

Responsible Government  
and the Australian  
Constitution

*A Government for  
a Sovereign People*

Benjamin B Saunders

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## *Foreword*

**T**HIS IS A book about the system of national government established by the first three chapters of the Australian Constitution. They are headed ‘The Parliament’, ‘The Executive Government’ and ‘The Judicature’. Specifically, this is a book about the nature of and relationship between the institutions of national government established by the first two of those chapters viewed from the perspective of the institutions of national government established by the third. Fundamentally, it is a book about the relationship between all three of those sets of institutions of national government and those to whom the Constitution refers as ‘the people’.

The Constitution refers to ‘the people’ in two quite distinct manifestations. The first is ‘the people’ acting as nation-builders in rare and important moments of constitutional time. The people in that manifestation are those who are described in the preamble to the Constitution as having ‘agreed to unite in one indissoluble Federal Commonwealth’ under the Constitution and who, since becoming so united, have on rare occasions agreed in referenda to make alterations to the constitutional text. The people in that manifestation are constitutive. They are the creators of the Constitution and are the ongoing source of its authority as higher law. That is so even though very few of the people might be described as ‘the framers’.

The second of the distinct manifestations of ‘the people’ is the people whose government is regulated and sustained by the Constitution. They are the people who remain the ongoing source of the authority of the Constitution as higher law now acting intra-constitutionally in ordinary time. The people in that routine manifestation are those by whom the membership of the Senate and the House of Representatives, as constituent elements of the Parliament, is required by the constitutional text to be directly chosen in periodic elections and to whom the Senate and the House of Representatives are by those means directly accountable. And it is the people in that manifestation to whom Ministers of the Executive Government are indirectly accountable by reason of being required by the constitutional text to be drawn from the membership of the Senate or the House of Representatives.

The constitutional structure established by the people acting in moments of constitutional time to facilitate government by and for the people acting in ordinary time has been recognised to instantiate two great constitutional principles. Each of those principles is assumed in the constitutional structure rather than prescribed in the constitutional text. Each is the product of history. Neither exists, nor has it ever existed, nor could it ever exist, in an abstract

form disembodied from observed institutional practices. Neither therefore is, nor has it ever been, nor could it ever be, the subject of definition as distinct from description.

An appreciation of those principles and their interrelationship is essential to an appreciation of the design and practical operation of the Constitution. It is essential to understanding the constitutionally authorised functioning of the institutions of national government which the Constitution establishes and sustains. It is essential also to discerning the limitations which the Constitution expressly and impliedly imposes on the powers of a range of institutions of government within the 'indissoluble Federal Commonwealth'.

One of the two great constitutional principles instantiated in the Constitution is 'the rule of law', which has been recognised to be assumed in the separation of the Judicature from other institutions of national government and in the nature of the Constitution as higher law. First coined in the second half of the nineteenth century as a label for a principle already by then centuries in the making, 'the rule of law' has long captured the attention of constitutional scholars. That is no doubt because the principle has been seen to be at once enduring, intrinsically legal and intrinsically theoretically contestable.

The other of the two great constitutional principles instantiated in the Constitution is 'responsible government', which has been recognised to be assumed in the constitutionally prescribed relationship between the Executive Government and the Parliament and in the constitutionally prescribed relationship of each to the electoral processes by means of which the Executive Government and the Parliament is each ultimately electorally answerable to the people acting in ordinary time. First coined around the middle of the nineteenth century as a label for a principle then newly emergent in the United Kingdom and then an object of colonial aspiration, 'responsible government' has attracted comparatively less attention in constitutional scholarship. Perhaps that has been in part because it has been seen to be an intrinsically political principle, dependent largely on conventional practices rather than on formal legal constraints and in part because of the difficulty of pinning it down. Its contours have been seen to be inherently elastic and its features have been seen to be in a process of perpetual development. By the second half of the nineteenth century, it had become a subject of colonial experimentation. With the advent of the Constitution, it continued to change.

Recognising the essentiality of 'responsible government' to the design and practical operation of the Constitution, the High Court relied on that principle at critical junctures throughout the twentieth century. It did so early in the twentieth century both in orientating its general approach to interpreting the constitutional text and in expounding the nature of the power exercised by the Executive Government. It did so later that century in discerning express and implied limitations on the power of the Parliament to restrict the capacity of

the people to engage in informed electoral choice. Along with references to ‘the rule of law’, references to ‘responsible government’ have continued with greater frequency in this century.

There is tension involved in reconciling the essentiality of such an evolving and intrinsically political principle with the fixed text and structure of the Constitution. For the High Court at the apex of the Judicature, resolving that tension in conformity with the rule of law has presented and will continue to present challenges.

The question of the extent to which the text and structure of the Constitution ought to be seen to foster the development of responsible government has now long been addressed by means of the adoption of an expansive interpretation of the constitutional text insofar as that text is expressed to confer power on the Parliament and the Executive Government and through the adoption of a minimalist approach to the drawing from the constitutional structure of implications which would restrict the power so conferred. By and large, the open texture of the constitutional text has been taken to indicate the making of constitutional room for outcomes that are the product of legislative and executive choices constrained principally by political accountability.

The more difficult questions are and will continue to be those as to the extent to which fidelity to the notion of the essentiality of responsible government to the constitutionally authorised functioning of institutions of government require the Constitution to be understood as mandating some measure of judicial protection for some features of responsible government. Risk one way lies in the potential for backsliding by the Parliament or the Executive Government were those who command a current political majority permitted by an exercise of legislative or executive power to stifle or impede one or more of the political processes by which they are assumed within the constitutional design to be politically constrained. Risk the other way lies in the potential for judicial mollycoddling to be counterproductive: to end up undermining the robustness of the political processes upon which the vitality and adaptability of the constitutional principle of political constraint depends.

This book does much to augment constitutional scholarship on responsible government within Australia. In so doing, it will do much to assist in future judicial consideration of issues of that kind. This contribution is important.

Drawing impressively on colonial history, and on the history of the development of political thought, Dr Saunders portrays responsible government within Australia as a ‘political model of constitutionalism’ embodied in a written constitution framework. The framing of the Constitution, he cogently argues, was deliberately non-prescriptive: the form of responsible government which the Constitution was conceived by its framers to facilitate was understood by its framers to be a form of popular sovereignty which would be dynamic and which would evolve in ways which they sought neither to predict nor constrain.

He presents a strong argument in favour of judicial restraint, not only in considering constitutional limitations on political outcomes, but also in considering whether, and if so when, the need might be thought to arise to save responsible government from itself.

Justice Stephen Gageler  
*High Court*  
*Canberra*  
*May 2023*

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