In 1999 a new program of civics and citizenship education, Discovering Democracy, will be operating in Australian schools. This book is designed for Australian citizens of all sorts as a painless introduction to the government and law of their country.

This is not a textbook. I have not always hidden my own views, but where they are plain the reader will also find views different from my own. The book will still have served its purpose if readers quarrel with it. Needless to say, the views expressed here have no official sanction.

At the end of the book there is a summary account of today’s governmental system. How it came to be this way is explained in the main text. Readers seeking information on a particular point may well find it treated in both parts of the book; the index will guide them to the relevant pages.

I am indebted to my colleagues from the Civics Education Group for encouraging me to write the book and giving me their criticisms of it. I am particularly grateful for the support and advice of Stuart Macintyre, whose report Whereas the People launched the program to reinvigorate civics and citizenship education.

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Who Rules?

How much do you believe in democracy?

The ancient Greeks who invented democracy really did believe in it. In their democracies the citizens themselves gathered in huge open-air meetings to pass laws and decide policy on everything, from taxation to the conduct of wars. They did not simply vote for a government every three or four years; they were the government. They held their meetings every nine days, and more often if required.

Of course in our large societies it would be impossible for the citizens to meet together in one place. The Greeks managed this because their societies were tiny and most adults were not citizens. Women were not citizens, nor were slaves who did most of the work, nor were migrants. Democracy was a club for native-born, free men. Still it was a very large number of male citizens who were eligible to come to meetings. At Athens, where democracy operated in the fourth and fifth centuries BC, there were over 20,000 citizens. An important meeting could only begin when 6,000 showed up.

What a crazy idea to make a crowd into a government! Surely the real decisions were made elsewhere. No. Wouldn’t different people show up to each meeting? Yes. Wouldn’t meetings change their minds? Yes. Wouldn’t citizens be swept away by emotion? Yes, sometimes. And yet this system of government lasted for almost two hundred years. It did work. The citizens of Athens were committed to making it work.

It came to an end because Athens and the other tiny Greek states were incorporated in 338 BC into an empire run by Philip of Macedon and then his son, Alexander the Great. Later, all of Greece became part of an even larger empire, the Roman Empire. Democracy was snuffed out and did not reappear for two thousand years.

The ancient Greeks would not call our system a democracy. Democracy means literally rule by the people. Our citizens don’t rule; they elect other people – politicians – to rule. Greek democracy is called direct democracy; ours is representative democracy. Since the number of our citizens is so large, we have to persist with electing representatives, but we could make our system more like Athenian democracy. We could allow citizens a more direct and regular say in governing. If a certain number of citizens wanted a new law or if they objected to a law that parliament had passed, the issue could be settled by the people voting at a referendum. With new communications technology, it will get easier and cheaper to take the opinions of the people.
But would this improve our system of government? What if the people should vote against taxation and in favour of more government services? If Australians had had the power to overturn laws, the great migration program after World War II might never have begun. Could it be that our politicians are more responsible, less prejudiced and more far-sighted than the people? Is it better not to have too much democracy?

The Greek philosophers from whom we learn a good deal about Greek democracy were opponents of it. They saw the people as fickle, ignorant and selfish. How could giving everyone a vote produce justice and good government, which require wisdom and experience? If you want a shoe mended, you ask a shoemaker; if you want to steer a ship, you find a pilot; if you want to govern, any Tom, Dick or Harry will do. The idea’s absurd. Since most of the people are poor, democracy will become an oppressive system: the poor will use it to rob the rich, to everyone’s cost.

The philosopher Plato considered government such an expert craft that he suggested a small group of people needed to be chosen for the job. Most people are of limited capacity and are fit only to be workers and to be governed. The few good people must be carefully educated to be rulers. They must not have personal possessions and their children must be taken from them. Justice can only come from detachment. It will never come from the hurly-burly of democracy.

Plato’s pupil Aristotle was also an opponent of democracy, but his method of determining what was good government was not to draw up schemes for perfect states. Instead he looked at governments as they actually operated. He divided the Greek states into three categories: monarchy, aristocracy, and democracy. Each had their virtues, but each tended to degenerate: monarchy into tyranny, aristocracy into oligarchy, and democracy into mob rule. He thought a mixed government, which combined the three methods and guarded against their failings, would be best.

Our system is a mixture. It was not developed according to democratic principles. At no stage was it designed in order to give the people the maximum possible say. We have added a democratic element – giving every citizen a vote for parliament – to a much older system. Some say that is why it has worked so well. Some of the best things about our system – individual rights, fair trial, a government that has to obey the law – were established well before everyone was allowed to vote.

These principles of individual rights and a limited government are called liberal principles. Our democracy is a liberal democracy. Those who are content with it fear that more democracy might endanger its liberal elements. If the citizens ruled directly they might be careless about the rights of minorities or
not be too fussy about how they got things done; they wouldn’t want governmental power to be limited. Other people say that if we want to call ourselves a democracy we must ensure that citizens are more directly involved in governing. They don’t want to give up on the standard set by Athens.

**Monarchy**

In our system of government, the addition of the democratic element has been the last of many changes to rule by monarch. Our system is based on the British system because the first white settlers in Australia came from Britain, and Australia was part of the British Empire. The British system still has a monarch at its head and so does ours. Australia is now an independent country, but we have kept the British monarch. In her Australian role, the Queen is called Queen of Australia. Since she can’t live in Australia, she appoints a governor-general in Canberra and governors in the State capitals. They play the part of the monarch in our system.

The predecessors of the kings of Europe were elected. They were warrior chiefs who were made kings by the shouts of their tribesmen. A system of kingship where the king is the eldest son of the previous king was no good for them. Their leader had to be a great warrior; they couldn’t run the risk of getting a weakling. Gradually they accepted that the king should come from a royal family, but they still kept the system of election. When a king died, they would choose the best warrior from among his sons – it might be the second or third son rather than the first.

These tribespeople lived in northern Europe in the first and second centuries AD. They were outside the boundaries of the Roman Empire, but they frequently crossed into the Empire on raids and sometimes settled there. In the fifth and sixth centuries AD so many of them invaded the Empire and seized territory that the Empire itself collapsed. Quite unexpectedly the warrior kings found themselves in charge. They formed a number of different kingdoms in what is now France, England, Spain and Italy.

When the Roman Empire collapsed, the Christian church survived. It was often the town’s bishop who went out to meet the invaders in an attempt to settle matters peacefully. The bishop organised what lands the invaders should take and once their leader was settled in the palace of the former Roman governor, he visited him to assist with administration. The new kings were illiterate.

The bishops quite soon persuaded the kings that the Christian God was superior to their many gods. They became Christian kings and according to
the formula supplied by the bishops, they ruled ‘by the grace of God’. The practice of electing kings faded away. The eldest son became king after his father died. At his coronation the bishop anointed him with holy oil – he was now ‘God’s anointed’ – and put the crown on his head. This ceremony still continues. At her coronation, Australia’s Queen was anointed with oil and crowned by the Archbishop of Canterbury.

The Christian church taught that Christians should obey their rulers no matter whether they were Christian or not. The authority they exercised came from God and to disobey them was the same as disobeying God. This was the teaching of Saint Paul, the early Christian missionary. His words recorded in the Bible were:

Every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him; consequently anyone who rebels against authority is resisting a divine institution, and those who so resist have themselves to thank for the punishment they will receive.

The kings, now blessed by God, were actually very weak. They couldn’t keep the old Roman administration going. Taxes were no longer collected. In the chaos caused by the invasions the old civilisation almost disappeared. Imagine a government without taxation: it’s almost a contradiction in terms. If the king was to protect his territory and remain king, he needed an army. Since he couldn’t pay for an army, he allocated land to his followers on condition that they supply him with soldiers when he needed them. This allocation of land in return for services is known as ‘the feudal system’. The great landowners who received land from the king were the barons, who were to become the nobility.

At the heart of feudal society was a contract: barons would serve the king but only so long as he served them. When a baron made his oath of allegiance to the king, he knelt, but then he stood and baron and king kissed each other as equals. This was the survival of the bonds between warriors.

Once they were secure on their land, the barons could exercise some discretion in their service to the king. They might have to supply troops when the king asked, but they might not send all he asked for or might send second-rate men. The king didn’t know who might turn up. We still observe the custom of the head of government inspecting troops. They walk up and down the ranks, perhaps stopping for a word with one soldier. This is a survival of the practice of a feudal monarch who inspected his troops once they were assembled. For him it was no formality. As he went up and down the
lines, the king was saying to himself, ‘What sort of rubbish have they sent me this time?’

Kings who had mighty subjects with mini-armies of their own were obliged to be consultative kings. If they wanted their barons to fight for them, they had to ensure beforehand that they supported the war in question. Kings had acquired the right to tax the barons, but only with their consent. When taxpayers had armies, a tax revolt was a real revolt. A king who put too many barons offside was in trouble.

This is what happened to King John in England in 1215. He had taxed the barons heavily to pay for a war in France which he had lost and with this loss went most of the English possessions in France. He had also pushed hard his rights as feudal lord of the barons’ lands in order to raise more money. He had exacted high fees when land passed from father to son and he had ruthlessly exploited the lands he held temporarily until an heir came of age. The barons fought and beat the King and, having cornered him, they made him sign what became known as the Great Charter or (in Latin) Magna Carta.

It is a hotch-potch of a document. The King promised to abandon a whole range of policies and practices that had given offence, chiefly those concerned with taxation and his position as feudal lord. What gave the document
a life beyond its own time was a general statement about government and law. The King declared that:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

These promises did not apply to many people. Most English people were not free – they were serfs (semi-slaves) working for the great landowners. Only later were these guarantees extended to all the king’s subjects. The important principle it enshrined immediately was that kingship was limited; it had to operate according to law; it was not above the law – at least in matters of property which is what the barons cared most about.

Proclaiming a principle and making it practice are different things. Within three months King John disowned Magna Carta. The principle was kept alive by the continuing weakness of the kings and by the feudal idea that government was cooperative rule.

Later in the same century the king’s need to consult was creating a new institution, the parliament, which means literally a place of speaking. There was no standard form for these meetings at first and different groups were invited at different times. It took some time for the gathering to assume the shape we know: two houses meeting together at the same time. The great barons and leaders of the church – bishops and archbishops – had always been consulted by the king. They sat together in the House of Lords. The representatives of the lesser landholders (who were not nobles) and of the towns were newcomers to the consultation process. They constituted the House of Commons, distinctly inferior to the House of Lords, and fully deserving the name it still keeps, the lower house.

The other element in the parliament was the king who called it together when he chose to and who could dismiss it at any time. Its function at first was not chiefly to make laws. The king called it together when he needed money. Before the parliament agreed to levy taxes, it presented the king with complaints and suggestions. The king would have to attend to these if he wanted his money. Sometimes this led to the passing of new laws. On many occasions, as part of the bargaining process, parliaments made kings commit themselves to Magna Carta.

Parliaments developed in other countries of Europe and for the same reason. Only in England, however, did parliament have a continuous life from feudal times until today. Elsewhere kings found ways of raising money without
calling parliament. The French king sold the right to hold government jobs; the Spanish king obtained gold from his possessions in central and South America. Once kings had obtained resources to build up their own army, they could put down the armies of their nobles and govern without consultation. One reason why parliament survived in England was that the king could not claim that he needed an army since England was an island. He needed a navy, but ships could not be used against his own subjects.

The kings who ruled without parliaments are known as absolute monarchs. They could pass laws and levy taxes on their own authority. They rested their claim to rule on the church’s teaching that they were God’s agents on earth, and much more than the feudal monarchs, they were god-like, setting themselves far above all their subjects. You might kneel and kiss their hand; you did not embrace them. The greatest of the absolute monarchs was Louis XIV of France (1643–1715). He put himself out of reach of his subjects by shifting from Paris to Versailles, 23 kilometres away, where he built an enormous, sumptuous palace. All authority came from him. He declared that he was the state.

And yet something survived from feudal times when kings were not supreme. Even these absolute monarchs were expected to govern according to the laws and customs of their realm. They could not be arbitrary monarchs, doing just what they liked. They could not, for instance, just seize the property or goods of their subjects if they were hard up, as some Eastern potentates did. Nor were the parliaments which had been put into mothballs forgotten. When Louis XVI of France was on the verge of bankruptcy in the 1780s he was driven to summon a parliament – the Estates General was the French term – which had not met for 170 years.

Not everything is the king’s. That was an important principle. In particular the property of the subject was his own. On that right, wider rights for all would later be built. The first country to achieve this was England.

**Constitutional monarchy**

While parliaments were disappearing on the continent of Europe, the English parliament survived and triumphed over the king. The decisive battles took place in the seventeenth century when the Stuarts were the royal house. Charles I was executed by parliament (or a part of the parliament) in 1649 and his son James II was sent into exile in 1688. Then parliament’s place was guaranteed and monarchs were subject to its control. They became constitutional monarchs.

In 1603 when James I, the first Stuart, came to the throne, parliament was a settled part of the governmental system, but not yet a necessary part.
Parliament passed laws, but the king in his council of ministers could also pass laws. Parliament approved the land tax, but other taxes and the old feudal dues from the great landowners could be raised by the king alone. There was no question that the king could choose when to call parliament and when to dismiss it. There was no law that parliament had to be called. The king had complete freedom in choosing his ministers. The rights of the crown were still very extensive; the laws and customs of the realm gave parliament its place, but how much power each had and how conflict between the two was to be resolved was not clear.

James I and his son Charles I were both regularly at loggerheads with their parliaments. The constant matter in dispute was money. The costs of government were rising, but parliament was reluctant to agree to extra taxation. The tax-take was also threatened by self-assessment: landowners themselves valued their land for tax purposes. When the kings pressed for more money, the House of Commons demanded in return changes to royal policy. The king became incensed, dismissed the parliament and raised money by other means. This in turn alarmed the parliamentarians for if ever the king could raise enough money outside parliament, its days would be numbered. As the parliament pushed its claims, the kings more stridently proclaimed their royal rights.

Sadly James I’s physical appearance did not match his royal claims. He was something of a slob who disgusted those he should have impressed. He was also highly intelligent, the most learned of the English kings, who commissioned the translation of the Bible which bears his name.

His son Charles was very different. Not as clever as his father, he was more principled and determined. He took his duties very seriously, was a devoted family man and, highly unusual in a king, faithful to his wife.

Charles made matters worse for himself by imposing a new church policy on his people. England had been for almost a hundred years a Protestant country. Charles pushed the Church of England in what we would call today a ‘high church’ direction – that is, closer to the teaching and worship of the Catholic church. The King wanted ministers to wear robes, for worshippers to bow at the name of Jesus, and for the communion table to be raised into an altar.

All this disturbed good Protestants. The radical Protestants, the Puritans, who already thought the Church of England was too ‘popish’, feared the King’s secret agenda was to make England Catholic again. There were other disturbing signs. The Queen was Catholic and was allowed to have priests celebrate mass at court. After a hundred years’ lapse, Charles had accepted a papal ambassador at his court.
The charge of being soft on Catholicism was a disaster for an English king. Catholicism was not only a dreadful superstition in Protestant eyes; to English patriots it was associated with foreign conspiracies, rule from Rome, and continental tyranny, for the great absolute states of Europe, France and Spain, were Catholic. At crucial moments in their conflict with the King, the parliamentary leaders were able to whip up an anti-Catholic frenzy. When men believed their faith was at stake, they were prepared to go to extremes.

Charles came to the throne in 1625. In the first four years of his rule, he called three separate parliaments, all of which ended in acrimony. In 1629 when Charles sent word to dissolve parliament, the leaders of the House of Commons refused to go quietly. The Speaker of the House, who was then appointed by the King, rose to close proceedings. The parliamentarians pushed him back into his chair and held him down while they passed motions condemning Charles’s church policy and the raising of taxes without parliamentary approval.

Charles then determined to rule without parliament. He had accordingly to become more inventive in his money raising. By ancient custom counties along the coast were taxed to raise money for the navy. Charles levied ‘ship money’ on the whole country, arguing reasonably enough that everyone benefited from naval defence. Most taxpayers complied, but John Hampden, a country landowner and a leader in the parliamentary opposition, refused to pay. He said the King’s wish did not make it lawful. Earlier he had gone to gaol rather than agree to a forced loan which was another of Charles’s money-raising methods. The case came to court where, by a narrow margin, the judges declared ship money was legal. Hampden for a second time went to prison. This turned out to be a defeat for Charles because once ship money was legal the tax became more offensive. Payments fell away and it had to be abandoned.

Charles was so principled that, not content with forcing his church policy on Protestant England, he must force it on Presbyterian Scotland as well. There was a riot in the chief church in Edinburgh when the new service was first performed. The Scots took a ‘solemn league and covenant’ against this blasphemy and invaded England. Charles had no alternative but to call parliament to raise the funds to repel them. It met in November 1640.

The whole parliament was against him. His church policy was condemned and all the devices he had used to raise money were declared illegal. Charles had to yield on all these matters because he had no choice. He also had to agree to the execution of his chief minister and the arrest of the archbishop who had masterminded the imposition of the church policy.
The chief grievances had now been removed, but how was England to be governed in the future? The parliamentary leaders did not trust Charles and rightfully feared that if he ever got the upper hand again they would be dead men. Though they proclaimed they were defending the ancient constitution, they proposed something new: in future the king could no longer choose his ministers; he should appoint only ministers approved by parliament. They put this demand in a Grand Remonstrance which listed all Charles’s offences. The offences were blamed not on him – for the king could still not be directly criticised – but on his ‘popish’ advisers.

