" also point out the relative weakness of the Senate against an Executive Government which has the confidence of the House of Representatives. As the

[52] *Williams,* [58] and [59] (French CJ), citing J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), 703, 707.
[53] *Williams,* [60] (French CJ). The Executive power here refers to the power contained in s 61 of the *Constitution*.

> Solicitor-General of Queensland put it in oral argument, the Senate has limited powers to deal with an Appropriation Bill, whereas it has much greater powers with respect to general legislation which might authorise the Executive to spend money in specific ways.'[54]

This reasoning relies on concerns of both federalism and of parliamentary control of finance to justify more than a simple appropriation of funds being required to support spending by the Executive. As discussed in Chapter 5, this reasoning had been present in previous judgments of members of the Court, most notability in the *PMA Case* and in the minority in *Combet*. Leading authors have noted the significance of his Honour's choice in *Williams* to interpret the restrictions placed on the Senate to deal with money bills under s 53 as a basis on which to restrict the Executive's power to spend absent specific statutory authority.[55] Chordia and Lynch have already pointed out the ramifications for federal concerns of his Honour's decision, since it was open to French CJ to 'decide *Williams* simply on the orthodox basis of emphasising the role of the House of Representatives' in responsible government.[56] Those authors argue that the reliance placed by French CJ on the operation of s 53 (limiting the Senate's power of amendment) and the power of the Senate to review legislation generally is 'even more significant' given that the Senate was created as an elected upper house and that the Convention Debates reveal that debate regarding the terms of s 53 'lay at the heart of the 1891 convention.'[57] According to Chordia and Lynch, the history revealed in the record of the Convention Debates demonstrates the framers' commitment to the creation of an upper house with equal powers to the House of Representatives (except with respect to powers to initiate and amend money bills).[58] The analysis in Chapter 4 of the Debates on the discussions regarding accountability to the Senate supports the authors' views on this point. It also supports his Honour's understanding that the framers were motivated by more than federal concerns *per se* in creating accountability to the Senate. Although it is difficult to draw bright lines between the role of federal and accountability concerns during the Debates, the record of the Debates reveals that both were raised as reasons to render the Executive accountable to the Senate.[59]

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[54] *Williams,* [60], (French CJ).

[55] S Chordia, A Lynch and G Williams, 'Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism' (2013) 37(1) *Melbourne University Law Review* 189, 205-206; N Aroney, 'The High Court on Constitutional Law: the 2012 Term - Explanatory Power and the Modalities of Constitutional Reasoning' (2013) *University of New South Wales Law Journal* 863, 883.

[56] Chordia and Lynch, above n 48, 97.

[57] Ibid, 98, citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, (Legal Books, 1997), 151.

[58] Chordia and Lynch, above n 48, 98. See also Chordia, Lynch and Williams, above n 55, 205-206.

[59] This was discussed in Chapter 4. See also A Twomey, 'Post-*Williams* Expenditure: When can the Commonwealth and the States Spend Public Money Without Parliamentary Authorisation?' (Pt 1) (2014) 33

French CJ used both federalism and responsible government to determine that the passage of ordinary legislation in addition to an appropriation of funds was necessary.[60] Whether federalism or responsible government played a greater role in either the Convention Debates or his Honour's judgment in *Williams* appears to be, as Appleby and McDonald have suggested, a matter of emphasis.[61] The necessary application of both ideas meant that his Honour was able to say that the Court had to protect accountability to the Senate as part of the requirements imposed by the *Constitution* itself.[62]

Gummow and Bell JJ also used accountability concerns in the form of the parliamentary control of finance to reject the common assumption as well. Their Honours said that:

> 'such a proposition would undermine the basal assumption of legislative predominance inherited from the United Kingdom and so would distort the relationship between Ch I and Ch II of the Constitution … there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process. And that appropriation process requires that the proposed law not originate in the Senate, and that the proposed law appropriating revenue or moneys "for the ordinary annual services of the Government" not be amended by the Senate.'[63]

Crennan J rejected the common assumption too, relying on accountability concerns in the form of parliamentary control of finance to do so. Her Honour started with the proposition that s 61 was 'shaped by the institution of responsible government and the exercise of Executive power under the Westminster system of Britain, as at the date of Federation.'[64] Crennan J then referred to what she regarded as the history of the principle of Parliament's exclusive control over taxation and supply, which principle her Honour said was applied to and 'readily understood in Australia at the date of Federation'.[65] Approving statements that had been made in *Egan*[66] that responsible government was 'traditionally considered to encompass the means by which

University of Queensland Law Journal 9, 18, recognising the role of federalism and responsible government during the Convention Debates; also that drawing a bright line between the two is a difficult task.

[60] Chordia and Lynch, above n 48, 106.

[61] Appleby and McDonald, above note 6, 270.

[62] Chordia and Lynch, above n 48, 98.

[63] *Williams,* [136] (Gummow and Bell JJ).

[64] *Williams,* [508] (Crennan J).

[65] *Williams,* [509] (Crennan J).

[66] Ibid.

Parliament brings the Executive to account', so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament', her Honour found that:

> **'**accountability came to be expressed in terms of the need for the Executive to enjoy the confidence of the House of Parliament dealing with finance, as the arm of government most immediately representing, and therefore responsible to, the people (that is, the electors)' [and in the] the notion that Ministers are liable to the scrutiny of the chamber of which they are members, both for their conduct and for that of their departments.'[67]

Her Honour then referred to her interpretation of Australian colonial history to find that:

> '[p]rior to Federation, it was appreciated that the sharing of political power was an important mechanism for avoiding arbitrary government and thereby maintaining civil order. That appreciation underpinned the principle of responsible government and the idea that a democratic representative assembly would give qualified persons a "stake" in government, both of which are sourced in the constitutional history of Britain and Australia in the 19th century.'[68]

Referring to provisions of the *Constitution* that incorporated these ideas (including ss 61, 81 and 83), Crennan J said that accountability was derived both from the requirements of the *Constitution* and from parliamentary conventions with the result that Bills became 'the subject of parliamentary scrutiny and debate'.[69] Parliament's control over expenditure was thus 'effected through the legislative process'.[70] Her Honour then concluded:

> 'Whilst the Executive has the power to initiate new policy and to implement such policy when authorised to do so, either by Parliament or otherwise under the Constitution, Parliament has the power to scrutinise and authorise such policy (if it is not otherwise authorised by the Constitution), and the exclusive power to grant supply in respect of it and control expenditure. The principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend.'[71]

The final two justices who struck down the spending in the case were Hayne J and Kiefel J. While Hayne J found it unnecessary to determine whether separate statutory authorisation in addition to an appropriation was needed, his Honour also referred to parliamentary control of

[67] *Williams,* [509] (Crennan J).
[68] *Williams,* [510] (Crennan J).
[69] *Williams,* [515] (Crennan J).
[70] *Williams,* [515] (Crennan J).
[71] *Williams,* [516] (Crennan J).

finance to find that the Executive was accountable to the Senate in financial matters.[72] His Honour's reasoning provides the clearest explanation of why ordinary legislation, in addition to an appropriation of funds, should be required to authorise spending by the Executive. It takes into account how parliamentary control of finance is can be exercised by the Senate under s 53 of the *Constitution*, as well as the Senate's equal place in the Commonwealth Parliament as an elected chamber in a bicameral parliament.

Hayne J had already set out in detail his interpretation of the relevant history of parliamentary control of finance in *Pape*.[73] In *Williams,* his Honour dedicated an entire section of his judgment to a discussion of 'parliamentary control' of finance, finding that many provisions of the *Constitution* (particularly ss 53, 81 and 83) provided for parliamentary control over the raising and expenditure of public moneys. These provisions reflected 'the cardinal principle of parliamentary control which underpinned the British financial system at the time of Federation and which had earlier been transported to the Australian colonies'.[74] Hayne J then spelt out the basis for finding that parliamentary control of finance required more than just an appropriation.

After referring to the conclusion reached by the Court in *Pape* (that neither ss 81 and 83 were a source of spending power), his Honour observed that 'since Federation, parliamentary control over expenditure has not stopped at that point in the process of appropriation at which the legislature authorises drawing from the Consolidated Revenue Fund.'[75] Picking up Isaacs J's reasoning on the point in *Wooltops,* Hayne J found that parliamentary control required control over both the appropriation of revenue *and* ongoing 'supervision of what is actually received and outlaid'.[76] His Honour went even further in rejecting the Commonwealth's submission that parliamentary control over expenditure ceased at the point at which Parliament identified a supporting appropriation. Hayne J said that such a submission treated 'how the Executive uses the moneys thus appropriated … as a matter for the Executive unless or until the Parliament has provided otherwise.'[77] As discussed in Chapter 5, Lindell has argued that it was for the Executive to obtain parliament's approval: not for the Executive to act unless and until Parliament disapproved.[78] Lindell's interpretation is supported by the basic proposition

[72] See above n 46 on Hayne J and Kiefel J's positions on this.
[73] See the discussion on his Honour's reasons in *Pape* above at II.A.
[74] *Williams,* [219] (Hayne J), citing *Pape*, 105.
[75] *Williams,* [223] (Hayne J).
[76] *Williams,* [219] (Hayne J).
[77] *Williams,* [236] (Hayne J).
[78] See G Lindell, above n 15, 315 and the discussion of his argument in Chapter 5.

underlying political accountability in the doctrine of responsible government: that the Executive can never act beyond the extent of any delegation made to it.[79] This assumes that parliament has made a delegation. In *Williams*, Hayne J also added that the Commonwealth's argument relied on an assumption about the existence of a Parliament with the power to 'otherwise provide' in the first place.[80] In rejecting this submission, Hayne J referred to the principle of parliamentary control of finance:

> 'The limit on the power to spend must be consistent with the general proposition that it is for the Parliament and not the Executive to control expenditure. And the Parliament can control expenditure only by legislation. Once it is recognised, as it was in *Pape*, that "appropriation made by law" is "not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure", it follows that the Parliament's control over expenditure can be exercised by not only the mechanisms of appropriation but also more specific legislation.'[81]

It was thus the Court's role to protect the various means by which the Commonwealth Parliament exercised its authority over the Executive's actions. On the operation of s 53 of the *Constitution* his Honour concluded that 'the raising and expenditure of public moneys is subject to parliamentary control' and, given that both chambers were elected houses, it followed that control was to be exercised by both chambers.[82] Thus, although his Honour found that it was not necessary to decide the matter in the case, all of his reasons supported the proposition that parliamentary control of finance had to be exercised by both chambers of the Commonwealth Parliament and through both the appropriations process and also by ordinary legislation.

Kiefel J, as the final member of the Court who struck down the spending in the case, mentioned accountability concerns in the form of parliamentary control of finance as well, finding that:

> 'The principle of responsible government, derived from parliamentary history and practice in the United Kingdom, is a central feature of the Australian Constitution. The relationship it establishes between the Parliament and the Executive may be described as one where the former is superior to the latter.'[83]

[79] Winterton, above n 11, 433.
[80] *Williams,* [237] – [238] (Hayne J).
[81] *Williams,* [252] (Hayne J).
[82] *Williams,* [220] (Hayne J).
[83] *Williams,* [579] (Kiefel J).

Like Hayne J, her Honour said that the Court did not need to determine whether a specific statutory approval was required in addition to an appropriation of funds on the case.[84] Her Honour went on, however, to express reservations about the Court's role in prescribing the requirements of parliamentary control of spending. Her warning contained echoes of the concerns that had been expressed by the majority in *Combet* about the Court transgressing its constitutional function.[85] In support of that reluctance, her Honour noted Dixon J's statements in *Bardolph* on the possibility that a subsequent approval of Executive action could occur.[86] The difficulty here is that *Bardolph* proceeded on the assumption that parliamentary approval of spending was based on what Lindell has described as the erroneous yet 'once popular doctrine that money might become legally available for the services of government upon the mere votes of supply by the Lower House'.[87] Further, even though *Bardolph* involved the interpretation of the operation of a unitary constitution, the Court's approach to responsible government in *Egan* suggests that the High Court might nowadays take a different view of the need for accountability to an upper house under unitary constitutions in Australia. Once concerns of federalism are added to Australia's model of dual accountability under its constitutions, it seems very difficult to argue with Lindell's and Hayne J's explanation that the Court should protect the principle of parliamentary supremacy, putting the onus on the Executive to establish that it possessed the requisite delegation to undertake action.