They had now gone too far. More and more members of parliament feared the parliamentary leaders were bent on dangerous innovations: they did not want to see a hobbled king and feared that the Church of England would be stripped of its bishops and turned into a Puritan affair. The King now had a party in parliament.

Perhaps encouraged by this, Charles planned a coup which he hoped would put an end to his troubles. With 400 armed men he invaded the House of Commons to arrest the five parliamentary leaders. Even then he was breaking a taboo: the House of Commons was in charge of its space and the King had no right to be there. The rule that monarchs and their representatives do
not enter the lower house of parliament still holds today; they go to the upper house and request the members of the lower house to join them.

Success may have excused Charles’s offence, but the parliamentary leaders had been tipped off and had escaped. Charles demanded that the Speaker tell him where they were, but the Speaker was no longer the King’s servant. He replied that ‘he had neither eyes to see nor tongue to speak in this place but as the house shall direct me’.

Charles’s attempt was further proof to the parliamentary leaders that he could not be trusted. They began to raise military forces without the King’s permission. The King withdrew from London to Nottingham and summoned loyal subjects to fight for him. The civil war began. It was an odd contest. The two parties were not fighting because they had fundamentally different ideals. Both declared that the government should consist of King, Lords and Commons. The parliamentary leaders did not envisage a government without a King, but they could not trust Charles. The King accepted that there should be a parliament, but he could not work with the parliamentarians who had so savagely harassed him.

The King lost the civil war, but ‘parliament’ did not win it. When the war began almost half the parliament was with the King. The parliamentarians who fought the King soon fell out amongst themselves and power passed to the army they had created and to its leader, Oliver Cromwell. It was he who determined that the King must be tried and executed. He drove out of the much reduced House of Commons those members who were opposed to this. Only 90 of the 500 elected in 1640 were left to endorse it. The King met his end nobly; he refused to acknowledge the legality of the court which tried him and was calm and composed as he knelt down to be beheaded.

Cromwell then ruled as military dictator. He attempted to rule with parliaments, but like James and Charles he always quarrelled with them and sent them packing. Cromwell and his followers were strict Puritans so that at the end of all its troubles England had to endure a wowser dictatorship. Charles had offended the Puritans by recommending dancing after church; Cromwell now offended London by closing its theatres.

After Cromwell died, one of his generals took charge and, sensing the national mood, called a new parliament to invite Charles’s son to return from exile and claim the throne. No new constitutional arrangements were made or promises extracted from Charles II. The parliament had simply declared that ‘according to the ancient and fundamental laws of this kingdom the government is and ought to be by king, lords and commons’ – and had left undefined the relationship between them. So the turmoil and disputes of the civil war and Cromwell’s rule had produced no acceptable alternative to the
old formula. Briefly a formula which was totally unacceptable had emerged. When the civil war was over Cromwell's common soldiers had joined in the debate about how England should be governed. A group of 'Levellers' argued that all men should be allowed to vote. Cromwell and his officers soon put them right: government existed to protect property, which is what the leaders of both sides in the war believed.

The battles between king and parliament soon resumed and continued throughout the reign of Charles II and his brother James II, who succeeded him. The quarrel no longer centred on money. All that Charles I had agreed to before the civil war remained law, so the prohibition on raising taxes outside parliament stood. Charles II simply bypassed parliamentary control of finance by receiving secret payments from Louis XIV, the great absolute monarch of France.

Religion continued to be the divisive issue. The Church of England, abolished during the civil war, was re-established on Charles's return. Those who refused to be members of it were denied freedom of worship and were prohibited from holding public office. This affected both the radical Protestants, for whom the Church of England was not Protestant enough, and the Catholics who, of course, could never join a Protestant body. Charles and James were both sympathetic to Catholicism. Charles declared on his deathbed that he was a Catholic; James was open about his conversion to Catholicism. Charles got his money from Louis XIV on condition that he support the French against the Protestant Dutch and promote Catholicism in England.

Charles's method of supporting Catholics was, by use of his royal power, to suspend the laws on religious discrimination. This gave relief to radical Protestants as well as Catholics, but Charles was mistaken in thinking that the Protestants would rally to his support. They did not want their freedom if it meant freedom for Catholics. A wave of anti-Catholic feeling swept over the country and parliament declared that the king had no power to suspend laws. Charles bowed before the storm and removed his Catholic brother James from his position as Lord High Admiral in the navy.

But the man ineligible for a government job was to be the next king. Charles had plenty of illegitimate children by his mistresses, but his Queen had no children. During the last years of his reign, parliament tried repeatedly to pass a law to exclude James from the throne. Whenever they took the matter up, Charles dismissed them. On this issue two parties formed, one of which still exists. The Whigs were those wanting to exclude James; the Tories (today's conservatives in Britain) protected James, not because they favoured him necessarily but because they didn’t think that subjects should choose
their king. They were prepared to accept even a Catholic king rather than risk the turmoil of another civil war.

When he became king, James was totally undeterred by all the controversy he had caused. He proceeded openly to favour Catholics and put them in official positions of influence. After carefully choosing the judges, he obtained a court verdict that the king could suspend the laws. The most frightening thing he did (along with his wife) was to produce a male heir. By his first wife James had two daughters, Mary and Anne, who were Protestants, as he was when they were born. Now his second wife had given James a son who would take precedence over his half-sisters. England faced the prospect of a line of Catholic monarchs.

This was too much even for the Tories. Parliamentary leaders of both parties committed an act of treason. They invited William, the Protestant King of Holland, to invade the country. William was married to James’s daughter Mary and was himself a grandson of Charles I.

When William and his army landed, support for James melted away. The commander of his army, waiting for the right moment, went over to the other side. James fled to France, which allowed parliament to declare that the throne was vacant. It invited William and Mary to be joint king and queen. England had chosen its monarch! This time there was a written agreement about the monarch’s powers, a document known as the Bill of Rights. It declared that the king had no power to suspend the laws parliament made, that only parliament could impose taxation, and that it must meet regularly. All subjects were to have the right to a fair trial and the right to petition the monarch. This settlement, achieved finally so easily and without bloodshed, acquired the name the Glorious Revolution.

The new arrangement was the first liberal system of government. It limited the power of the king, who could only rule through parliament, and it granted subjects some basic rights. It was not a democratic system. Only property holders voted for parliament, which was made up of the great landowners. Ordinary people enjoyed the civic right to a fair trial; the only political right they had was to petition the king.

The parliamentarians who set up this system did not think of themselves as liberals; liberalism as a doctrine developed later in the eighteenth century. They were backward-looking revolutionaries who always declared they were only struggling for their ancient rights and liberties. In one sense Charles II and James II were better liberals than their parliamentary opponents because they did not want to deprive people of their rights on account of their religion. What drove the parliamentarians to their furious attacks on the Stuart kings was the desire to protect the Protestant religion and to stamp out
Catholicism. Out of this illiberalism came a liberal system of government. To preserve it, the parliamentarians declared in the Bill of Rights that in future no English monarch could be a Catholic. That provision still stands and applies to the monarch of Australia as well.

The Bill of Rights did not reduce monarchs to figureheads. They could still choose their own ministers and shape government policy. However, since ministers could only govern if they were acceptable to parliament, which controlled the money, gradually the balance between king and parliament shifted. Parliament chose the ministers and the king had to accept them and act on their advice. This is the system of government in Australia today. It is called the Westminster system because Westminster in London is where the British parliament sits.

The powers of the monarch as head of the government were never formally taken away. It is only by convention that the monarch acts on advice of ministers. If you read our Commonwealth constitution literally, you will gain a totally wrong impression of how our government works. The monarch still appears as head of the government and there is no provision that the governor-general (the monarch’s deputy) has to act on the advice of ministers. That happens because of the conventions of the Westminster system.

Some democratic reformers argue that when power was in effect taken from the monarch, some of it ended up in the wrong place. The prime minister is the new monarch! The prime minister and ministers can use the monarch’s old power to declare war and enter into treaties. They may consult parliament on these matters, but they are not obliged to. The reformers want to make this an obligation.

The signing of treaties has become controversial in Australia. Treaties now deal with a huge range of matters, not simply peace settlements and trade agreements. By signing an international treaty on, say, the environment, the Commonwealth government acquires the power to pass laws on the subject even though the constitution had left the matter to the States.

The monarch and those acting in place of the monarch have not lost all power. The so-called reserve powers remain. They are the powers which allow the head of state to be an umpire in times of crisis and the ultimate protector of the constitution. They are not defined in law and there is some dispute over their extent. One power that is agreed on is the right of the monarch to dismiss a government that is acting illegally or unconstitutionally. The monarch remains the guardian of the Westminster system.
Democracy

Before ordinary people could obtain political rights, thinking about government had to change. If authority came from God, it rested on a monarch to whom everyone else was subject. If it came from tradition, ordinary people traditionally had been of no account. Tradition gave rights to property holders.

The change in thinking began just after the Glorious Revolution of 1688. John Locke published *Two Treatises on Government*, in which he argued that government was a contract between ruler and people. Contract was not a new idea, but the people making the contract were new. They were not people of a certain status living in a particular place; they were simply human beings possessing rights and living ‘in a state of nature’ before there was government. Locke did not actually know how people had lived in a state of nature: he imagined this situation to get at the heart of the relationship between rulers and ruled. He thought the people must have agreed to form a government to protect their rights to life, liberty and property. If these were not protected by the government, the contract was at an end. So the people had a right to reform or remove the government; they had a right to rebel. That idea was certainly a rarity in theories of government. This was the first statement of liberal political thought.

Though Locke’s book was published after the revolution, it may have been circulating beforehand and encouraged the parliament in its stand against James II. It definitely gave the American colonists the intellectual ammunition for their revolt against the British in 1776.

John Locke’s ideas were taken up with great enthusiasm by French progressive thinkers in the eighteenth century. What a contrast his theory was to the reality they faced: an absolute monarch ruling by divine right. These thinkers were reshaping ideas on all subjects by appealing to reason and nature, not to God, or the church or established authority. This intellectual movement is known as the ‘Enlightenment’ because it aimed to free humankind from ignorance and superstition and lead it to a better future.

Like Locke, the French thinkers worked with the concept of man and what man naturally was. Rousseau’s book *The Social Contract* begins ‘Man is born free and is everywhere in chains’. However, while these thinkers talked of man and his natural rights, when some of them thought of applying their theories, ‘man’ was not all men and certainly not women. But if rights came from being human, how could they be denied to anyone? This quickly became very clear in the French Revolution.
When King Louis XVI summoned the Estates General, it met in the traditional way: there were three houses, one for the nobility, one for the clergy and one for the third estate, the commoners. The middle-class leaders of the third estate, representing over 90 per cent of the people, refused to accept that the other two houses could veto their plans for reform. The third estate declared themselves a national assembly and invited the clergy and nobility to join them. The King was contemplating closing down the Assembly, when the people of Paris seized arms and captured the great royal fortress, the Bastille. The revolutionaries now had an army of their own and the King was forced to accept the Assembly’s existence.

The Assembly drew up the Declaration of the Rights of Man and Citizen which is based on Enlightenment thought about rights and government, not merely for French citizens, but for people everywhere. The revolutionaries wanted their revolution to spread and the words of their declaration were a rallying call to humankind. ‘Men are born and remain free and equal in rights’, said article 1. ‘All citizens are to be equal before the law and all are to participate directly or through representatives in the making of law’, said article 6. Here you might think is a democratic charter. It certainly became and remained that, but when the Assembly which drew it up planned a constitution, it divided citizens into ‘active’ and ‘passive’ and gave votes only to the active, who were to be property holders.

These restrictions could not stand. The common people of Paris who had saved the revolution would not accept them. They took the declaration at its word – they were full citizens. They met regularly all over Paris to discuss public affairs and when the representatives of the people were not acting as they thought right they invaded the Assembly to tell them so. The constitution which had excluded them had retained the King, but after the King had made abundantly clear that he wanted to overturn the revolution, the people of Paris deposed him by an armed assault on his palace.

The people of Paris included women. They took part in the demonstrations and protests and were allowed to join the revolutionary clubs. If rights came from being human, why shouldn’t women have rights? Olympe de Gouges, an actress, published in 1791 The Declaration of the Rights of Women and Citizenesses. This was not a message the male revolutionaries wanted to hear. Soon they were putting pressure on the women to return to their traditional roles. However, women now had an argument for rights which in the long term could not be denied.

The next constitution in 1791 gave the vote to all adult men. The greatest state in Europe, the home of royal absolutism, was in the hands of the people. The people’s representatives resolved to execute the king. They then had to conduct a war against the enemies of the revolution at home and abroad (for
the revolutionaries had courted a war with all of Europe). They created a
government which ruled by terror; it ignored the Declaration of the Rights
of Man and processed anti-revolutionary suspects through kangaroo courts
to the guillotine. The common people of Paris out on the streets acted as the
government’s vigilantes.

All the fears of democracy as mob rule and tyranny had been realised.
In England the revolution had at first been welcomed for it seemed that its
aim was to produce a constitutional monarchy like its own. With the execu-
tion of the King and the terror, the governing classes of England became
fierce opponents of the revolution. They were afraid that their people would
catch the contagion from France. And not without reason, for thousands
were reading The Rights of Man, a book by Tom Paine, an Englishman who
had been at the centre of the revolutions in America and France. The book
was banned and any moves for popular organisation for democratic rights
stamped out. In Edinburgh five men were transported to Australia for
attending a convention of the Friends of the People.

As the revolution unfolded, it confirmed in the English their opposition to
theories about rights and governing from first principles. Their ancient consti-
tution of King, Lords and Commons preserved more liberty than French paper
constitutions which had led to mob rule. This attitude was also shared by
nearly all those who wanted reform in England because they could not be blind
to the fact that the revolution in France had failed at terrible cost. The reform-
ers wanted to adjust and improve the British constitution, not ditch it. They,
like everyone else in England, already had some rights and when the panic over
the revolution passed, were free within strict limits to organise to achieve more.

The virtues of the British constitution were usually explained by its being a
mixture of the sort Aristotle recommended. King, Lords and Commons
were his monarchy, aristocracy and democracy, balancing each other. It was
more true to say that England enjoyed stable government because the landed
class was in control of both houses of parliament and the king had to follow
their policy. It was certainly odd to call the House of Commons the democ-

tric element in the constitution. Its members were elected, but by property
holders. Most of the people did not own property.

The Commons was becoming less credible even as a representative of prop-
erty. The system of electorates had grown up in an ad hoc way and had never
been reviewed. Towns which had disappeared completely still elected
members. The man who owned the land where a town had stood was the
sole elector. This piece of land was bought and sold at a high price because
you were buying a seat in parliament. If the town had a few inhabitants left,
their landlord or the person who provided them with the most beer
controlled the election. New towns had no representatives at all; towns
which had grown rapidly had fewer members than stagnant or non-existent towns.

The distribution of population and wealth in England was changing rapidly because of the Industrial Revolution. Towns were booming because they were home to the new steam-powered cotton factories and the growing number of iron works and metal shops. Britain was becoming a society never seen before where trade and industry were more important than agriculture and most of the people lived in towns.

This economic transformation greatly increased the number of middle-class people. It created a working class because now working people were massed together in the towns, sharing common experiences and beginning to organise to improve their lot. Their living and working conditions were often appalling. There was no control over safety and health in factories or of hours worked. They lived cramped into old housing or in jerry-built new houses. An economic slump threw thousands out of work and brought them close to starvation.

This society was still run by the landowners. In the 1820s, 1830s and 1840s their control was challenged by middle-class and working-class people, sometimes acting together, sometimes apart. The size and reach of their great organisations was an entirely new element in politics.

The middle class gained entrance to the political world in 1832 when parliament for the first time reviewed and reformed the whole system of representation. This was the great Reform Act. It took seats away from non-existent and tiny towns and gave them to the new and growing towns. It did not, however, operate on the principle that electorates had to be equal in population. The plan was still to represent interests – the landed interest, the manufacturing interest and so on. The Act set for the first time a uniform rule on the qualification for the vote in the towns. The amount of property to be owned or rent to be paid included the middle class but excluded the working class.

This Act had only been passed after a tremendous mobilisation of the people for there was great opposition to it within the parliament. The numbers and muscle in the great meetings and processions were provided by the working class. But then they were betrayed. They were not given the vote by the Reform Act. They then formed their own organisation to make Britain a true democracy. Their demands were set out in a People’s Charter in imitation of Magna Carta, which was the treasured symbol of English liberty. They took the name Chartists.
The charter had six points:
1. a vote for all men;
2. voting to be secret so that workers would not be afraid of offending their landlord or boss by the way they voted;
3. any man could stand for parliament (which meant the abolition of the existing property qualification);
4. members of parliament to be paid (necessary if workers were to get into parliament);
5. electorates to have the same number of voters;
6. parliament to be elected every year.

Their strategy was to make their charter into a petition to parliament and collect so many signatures on it that parliament would have to take notice. Their first petition was signed by over a million people and was 5 kilometres long. When it arrived in the House of Commons the members refused even to discuss its demands. The same thing happened with their second petition and their third. By then the Chartist organisation was fading away.

What else could they have done? They discussed going on strike until their demands were met, causing a run on the banks, spending their money only at shops which supported them – and armed rebellion. Some Chartist leaders were convinced that only force would work and others threatened it in their
speeches. They ended up in gaol. There were a couple of botched attempts at armed uprisings. At Newport in south Wales 3,000 miners marched on the town and were met by a small group of soldiers who had no trouble in dealing with them. Twenty-four miners were shot. The leaders were transported to Australia.

Most Chartists were opposed to violence. Even if more had supported it they had no chance of success because the landowners and the middle class and the government were all determined to resist. Some middle-class people wanted further reform (like the secret ballot) but they did not want the working class to take over the parliament, which is what they feared the charter would lead to. Popular risings usually only succeed when the governing classes are disunited and a government is weak or indecisive.

The Chartists’ was a radical program, but they were also remarkably restrained. These were terrible times and yet men close to starvation accepted that protest had to be peaceful. The Chartists ferociously attacked the aristocracy, but their plan did not include abolishing the House of Lords. They made no attack on the young Queen Victoria. They were respectful of English tradition. They didn’t appeal to French theory to support their claims, but to a supposed golden age in England’s past when the people did govern. When they were accused of being rebels, they pointed to the rebel lords and gentlemen who had got rid of James II.

After the failure of their third petition in 1848, the Chartists moved into other activities like trade unions and worker education. They had to live a long time to see their charter implemented. Most workers in the towns got the vote in 1867, in the country in 1884; but it was not until 1918 that all men were allowed to vote. Payment of members was not introduced until 1911 when the length of parliaments was reduced from seven years to five.

In Australia most of the charter was adopted much more rapidly. The period of the great movements for reform in Britain coincided with the first migration of free people to Australia. The migrants had an education in democracy before they set sail. Even if they were not activists and even if they were not democrats, they had been witnesses to something entirely new: a sustained agitation by working people requesting to be treated as full citizens.

**Australian democracy**

British government in Australia began as one-man rule. The governor in early New South Wales was the government and the maker of local law. It was not until 1823 that he was advised by a small council which he himself nominated. In other colonies the governor had a council from the beginning. Later the councils were expanded, given more responsibilities,
and two-thirds of their members were elected by voters who had to pay so much rent or own so much property, as in Britain. This happened in New South Wales in 1842; Victoria, South Australia and Tasmania in 1850; and Western Australia in 1870.

These changes made no difference to the composition of the government. That still consisted of the governor and his officials, who were appointed from Britain. The officials were in effect the ministers, responsible for finance, lands, police and so on. The councils had no voice in the choosing of these people and officials were not responsible to the councils. They and the governors were responsible to the British government.

The councils made local laws, but not on all subjects. Land policy, which is what the colonists were most interested in, was kept in British hands. Nor did the councils have full control over the spending of taxes. Otherwise, like the early parliaments, they would have tried to control the governor by holding back his salary.

As British settlers overseas, the colonists were entitled by British tradition to govern themselves. Obviously convicts could not govern themselves and the British government was wary of moving too quickly to self-government. The colonists asked for it but rarely with any great sense of urgency. In the 1820s and 1830s ex-convicts agitated for a fully elected local Assembly but chiefly because they wanted their status as free people confirmed by becoming voters for it. In the 1840s there was a stronger demand from the squatters for self-government so that they could turn themselves into the owners of the lands they had seized. This quickly came to an end when the British government granted them not ownership but long leases.

The movement for self-government was weak partly because the colonists could exert influence on the British government. They petitioned the monarch and the parliament or lobbied at the Colonial Office. John Macarthur, the sheep man, boasted that he had been responsible for the recall of numerous governors. The squatters obtained their leases after a lobbying campaign in Britain.

More importantly, the governor and his officials provided good government. It was not inattentive or grossly inefficient and corrupt or tyrannical. Australians have never known governments like this. They complain about government, but they do not fear it. The one monumental failure by a governor and his officials was the administration of the Victorian goldfields in the 1850s. The system of licences to dig had been developed by a British official in New South Wales. There it did not give much trouble because the gold commissioners were attentive and the fields small. The local landowners
complained about the British official because he had made it too easy to go digging.

In Victoria the fields were immense, the commissioners remote and the police who checked on licences corrupt. The protest movement at Ballarat in 1854 demanded an end to the licence and the commissioners. Under the influence of Chartists, they also asked for votes for all men and payment of members. The protest ended in bloodshed when a small proportion of the protesters formed a stockade at the Eureka lead and hoisted a rebel flag. British soldiers attacked the stockade and killed 30 diggers.

Eureka has become an important symbol of democracy, but by the time it happened Britain had already promised self-government to the colonies. The British government did not want to govern against determined colonists. It had had bad experiences twice, first with the American colonists in the 1770s and then with the Canadians in the 1830s. The government got into its first serious trouble with the Australian colonists when it decided to resume the transportation of convicts in the late 1840s. This led to popular protests in four colonies and there was a whiff of revolutionary talk in the air, nearly all bluff. With a change of government in Britain, the policy was abandoned in 1852 and the colonial councils in New South Wales, Victoria, South Australia and Tasmania were told they could draw up constitutions for self-government. (Western Australia did not become self-governing until 1890. Queensland was still part of New South Wales. When it separated in 1859 it took over the New South Wales constitution.)

The colonies were to have their own parliaments of two houses. The premier and ministers were to be members of parliament and to have majority support in the lower house. Governors were no longer to be active in government, but to act on the advice of their ministers. This would establish the Westminster system in Australia. It is sometimes called ‘responsible government’ because ministers are responsible to parliament. The colonists would only be self-governing in internal matters. Foreign affairs and defence would remain in British control.

In planning the new constitutions, nearly everyone agreed that the British model was the one to follow. The respect for the British constitution was immense. In New South Wales the conservative William Wentworth, the leader of the squatters and large landowners, planned to imitate the House of Lords exactly. He proposed that a colonial nobility be formed so that there would be lords and dukes for the upper house. Middle-class and working-class people opposed the scheme and it was laughed out of court. Daniel Deniehy, a witty democrat, called the scheme ‘a bunyip aristocracy’. But liberals and even some democrats agreed that there had to be a conservative upper house if the local constitution was to be like England’s. They wanted
it elected by property holders. This was adopted in Victoria, South Australia and Tasmania. In New South Wales, after Wentworth’s scheme was abandoned, the upper house was to be made up of people nominated by the governor.

Except in South Australia, the lower houses were far from democratic. But as soon as the new constitutions came into operation democratic reforms were carried in New South Wales and Victoria. In those two colonies and South Australia, all men now had the vote, by secret ballot, in more or less equal electorates, and with no property qualification for members of parliament. Four of the six Chartists’ points had become law.

From the 1860s Australia was famous around the world for its democracy. In the United States the secret ballot was known as the Australian ballot. In Britain Australian experience was used to debate the pros and cons of democracy. The program for Australian democracy had come from Britain. There, after a long struggle, nothing had been achieved; in Australia at the first time of asking there had been success. Why?

In Australia conservatives were handicapped by the way population was distributed. The main enterprise was wool-growing on huge properties, but the properties employed very few people directly. Wool created more jobs on the roads, in the wayside towns and in the great port cities. These were the centres where liberals and democrats were strong. Then in the 1850s the gold rush produced new democratic communities and towns dotted through the pastoral countryside.

In Australia there was also less resistance to democratic reform because the well-off did not fear the lower orders in quite the same way as the aristocracy and middle class did in Britain. There masses of people were wretchedly poor, dirty and ignorant. You did not have to be alarmist to worry about giving them the vote. In Australia there was no such under-class. More working people owned property or rented decent houses and indeed more and more were qualifying for the vote as property values rose in the inflation caused by the 1850s gold rush. In Victoria after Eureka the monthly licence was replaced by an annual miner’s right. If you held an annual licence from the crown, you were entitled to vote so the diggers already had the vote. And no matter how democratic the lower houses became, the upper houses would ensure that the democracy did nothing rash.

The upper houses did turn out to be great brakes on democracy. Time and again popular policies were rejected there. Very little could be done about it. There were no provisions for resolving deadlocks between the houses. At elections for the upper houses only property holders voted and elections were staggered so that it took many years for the membership to change.
In New South Wales and in Queensland, which had copied the New South Wales constitution, things were not so bad. The members of their upper houses were nominated by the governor. If they defied the wishes of the people, the government could advise the governor to appoint new members. By this means the government in New South Wales passed its laws to allow settlement on the squatters’ lands in 1861.
Towards the end of the century there was a strong movement to make the constitutions of the colonies more democratic and some important changes were made. Property holders were no longer allowed to vote in each electorate where they held property (a survival from the days when all votes depended on property). Payment of members was introduced. Victoria had acquired this first in 1870; the other colonies followed in this order: Queensland 1886; South Australia 1887; New South Wales 1889; Tasmania 1890; Western Australia 1900. With the introduction of payment of members five of the six Chartist points had been achieved. Annual parliaments, the sixth point, were never adopted, but parliaments were reduced to three-year terms.

Women were given the vote in 1894, in South Australia, something which had not been demanded by the Chartists. It took some years before the other colonies followed: Western Australia 1899, New South Wales 1902, Tasmania 1903, Queensland 1904, Victoria 1908. Women had to struggle harder and longer to get the vote than men. Against a great deal of mockery, they argued they were citizens and were entitled to political rights. Like the Chartists, they assembled massive petitions to show the amount of support they had.

This second wave of democratic reform attacked the upper houses, but made very little impression on them. It was because of all these disappointments that the Commonwealth constitution drawn up in the 1890s provides that the upper house (the Senate) will be elected by the same people as the lower house and that there is a method for resolving deadlocks between the two houses.

The first significant change in the States’ upper houses came in 1922 when the Legislative Council of Queensland was abolished. Because it was a nominated house, the government could advise the governor to appoint new members to it. A Labor government persuaded an acting governor to appoint so many new Labor members that the house was prepared to vote itself out of existence. A Labor government in New South Wales tried the same thing in 1925 but some of the new members decided once they were seated that they would rather stay. Queensland is still the only State without an upper house.

Property holding as a qualification for voting in State upper houses did not disappear until the second half of the twentieth century. Citizens of all sorts were not allowed to vote for the upper house in Victoria until 1950; in Western Australia until 1964; in Tasmania until 1969; South Australia until 1974.

Now that all upper houses (including that of New South Wales) are elected by the citizens, can we say that parliamentary democracy is established? Or is Queensland a better democracy because it has no upper house? There is a tension here between liberal principles and democracy. If we feel that
governments have become too powerful and their actions need to be closely scrutinised, we might be glad that an upper house questions them or blocks their measures. If we want governments which have been elected by the people to put their policies into action, we will be opposed to upper houses getting in their way.

Whether upper houses can get in the way of governments may depend on how they are elected. If the two houses are elected in the same way, the upper house may simply mirror the lower house and the government will control both. In most States lower houses are elected by preferential voting. This means that usually one or other of the major parties wins the seats, with the preferences from minor parties and other candidates determining, when the issue is close, which of the parties it will be. Since the minor parties themselves don’t win seats, there is more likelihood that one party will have a clear majority of seats. This helps to make for stable government.

For elections to the Senate and the upper houses of New South Wales and South Australia proportional representation operates. This gives minor parties a better chance of winning seats and sometimes they hold the balance of power. When this happens the upper house will act as a house of review.

Equal electorates (that is, with the same number of voters) for both houses are necessary for a democratic parliament. For most of our history this has not been well observed. If electorates were more or less equal, they frequently ceased to be so as population drifted from the country to the cities. An imbalance in favour of the country was defended on the old grounds of ‘interest’: since the country produced most of the nation’s exports, it deserved extra representation. Now in the Commonwealth and most of the States there is machinery to review electorates regularly and make adjustments so that they remain equal.

The opponents of democracy always argued that equal electorates was a highly artificial scheme. Parliament should represent society as it actually operates in its social groups and economic interests. Some modern democratic reformers have returned to this view. They propose that people vote as workers, business people, homemakers or students. They argue that this would give better representation of our interests than being lumped together in a geographical area with people of all interests. We would also feel better about the system because we would be more closely connected to it.

Whatever the electoral system, governments deal with groups and interests. If a prime minister wants to win acceptance of a new and complex policy he brings together what are today called the ‘stakeholders’, everyone with an interest in the issue. When the Hawke Labor government took office in 1983 it held an economic summit with representatives of employers, unions and
State governments. The summit met in the House of Representatives chamber. This offended some people since it made it very obvious that parliament was not being used as the forum for bringing the representatives of the people together and resolving important issues. On the other hand, there was more interest in this summit than in a sitting of parliament. It did seem much more to represent the nation.

In the nineteenth century democrats wanted to reduce the time between elections. Recently State parliaments have been given increased terms: from three to four years. The case for doing this is that governments often have to adopt unpopular measures. If they are worried too soon about getting re-elected, the time when they can govern well is very short. Most parliaments made this change without consulting the people. In New South Wales in 1981 a referendum was held. The voters agreed to the change and so accepted that good government requires that their influence be restricted. Aristotle would have been pleased at this wisdom.

**Australian parties**

Visit the House of Representatives in Canberra when parliament is sitting. Mostly you’ll find very few members sitting there. The place is virtually empty. But then a vote is to be taken. Bells ring and members flood in. They haven’t heard the speeches, some don’t know what they are voting on, but they all know what side to vote on. The Liberal and National Party members vote together, the Labor Party members vote together. The votes are entirely predictable.

Democratic reformers say that the parties have hijacked the parliament. Members don’t vote according to the wishes of their electors or what they think themselves; they vote according to their party. The reformers also say that parties have undermined the Westminster system of government. According to the theory, members of parliament watch a government carefully and if it performs badly they will refuse to support it and it will cease to be the government. Parliament is meant to be in charge of the ministers. But now party discipline is so strong, no matter what ministers do, their fellow party members will support them. They become ministers because their party is in a majority and so long as the party holds together they will remain ministers. The opposition party may move that the house has no confidence in the ministers, but ministers will always have the numbers to save themselves. It’s the ministers who control the parliament.

So what would a parliament without parties be like? We don’t have to imagine this; we can look at the first thirty years of the parliaments of the Australian colonies, from the 1850s to the 1880s. There were no parties of the sort we know. Sometimes there was a division between liberals and...
conservatives, but there was not a liberal and a conservative party and the members did not have to vote with each other. Mostly members of parliament were not divided into two sides. They formed loose groups among themselves – ‘factions’ they are called – with plenty of movement between the groups. One group and its supporters might form a government, but soon some of the supporters would withdraw their support and the government would fall.

Frequently at elections politicians did not say they were members of a party or even a group. They said they would support good government, the development of the colony and, in particular, the very necessary work of a railway to their electorate. When they got elected, they would support a government which promised to build the all-important railway. If the railway did not appear, they would desert the government and look for another group to support.

There is no doubt that the Westminster system worked properly at this time. Ministers were responsible to parliament and often ministers would lose parliament’s support and cease to be ministers. The disadvantage of the system was that governments were very unstable. A government which lasted more than a year was doing well. Once parties developed, governments became much more stable. A stable government has time to carry out its plans and to think of doing things whose benefits will only come years later. It knows that its supporters, bound by party discipline, will not desert it when it does unpopular things or doesn’t give an electorate a railway.

The first modern party to develop in Australia was the Labor Party. It was formed by trade unions in the 1890s after they had been defeated in a series of great strikes. At the same time a long period of prosperity ended and many workers became unemployed. The Labor Party wanted to improve wages and conditions and get the government to provide more jobs. Some of its members wanted to replace private businesses with socialism where there is
no private profit and businesses are owned by the government or the workers. For most this was a distant ideal – they wanted immediate benefits first.

The Labor Party was very suspicious of politicians. It didn’t want the members it elected making up their own minds on issues. They were there to get the Labor program voted into law. They should meet together before votes were taken, decide which way they would vote to advance the Labor cause, and then everyone had to vote that way. Anyone who did not, would be expelled. This meeting of the party members was called ‘a caucus’.

The Labor Party grew very rapidly. It had the advantage of being the first well-organised party. It had thousands of workers who campaigned for the party for nothing. Usually candidates had to pay people to go from house to house asking people to vote for them (voting was voluntary) and they had to provide free drinks to their closest supporters who ran their campaign.

Within twenty years of Labor’s formation, all the politicians outside the Labor Party combined to form one party to fight it. This was the first Liberal Party, formed in 1909. It has re-formed several times and gone under different names – Nationalist Party from 1917, United Australia Party from 1931 – until it became the Liberal Party again in 1944. This party was supported by business and middle-class people. Middle-class women did a lot of the voluntary campaigning. The party defended private enterprise from Labor’s attacks and said socialism threatened individual liberties and would not work.

Politicians were important in forming the Liberal Party and they were allowed more freedom than Labor members. They were expected to follow the party program, but they were not expelled for voting in a different way from their colleagues. Liberals attacked the Labor Party for undermining parliament as a place of debate and considered judgement, but if they were to beat the Labor Party they could not be too different from it. Party discipline became tighter in Australia than in other parliamentary democracies. Even the Speaker in Australian parliaments is not independent. The majority party appoints the Speaker and expects the Speaker to support it.