Whatever the reasons underpinning Kiefel's reservations in *Williams* (about prescribing too tightly the requirements of responsible government), her Honour's concerns were subsequently implemented in *Wilkie v Commonwealth.*[88] The decision is discussed below.[89]

C: Ramifications of the reasoning in *Williams*

Constitutional law scholarship has recognised the significance of the Court's use in *Williams* of accountability concerns (in the form of parliamentary control of finance).[90] The reasoning

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[84] *Williams,* [569] (Kiefel J).

[85] This was discussed in Chapter 5.

[86] *Williams,* [568] (Kiefel J). Her Honour found that the case did not need to be determined on this basis in any event: *Williams,* [569] (Kiefel J).

[87] Lindell, above n 15, 309. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), 522-23 on this view.

[88] *Wilkie v Commonwealth* (2017) 349 ALR 1. (*Wilkie*).

[89] At D.

[90] Gerangelos, above n 29, 100, 101, 114, 119, 122; Lindell, above n 44, 365, 381-82; Aroney et al, above n 31, 428, 429, 463, 472, 474-75, 481. Principles of responsible government became 'federalism enforcing' in this sense in *Williams:* ibid. See also Twomey, above n, 59, 12, 19, 20; C Saunders, 'The Scope of Executive Power' (2013) *Papers on Parliament No 59, available at* https://www.aph.gov.au/~/~/link.aspx?_id=C8C131542382464EB28135A33F9EA201&_z=z.

of various members of the Court in *Williams* made clear that accountability to the Senate was not based solely on federal concerns but also on broader considerations of Executive accountability to Parliament, including the protection of fundamental principles of parliamentary supremacy through the control of finances by both chambers of the Commonwealth Parliament.[91] Ultimately, the decision in *Williams* made clear that the Senate needed to be provided with a sufficient opportunity to review spending by the Executive.[92]

Hume, Lynch and Williams note that the approach of the majority in *Williams* marked a retreat from the principles which saw Commonwealth power expand over the 20th century, principles that had reached their high water mark in the majority judgments in *Combet*.[93] In summary, the authors say that federalism and responsible government, working together in *Williams,* managed to kill the common assumption that the Executive power of the Commonwealth followed the contours of the Commonwealth's legislative powers.[94] Although federal concerns as a limitation on Executive power were traceable in earlier decisions of the Court, those concerns managed to find a 'beachhead' in *Williams*.[95] A similar point can now be made for the use of accountability concerns in *Williams*. The willingness of the Court to use accountability concerns is seen in all of the majority judgments in *Williams*, demonstrating the Court's apparent acceptance that general words in the *Constitution* conferring power may be 'cut down' once regard is had to 'considerations of constitutional structure and the fundamental constitutional doctrine of responsible government'.[96] The approach in *Williams* ultimately provides us with an example of federalism and responsible government working together to protect accountability to the Senate in financial matters.[97]

What can also be observed is that the approach of the majority in *Williams* generally marked a clear retreat from the majority's approach in *Combet*. Although *Williams* has been described in literature to date as a case about the use of federal concerns to restrict the Executive's spending power, leading authors have recognised that a number of the justices in *Williams* used responsible government working *with* federalism to restrict the Executive's power to spend.[98]

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[91] Appleby and McDonald, above n 6, 270.
[92] Ibid, 273; Hume, Lynch and Williams, above n 6, 73; see also Aroney et al, above n 31, 443, 463, 481.
[93] Hume, Lynch and Williams, above n 6, 71.
[94] Ibid.
[95] Hume, Lynch and Williams, above n 6, 74.
[96] Ibid, 71.
[97] Ibid.
[98] Hume, Lynch and Williams, above n 6, 71, 91; Choria and Lynch, above n 48, 107; Appleby and McDonald, above n 6, 281. On the use of federalism as interpretive methodology by the Court in *Williams* see Hume, Lynch and Williams, above n 5, 71, 73, 74, 83.

Hume, Lynch and Williams have gone so far as to suggest that *Williams* is a case 'primarily' about the operation of responsible government.[99] Lindell agrees with this assessment, arguing that the concern at the heart of *Williams* was 'directed at the question of the accountability of the executive to the Parliament'.[100] Ultimately, *Williams* is a case about accountability and the operation of responsible government.[101]

Authors have also drawn attention to the way members of the Court in *Williams* focused on the different nature of responsible government in Australia's constitutional history to reason that the framers had incorporated accountability to the Senate.[102] Appleby and McDonald have pointed out there had been some recognition of the importance of Australia's own constitutional history in previous decisions of the Court.[103] In 2003, for example, Gleeson CJ, Gummow, Hayne and Heydon JJ said that 'unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty.'[104] Precisely where the relevant differences between the British and Australian constitutional systems might lie has proven to be the ongoing challenge for the Court.

The majority judgments in *Williams* may well be a fair representation of the type of accountability George Winterton contemplated in 2003. Writing about the extent of Executive power, he concluded that:

> 'it is desirable that executive action should be subject to legislation, especially under a system of responsible government: this promotes accountability to Parliament, giving Parliament authority to examine executive action; strengthens the rule of law by subjecting executive action to judicial review … and it enhances democratic government since legislation involves greater democratic input than executive action.'[105]

What is particularly notable about the approach in *Williams* is that, as Appleby and McDonald have argued, it led to a 're-envisioning' of executive power in Australia by 'lessening the focus on its British ancestry'.[106] This was achieved, in part, because of the Court's willingness to

[99] Hume, Lynch and Williams, above n 6, 91.
[100] See also Lindell on this point in Lindell, above n 44, 381.
[101] Hume, Lynch and Williams, above n 6, 71.
[102] Lindell, above n 44, 368; Appleby and McDonald, above n 6, 272; Chordia and Lynch, above n 48, 93, 99-100.
[103] Appleby and McDonald, above n 6, 271 citing *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.
[104] *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, [66].
[105] Winterton, above n 11, 433.
[106] Appleby and McDonald, above n 6, 272.

recognise Australia's own constitutional history, including the existence of both accountability and federal concerns at the Conventions in framing accountability to the Senate. *Williams* provides us with an example of the proposition that 'several provisions [of the Constitution] … can only be understood adequately through a close and careful analysis of the Constitution's text, structure, history, principles and purposes.'[107] The most obvious and important of these principles is responsible government, and its key requirement of supremacy of Parliament over the Executive.[108] *Williams* recognises that its adoption in Australia has been different in one key respect: that accountability in matters of finance has been and is owed to two parliamentary chambers. As Kerr has recognised, the decision in *Williams* provides us with an interpretative methodology that relies on notions of responsible government and the rule of law to restrict the Executive's power to spend.[109] In doing so, the decision 'advances a unique Australian theory of executive power, informed by the framers' combination of responsible government with federalism'.[110] Thus:

> 'While our theory of the Commonwealth Executive is still informed by the British component of our constitutional ancestry … it is also modified by the framers' bold experiment: the merging of federalism with responsible government.'[111]

This recognition was achieved, in part, because the Court recognised Australian constitutional history, including how the framers had to recognise accountability to each parliamentary chamber based on the dual considerations of federalism and responsible government. Appleby and McDonald have highlighted that:

> '[c]ontrol over public funds was treated by the majority in *Williams* as being both a question which went to the the way in which the principle of federalism is embodied in a constitutional system … [*as well as a question* which goes to the] … nature and extent of parliamentary supremacy over the Executive'.[112]

The result in *Williams* was that accountability concerns, working alongside federal concerns, were used by the Court to constrain the manner in which the Executive could contract 'in a manner that was not previously conceived'.[113] As we saw in Chapter 5, although accountability

[107] Aroney, above n 55, 883.
[108] Ibid.
[109] Kerr, above n 29, 145, 147.
[110] Appleby and McDonald, above n 6, 256.
[111] Ibid, 281.
[112] Appleby and McDonald, above n 6, 262-272, 273.
[113] Chordia, Lynch and Williams, above n 55, 230. See also Appleby and McDonald, above n 5, 256, 273.

concerns had appeared in previous judgments of the Court, *Williams* is significant because it represented an authoritative pronouncement by the Court of how far it was willing to go to protect accountability to the Senate in matters of finance using both federal and accountability concerns. The result of the decision in *Williams* reflects the 'hybrid constitution' Saunders has spoken of, with a modification of the principles of responsible government having been part of the Australia's constitutional history now recognised by the Court.[114] The result of the Court's recognition of dual accountability in Australia has been, as Appley and McDonald point out, to 'substantially alter our understanding of the Commonwealth Executive, and significantly remove it from our British origins'.[115] This understanding was achieved by an acknowledgment of Australia's own constitutional story of accountability. That this history provided for a different form of accountability to our British inheritance was confirmed by the Court in *Williams 2*.[116]

In *Williams 2* the Court affirmed its approach in *Williams,* to the extent of saying that it was not prepared to revisit the matter. In a joint judgment, the Court confirmed that it was not prepared to interpret Australia's bicameral system as being the equivalent of the 'unitary system' of Great Britain.[117] Analysing the decision in *Williams 2*, Chordia, Lynch and Williams observe that:

> 'After noting that even the scope of British executive power was controversial, the Court complained about the selectivity of looking to those constitutional provisions which highlighted the historical connection to British constitutional practice in order to sustain an assumption of parity between the Commonwealth executive and that of the United Kingdom … [a]lthough British constitutional history might inform the question, "the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power".'[118]

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[114] C Saunders, *The Constitutional framework : hybrid, derivative but Australian* (Centre for Comparative Constitutional Studies, Law School, University of Melbourne, 1989), 10, 19. Saunders says the hybrid is the effect of the combination of federalism with the principles of responsible government.

[115] Appleby and McDonald, above n 5, 272.

[116] *Williams v Commonwealth* (2014) 252 CLR 416. (*Williams 2*).

[117] *Williams 2,* [83], French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ. Gageler J was exempted from determining the matter since he had been Counsel for the Commonwealth (as Solicitor-General) in *Williams*. The Court affirmed its finding in *Pape* that s 81 is not a source of spending power, and the finding in *Williams* that the Executive is limited to spending in those areas of responsibility allocated to it by the *Constitution*: see (*Williams 2*), [20], referring to *Pape* at [8], [133]-[134], [232]-[243]. For a summary of the facts and reasoning of the Court in *Williams 2* generally see Chordia, Lynch and Williams, above n 3; Twomey, above n 59.

[118] Chordia, Lynch and Williams, above n 3, 315, citing *Williams 2,* [81].

Williams 2 affirmed that any analogy between the operation of political accountability under the British Constitution with the *Constitution* was not appropriate, with the Court distinguishing the British Constitution as operating under a different form of government to that which operated in Australia.[119]

D: The ongoing question

In spite of the Court's commitment to the recognition of the role of the Senate in holding the Executive to account (particularly in financial matters) in *Williams*, Kiefel J raised an ongoing question in the case about the supervisory function of the Court and its role in prescribing the requirements of parliamentary control of finance. In *Wilkie*, a return to the more hands-off approach to the Court's supervision of relations between Parliament and the Executive was posited once again.

Although Kiefel J had been in the majority in *Williams*, her Honour had argued that the Court needed to be careful about prescribing the precise manner in which Parliament could authorise spending by the Executive. Kiefel J had not gone as far as her colleagues in prescribing the requirements of parliamentary control of finance.[120] Neither had her Honour disagreed that the principle of parliamentary control of finance was a fundamental part of the *Constitution*. However, her Honour had questioned how prescriptive the constitutional framework required the Court to be in policing the limits of Parliament's control over finance. As Chordia, Lynch and Williams point out, the fact that reservations had been expressed in *Williams* about the requirement for a separate (and prior) statutory authority (in addition to an appropriation of funds) must continue to raise questions about whether this requirement will be adhered to by the Court in the future.[121]

Kiefel J's view has received some support in constitutional law scholarship. Lindell as well as Appleby and McDonald have argued that it is highly questionable whether any of the reasons provided by the majority in *Williams* justified the conclusion that the principle of parliamentary supremacy over finances requires the passage of an Act of the Parliament in addition to an

[119] Ibid.