The National Party began during World War I as the Country Party. Farmers wanted a party of their own because they thought neither of the other parties understood them. The Labor Party attacked private ownership and wanted farm workers to be paid more. The Liberal Party was too friendly with the city businesses which charged farmers too much for selling their produce. Both parties cared more for the cities than the country. If their own third party was to succeed, it would have to be well disciplined. The National Party has been run much more like the Labor Party than the Liberal Party, though it usually cooperates with the Liberal Party to form governments.
As we watch political parties form, we cannot believe they are the enemies of democracy. They help democracy by allowing people of similar interests and outlook to organise and increase their influence. The workers voting Labor, the middle-class women voting Liberal, the farmers voting National were pleased to have a party that spoke for them. The parties are mini-democracies in themselves. You can join a local branch and have an influence on the party program and who gets selected as the party’s candidates.

Dream on, say the democratic reformers. Very quickly parties are run from the top, not by the ordinary members. The paid officials and the leading parliamentarians take charge. They manage the party’s conferences so that the ordinary members don’t rock the boat. They are half-right about this. Leaders may be strong, but most start off as ordinary members. Local members cannot be ignored because they are needed in campaigning at elections. When it comes to choosing the party’s candidate for an election, the local members have a say. They would prefer to be fully in charge, but the leadership wants to make sure that good people are chosen and perhaps a place found for a good candidate from outside the district. Candidates are now usually chosen by a panel of local and central people.

The newest party, the Democrats, is determined not to be like the others. Party policy is arrived at by a vote of all members. Party members choose the
party’s candidates for elections by secret ballot. In other parties the leader in parliament is chosen by the party members in parliament. The Democrats’ leader is chosen by a vote of all members. In parliament Democrats are not expected to vote ‘like sheep’, but if they vote differently from their colleagues they have to explain why to party members. It may be that the Democrats can only be so democratic because they are a minor party with no hope of forming a government.

Even for people who are not members of them, parties serve a useful purpose. You become aware of this when you have to vote and there are no parties. In a local government election, one candidate will say he is in favour of consultation and efficient local services and he is president of the marching girls. Another candidate will say he is in favour of consultation and efficient local services and he is president of the scouts. How do you choose between them? If one said he was Labor and the other Liberal you would have some idea of their approach to government.

Not really, say the democratic reformers. Perhaps once, but not now. Parties may claim they are very different, but actually they are very similar. Instead of clear policy differences, we are presented at elections with slick advertising campaigns that are concerned with image not substance.

Experts have long noted that in a two-party system the parties will tend to come together. If they just pleased their keen followers, they could not get a majority of the people to support them. Both parties have to appeal to people in the middle ground, those who will change their vote from one party to another. To secure the support of these people, they may have to water down their program and disappoint their keen followers. And so in practice they end up not very far apart.

Recently other forces have moved the two major parties closer together. There has been a decline in the proportion of blue-collar workers in the workforce. Labor has made up for this by attracting many professional people to its support – schoolteachers, nurses, public servants. It has dropped socialism even as an ideal and has developed close relations with business. The Liberals, once the party of business, now attracts the votes of many working people.

Parties have a great will to survive. Even though the world in which they were born has disappeared, they will attract new supporters and live on. They have an established organisation and a core at least of people who will always vote for them. They will squeeze out, if they can, any newcomers. There are many more members of conservation groups in Australia than members of the political parties. The old parties have met this threat by adopting conservation policies. It was easier for Labor to become a green
party. It was used to putting curbs on business which is often what conservation required. But then conservation policies on forests began to threaten the jobs of workers, Labor’s traditional supporters. So Labor had to be a little less green. Businesses who did not want green policies to interfere with them should have been able to look to the Liberal Party, but that party too saw the need to attract the votes of conservationists. Its business supporters then complained that it was holding back development. Even though it gets them into difficulties, the parties try to harness every new cause to their side.

The democratic reformers say it would be much better if the conservationists and every other cause had their own members of parliament. This could happen if the system of voting for all houses of parliament, lower and upper, was changed to proportional representation. This prevents elections becoming contests between just two major parties and allows all parties, large and small, representation in the parliament according to the strength of their support. With this change, there might be five or seven parties in the House of Representatives. We could then have a party closer to our own point of view and not two major parties which are always going fuzzy as they try to please too many people.

But with this many parties no one party would have a majority. There would no longer be such stable government. Good, says the reformer. Why make stability the chief aim? A stable government is an unaccountable government. A government without a guaranteed majority would have to work hard to persuade parliament that all its measures were worthwhile.

A stable government in a two-party system is not as unaccountable as the reformers claim. It will be able to pass its laws through the lower house, but it may not control the upper house which may block its laws and set up inquiries into its doings. In the lower house it will be attacked by the opposition party whose criticisms may be taken up in the media. Each day in parliament there is question time, when members can ask ministers questions about their policy and administration.

Members of the same party meet regularly when parliament is sitting. Here, behind closed doors, the real debates take place as the members decide what policies to support and how they will vote in parliament. In the majority party – that is, the party which is governing – ministers have to explain and justify what they are doing to their own party members. Backbench members may criticise ministers for not following party policy. Ministers will explain that unforeseen difficulties have arisen or that a policy would cost more than expected. When governments do something unpopular, backbenchers worry that they will lose their seat at the next election. Ministers tell them that their policies will bring long-term benefit or that a few people will suffer but many
more will benefit. Ministers sometimes lose these arguments and policies are changed.

The leader of the party is elected by the party members. This person becomes the prime minister when the party is the majority party. In the Liberal Party the prime minister chooses the ministers. In the Labor Party they are elected by the party room meeting (the caucus). In both parties, prime ministers will only keep their job if they have the support of a majority of the party. Prime ministers have been removed by parties. This is the ultimate hold a party has over its government. Some experts say we should still use the term ‘responsible government’, but the responsibility of ministers is now to the party rather than the parliament.

The democratic reformers are not persuaded. All this is a long way from rule by the people. The best way to achieve that, they claim, is by the initiative and referendum. This scheme allows a certain number of people to sign a petition for a new law and the law is then voted on by everyone. You bypass parliament. You bypass the politicians.

Many States in the United States run these schemes. Voters have been more responsible in using them than the opponents of direct democracy feared. There are problems, however. Large organisations and businesses have a great influence on the outcome. They hire people to collect signatures and can pay for television ads (sometimes misleading) to run before the vote is taken.

This is a reminder that democracy cannot be separated from the society in which it operates. Democracy in a small country of farmers and craftsmen will be different from democracy in a large country, like Australia, of big organisations, big business and advertising. These affect what sort of democracy we can achieve. It is impossible for us to reach the Athens standard of direct popular involvement.

Even though the Athenians ruled directly, they still had politicians. They guided discussions and took responsibility for carrying out the people’s wishes. Democratic reformers who want more direct democracy are sometimes driven by hatred of politicians. They will never get rid of politicians. Politicians are necessary when government is by discussion and argument. If you don’t want politicians, try a dictator.
For the ancient Greeks, a society and its government were not separate things. They belonged to a ‘polis’, what we translate as a city-state, and from which we get our word ‘politics’. The polis was small in area, a town with a circle of country around it which you could walk across in a day or two. They could not imagine a large society working well because they wanted all citizens to have a direct involvement in the business of government, even when the polis was not a thorough-going democracy. Aristotle considered that in a good polis citizens should know each other by sight. Athens, with a citizen population over 20,000, was unusually large.

The polis was not a government of the community; it was the community. The citizens were involved in government and government organised the community’s cultural life and religious festivals. Your sense of belonging was bound up with your political allegiance. Citizenship was not part of your life; it defined your life.

How do we think of ourselves as Australians? As citizens, very little. We think of ourselves as free and easy, informal and egalitarian. Citizenship is rather stuffy. Who are our heroes? Ned Kelly, an outlaw; Don Bradman, a cricketer; and Phar Lap, a horse. What are our national symbols? Kangaroo and emu, bush and beach, green and gold, the Sydney Harbour Bridge and Opera House, Uluru. In none of this do we celebrate our civic life, the common life we make as we govern ourselves. Politics is seen as an ugly business, practised by a despised group of people, the politicians. We don’t expect to find heroes there or what defines us as a people.

If, like the United States, we had been obliged to fight Britain to become independent, there would have been a strong civic component to our nationalism. The Declaration of Independence and the constitution are regarded by Americans as documents which define who they are – they are a people who believe in certain political principles.

Our history has been very different. The British Empire readily adjusted to the desire of the Australian colonies to be self-governing and in the late nineteenth century, to their wish to join together as a nation. In the Declaration of Independence, the Americans began their national life by compiling a long list of all the wicked deeds of King George III; Australians invited the future King George V to open their first national parliament.

Australian loyalty to the British Empire strengthened since Britain allowed Australians to govern themselves. It is wrong to assume that as Australian...
national feeling grew, loyalty to the Empire declined. In 1901 Australians were pleased with two things: that their new nation would be more independent of London than six colonies and that their union would strengthen the British Empire. Australian attachment to Britain was in part sentimental and in part born out of self-interest. Britain was a great trading and military power. It bought Australia’s primary produce and its navy protected Australian shores. In fighting for Britain in two world wars, Australians were not fighting for another country. They were fighting for the Empire of which they were a part and which was essential to their welfare. These considerations influenced even those of Irish descent in Australia who had no sentimental attachment to Britain. They fought in the wars in the same proportion as the rest of the population.

Of the self-governing dominions of the British Empire, Australia was furthest from Britain and most in need of protection. From the early years of the twentieth century Australia feared an attack from Japan. This helps to explain why Australia did not want the ties of the Empire to weaken. After World War I, South Africa, Canada and Ireland wanted to become fully independent so that Britain would no longer have any control over them and they could develop their own foreign policy. A plan was found to keep these dominions within the Empire, but without being in any way under the control of Britain. The monarch would be divided. George V would be King of Britain and King of Canada. On all Canadian matters, internal and external, he or the governor-general would act on advice only from Canadian ministers.

This formula was made into law in 1931 by the Statute of Westminster, an act of the British parliament. Australia had not wanted this formal statement of dominion independence and asked that it not apply to Australia until Australia adopted it. This was not so much because it was opposed to these arrangements; it thought formal statements would damage the informal bonds and sympathies which held the Empire together. If Australia asserted its independence, would Britain still buy its goods and protect it from the Japanese?

Australia did not adopt the Statute of Westminster until 1942. However, before that date it had begun to appoint its own ambassadors and act like a fully independent country. This makes it very hard to decide when exactly Australia did become an independent country. Nothing more clearly indicates that our political independence is not bound up with our national identity. We are not even sure when it happened.

Until the 1950s most Australians thought of themselves as British as well as Australian. Sir Robert Menzies, prime minister from 1949 to 1966, declared that he was British to the bootstraps. At the Melbourne Olympics in 1956
‘God Save the Queen’ was played when an Australian won a gold medal. It remained Australia’s national anthem until the 1970s.

It was as Britons that Australians learned what it was to be citizen. Individual liberty, the rule of law, a fair trial, parliamentary government: these were great British achievements which Australia shared because it was British. Australian school children learned about Magna Carta and Hampden defying Charles I over ship money. It was British respect for law which they were urged to follow. They were told that the great glory of the British Empire was its civic virtues. It allowed self-government to British settlers overseas and brought order and justice to its African and Asian possessions.

Australia did have its political quarrels with Britain, but these were readily resolved and left no bitterness. Australia’s ongoing quarrel was with Britain’s social structure and attitudes. We did not want to reproduce here aristocratic privilege, rigid class distinctions, snobbishness, and formality. So our nationalism was much more social than political, though, as some people realised, it was only through politics that the good qualities of Australian life could be preserved and extended.

As our links with Britain have weakened and our population changed, we no longer think of ourselves as British. In losing the British side to our nationality, our sense of ourselves as citizens has weakened. Other sources of civic identity are emerging. Younger people are more likely to think of their rights not as a British inheritance, but as conferred by the Universal Declaration of Human Rights drawn up by the United Nations in 1948. They are simply human rights.

But will we come to feel that we are citizens because we are Australians? The odd thing is that the people were very closely involved in the making of the Australian nation. The United States constitution begins with the words ‘We, the people …’ but actually the Australian people were more involved in constitution making than the Americans. If ever we want to think of ourselves as Australian citizens, we have a rich heritage to draw on.

**Nation making**

The six Australian colonies developed separately from each other. In the 1880s and 1890s more links were growing between them. Their railway systems joined at the borders. People travelled more to other colonies to look for work and do business. Some companies operated in two or three of the colonies. BHP, which was run from Melbourne, had its mines at Broken Hill in New South Wales, which got its supplies from Adelaide. Churches, trade unions and professional people formed Australia-wide organisations.
The colonies belonged to the one empire, but in some things they treated each other as foreign states. When you crossed the River Murray from New South Wales to Victoria you passed a building with the notice ‘Her Majesty’s Customs’. At the other end of the bridge was another building and its notice read ‘Her Majesty’s Customs’. At the second building, you had to stop to have your bags searched. If you were a drover, the customs officer counted your sheep, on which you had to pay a duty.

As trade between the colonies grew, the customs houses on the borders became more annoying. But it was going to be difficult to do away with them. Victoria had adopted a policy of high duties to protect its industries from overseas competition. New South Wales had adopted a policy of low duties to promote trade and keep the costs of goods as low as possible. The pros and cons of protection and free trade was the great issue of colonial politics. It divided New South Wales and Victoria, the two large colonies, already very jealous of each other. They might agree that it would be better if the colonies were united and goods flowed freely between them, but they could not agree on the policy to be followed by the new nation in regard to goods from overseas. Would it be protection or free trade?

If ever there should be a union, Victoria looked well placed to impose its policy on the nation. By the late nineteenth century, the smaller colonies of South Australia, Queensland, Tasmania and Western Australia had adopted its policy of protection, though they did not levy duties as high as in Victoria. This made New South Wales very suspicious of union, especially if it was proposed by Victoria. Since New South Wales was the foundation colony, some of its inhabitants couldn’t get over thinking that it was Australia. If the other colonies wanted union, let them rejoin New South Wales.

The advantages of an Australian union were obvious. Each colony had its own tiny army. Much better, if the continent were to be defended, that there be one army. The telegraph systems of each colony were joined together. Much better if the telegraph and the postal service were run as one system. Lighthouses which protected everyone’s shipping should be a common responsibility. Criminals and bankrupts and deserting husbands who skipped across the colonial borders could be controlled if there was a national government. All the colonies had laws to keep out coloured immigrants, but a White Australia policy would only be secure when it was enforced as a national policy.

Advantages, advantages. Things can always be done better, but what would compel them to be done better? What would make six colonies agree to give up some of their powers and agree on the terms of their union? Getting rid of the border customs was the big advantage of union, but that presented the
greatest difficulties. Some necessity or some passion was going to be needed to make the nation.

At first it looked like it would be necessity. An external threat had led the colonies in North America to combine in the 1770s to protect their liberty. The threat posed by the United States had pushed Canada into union in the 1860s. In the early 1880s suddenly Australia faced an external threat. France and Germany were eyeing off territories in the south Pacific in what Australians considered their back yard. Germany had designs on New Guinea and France on the New Hebrides (now Vanuatu). Australians urged Britain to make these territories British.

In 1883 the Premier of Victoria organised a conference of the colonies to plan joint action. The Victorians hoped that this would be the spur to create a federal union. A combined Australia could bring more pressure to bear on Britain and organise to cover the costs of British rule in the threatened territories. New South Wales did not want union, especially not with Victoria in the lead. The conference agreed only to the creation of a very weak body, a Federal Council, a coordinating committee rather than a national government. New South Wales refused to join it.

If the outside threat had continued, something more might have eventuated but, as a result of colonial lobbying, Britain did become more active in the south Pacific. After Germany claimed northern New Guinea, Britain took the southern portion, Papua, closest to the Australian coast. The French were pressed to accept joint control with Britain of the New Hebrides.

In 1889 Sir Henry Parkes, Premier of New South Wales, announced that the time had come to form a proper national parliament and government. The leaders of the other colonies thought this was a stunt, designed to boost Parkes but not to advance the federal cause. If New South Wales was now truly interested in federation, let it join the Federal Council which by degrees could grow into a stronger union. Everyone knew the difficulties in the way, particularly the free trade or protection dispute. To go immediately for union was to risk failure.

Parkes had to hurry. He wanted the glory of founding the nation, but he was 74 years old, though still very active. He had just married for the second time and his wife was pregnant. His commitment to federation was announced in a speech at Tenterfield in northern New South Wales near the Queensland border. When that was received coldly, he responded with a great series of speeches, more impressive than the original. He brushed aside all the doubters and the advice to proceed cautiously. The nation in essence already existed, he said. ‘The crimson thread of kinship runs through us all.’ We are
all British; we are one in sympathy and hope. We want to be a nation; let us be a nation. As to the dispute about trade policy, he was happy to leave that to be resolved by the first national parliament. To the great dismay of his own free-trade followers in New South Wales, he said free trade was a trifle compared to the grandeur of Australia stepping into full nationhood. Here was the passion.

Parkes was tapping a strong popular sentiment, that Australia was destined to be a nation. God seemed to will it in setting British people on a continent of their own without the frontiers which divided peoples elsewhere and over which wars were fought. ‘Advance Australia Fair’, written in 1878, picks up this idea in ‘our home is girt by sea’. In this special place a new nation free of old-world ills could be born.

The Australians who most wanted the nation were those born in the country, who by the late nineteenth century were a majority. Doubts were often cast on their worth because they were not British-born. If they could belong to a nation, they would stand much higher. They would no longer be colonials but partners in a great progressive enterprise, joining the wider world of nations and acknowledged as a nation by them.

One of the largest organisations in the country, the Australian Natives Association, had these aims. To the great annoyance of the pioneers from Britain, it was open only to men born in Australia. It began as a friendly society, one of the many which in return for a small subscription, paid medical expenses and sick pay and, if these failed, a funeral benefit. It grew into a debating society and then a nationalist organisation committed to federation. Strongest in Victoria where it was founded, it had a presence in the other colonies. Its most notable member was Alfred Deakin, a young Victorian politician, a great orator and the leader of the federal movement in his colony. Everywhere the ‘natives’ were at the forefront of the federal campaign. In Sydney in 1889 they organised a meeting where Parkes gave one of his great federation speeches.

The strength of the sentiment for union registered its first victory when Parkes got his way. Whatever the leading politicians in the other colonies said, they could not diminish his vision. They met with him in Melbourne in 1890 and agreed to call a convention in 1891 to write a federal constitution. They also accepted his strategy of appealing to national sentiment and leaving the difficult question of trade policy to be settled by the first federal parliament.

The convention met in Sydney with Parkes in the chair. There were seven delegates from each colony elected by their parliaments. It drew up a constitution drafted by Sir Samuel Griffith of Queensland which formed the basis
of the constitution eventually adopted. The constitution was referred to the parliaments of the colonies for approval.

The whole movement now came unstuck. Parkes was attacked by his own free traders over the details of the constitution and for putting free trade in danger. The charge was led by George Reid, who wanted Parkes’s job as leader of the free-trade party and premier. Parkes’s position became worse after the 1891 election because he became reliant on the support of the new Labor members who were interested in working conditions and wages and not at all in federation. To survive as premier, he could no longer treat federation as the top priority. Since the New South Wales parliament was in no hurry to consider the constitution, there was little point in the other colonies proceeding.

Soon after Parkes was defeated in parliament and left the premiership for the last time. He handed over the leadership of the federal movement to Edmund Barton, a much younger man, born in Sydney, a great patriot who was to become Australia’s first prime minister. Barton, making little headway in the parliament, encouraged the formation of federation leagues in the towns along the River Murray where the border duties were a great nuisance. He established a central league in Sydney to coordinate the movement.

The leagues along the Murray organised a federation conference in 1893 at Corowa, a river town on the border. It was attended by politicians from New South Wales and Victoria, business representatives from Melbourne and a large contingent from the Victorian branches of the Australian Natives Association. It was designed to put pressure on the parliaments to take up consideration of the 1891 constitution. It produced a surprise. One of the ‘natives’, John Quick, a Bendigo lawyer, suggested that the whole process should start again from scratch with the people in charge. They should elect delegates to a new convention and the constitution they drew up should be referred not to the parliaments, but to the people for their judgement at referendum.

The scheme was accepted with great enthusiasm by the conference. It was a very un-British proposal. In Britain sovereignty, ultimate power, lay with the parliament. Quick’s proposal gave sovereignty to the people. So had the Americans, but they had not involved the people so directly in constitution making. The delegates to their constitutional convention were elected by the State legislatures and the constitution was approved by specially elected State conventions.

Quick took his scheme to Sydney where it was taken up by George Reid. Since Reid had taken over from Parkes as leader of the free traders, he was now less hostile to federation. He thought a better constitution could be
produced than the 1891 version and that support for free trade was growing so that it had a chance of becoming the policy of the new nation. Reid was himself a convinced democrat and thought constitution making would be more likely to succeed if it rested on popular involvement.

Reid organised a special meeting of premiers at Hobart in 1895 which accepted Quick's scheme. It was finally adopted by the parliaments of four colonies: New South Wales, Victoria, South Australia and Tasmania. It was criticised in the parliaments for throwing away the work of 1891 and for handing constitution making over to the people, but if this was the method which New South Wales wanted to follow, it had to be accepted if federation was to be secured. So conservative upper houses in Victoria, Tasmania and South Australia accepted this ultra-democratic scheme. The Western Australian parliament did not accept it and instead itself elected delegates to the new convention. Queensland could not agree on how the delegates were to be elected and was not represented at the new convention.

The elections for delegates were held in March 1897. As Reid had expected, the leading politicians in each colony were the successful candidates. They behaved very differently in the convention from in their parliaments. There was little point-scoring and no personal attacks. The standard of debate was high. This was not a forum divided into two sides, but a negotiating body where compromise was essential for success. Barton was the leader of the convention, in charge of getting approval for the constitution line by line, sometimes word by word.

When their work was done, it went to the people for their judgement. The people in four colonies – New South Wales, Victoria, South Australia and Tasmania – voted twice. The first time all four colonies voted Yes, but in New South Wales the Yes votes did not reach the minimum number parliament had set for acceptance. The constitution was then amended by the premiers to please New South Wales and the vote taken again. The Yes votes were higher and high enough in New South Wales for acceptance. This amended constitution was put to the voters of Western Australia and Queensland and accepted.

The campaigning was very like an ordinary election campaign – there was plenty of hype, lies, and scaremongering. The highest and the lowest motives were appealed to. But voters had solid information to help them make a decision. Governments sent each of them a copy of the constitution and newspapers printed special federation supplements with cases for and against. The sovereignty of the people was taken seriously.

It is hard to establish why people voted as they did. Many factors had to be considered: how the constitution would work, how it would affect the
The British government did not believe in the sovereignty of the people. When the constitution reached London, the government proposed some amendments before they presented it to parliament. The chief concern was to allow more matters to go on appeal from Australian courts to the Privy Council in London. The Australian delegates who had accompanied the constitution were outraged: nothing could be changed because it all had the authority of the people. They fought furiously against the British government and kept the changes to a minimum. They were not resentful at having to have their constitution enacted by the British parliament, quite the reverse, but they were determined to have the maximum of self-government within the Empire.

So the Australian constitution takes the form of a British act of parliament, but since the Statute of Westminster (1931) it is an act which the British will never interfere with. It can now only be altered within Australia. In its
opening passage it still says that it is enacted by the Queen, the House of Lords and the House of Commons, but before that it announces that Australians had agreed to federate. In the 1891 draft the words had been the ‘colonies’ had agreed. At the 1897–8 convention John Quick, who had been responsible for the Corowa plan, had this changed to ‘the people’.

**Constitution making**

When the political leaders of the colonies decided they wanted to unite, they had a number of constitutional options to choose from. They could disband the colonial governments and create a unified state, a single, supreme (or sovereign) Australian government which might then give some of its powers to local or regional bodies. This is how Britain was governed. Almost no one was in favour of this. The colonists were too attached to their own colonies.

At the other extreme, the colonies could retain all their powers (and sovereignty) and create a coordinating body to do the bare minimum of national tasks, such as defence. A few favoured this and it sometimes seemed a surer way to proceed than more ambitious schemes. Between the two extremes there were any number of alternatives.

Very quickly at the 1891 convention the founders decided on the United States scheme, which was not a compromise between the extremes, but a combination of them. The national government was sovereign in some matters and the States were sovereign in other matters. This is the modern system of federation that the United States invented. It was a mind-blowing invention because until then everyone thought sovereignty had to be single, that it could not be divided. Actually in the United States sovereignty was single and divided. The people were sovereign and they allocated one part of their sovereignty to the States and another to the national government.

The Australian founders also decided to accept the United States way of dividing power between the two levels of government: the subjects on which the national parliament could pass laws were listed. All other subjects remained with the States, which is what they intended to call the colonies. (You can see the list of federal powers at sections 51 and 52 of the constitution.) Most of the list was readily agreed on. Old age pensions and the settlement of interstate industrial disputes only just made it at the last minute during the second convention of 1897–8.

The copying continued. In 1891 the Australians decided to put together their national parliament in the same way as the United States Congress. There would be two houses with the American names, the House of Representatives and the Senate. The House of Representatives would be elected by the people (the men, that is, who already had the vote for the colonial parliaments). The number of members elected in each State would...
depend on its population. So this house would be dominated by the representatives from the two large States, New South Wales and Victoria. The Senate would have the same number of members from each State and would be elected by the State parliaments. So it would be dominated by the smaller States. To become law a measure had to pass both houses so that it would have the approval of the people and of the States.

The trouble with the copying was that the Australians had no use for one part of the American model: the election of a president. They wanted to stick with the British or Westminster system of responsible government which was used in the colonies. The premier and ministers were members of parliament, not elected separately. This did not make them think again and develop a totally new Australian design. They would patch up the American model; they would be improvisers rather than inventors.

The American founders regarded the separate election of the president as of the utmost importance. Under the influence of Montesquieu, one of the French Enlightenment thinkers, they believed that liberty was only safe if the three elements in government were separate. This is the doctrine of the separation of powers. Law making (done by the legislature) had to be separate from the administration of the laws (the executive) and that had to be separate from the courts which decided whether the law was being followed (the judiciary). So the head of the American executive (the president) was not a member of the legislature (the Congress). The president was elected separately and he chose ministers who were not members of Congress.

The American founders believed all governments tended to threaten liberty. Liberty appeared to be safe only in small societies. In forming a government covering all the American States, they were taking a great risk. It might become as tyrannical as the British government had been towards them.

To avoid this danger, power must be dispersed. No one group or individual could then capture all the centres of power and each power centre would keep the others in check. So power was dispersed between the national government and the States, between the legislature, the executive and the judiciary, and within the legislature between the House of Representatives and the Senate. Even with all these precautions, the founders struggled to get their constitution approved. Before they could succeed, they had to promise that as soon as it came into operation an amendment would be passed providing for a bill of rights. This would guarantee the rights and freedoms of citizens.

A few of the Australian founders worried that the national government might become too large or too expensive, but no one feared that it would become tyrannical. It was to be British after all and the British system of
government had preserved freedom for over two hundred years. They were not nearly as concerned with the separation of powers as the Americans. They knew judges must be independent and they provided for a separate and independent High Court, but they were happy to mix the executive and legislature together. Placing the government in the parliament was not a danger to liberty but a protection of it. The ministers were responsible to parliament; if ever they threatened citizens’ rights, the parliament elected by the people would control them. They saw no need for a bill of rights. (The Americans feared that a government in the parliament might control the parliament instead of being controlled by it.)

The problem of applying the Westminster system to the American model was that if ministers were responsible to the House of Representatives, it would become a more powerful house than the Senate. It would determine who would be the government. The careful balance of one house representing the people and the other the States would be upset. You can see why it was the delegates from the small States who were most interested in following the American model completely or making some changes to the British one. Their nightmare was that the ministers would come only from New South Wales and Victoria. But from the small States there were also delegates who wanted to keep the British system. That’s what the majority of delegates wanted. The 1891 draft constitution allowed for it, though it did not insist on it and so left open the possibility that an alternative system might develop. The 1897–8 convention adopted the British system.

The essential business of government is raising money by taxation and spending it. By convention in the British system, the upper house did not interfere in these matters. They were the business of the people’s representatives. But if the Senate were denied the right to interfere in taxation and spending, it would be weakened still further. The delegates of the smaller States were much more concerned about this. A compromise was reached: the Senate could vote against these measures, but it could not amend them. It could only suggest amendments. This compromise was blown up at the 1897–8 convention and then patiently put together again. It explains why today a government which does not control the Senate can still pass its budget measures unless the Senate decides to throw everything into confusion and reject the budget outright.

The 1891 constitution was criticised for not enshrining the Westminster system and chiefly for not being democratic enough. In the 1890s, the decade of constitution making, support for democracy strengthened. The colonial constitutions were altered to stop property holders getting a vote in each electorate where they held property and attacks were mounted on the powers of upper houses. Support grew for allowing voters to suggest new laws and vote directly on them (the initiative and referendum).
The 1897–8 convention had a much higher proportion of radical liberals and democrats among the delegates than the 1891 convention. The delegates had been directly elected by the people, which was in itself a remarkable democratic measure. The new Labor Party sent only one delegate to the convention, but it had a great influence on it. It was the fiercest critic of the constitution as undemocratic and, unless things were changed, Labor’s influence would make it difficult for the Yes case to be won at the referendum.
The most spectacular change of the decade was the granting of votes to women in South Australia in 1894. This encouraged women in other colonies to press on with their campaign to win the vote. In South Australia Catherine Helen Spence, one of the great campaigners for women’s rights, stood as a candidate for the convention. She was not elected, but did quite well, the first woman to stand for election in Australia.

When the convention met, women sent petitions asking for votes for women to be included in the constitution. The foundation of a new nation was a great opportunity for the women – and for men, as they told the convention. It could mark Australia as a progressive nation and set a standard for the world. In New South Wales, even though women did not have the vote, they formed organisations to campaign for federation at the referendum. By participating in this great national cause, they wanted to show themselves worthy of becoming full citizens.

At the convention two South Australian delegates, the premier, Kingston, and the treasurer, Holder, were the women’s advocates. They failed to get votes for women written into the constitution, but they did almost as well. At the first federal election, the voters were to be the same as those who voted for the colonial assemblies. This meant that South Australian women had a federal vote. By the time of the first election, Western Australian women had been granted the vote (in 1899) so they voted as well in the first federal election. Once the federal parliament met, it could set one rule for voting at federal elections, but it was not to take the vote from anyone who already possessed it. Parliament would find it impossible to retain votes for women in South Australia and Western Australia and deny it in the other States. All women must get the vote as soon as the federal parliament made its own law – which is what happened in 1902.

Other democratic changes were written immediately into the constitution. The Senate was to be elected directly by the people and not by the State parliaments. The senators were to receive payment as well as the members of the Representatives. Electors were to have only one vote which meant no extra votes for property holders. The constitution was to be altered by the electors themselves voting at referendum.

The other major change was to provide for a means of resolving deadlocks between the two houses. Like the colonial constitutions, the 1891 constitution made no provision for this. Liberals and democrats had been so frustrated by the conservative colonial upper houses rejecting popular measures that they insisted that the federal constitution allow the people’s will ultimately to prevail. Most of the delegates from the large States, still worried about the small States dominating the Senate, wanted the same.
The arrangement agreed to was that if a measure had been twice rejected by the Senate, with a gap of at least three months in between, then both houses could be dissolved – that is, they were closed down and all the members were to face the electors (a double dissolution). If after the election of a whole new parliament, the two houses still disagreed about the measure, then they would sit together to resolve it (a joint sitting). At first a three-fifths majority was required at the joint sitting to pass the measure. This was altered to a simple majority at the request of New South Wales after the first referendum.

The only thing a democrat could still complain about was States with tiny populations getting the same number of senators as the large States. This was much complained about during the referendum campaign, especially by the Labor Party in New South Wales and Victoria, but without this, the small States would never have agreed to federation.

In their patch-up job on the American constitution, the Australian founders had been concerned to create a Westminster style government that could actually govern and to ensure that the popular will would ultimately prevail. But it was still an American model where power was dispersed. A national government in Australia can be frustrated by State governments, have its measures overturned by the High Court or blocked by the Senate. Until the 1970s the Labor Party opposed these restrictions on the national government and wanted a unitary rather than a federal government. They saw these restrictions as undemocratic. But as the power of government has grown, more people, including Labor people, are pleased that there are restrictions on it. Our thinking is moving closer to that of the American founders.

The Senate has not operated as most of the founders expected as a States’ house. As a few of the founders foresaw, parties provided the key division in federal politics, not a battle between large and small States. The Senate is still important for the smaller States because it means that overall they send more politicians to Canberra than if representation was solely according to population.

If members of the one party control both the Representatives and the Senate, the Senate will not act as a house of review. Since 1949 the Senate has been elected by proportional representation which makes it easier for small parties and independents to gain seats and harder for a government to control the Senate. This has allowed it to develop as a strong house of review where government measures are closely examined in special committees. These are taken seriously because the Senate can reject measures. A government has the option of making a rejected measure the basis of a double dissolution election, but this is a cumbersome process. Compromise is the more usual outcome.
Responsible government has worked within the borrowed American framework. Only once has the system been thrown into crisis. In 1975, when the Whitlam Labor government was in office, the Senate refused to pass its budget until it agreed to hold an election. The Liberal-National majority in the Senate thought the government was so irresponsible that the people should immediately have the chance of passing judgement on it and electing their party to government instead.

A government can only spend money with parliamentary approval. With its budget held up, the government was running out of money. But Mr Whitlam refused to call an election. He insisted that the Senate was overturning the system of responsible government where a government can govern while it has the support of the House of Representatives. The opposition senators said the constitution clearly gave them the right to reject money Bills, though they could not amend them.

Here was a conflict which the founders had not resolved. The governor-general resolved the crisis by using the reserve powers and dismissing the prime minister and calling an election. This act created such bitterness and division that it is unlikely to be repeated. The parties are interested in avoiding such a crisis. So the patch-up job continues to work.

What sort of nation?