[120] French CJ, Gummow and Bell JJ and Crennan J found that both an appropriation of funds for the purpose together with an Act of the Parliament approved by both parliamentary chambers was required to authorse spending. Hayne J had (without determining the matter in the case) argued that this was part of the requirement of ongoing supervision by Parliament of the manner in which the Executive spent sums appropriated. This followed Isaacs' reasoning on the point in *Wooltops*. Although he doubted that this needed to have been provided prior to the spending being undetaken. See above at B for a discussion of the judgments.

[121] Chordia, Lynch and Williams, above n 3, 316.

appropriation of funds.[122] Twomey has doubted whether scrutiny over new spending receives any greater parliamentary scrutiny than do appropriations for the ordinary annual services of the government.[123] She has also suggested that any concern regarding the limitations of the Senate to review money bills is also questionable since, in practice, the Senate sends back requests for amendments and presses those requests.[124] Lindell, however, has pointed out that Twomey's argument does not take into account the Senate's limited power either to suggest amendments to money bills or its power to veto them.[125] Further, as discussed in Chapter 5, a reason for requiring legislation (in addition to an appropriation of funds) harks back to something Isaacs J referred to in *Wooltops* (and Hayne J acknowledged in *Williams*): that parliamentary control of spending should proceed on the basis of a specific statutory authorisation.[126] There are also opportunities for further scrutiny and input by the Senate if ordinary legislation (over which the Senate has a power of amendment) is required in addition to a money bill, particularly because, as Lindell and other authors have explained, parliamentary practice has evolved over the years to support appropriations that are almost tantamount to being an appropriation in blank.[127] This gives the Senate limited oversight of (and input in) spending. By requiring ordinary legislation in addition to an appropriation the Court is said to be protecting opportunities for review and amendment of ordinary legislation afforded to the Senate by s 53 of the *Constitution*.[128] This was a significant matter taken into account by the Court in *Williams*.[129] It reflects the concern expressed by Isaacs J in *Wooltops* that spending is controlled not just by appropriation but by the enactment of specific legislation.[130] The Court's next decision in *Wilkie,* however, would raise questions once again about whether the Court will continue to support the prescription of separate statutory authorisation to support spending undetaken by the Executive and, in turn, the extent to which the Court will involve itself in protecting accountability to the Senate.

[122] Lindell, above n 44, 370; See also Appleby and McDonald, above n 6, 271.
[123] Twomey, above n 59, 21.
[124] Ibid, 21.
[125] Lindell, above n 44, 371.
[126] Ibid.
[127] Lindell, above n 15, 309; Appleby, above n 35, 93, 94, 95, 98, 104.
[128] See Chordia, Lynch and Williams, above n 55, 200-201, citing Winterton, above n 11, 121 (referred to by French CJ in *Williams* at [38]); Twomey, above n 59, 24; Appleby and McDonald, above n 6, 271-272; Lindell, above n 44, 381-382.
[129] Ibid.
[130] Chordia, Lynch and Williams, above n 55, 201.

IV. The current state of affairs: a return to the narrow approach?

In 2017, the High Court heard another case dealing with parliamentary control of spending by the Executive. In *Wilkie* the Plaintiff argued that several constitutional provisions, including s 53 of the *Constitution*, made clear that Parliament's control of moneys cannot be by-passed and that the Act under challenge in the case represented an invalid delegation of legislative power to the relevant minister, which delegation (it was argued) was an abdication of responsibility by the Parliament of its constitutional role of oversight of spending.[131] The appellant's further argument was that the appropriation of funds by legislative instrument was inconsistent with s 83 of the *Constitution* and that any appropriation of funds required approval of the Senate.[132] Much in the appellant's submissions relied on the reasoning of the Court in both *Pape* and *Williams* although, as Chordia, Lynch and Williams have pointed out, the appellant may have got further in the case had he made much clearer his reliance on the principle of parliamentary control of finance.[133] Instead, the argument Wilkie made was framed on the principal basis that legislation relied on by the Commonwealth in the case (being s 10 of the Appropriation Act No 1 2017-2018) was invalid or that, in the alternative, the delegation to the Finance Minister (to spend the funds under challenge) was not authorised by that section. Framed in this way, the Court was able to approach the validity of the spending as a matter of construction of the authorising statute, much as it had done in *Combet*. Further, by the time *Wilkie* was determined, Kiefel J had been appointed as the Chief Justice of the Court, and Stephen Gageler, who represented the Commonwealth in *Williams* (and had advocated for the adoption of the common assumption in that case) had become a member of the Court. I argue that the decision in *Wilkie* marks a qualification of the majority's findings in *Williams* and the broad approach to accountability, potentially flagging that the Court may return to a narrower approach to accountability in the future.

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[131] Arguing that the legislation under challenge did by-pass the Parliament by enabling the Minister for Finance to appropriate funds from the Consolidated Revenue Fund in breach of the constitutional requirements for the appropriation of funds set down in *Pape*: *Wilkie*, Submission of the Plaintiff, 23 August 2017, [17]-[22], also [25]-[36]; *Wilkie,* [244]. For more details of the specific legislation and delegations under challenge see A Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government' (2017) *Australian Public Law,* (27 November 2017) https://auspublaw.org/2017/11/wilkie-v-commonwealth/.

[132] Supporting the findings on this in *Pape*. The appellant did argue that an appropriation of funds had to be made by a law made by the Parliament, which included approval by the Senate: *Wilkie*, Submission of the Plaintiff, [23]-[24]. It was argued that this required both a valid prior appropriation of funds by the Parliament itself as well as subsequent control being exercised by Parliament over the Executive's expenditure of funds following the decision in *Williams*.

[133] Chordia, Lynch and Williams, above n 3, 316.