At the first federal election in March 1901, protectionists and free traders battled it out to control the new nation. The issue which had to be decided was how high the customs duties on imported goods would be. How could anyone get excited over this? Because the two sides represented not only different interests, but different ideals.

The protectionists wanted to keep out foreign competition and build up local industries so that the nation would develop a strong and diverse economy; it would never be a great nation or a secure nation if it only grew wheat and wool. Protectionists called those who imported goods selfish and unpatriotic.

The free traders said propping up uneconomic factories forced everyone to pay the high prices for their goods, which damaged the economy overall. If nations did not erect barriers against each other’s trade, all their economies would grow more and there would be less international tension. Free traders called factory owners who demanded protection privilege seekers and monopolists.

The result of the election was a narrow win for the protectionists. But they did not control the parliament, because the third force, the Labor Party, had done well and held the balance of power. The Labor Party could not decide
whether it was for free trade or protection. Protection promised jobs for workers, but it also put up prices. Protected boot factories would give some workers jobs, but make all workers pay more for boots. Labor supported the protectionist government of the first prime minister, Barton, but some Labor members voted with the free traders to reduce the duties in its customs bill. The first Commonwealth duties were only mildly protectionist, much lower than the old Victorian ones.

After three years Barton retired from politics and became one of the first judges in the High Court. The new leader of the protectionists and second prime minister was Alfred Deakin. He wanted to be a scholar or a poet or a religious leader, but he turned out to be good at politics, which he had stumbled into and was always thinking of giving up. He was a magnificent orator and skilled at getting people to work together. He came from Melbourne where workers had joined with owners of factories and workshops to make Victoria the stronghold of protection. He had more influence than any other man on what sort of Commonwealth it was to be.

Deakin persuaded the Labor Party to support protection by linking protection to wages. This was called new protection. A factory owner would only get protection from overseas competition if he paid fair and reasonable wages. Many workers had thought the argument over free trade and protection was a bosses’ trick. Neither policy made much difference to the workers. Now protection was going to deliver what every worker wanted: a bigger pay packet. With united Labor support Deakin passed really protectionist duties in 1908. For the next sixty years protection was the settled policy of Australia.

Deakin, with Labor support, also introduced a bill for settling strikes and industrial disputes. Representatives of bosses and workers would have to appear before a special court and accept the judge’s ruling. This is compulsory arbitration. It was developed in Australia after the huge strikes of the 1890s. These had shocked the community. Bosses refused to negotiate, workers and their families suffered, services stopped, governments ordered out troops. It seemed like all the old-world ills were starting up in this new land. The solution was to make the parties settle matters peacefully. Both bosses and unions were suspicious of the scheme, but since unions had lost so badly in the strikes and were still very weak, they supported it hoping it would give them more than they could get by their own efforts.

One of the first tasks of the Arbitration Court was to decide what were the ‘fair and reasonable wages’ which a factory owner had to pay to enjoy protection from foreign competition. Justice Higgins decided that wages should not give just a bare living and they should not be settled by market forces; they should allow the worker to live as a ‘human being in a civilised community’ and support a wife and three children. He summoned some wives of
workers into court to examine them on their household budgets, for wives were usually in charge of spending. He then settled a wage, the basic wage, which became the standard which the court used whenever it had to settle wage rates. No man could be paid less than the basic wage. Extra rewards were given for skills and the court became the judge of what these extras should be and who should do what job. All this was laid down in an award which covered wages and conditions for a whole industry.

The court set women’s wages lower than men’s because women did not have a family to support. Women’s wages had always been lower than men’s, but in making this difference into law the court made it harder to change it. Nearly all women in paid work at this time were single women who would become full-time homemakers once they were married. Lower wages for women was hard on women whose husbands had died or left them and who had to work to support their children.

Almost everyone believed that a married woman’s place was in the home – even the women who had just won the battle to get women the vote. They said that women should get the vote because they were citizens, but also because they were homemakers and carers of children and therefore had a different and valuable perspective to contribute to politics. If they had said that they wanted the vote as a first step to entering all male positions of power, the men would have been much slower to give it to them.

At this time Australia was seen as one of the most progressive nations on earth. Its women were citizen mothers and by a court of law their husbands earned enough wages to support them and their children. Over the next two decades, Australia seemed to fall behind. Other nations began schemes for social welfare which covered sickness, unemployment and old age. They
were insurance schemes: everyone contributed and you got benefits as you needed them. The only social welfare benefit in Australia was the old age pension introduced in 1908.

One reason why insurance schemes were not adopted here was that many Labor people were opposed to them. They did not want to have to make insurance contributions; they wanted the rich to be made to pay for the people’s welfare. Nor did they want unemployment benefits. They wanted work, work at good wages and if there was no work the government should provide work. Once there was an unemployment benefit, they said, governments would not worry about finding the unemployed work. Governments in Australia had been great providers of jobs because they ran railways, built roads and ports, cleared land and drained swamps. When unemployment rose, they had usually expanded their works to provide more jobs.

In the Great Depression of the 1930s unemployment rose to 30 per cent and at one time or another probably half the workers experienced unemployment. Times were so bad that governments did not have the funds to create jobs on public works. There was no unemployment benefit. At first the unemployed had to rely on handouts from charities. Then the State governments gave out vouchers which you could take to shops to buy food. But governments thought it was bad to support people who were doing nothing and most of the unemployed themselves wanted work not handouts. So governments put a special tax on those in work to get funds to provide work for the unemployed. The work was often hard and sometimes the unemployed had to leave home to take it. It was not full-time work: you got more hours if you had more responsibilities. Married men with large families got most.

The Labor governments of John Curtin and Ben Chifley, which held office during and after World War II, were determined that workers should never suffer again as they did in the Depression. They planned to manage the economy more closely to keep people in work and they introduced a full range of social security benefits, including unemployment benefit. The Labor government planned to pay for this welfare out of ordinary taxation because its supporters did not like contributions to an insurance scheme, but workers for the first time now had to pay income tax.

Our social security is still paid for in this way. Some say insurance schemes are better because since everyone contributes, everyone is eligible for benefits without means tests. Our welfare is ‘targeted’ to those who need it most, but those getting welfare can then become targets for those who resent supporting them. Welfare is one group paying for another instead of the community making provision for itself. Only with the Medicare levy do we have a community provision for welfare.
For three decades after the war, very few people received the unemployment benefit because there was close to full employment. Since the mid-1970s governments have not been able to manage the economy so well and many people have been unemployed. Since they received a benefit, there was less pressure on governments to find work for them. But now governments realise that a permanent life on welfare is not good for the unemployed or for society. The unemployed are more likely now to be doing community work or in training. ‘Work, not handouts’ is a message we are re-learning.

During World War II women did work they had never done before and that men thought they would never do. They managed heavy machinery in factories, drove tractors and mended cars. They got higher wages; a few even the same pay as men. After the war things were meant to return to normal, but they never did. Before the war women had begun a campaign in the unions for equal pay. This now strengthened and after a long fight with small victories along the way, the Arbitration Court finally accepted the equal pay principle in 1972. The idea of a wage-earner being paid for dependants was dropped. In the 1960s and 1970s more and more married women were working and the notion of the man as sole breadwinner was disappearing. Of course children were still an added expense. Instead of wages being adjusted for children, welfare payments were made to parents with low incomes.

Australia’s founding policy of protection was first brought into question in the 1960s. It had helped many industries to grow, but the old free-trade argument was raised against them. The high price of their products was a burden and the industries became inefficient because they were shielded from competition. The argument was put first by economists who worked in the universities, the newspapers and the public service; it was taken up by the Labor Party with some hesitation and then wholeheartedly by the Liberal Party.

It was actually the Labor governments of Gough Whitlam in the mid-1970s and of Bob Hawke and Paul Keating in the 1980s that removed nearly all the protective barriers. They believed this would create a strong and efficient economy that would benefit workers in the long term even if the abolition of protection made some of them unemployed straight away.

The new free traders were called economic rationalists. They believed nearly all controls on the economy produced more harm than good. They were fierce opponents of the arbitration system and industry-wide awards. They said fixing one set of rules for factories throughout the country was rule making gone mad. Businesses would work more efficiently if managers and workers decided on what rules would work best for them. Trade unions wanted to keep to the awards because they thought workers would not have as much power if they were negotiating with the boss at the workplace.
The Liberal Party took up the attack on the arbitration system, but it was the Labor government of Paul Keating which took the first step towards workplace bargaining. The Liberal-National government of John Howard has moved more firmly in this direction. That odd Australian invention – a court which sets wages – is still there, but is under threat.

In the early twentieth century Australia was called a social laboratory because of its experiments with new ways to secure welfare. Now the economic rationalists say our economy suffered from too much control which we must abandon so that we can keep up with world’s best practice. They say being part of a global economy increases efficiency and prosperity.

There is no longer a strong protectionist movement. There are people who say that even if our industries do not have protection from imports, they still need government encouragement. They also fear that in being open to the world we may lose control over our own destiny. They say that the people who control international finance and multinational companies are not interested in our welfare, only in their own.

To join the world or protect ourselves against it: we are having the same argument as at the start of our nation. Both sides think their method is the best route to prosperity. In this dispute, we must not lose sight of what prosperity is for. We may no longer use Justice Higgins’s methods, but we should still make sure that all citizens have the chance to enjoy a decent living in a civilised society.

Who is the nation?

Almost the first thing the new Commonwealth parliament did was to adopt a White Australia policy. This meant that if your skin was not white you could not migrate to Australia. In the 1880s and 1890s the colonies had already stopped migration from Asia. The new parliament wanted to secure this policy Australia-wide and make it the foundation of national greatness.

All parties supported this policy. The Labor Party had put it on the top of its platform for the first election and not just because it could not decide between protection and free trade. Workers had taken the lead in opposing Chinese migration to Australia. In the 1850s thousands of Chinese had come to the goldfields. White diggers objected to them, sometimes violently, and the colonies had stopped the Chinese from coming. When these restrictions were lifted, a small-scale migration resumed. Workers and trade unions objected that these people, coming from much poorer societies, were willing to take low wages. Sometimes employers had turned to Chinese workers because they could pay them less. Pressure from workers had pushed the colonial governments to reimpose bans on Chinese and Asian migration.
Workers believed that, as well as threatening wages, the Chinese were a lower race. Nearly everyone believed this, which explains why the workers got their way on the issue of Chinese migration. It had been accepted as scientific that there were higher and lower races and for the higher to mix its blood with the lower threatened its health. Australians had no doubt that whites were the highest race and among the whites the British were the best. By staying white and British, the new nation would give itself a flying start.

Because a people are thought inferior, they don’t have to be kept out of a country. They can be brought in, exploited, despised, discriminated against in every way. Australians did not want a society like that. They wanted a society of equal political rights, decent wages, opportunity for all, and no firm social barriers. There could be no place here for people whom they could not treat as equals. Because they were democrats and progressive, Australians were stronger racists.

The difficulty with the white Australia ideal was that there were large groups of non-whites already in the country. The first Commonwealth parliament decided to ship one group out of the country. These were the Pacific Islanders who worked on the sugar plantations in northern Queensland. They signed on for three years and were paid low wages. When their time was up, a few signed on again; some, after a spell at home, returned for another three years; always there were new young men being shipped in.

All this was to stop in 1906. When the time came, some Islanders did not want to go home. Those who had married an Australian woman, bought land, or had been here since 1879 were allowed to stay. To help the sugar farmer pay higher wages to white workers, the parliament put a high duty on foreign sugar. This put up the local price and gave the farmer higher returns.

The largest non-white group could not be dealt with so easily. The Aboriginal people could not be shipped somewhere else. As the white Australia ideal developed, they were seen as a threat to it. They had been a threat of a different sort in the early days when they resisted the invasion of their lands and thousands had been killed. But when that battle was over, no one took much notice of them. Everyone thought they were dying out. Governments recognised that they were poor because they had lost their lands and gave them food and blankets. Some church people were concerned at their plight and started mission stations and persuaded governments to set aside reserves. These did provide a base for new communities to develop. Aboriginal people came and went and many worked successfully as shearers, drovers, stockworkers and harvesters. They were not, like the Chinese, a big political issue.

However, the few politicians and administrators who did think about the Aboriginal people were troubled. A black minority threatened the unity and
racial purity of the nation. In the south-east of Australia, the number of full-blood Aborigines was decreasing, but the number of Aborigines of mixed descent was growing.

Around the turn of the century, two new policies on Aboriginal people were developed. Those responsible for them thought they were helping Aborigines, but this was help poisoned by racism. In the south-east of the continent, Aboriginal communities were to be broken up and Aborigines of mixed descent to lose themselves in the wider community. That would mean that the Aborigines as a separate people would disappear. In the north and west, where Aboriginal people were still numerous, they were to be kept away from the rest of the community or only allowed to be part of it under strict control. That would protect them and protect white Australia from them.

To make these policies work, administrators were given huge powers over Aboriginal people. They could say where they were to live or not to live, who they could marry, what should happen to their children. On the reserves they could control and punish them as if they were prisoners in gaol. In the south-east, informal rules operated in country towns to keep Aboriginal people out of swimming pools and down the front in the cinemas. In the north and west, by law, they could not go into towns and cities, or only in daylight hours.

The poison in the policy led to the horror of taking children from their parents. Neglected children were taken from white parents. It was an easy step to say that all children in a rough Aboriginal camp were neglected and would be better off with someone else. The next step was to say that any Aboriginal child would be better off by not being Aboriginal. So children were taken from loving and caring parents for their own good. And for the good of white Australia for if the children were put to work in white homes and farms and married a white person, then the Aboriginal blood and colour would get fainter. Because of this concern with breeding, more girls were taken than boys.

The process of taking away Aboriginal people’s civic rights and placing them under official control had begun when the Commonwealth was formed. In its second year the Commonwealth parliament decided who should have the right to vote in federal elections. (For the first federal election, you voted if you had the right to vote in State elections.) The parliament decided that Aboriginal people should not vote. In Western Australia and Queensland they had already lost the right to vote. In South Australia, Victoria and New South Wales, they still had that right and they kept it. The Commonwealth government had actually included Aboriginal people in its voting bill, but when objections were raised, they readily agreed to exclude them. This was the measure which made Australia famous around the world as a progressive
nation because it gave the vote to women. So white women came into citi-
zenship as the Aboriginal people went out.

Australia was confident in its white, British identity until World War II. Then Britain could not defend Australia. Its great naval base at Singapore fell to the Japanese and Australia had to look to the United States to defend it. The Japanese came as far south as New Guinea and it seemed as if they could invade Australia. Darwin and other northern towns were bombed.

Australia needed a great power to defend it because its population was a tiny seven million. If it was to be more secure in the future, its population would have to grow rapidly. This was the aim of the post-war Labor government and its Minister for Immigration, Arthur Calwell. He had an American grandfather and was a great admirer of the United States, which had built up its population by accepting people from all the countries of Europe. In the great migration program he planned, some migrants would come from con-
tinental Europe, but most still from Britain. He knew Australians would be suspicious of Europeans so he made a sort of promise that for every one of them there would be ten migrants from Britain.

But not enough Britons wanted to come and there was a problem getting ships. When Calwell visited Europe in 1947, he learned of the millions of refugees who wanted to make a new home and that the refugee organisation had ships. So he broke his promise and set Australia on a new course. The ships brought Poles, Latvians, Ukrainians, Lithuanians and Hungarians. In the 1950s the program Calwell had started was extended by the Menzies Liberal government to Dutch, Germans, Italians and Greeks; in the 1960s to Yugoslavs and Turks. Britons remained by far the largest group, but for every one European there was just one Briton. Australia was rapidly ceasing to be British.

Calwell worked very hard to make sure this huge change was a success. He got pictures of handsome, beautiful and fair-skinned migrants into the newspapers. He guaranteed to the unions that migrants would all receive the award wage because unions were always suspicious of migrants taking lower wages. To make migrants feel welcome, he said they should be called New Australians and he formed a good neighbour organisation to help them settle in.

Calwell did not want the migrants to form separate communities but to move quickly into the wider community and adopt the Australian way of life. This is the policy of assimilation. The migrants ignored it. They made adjustments to fit in with their new society, but at their own pace. Since it was a free society, they could live where they liked, run their own newspapers, start clubs and open their own businesses. Naturally as strangers
they wanted to keep contact with each other, though in time, as they have prospered, migrants have scattered throughout the cities instead of living in one part of them.

With this huge change, the White Australia policy stood firm. As an old Labor man, Calwell was a passionate believer in it. Both parties were still committed to it. But it could not last. The belief that there were higher and lower races had been exploded. Hitler in killing millions of Jews, had shown what terrible consequences could flow from racial prejudice. The new United Nations formed after World War II was committed to racial equality. And Australia, close to the newly independent nations of Asia, could not forever insult them.

Scholars from Melbourne University, some of whom had studied in Asia, led the movement for change. They enlisted the support of church people and produced in 1960 Control or Colour Bar?, one of the most influential books in our history. They answered Australians’ fears that if you opened the gates to Asia a flood of migrants would pour in. They said that this migration could be controlled and if the migrants were chosen for their skills and their ability to fit in, they would be like any other migrants.

White Australia was at last being debated, but while Sir Robert Menzies was prime minister there would be no change. When he retired, the new Liberal...
The prime minister, Harold Holt, changed the law in 1966 to allow non-white migrants to come and soon there were more than the reformers had thought possible. The Whitlam Labor government, elected in 1972, completed the change and established a migration policy with no racial discrimination, which both parties have supported since. This has allowed thousands of Chinese, Vietnamese, Indians and other peoples from Asia and Africa to settle here.

Beginning in the 1970s Australia took on a new identity; it was not British, not white, but multicultural Australia. Instead of an official policy of assimilation, multiculturalism encouraged migrants to preserve their own culture.

As Australians changed their idea of who they were, they could stop thinking of Aboriginal people as aliens and a threat. In the 1930s Aboriginal people had formed organisations to demand that they have the same rights and opportunities as other Australians. With white sympathisers they kept up the pressure and had a great victory in 1967 when the Australian people agreed in a referendum to change the constitution on Aboriginal matters. This was a symbolic moment of reconciliation, though the actual changes made were not what many people think. Aboriginal people had already been given the vote in the Commonwealth in 1962. Their civil rights in the States had been almost fully restored. In 1967 the Commonwealth gained the power to pass laws on Aboriginal affairs (which has been very important) and Aboriginal people were now to be counted in the census.

In the 1950s and 1960s governments thought Aboriginal people would gradually assimilate and, like the migrants, live like other Australians. There was a moment in 1966 when that changed. The Gurindji people, who worked on a cattle station in the Northern Territory, went on strike for equal wages. They had a white supporter on the spot, Frank Hardy, an old communist who knew something about how to run a strike. To his surprise, the Aboriginal people told him that they really cared more about getting their land back. Frank thought they had no chance, but he turned himself into an adviser for a land rights campaign. That came to success when in 1975 Prime Minister Gough Whitlam handed the Gurindji the title to their land. The Liberal prime minister who followed him, Malcolm Fraser, passed land rights legislation for the Territory and some States have done the same for their lands. National land rights were established by the High Court with their Mabo and Wik decisions.

Aboriginal people living on their own land and upholding some of their traditions were not following ‘the Australian way of life’, but in a multicultural Australia this was perfectly acceptable. Official policy on Aborigines changed so that they were to decide how they would live. This is the policy of self-determination. In 1990 most of the money the federal government spent on
Aboriginal people was given into the control of a body elected by them, the Aboriginal and Torres Strait Islander Commission (ATSIC).

Some people have opposed multiculturalism. They fear that if migrants are encouraged to retain their own culture, the nation will be too divided. Often they are not aware of all parts of the policy. It sets down that migrants’ first loyalty must be to Australia and to its principles of democracy, equal rights for men and women, toleration of differences, and the rule of law. There is a strong element of assimilation in multiculturalism.

The success of the migration program has been the great wonder of Australian history. On the whole migrants have done well, are pleased with Australia and want to belong to it. Australia has become a more lively and interesting place because of all the different people in its population. There has not been great tension and bitterness. Of course migrants have suffered prejudice from some Australians but, compared with other nations, Australians have been very tolerant of the newcomers and ready to accept them as citizens. No nation has had its population change so much in such a short time.

One reason for the success is the nature of the Australian people. Imagine millions of migrants going to a country which cared a lot about who your parents were, or your schooling, or how you spoke, or whether you had read the right books, or whether you gave people their right titles. Australia is the opposite to all this. Because it is easygoing, informal and egalitarian, it was more welcoming to migrants and wanted them to have ‘a fair go’. We’ve met up with these qualities before. They’re the ones that make Australians reluctant to think of themselves as citizens.

At the same time as Australia was ceasing to be British, Britain was ceasing to be a great power. It joined the European Union and could no longer give Australia special trade deals. Australia’s trade shifted to Asia and the Pacific; its defence ties were already with the United States. The links with the ‘mother country’ were weakening. The one formal link was that the English Queen was still Australia’s head of state. To more and more Australians the Queen did not seem an appropriate symbol for an independent, multicultural Australia whose destiny was no longer bound up with Britain. They have argued that Australia should become a republic. If it does, perhaps we will remember the date on which it happens.
How does democracy relate to law?

In Athens the citizens were directly involved not only in the making of law but in running the courts. Their normal court consisted of 501 citizens, chosen at random. This was not an enormous jury; they were the judges and the jury. In our courts the jury decides what happened: did the accused commit the deed (the facts of the case)? The judge decides on the law: whether the law has been broken; what evidence can be given to establish the facts; what penalty the guilty should suffer.

In the Athenian courts, the citizens decided on the facts and the law and did not worry much about the distinction. The courts heard the evidence and then voted on whether the accused was guilty or not. The number of citizens making up the court had to be an odd number so there would not be a tie. You could be found guilty by 251 votes to 250.

There were no lawyers in the court. No experts of any sort. The citizens brought and defended their own cases against each other. The man who presided over the court was simply the chairman of the meeting. The accusing citizen spoke; the defending citizen spoke; they each had a right of reply and then the vote was taken. If the accused were found guilty, the court then decided the penalty.

Is maximum popular involvement the standard for democratic justice? In our courts the jury provides a democratic element, but the judges are appointed by the government. In some of the American States citizens directly elect the judges. Parties run candidates so you can vote for a Democrat judge or a Republican judge. In 1986 in California the Republicans campaigned against the re-election of a Democrat judge because she was reluctant to use the death penalty. She was defeated and the new Republican judge condemned more people to death. If you don’t think justice should be this democratic, try the ancient Roman legal system instead.

Rome was never a democracy. It began as a small city-state like the Greek city-states. There were popular assemblies, but the controlling body was the Senate, made up of men from old noble families and new wealthy families. The Greek city-states stayed small and wanted to stay small. Rome expanded to include all of Italy and then countries all around the Mediterranean Sea.

Romans were great fighters and intelligent rulers of the people they conquered. But conquest changed Rome itself. It was no longer a society of small
farmers who took time off to serve in the army. Men made rich by the conquests bought out the small farmers; generals with huge permanent armies became powerbrokers. The generals fought amongst themselves until one of them emerged as the chief ruler and first emperor. He was Caesar Augustus who took power about twenty years before Jesus was born. As the Bible records, it was his ordering of a census of the whole Empire which took Joseph and Mary to Bethlehem.

The Romans brought order and a single system of law to their Empire. The law changed as their conquests grew. The scholar lawyers who were chiefly responsible for developing the law were very interested in the laws of the conquered people. Comparing laws helped them to establish broad principles of justice which they then applied to particular situations. Greek philosophers had thought about justice in the abstract while the Athenian democracy was administering justice in a rough and tumble way. The Roman scholars thought about justice so they could develop rules for all situations; they were practical philosophers. Here are some examples of their work.

If you hire a horse, do you have to compensate the owner if it is stolen? Yes – because you should have looked after it. But if it was stolen by violence? No – because you don’t have to risk your life for a hired horse. However, if you’re late in returning the horse and it’s stolen, you must compensate the owner even if it has been stolen by violence.

If you ask a jeweller to make you a gold ring, are you buying a ring or hiring the service of the jeweller? It’s important to know because contract of sale and contract for hire have different rules. The answer depends on who supplies the gold. If you do, it’s a contract for hire. If the jeweller does, it’s a contract of sale.

When your will speaks of your property, does this include property acquired after the will was made? Yes. If you leave property to your nephews does this include nephews born since the will was made? Yes. Do the heirs of a nephew who has died since the will was made inherit his share? No. The principle was that the will speaks from the time of death.

In 530 AD the Emperor Justinian ordered that all the laws and the works of the greatest scholars be brought together and their differences and contradictions ironed out so that the law would be fixed for all time. Justinian was establishing a code of law, which is the whole law written down in one place. The minister of justice and sixteen scholars and experts were given ten years for the job; they had it done in three. This magnificent intellectual achievement drew on the work of many minds over several centuries, but what made it law was the emperor’s command. What the emperor wills has the force of law: this was the fundamental legal principle of the Roman Empire.
In the later Roman Empire court procedure changed. The judge, a servant of the emperor, was in full charge. Juries, which had existed in Rome’s early days, had disappeared. The judge conducted an investigation to find out what had happened, questioning the plaintiff, the defendant, and the witnesses. This is known as the inquisitorial method. The judge made a decision on the facts and the law.

Justinian was emperor of a much reduced Empire. The Empire in Western Europe had collapsed one hundred years before. He was emperor of the eastern Empire which had its capital at Constantinople (now Istanbul). In the west his code was unknown. The German invaders of the Empire brought their own laws with them. In some places they completely replaced Roman law; in other places German and Roman law became mixed. Though some Roman law survived, it was cut off from the Roman learning which had created it.

In the eleventh century, five centuries after it was written, a copy of Justinian’s code was discovered in Italy. It caused a sensation. Here was something which dealt with everything you might ever want to know about law and more, which was not a series of laws but a whole system of justice, and which made the existing laws look so primitive. Thousands of scholars, royal officials and students travelled to Italy to study and debate it in the law schools of the new universities.

Over the next few centuries European law was refashioned according to the Roman model. In parts of Germany Roman law was adopted completely and local customary law wiped out. This was a great loss to the peasants because in Roman law landed property can have only one owner. By customary law peasants had collected wood in the lord’s forests and grazed their cows on his meadow. Under Roman law he could now keep them out; everything was his.

This refashioning was conducted by the kings and princes. It was part of the process by which they were turning themselves into absolute monarchs. They were very much attracted to the principle that the word of the emperor makes law. They also changed their courts over to the Roman system of the judge as sole inquisitor.

A democrat can’t be drawn to this model. For the third attempt, try the English system. At least it will be familiar since it is our own. Roman law had very little influence in England. Just as England did not follow the path to royal absolutism, its legal history took a different course.
Common law

The system of law which developed in England is called the common law. It became a worldwide system because of Britain’s conquests and expansion overseas. It operates in Australia and in the United States, Canada, New Zealand, Malaysia and India. The common law is the great rival or alternative to the system which derives from Roman law which operates in Europe, South America and Japan. That is called the civil law.

The common law in England was established by judges appointed by the king and operating in courts the king had created. So it is not ‘common’ in its origin. It is called common because it established one law – the common law – for the whole kingdom.

The kings who set this process going were foreigners, the descendants of William, Duke of Normandy (a part of France), who conquered England in 1066. This conquest was not a large-scale invasion; it was a take-over at the top by William, who became king, and his followers who became the chief landowners. The establishment of the common law was one way they strengthened their hold on the country and ran it more efficiently.

England was already close to being a single country and it had been made completely so by Duke William’s thorough conquest. All the English were subjects of the new kings. European countries were still a patchwork of semi-independent princedoms and dukedoms. Princes and dukes had subjects, but these people were not subjects of the king, only the princes and dukes were. The process of creating a single law began much later in Europe using the rediscovered Roman law. The French kings of England, beginning their unification earlier, had to work with the materials to hand.

The people of England were Anglo-Saxons, descendants of the Angles and the Saxons, the German tribes who invaded the island after the fall of the Roman Empire. Their law was more folk custom than law, and varied from place to place. The new kings did not interfere directly with it. The old local courts continued to operate. The kings set up an alternative system by sending royal judges on circuit through the country to hear cases. They used the old laws and ironed out their differences by keeping in touch with each other and following each other’s decisions. To know what the law was you had to know what the judges had decided. The common law works by precedent. The reports of particular cases – volumes and volumes of them – are today the basic tools of a common law lawyer. The starting point for a civil law lawyer is the code of law, the law as it has been defined in one place at one time.
The king’s judges carried over from the old courts the use of ordeals to establish guilt or innocence. The accused were obliged to grasp a burning hot piece of iron and walk so many paces. If after three days the wound was healing they were innocent; if the wound was festering they were guilty. Or they were thrown into water. The person who did what was natural and sank was innocent; a floater was guilty. These practices were all approved by the church. The priests were actually in charge of the ordeals. The ordeal of grasping the iron took place in church during mass. Ordeals were pre-Christian, but the church had accepted them and declared that they allowed God to determine guilt or innocence.

In 1215 the pope declared that priests were no longer to supervise ordeals. There had long been doubts held in the church about them and these had strengthened as the rational methods of Roman law became known. Without the priest’s blessing, ordeals were worthless because they would no longer give God’s verdict. The king’s judges then turned to a practice which had operated in parts of France, the jury. The jury at first were to say from their own knowledge of local people and events whether the accused were guilty or not. It was some time before they became, as they are today, a group who assesses the evidence given by other witnesses.

Juries could still be in trouble themselves if the judge thought they gave a verdict against the evidence. It was not until 1670 that the jury’s right to decide any way they liked was established. This is an important democratic check on the law. When political reformers and rebels have enjoyed some popular support, government attempts to punish them have failed. The rebels from the Eureka Stockade who were tried for treason were all freed by Melbourne juries. Our criminal laws today can only be enforced if juries will convict people of breaking them.

In the old courts justice had been designed not so much to try individuals as to settle feuding between families and clans. If a man had been murdered, his relatives went to court to get a compensation payment from the relatives of the man who did the deed. There was a scale of charges. A great landowner might be worth ten times a small farmer. In these courts, people were very definitely unequal before the law.

In the new courts, murder and other offences were treated as disturbing the king’s peace and the individual offender was punished. Much less notice was taken of the status of offenders and victims. Of course a great noble would be treated more carefully than a poor man and a nobleman charged with a crime might refuse to show up at court. Or if he showed up, a jury would be too scared to convict him. But nobles in England had fewer legal privileges than they enjoyed in Europe. This enabled the principle of equality before the law to develop in the common law courts.
In the new courts the procedure for deciding cases was a carry-over from the old. One person accused another. The accused denied the charge. The matter was not settled now by an ordeal, but by both sides putting their story to the jury. It was a form of battle. This is the adversarial system which still operates in our courts. It is very different from the inquisitorial system of the Roman civil law. Civil law judges don’t watch while the two sides spin totally different stories. They are in charge of the process from the beginning and they ask the questions to find out what happened.

Gradually the king’s courts attracted more business because the power of the king’s name settled a case more definitely. After several centuries the old courts faded away. The common law judges built up the precedents which fixed the law on property, goods and liberty. They also set the rules to make sure a trial was fair. The most important rule was that you were innocent until proved guilty. The development of the common law was set in motion by kings, but it was not the king’s law; it was more deeply rooted, more organic; it was the law of the land.

The kings developed a rival court system which was much more fully their own. These were the prerogative courts which the kings used to enforce their policy and to deal with powerful subjects who might defy the ordinary courts. Here there was no jury, no right to cross-examine witnesses or even to know who they were. The most famous of these courts was the Star Chamber, whose name is still a symbol of arbitrary power.

The common law courts attempted to stop the expansion of the prerogative courts. One weapon they had was the writ (or order) of habeas corpus (which is Latin for ‘you have the body’). The judges could send a writ of habeas corpus to the authorities holding subjects for trial in the prerogative courts. The writ requires that the body being held be produced in court so that the judges can decide whether the person is being held lawfully or not. If the court decides that the imprisonment is illegal, the person is set free. The court would not always come to this decision or even always issue a writ. The king was someone judges had to fear since he chose them, promoted and dismissed them and the common law judges could not completely deny that the law did give the king prerogative power.

The power of the king over the courts was fought out during the seventeenth century at the same time as the battle between king and parliament. Charles I made his church policy even more unpopular by enforcing it through the prerogative courts. Pyrmne, who wrote about the bishops as a cancer in the church, had his ears cut off by the Star Chamber. The King imprisoned on his sole authority landowners who refused to lend money to him. Five of them applied to the common law court for a writ of habeas corpus, which was granted. The court then heard the argument and decided for the King. This decision
and the support of the court for the King in the ship money case was truly alarming. To accept the prerogative rights of the King was one thing; for the King to get the common law courts to support him in raising money without parliament was another, for these courts were the defence of the Englishman’s property and liberty.

When parliament had Charles at its mercy in 1640–1, it got his assent to laws which abolished the Star Chamber and all the other prerogative courts. This ban still applied when the monarchy was restored after the civil war. James II ignored it and opened a new prerogative court to deal with church matters. This was closed down by the Bill of Rights in 1688 when James was excluded from the throne and parliamentary supremacy established.

Charles II continued as his predecessors had done to imprison people on his own authority. To avoid them being released by a writ of *habeas corpus* he arranged for them to be sent to Scotland or Ireland or the Channel Islands where the court had no authority. This loophole was closed by parliament in 1679. The Habeas Corpus Act obliged courts to issue the writ and made it illegal for the government to evade it by shipping prisoners out of the country.

*Habeas corpus* came to be regarded as the great defence of English liberty. Its reputation soared when in 1771 a slave about to be shipped out of England to Jamaica obtained a writ of *habeas corpus* and was set free by the court. Though the judge had not gone so far, his judgement was taken to mean a slave was free once he was on English soil. *Habeas corpus* is still in Britain and Australia the protection of the citizen against illegal arrest and detention. When in wartime governments do want to detain people without trial, they have to get parliament to suspend *habeas corpus*.

The king’s power to control what happened in the courts was removed completely by an Act of parliament in 1701. The judges once appointed were to remain in office so long as they did their job properly. They could no longer be dismissed at any time by the king. If they were to be dismissed it had to be by a vote of both houses of parliament.