In the event, the Court disagreed with *Wilkie* on a number of bases, including on the issue of whether sufficient controls had been put in place already by Parliament with respect to the relevant monies.[134] The Court ultimately appeared to dismiss the appellant's argument as to the validity of the spending because it found that Parliament had clearly appropriated the full amount of the moneys to the Minister, which could be used for the purposes (described as 'items') identified in relation to each entity listed in the Schedule to the Act. Their Honours said that the purpose for which the minister could draw funds had been set out with 'appropriate specificity' by Parliament.[135] In other words, the Court found that there was clear statutory authority for the spending under challenge. The entirety of the Court[136] referred to doubt from a number of sources regarding how the form of the appropriation in the case could be reconciled with the 'constitutional requirement for an appropriation to be for a legislatively determined purpose.'[137] Their Honours said that the answer lay in the fact that 'the degree of specificity of the purpose of an appropriation is for Parliament to determine.'[138] This is reminiscent of the views expressed by members in the majority in *Combet*. Taking up the concerns Kiefel J expressed in *Williams* about the Court being careful about prescribing 'too tightly the specific requirements of responsible government',[139] their Honours refused to intervene in the case. Twomey has argued that, as a result of this reluctance to intervene, the approach in *Wilkie* has:

> 'far greater ramifications as a precedent which upholds the capacity of the Executive to allocate the appropriation of funds and to expend them when there is existing standing authorisation in legislation to do so, without any parliamentary scrutiny and even against the will of Parliament. It undermines the foundational constitutional principle of responsible government and the authority of the significant precedents.'[140]

Those significant precedents included *Pape* and *Williams*. The explanation for the result in *Wilkie* appears to be that the Court was satisfied that the spending under challenge was supported by relevant legislation (in addition to an appropriation of funds). That is, the Court

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[134] The Court found that the challenge was brought on a misconceived premise about when and how a parliamentary appropriation of funds in the case had taken place. The Court found that Parliament had already made an allocation of an amount on which the Minister could draw funds: *Wilkie*, [92]-[94].
[135] *Wilkie*, [91].
[136] Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[137] *Wilkie,* [91], referring to doubts expressed by Professor Campbell in E Campbell, 'Parliamentary Appropriations' (1971) *Adelaide Law Review* 145, 151-52; also Australia, Senate Standing Committee on Finance and Government Operations, *Advance to hte Minister for Finance,* Parliamentary Paper No 217/1979 at 13 [2.1] and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 600-601.
[138] *Wilkie,* [91].
[139] *Williams*, [580] (Kiefel J).
[140] See Twomey, above n 131.

was satisfied that Parliament had already exercised sufficient control over the spending under challenge by authorising it. The authorisation in the case was broad. As Twomey and others have pointed out, by the Court supporting spending undertaken under broad appropriation provisions alone, the risk is that the Court allows governments to rely on authorisations that are 'so broad and suffused with weasel-words that they are meaningless'.[141] This was the concern Lindell had earlier expressed about what amounted to an 'appropriation in blank' in *Combet*, that it undermined parliamentary control of finance.[142] Appleby too has argued that there are good reasons, including concerns relating not just to parliamentary control of finance but also broader concerns based on the rule of law, for the Court's intervention in policing adherence to the constitutional requirements of responsible government.[143] The decision in *Wilkie* certainly raises the spectre of a return to the approach taken by the majority in *Combet*, and suggests that the Court will in future show once again its reluctance to intervene in questions of parliamentary oversight of spending.[144]

The Court did affirm that there was a difference between the operation of parliamentary control of finance under the *Constitution* compared to the British model of government on which it was based, finding that ss 81 and 83 of the *Constitution*:

> 'thereby combine to exclude from the scheme of the Constitution "the once popular doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House".'[145]

On the face of this finding in *Wilkie*, it would seem clear that a simple 'transference' of responsible government from the British to the Australian context is not possible.[146] What this may mean in individual cases, however, is much more difficult to predict given that the Court has once again suggested that questions of authorisation and, hence, control of parliamentary finance, may be left to Parliament, not the Court, to determine. The Court in *Wilkie* may have

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[141] Twomey, above n 131.

[142] As discussed, this was also Lindell's concern in *Combet*, which had the potential to undermine parliamentary control of finance: see Lindell, above n 15, 309, 316-317. See the discussion in Chapter 5 on Lindell's arguments as to why such broad authorisations are not appropriate. In *Wilkie*, the Court did say that a valid appropriation cannot be made in blank, finding that it was clear that the purpose for which an appropriation is made needs to be clear by the Parliament: *Wilkie*, [71]. Twomey's criticism is that the appropriation in *Wilkie* was quite vague.

[143] Appleby, above note 35, 93, 94, 95, 98, 104. Appleby's concerns were discussed in Chapter 5 in more detail.

[144] Twomey, above n 131.

[145] *Wilkie*, [61], Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ, citing Harrison Moore, above n 87, 522-523. The Court said that a valid appropriation cannot be made in blank, finding that it was clear that the purpose for which an appropriation is made needs to be clear by the Parliament. *Wilkie*, [71].

[146] Aroney et al, above n 31, 407.

approved the findings in *Pape* and *Williams* regarding the importance of the principle of parliamentary control of finance. However, the Court did not say that the Executive was *not* accountable to the Senate. The difficulty remains that the effect of the decision (through an absence of intervention by the Court) may be that it marks a return to favour for a strong parliamentary Executive with power to implement government policy based on the assumption that political accountability was owed by the Executive to the House of Representatives alone in questions of finance.[147]

V. Conclusion

The decisions in *Pape* and *Williams* fall within a long line of judgments of the Court that can be characterised as having adopted the broad approach to accountability, that accountability to the Senate is required in matters of finance. In *Williams*, the principle of parliamentary control of finance working together with federalism was used to find that accountability to the Senate had to be protected by the Court. Both accountability and federal concerns were recognised as having been one of the reasons that the framers incorporated accountability to the Senate in the *Constitution*, and why accountability to the Senate needed to be enforced by the Court.[148] The Court recognised that the *Constitution* was not a simple replica of the British model. The *Constitution* had not adopted the 'once popular doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House.'[149]

In recognising the importance of the Senate, the Court's approach in *Williams* reflects the dual concerns of federalism and accountability, both of which were expressed by the framers at the Conventions. The approach taken in *Williams* accords with Australia's history of strong bicameralism, with upper chambers playing a significant role of review of legislation and control of finance. The Court's most recent approach in *Wilkie*, however, highlights that the question of the extent to which the Court will police the means through which such oversight by the Senate will occur will continue to be an issue for the Court. Any retreat to the approach of the majority in *Combet*, moving the Court away from protecting opportunities for accountability, will not only move the Court further away from the dominant approach to

[147] Matters that Appleby and Lindell have previously warned against: G Appleby, above n 35, 102; G Lindell, above n 15, 308-311.
[148] Hume, Lynch and Williams, above n 6, 71, 91; Chordia, Lynch and Williams, above n 55, 230; Chordia and Lynch, above n 48, 107; Appleby and McDonald, above n 6, 281.
[149] *Wilkie*, [61], Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ, citing Harrison Moore, above n 87, 522-523.

accountability that has long been present in its own jurisprudence; it will also move the Court further away from Australia's constitutional story of dual accountability.

CHAPTER 7: CONCLUSION

This thesis has sought to determine the extent to which the framers of the *Constitution* incorporated into the constitutional system the broader goals of political accountability that were already present in Australia's colonial bicameral parliamentary systems. It also considered the High Court's emergent reliance on those goals of political accountability to upper chambers.

The inquiry of the thesis was prompted by the High Court's approach to accountability to the Senate in its decision in *Williams.*[1] While recent scholarship had discussed extensively the degree to which accountability to the Senate was prompted by federal concerns, no detailed examination of the nature of accountability based on the principle of responsible government had been undertaken. This thesis sought to bridge that gap by examining how accountability concerns, in the form of parliamentary control of finance and the role of an upper chamber as a house of review, numbered among the matters raised by the framers of the *Constitution* in arguing for the Executive to be accountable to the Senate. It examined the extent to which those discussions were informed by Australian colonial constitutional experience.

Part I investigated the constitutional landscape in which the Conventions and the discussion about the relative merits of distinct accountability to the Senate took place. The first of its two chapters set out the relevant intellectual and institutional contexts in which the framing of the *Constitution* took place, considering the constitutional models and underlying theories of political accountability of the role of upper chambers the framers relied upon at during the Conventions.

Chapter 2 demonstrated that some of the treatises relied on by the framers certainly asserted that responsible government under the British Constitution required accountability (particularly in matters of finance) solely to the lower house. However, some contemporary commentators recognised that the picture of accountability under the British Constitution was

[1] *Williams v Commonwealth* (2012) 248 CLR 156. (*Williams*).

far more complex throughout most of the 19th century. Nonetheless, the Diceyan notion of accountability solely to the lower house was adopted by nationalists during the Debates to support the proposition that the Executive should be accountable solely to the House of Representatives, particularly in financial matters. When it came to the Canadian Constitution, however, the framers specifically rejected the idea that the Canadian model was appropriate in an Australian context, primarily because the Executive in that system had no real accountability to its Senate.

Moreover, Chapter 2 also established that many of the treatises the framers relied on during the Debates, including even those that expressed the Diceyan view, also referred to much broader principles underpinning political accountability of an executive to both chambers of bicameral parliaments. These principles included the principle of parliamentary control of finance and the benefits of a second chamber of legislative review. These ideas already existed in Australia's colonial constitutional practice. They existed separately and apart from any concerns of federalism. The idea that good government was better achieved if an executive was politically accountable to two parliamentary chambers, including in matters of finance, was adopted by Australia's colonial parliaments. The idea was later adopted by the framers during the Conventions.

The constitutional landscape against which the Debates took place was more fully set out in Chapter 3, It explored how Australian parliamentarians developed their own specific constitutional practice of political accountability to upper chambers under their colonial constitutions. That practice included upper chambers with extensive powers to call an executive to account, including powers to veto money bills. This power of veto existed for both elected and nominated upper parliamentary chambers. The power to veto money bills was largely uncontested in each colony. Far more attention was dedicated to debates around the power of upper houses to amend money bills. Chapter 3 revealed that upper houses in the Australian colonies often insisted on their separate powers to render governments accountable to them, particularly in financial matters. That insistence included the upper house role in the review of legislation (ordinary and money bills) and, more importantly, in exercising oversight of executive spending as part of protecting the principle of parliamentary control of finance. It also included acknowledgment that the role of upper chambers included representing something other than the majority interests which could be reflected in a lower chamber. In many instances, upper houses exercising their constitutional powers had led to constitutional deadlocks, including deadlocks over supply. Upper houses, particularly in Victoria, had been

prepared to use their power of veto in instances where governments were attempting to by-pass parliamentary control of spending. Obviously, federalism was absent as a justification for this constitutional relationship: it was based on the aims of good government under the doctrine of responsible government. Many of the men who would become influential during the Debates were aware of these constitutional conflicts, including the reasons proferred by upper chambers for their actions in oppposing executive action. These men took with them a knowledge of the benefits and the pitfalls of providing an upper house with a power of amendment and/or of veto of money bills. This knowledge became important during the Debates in framing both the money bill provisions and the deadlock mechanism of the *Constitution*.

Part II considered how the intellectual and institutional context became relevant in the Conventions during discussions on how and when the Commonwealth Executive would be politically accountable to the Senate in financial matters as well as on the debate regarding how deadlocks between the two chambers would be resolved. This Part's Chapter 4 considered how, during the discussions in the Debates regarding the powers of the Senate to deal with legislation, there existed a traditional categorisation of nationalists (in favour of the Diceyan notion of responsible government and accountability solely to the lower house) and States-righters (in favour of accountability to the Senate in all matters). The chapter demonstrated that a third category of delegates was also present and influential in achieving the major compromise of the Debates. Consisting of some of the leading figures of the Debates, particularly Griffith, Barton and Kingston, this group of delegates urged others to accept dual accountability on the basis that it reflected the systems of accountability with which their fellow delegates were already familiar. They also relied upon arguments about the flexibility of the concept of responsible government itself at this time, as well as arguments about the democratic benefits of creating an upper house capable of acting as a check upon the wishes of a bare majority. Overall, delegates in this third category urged the other two groups to reach a compromise, partly on the basis that dual political accountability was not a novel concept to the Australians and partly because, in fact, such dual accountability resulted in certain benefits for democracy. The result was that both federalism and the benefits of dual accountability under the framers' own experience of responsible government provided the basis for the constitutional provisions that render the Executive accountable to the Senate.

Part III moved from the pre-Federation history of dual accountability in Australia's bicameral systems to explore how the High Court has used and continues to use ideas about the benefits of dual accountability, including review of legislation and parliamentary control of finance, to

render the Executive politically accountable to the Senate. What emerged was that the Court has recognised that the Senate is not just a States' house, reflecting federal concerns, but also that it acts as an upper house more generally, reflecting responsible government concerns, and fulfils the functions of a house of review and ensures the operation of the principle of parliamentary control of finance. The analysis in Part III revealed that there are many judgments in which the Court recognised that upper chambers in bicameral systems in Australia (including the Senate) have a distinct and important role to play in achieving appropriate review of legislation, including the review and ultimate control of finance. The Court has recognised that these goals formed part of the motivation during the Debates for the incorporation of accountability to the Senate. It has distinguished the operation of political accountability under the *Constitution* from its British ancestor, rejecting the idea that a government can obtain approval for spending based on a vote of the House of Representatives alone. There was one exception to the Court's dominant approach on this point: the majority judgments in *Combet*.[2] In decisions following *Combet,* however, the Court returned to the broad approach to accountability, making clear that principles of responsible government itself required the Court to protect the role of the Senate as a house of review (including review of spending by the Executive). Its most recent decision in *Wilkie*[3] suggests that a return to the approach in *Combet* may be on the cards once again. If the Court does return to the majority's approach in *Combet*, it will adopt a position that is out of step with the dominant approach of the Court in previous decisions, the history presented in the Conventions as well as Australia's long history of dual accountability.

This thesis concludes that Australia has a unique constitutional history of strong bicameralism. Australia is a country that has more experience with bicameralism than any other parliamentary democracy, yet large parts of that constitutional experience and its continuing relevance have not been explored in depth in literature on Australia's Commonwealth *Constitution* to date.[4] The pre-Federation constitutional history examined in this thesis lends further support to the works of authors who have argued that Australia has a long history of 'consensus democracy' or 'strong bicameralism' in its parliaments, and that Australia's specific constitutional history and experience was profoundly influential in the framing of the *Constitution*.[5] The

[2] *Combet v Commonwealth* (2005) 224 CLR 494. (*Combet*).
[3] *Wilkie v Commonwealth* [2017] HCA 40. (*Wilkie*).
[4] J Uhr, 'Bicameralism and democratic deliberation' in N Aroney, J Nethercote and S Prasser (eds), *Restraining Elective Dictactorship: The Upper House Solution?* (University of Western Australia Press, 2008) 11, 23.
[5] Ibid, 23; A Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty One Countries* (Yale University Press, 1984), passim.

constitutional history explored in this thesis supports the argument that Australia's colonial constitutionalism had a significant impact on the form of political accountability the framers adopted under the *Constitution*. The Australian constitutions used by the framers in designing accountability to the Senate had already adopted distinct forms of accountability to their upper chambers. That accountability in unitary constitutions was obviously not based upon federal concerns but was underpinned by broader concerns around accountability of the executive to parliament more generally. Accountability to upper chambers was viewed by many of Australia's colonial parliamentarians as well as delegates to the Conventions as providing benefits to democracy, including ensuring parliamentary control of finance, providing opportunities for review and revision of legislation and for the taking of views not necessarily represented through majorities in lower chambers. These goals of accountability had a firm basis both in theory and in the constitutional models used by the framers and with which the framers were most experienced. During the Conventions, these ideas and the experiences of delegates were transposed into discussions on the operation of accountability of the Executive to the Senate. Leading delegates to the Debates urged others to accept dual accountability not just because a federal model of government would have to be adopted but because dual political accountability was the system of governance with which the framers were already most familiar. As Stone has reminded us:

> 'the Australian Senate is only the most visible and celebrated manifestation of an Australian tradition of strong bicameralism. It is too often overlooked that the institutions of national government devised in the Constitutional Conventions of the 1890s were not built from scratch but were powerfully shaped by Australian colonial constitutionalism, within which strong elective upper houses were a prominent feature.'[6]

Whilst federal concerns provide an explanation for accountability to the Senate, they are only part of the explanation. Thus, although federalism suggests one reason for bicameralism and dual accountability, the adoption of bicameralism for Australia's Commonwealth Parliament cannot be explained solely by reference to federalism.[7] Broader concerns of accountability

[6] B Stone, 'Australian Bicameralism: Potential and Performance in State Upper Houses' Department of the Senate Occasional Lecture Series at Parliament House, Commonwealth Australia, 8 November 2002), 1, available at https://www.aph.gov.au/binaries/senate/pubs/pops/pop40/stone.pdf, accessed on 9 January 2019; C Sharman, 'Australia as a Compound Republic' (Pt 1) (1990) 25 *Australian Journal of Political Science* 1, 1–5.

[7] Uhr, above n 4, 12, citing A Lijphart, *Paterns of Democracy* (Yale University Press, 1999). 201-3. Also Uhr, above n 4, 14, citing G Brennan and L Lomasky, *Democracy and Decision* (Cambridge University Press, 1993), 214-15 and A Mughan S Patterson, *Senates: Bicameralism in the Contemporary World* (Ohio State University Press, 1999), 3.

derived from theory and from the key (Australian) constitutional models the framers relied played a role in creating accountability to the Senate. This dual influence of both federal and accountability concerns has now been explicitly recognised by the High Court in *Williams*. The importance of these accountability concerns provides a reason to understand that the *Constitution* created a form of dual political accountability of the Executive to both chambers of the Commonwealth Parliament.

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