Making law and dispensing justice had been two of the great functions of monarchy. By the end of the seventeenth century in England there was a monarchy which could do neither. Only parliament could make law and only the common law courts with their independent judges could dispense justice.

This is the system which was established in Australia with self-government. Our judges are appointed by the governor-general or in the States by the governor, acting on the advice of ministers. Once judges are appointed they
are secure in their job. They can be dismissed only for bad behaviour if both houses of parliament agree. This means that judges are independent of the government which appointed them.

According to the principle of separation of powers, the judiciary should be separate and independent both from the body which makes the laws (the legislature) and the body which administers them (the executive). We follow this principle much more clearly in regard to judges than in the matter of the executive government (where ministers sit in the parliament).

However, in the common law system judges do more than decide whether the laws passed by parliament have been obeyed. Much of the law is still common law, law as it has been laid down by judges. In these areas, as new circumstances arise and values change, the judges decide matters in a different way. A thousand times it has happened that if judges decided strictly according to precedent, they would do what seemed like an injustice. So in a small way, and occasionally in a large way, they make law.

Ordinary people become famous when a judge does something unusual in a case they have brought because it goes into the Law Reports and becomes a precedent in future cases. Mrs Donoghue, a Scottish woman, is the most famous shop assistant in history because of the 1932 case *Donoghue v. Stevenson*. Mrs Donoghue was at a cafe with a friend. The friend poured her some ginger beer which she drank. When her friend poured her some more, a rotten snail plopped into her glass. The sight of the snail and the effect of the bad ginger beer made her sick.

Mrs Donoghue took Stevenson, the maker of the ginger beer, to court. She ended up in the highest court in the land, the House of Lords, which ruled in her favour. On the law as it stood, she should not have won because there was no contract between her and the maker of the ginger beer. Her contract was with the cafe proprietor. Only parties to a contract can sue each other. But in this case Mrs Donoghue had been made ill, no one could have checked the contents of the bottle because it was opaque, and since the bottle was sealed it was clear that the snail had come from Stevenson’s. So the court decided that Stevenson did owe a duty of care to the people who would eventually drink his ginger beer and that Mrs Donoghue was entitled to compensation. This was a landmark case in the development of consumer law.

Until quite recently judges and legal scholars argued that judges did not make law. Even when they seemed to be doing so, they were simply declaring what the law was in a new situation. A new school of legal realists say this is a fairy tale. Judges are not legal technicians making sure that the law takes its true course. No matter how detached they are, the views and values of
judges will affect what they do and to any legal problem there are a number of answers. The law is an open system managed by human beings.

The legal realists have won the debate. Some of them go further and say judges should be more active in creating law, especially when parliament has been reluctant to change the law. In controversial matters parliament is sometimes happier to leave change to the judges. In three States in Australia the laws on abortion were changed by judges who widened the circumstances when abortion would not be illegal.

If parliament does not like what the court does, it can overrule the court. It is a rule of our system that statute law (passed by parliament) prevails over common law. But our faith in judges will be eroded if we believe that judges not only make law, but make it up any way they like. The sensible realists are now debating what guidelines judges should follow when they are making law. What they decide has to grow out of previous law. The law is open, but it must remain a system.

A stricter application of the separation of powers would reduce these problems. The French revolutionaries, who believed passionately in this principle, wanted parliament to lay down laws which were simple and clear. All citizens could know them and judges would only have to apply them.
They would produce a code of law whose authority would be the will of the people rather than that of an emperor or king.

The code was actually drawn up by Napoleon, the military dictator who took over from the revolutionaries and gave France much of what the revolution had promised – except political liberty. He regarded the code as his greatest achievement. It was a worthy successor to the great Roman code and it embodied much of Roman law. Napoleon’s code is still the law in France and it provided the model for the codes of other European countries. All these now rest on the authority of parliament. Of course where there are codes judges do not merely apply the law; the law has to be interpreted in the particular case, but judges do not, to the same extent, change the law.

In England and Australia when parts of the common law have become too complex, parliament has reformed or replaced them. But there has never been any interest in changing over to the civil law system. The common law has been seen as the protector of property and liberty. The High Court has recently continued this tradition when it ruled that a trial was unfair if the accused did not have a lawyer and that the evidence of a single policeman would not be accepted. The Supreme Courts in the States now hear cases where citizens claim they have been denied natural justice.

Our system of courts, like the parliament, took shape a long time before democracy. There is a democratic element in it – the jury. There is a very strong liberal element – the courts are independent and a check on government. Judges are trusted with great powers because it is known they will use them to protect the citizen. This does not mean our system is perfect. Legal reformers have recently been looking at the civil law. If our judges were more in control of cases and proceedings were less adversarial, justice might be quicker and cheaper.

**English law in Australia**

In January 1788, 735 convicts and 200 soldiers settled on the territory of the Eora people on the southern shore of Sydney Harbour. You might think that normal English law would be suspended for such an operation. The convicts would be controlled by penal or military discipline and the Aboriginal people would be shot if they interfered. In fact the British government declared that English law would govern not only this odd settlement, but all of New South Wales, which meant that Aboriginal people became subjects of the king.

From what it already knew about the Aborigines, the British government decided that they were not the owners of the land. They simply wandered over it, did not plough the soil and had no settled homes. Australia could be treated as *terra nullius*, a Latin term which means land belonging to no one.
Where a native population did cultivate the land and had settled homes the British government did treat them as owners. Before deciding on Australia for its convict settlement, it was looking at a site in west Africa which it planned to buy from the native owners.

Since the British government decided Australia was not owned, it claimed full rights over it and saw no need to negotiate with the Aboriginal people. The first governor, Arthur Phillip, was instructed to treat the natives kindly and punish those who disturbed them or their possessions. Very soon convicts were being injured or killed by Aboriginal people and Phillip was under pressure to get tough with them. He refused, saying the convicts were the aggressors. They were taking spears to sell as souvenirs and were probably interfering with the women. Then one of Phillip’s own servants was killed. He ordered a group of soldiers to march through the bush to catch or shoot six Aboriginal people. So they were not subjects. Aboriginal people did not have the protection of the law. This time the soldiers found no Aboriginal people. On other occasions soldiers and police on horseback did find and kill them.

The instructions to governors stayed the same. The governors told the settlers that killing Aborigines was murder. But whenever Aboriginal people held up the advance of white settlement into their territory by killing settlers, the governors sent police or soldiers to deal with them or turned a blind eye to what the settlers did. Thousands of Aboriginal people were slaughtered. On a few occasions white men were brought to court for the killings. They nearly all got off. Aboriginal people could not use the courts to protect themselves – these subjects of the king were not allowed to give evidence because, not being Christians, they would not take seriously the oath to tell the truth.

The settlers said there was a war between them and the Aborigines. They were more honest than the British government. If the Aboriginal people had been treated as enemies rather than subjects there is a chance they may have done better. With enemies there may be negotiation and captured enemies are prisoners of war. But it is hard to imagine a different outcome on the frontier. The settlers were hungry for land, especially when they moved into sheep and cattle farming. For the Aboriginal people land was not something that could be sold or negotiated away.

The British government became aware that its Australian settlement was destroying the Aboriginal people. In the 1830s and 1840s the men and women who had campaigned against slavery in the Empire urged the government to protect the Aborigines. The government did not change the *terra nullius* doctrine or stop the advance of settlement (which would have been very difficult), but it did organise small reserves and protectors in the new
Governor Arthur in Tasmania attempted to show with these posters that English law operated equally for Europeans and Aborigines: in practice, it did not.

Arthur’s Proclamation to the Aborigines, 1828
Collection: Tasmanian Museum and Art Gallery
settlement of Port Phillip and the leases it issued to squatters made it clear that Aboriginal people still had the right to hunt over their lands. It also reminded the governors that the death of an Aboriginal person was to be treated in the same way as the death of a white person.

Governor Gipps took this message to heart. In 1838 he put 11 men on trial for murdering 28 Aboriginal people at Myall Creek. When the jury found them not guilty, he put seven of them on trial again. When the second jury found them guilty, he ignored the huge public campaign to spare their lives. All seven were hanged.

Most white men on the frontier did not think the killing of Aborigines was a crime. This case had only got to court because of unusual circumstances. The Aboriginal people who were killed had been camped at Myall Creek cattle station. They were not living in the bush and spearing cattle. They were working part-time on this and other stations. The murderers, who had been roving the district looking for Aborigines to kill, found easy prey at Myall Creek. The Aboriginal people were rounded up and led off to be slaughtered. When the station overseer returned, he wanted to know what had happened to them. He found the pile of bodies and alerted the authorities.

The overseer was appalled at the wanton killing of harmless people, but even in these circumstances many whites did not want the murderers to be punished. Governor Gipps’s determination to hang them made little difference to what happened on the frontier.

The English law, which did very little to protect the Aborigines, was altered to benefit the convicts. In England a convict could not own property, take a case to court, or give evidence in court. In New South Wales all these rules were ignored. The first case in the civil court was brought by two convicts against the captain of their ship for losing their luggage.

The courts could make these changes because English law had to be followed only as far as circumstances allowed. Since two-thirds of the population were convicts, the courts could scarcely have operated if convicts could not give evidence. Convicts brought property with them and obtained more by working for wages in their time off. If the law had held they did not own this, then the authorities could not have stopped convicts pinching things from each other. To protect their property, convicts had to be able to bring a case and give evidence.

While the convicts were serving their term, they had to work for the government or a private master. This was the punishment laid down by the law. If they did not work or were rude to their master, the men were flogged and
the women sent to the Female Factory which was a workshop and prison combined. These punishments too were imposed by the law. Masters could not punish their own servants; they had to take them to the local court. At the court the convicts could also lodge complaints about their masters, an important right made possible by the rule that they could give evidence.

When they had served their term or received a pardon, the convicts were told they had all the rights and liberties of free subjects. In some cases this was more than they would have been entitled to in England. There for some crimes you were deprived of rights for ever.

The decision to use English law to run a colony of law breakers made an abnormal colony into a more normal one. The law breakers were regarded as still having legal rights; if they were to be punished further it was by the law, and when their term was up they were free subjects.

The colony’s first law courts were very different from the English ones. The judge was a military officer, known as the judge advocate. In criminal cases there was a jury, but again this was made up of six military officers who decided the case along with the judge. A majority verdict was enough to convict the accused. The early judges were not trained in the law. The only people trained in the law in the colony were lawyers who had been sent out for fraud and forgery. They were allowed to practise in court since there were no free lawyers. In these odd-ball courts English justice was followed more or less.

From 1810 the judges were trained in the law. The governor at this time was Lachlan Macquarie, the builder and improver, friend of the ex-convicts, and firm believer that only he should rule. This is what the British government still believed: the new judges were still officers under the governor’s command.

When Judge Jeffrey Bent arrived in 1814 to open a new civil court he was appalled at ex-convicts practising as lawyers. He refused to have them practise in his court. Two free lawyers had been sent from England by the British government, but only one had arrived. Until there were two, Bent was determined to keep his court closed.

The governor asked him to admit the ex-convict lawyers. Macquarie did not want legal business to be held up and he did not like a slur being cast on the ex-convicts. Bent was furious with the governor for interfering with the independence of a judge and for polluting the legal profession with ex-convicts. The quarrel continued and the court stayed shut. Bent accused Macquarie of governing like a Roman emperor – he wanted his wish to be law. He refused
to pay toll on the Parramatta Road because he said a governor acting alone had no power to enforce a tax.

Bent is usually depicted as the villain in this story. Macquarie is the good guy protecting the former convicts. But the usual rule – it is our rule – is not to have ex-criminals as lawyers. New South Wales was such a strange society that the usual rules had unusual effects. Bent was not simply keeping out a few bad eggs; he was putting down all the ex-convicts who thought they could resume their old position in life. The British government supported Bent’s principle and ruled that the ex-convict lawyers must no longer appear in court. The free lawyers kept them on as ‘clerks’ since they knew the business and the clients so well. But Bent himself was recalled for being rude to the governor. Macquarie had said either he goes or I go.

Macquarie was the last governor to rule alone and to have power over judges. From 1823 the governor had a small council and judges were independent. The same arrangement was also made in Tasmania, the only other colony at this time. The courts had the full powers of English courts and operated more or less as they did except for one thing – the jury was seven military officers. The ex-convicts and their supporters wanted ordinary juries which they saw as their right as free subjects. They continued to ask for this. They were not unhappy with the verdicts of the officers. They wanted the right to sit on juries as a public demonstration of their worth. Many of them had done well and were respectable citizens. A few were very wealthy, much wealthier than many of the free settlers who looked down their noses at them.

The free settlers did not want to have ordinary juries if ex-convicts were to sit on them. They feared that this was the first step to ex-convicts running the colony which would happen if the British government allowed a local assembly for which ex-convicts could vote. Ex-convicts were much more numerous than the free settlers. The free settlers said that if New South Wales were to have juries and an assembly, special rules would have to apply: property alone could not be a test of the right to sit on a jury or to vote.

The British government faced a problem. Juries and assemblies were the rights of British subjects who had settled overseas, but were ex-convicts the right people to judge guilt and innocence in a criminal trial? Our rules today exclude convicted people from juries. This was another of the odd problems which a convict colony threw up. The British government solved it by doing nothing. It didn’t allow ex-convicts to sit on juries or make special rules for juries. It continued with the military juries for another ten years.

Ex-convicts were allowed to sit on juries in criminal cases from 1833. The free settlers were angry about this, but it was becoming clear that the convict era would soon be over. Free workers were now coming from Britain as well
as convicts and the native-born population was increasing. In 1839 the British government announced that transportation to New South Wales was finished. Only then did it decide that there could be voting for two-thirds of the Legislative Council. If ex-convicts met the property test they could vote. This was introduced without bitterness in 1843.

Ex-convicts’ rights

The great danger of a convict colony was that the ex-convicts would become a degraded group not enjoying the same rights as others. Some of the free people wanted this. It didn’t happen partly through luck, partly good management and partly because the ex-convicts, seizing their chances, made themselves into a prosperous and wealthy group who could not be ignored. The former convict colony could move to self-government with its peculiar problems already solved.

Western Australia and South Australia, founded separately as free colonies, had not faced these problems. From the beginning their governor had a council, the judges were independent of the governor, and ordinary juries operated.

Appeals to England

When the colonies acquired self-government, judges were no longer appointed from London. They were appointed by the colony’s government which was responsible to parliament. The parliaments could pass almost any laws they liked on internal matters. The British government had the right of veto which it used very rarely. The judges were not as free. They were part of the common law system and from their courts people could appeal to the Privy Council in London, the highest court for the empire. The judges had to give close attention to the rulings of British judges.

The creation of the Commonwealth created a new court, the High Court. Some of the founders wanted to make this the last court of appeal in Australia and stop appeals to the Privy Council. But others did not want to break this link and the British government wanted it preserved. So Privy Council appeals survived from both the High Court of Australia and the Supreme Courts of the States. The judges still had to follow British precedents. The process of freeing Australian courts from British supervision began in 1968 and was completed in 1986. Australian courts still look for guidance and suggestion to British cases just as they do to cases throughout the common law world, but British cases no longer have any special standing.

‘Activist’ court

In the 1980s the High Court became bolder in its interpretations, more ready to depart from precedent. It was called an ‘activist’ court. No longer bound by British precedent, its boldest act was to overturn the starting point of English law in Australia, the doctrine of terra nullius. In a case brought by Eddie Mabo in 1992 it ruled that his people in the Torres Strait islands were the owners of their lands and that native title had existed throughout

Mabo
Australia at the time of British settlement. Where land had been sold or leased native title had been removed, but on crown land it still survived. There was a doubt whether a pastoral lease removed native title. In the *Wik* case in 1996 the court ruled that it did not. It pointed to the fact that the first pastoral leases, by order of the British government, had allowed the Aboriginal people the right to hunt.

The court was both praised and condemned for these decisions. The critics said that such a fundamental change should have been made by the parliament, not by unelected judges. The supporters of the court said this was a case where the court had to act because the parliament had not. Land rights legislation for Australia had been talked of, but not provided. Some of the judges said the Australian people would want them to decide as they did. Who are they to judge what the people want, said the critics.

The court could have told Eddie Mabo that according to precedent he didn’t own his land and that may have spurred parliament to act. But judges have to deal with the case before them and do justice. The majority of the court, with the evidence before them, thought it would be an injustice to decide against Eddie Mabo.

The parliament remains in charge. After the Mabo and Wik decisions, governments put measures to parliament to define who had native title and how far this right would extend and when it would be overridden. It could have passed a law to abolish native title on all land.

One of the judges of the 1980s said that of course judges reflect public opinion in their decisions. It would be very strange if they did not. The question is whether they should lag behind public opinion, be up with it, or ahead of it. If they are too far ahead, their judgements will not stand. On Mabo and Wik, they were probably just a little in front.

**Constitutional law**

In a federal constitution like ours sovereignty is divided. The federal parliament can do some things. State parliaments can do other things. Who is to decide where the boundary lies? The constitution lays down the boundaries, but who is to interpret the constitution? The judges of the High Court.

This is a huge power for judges to have. Sometimes governments have been elected to pass a certain law, parliament has passed the law, and then the High Court has declared that the law does not exist. The parliament did not have the power to pass it. The Labor Party many times had laws dealing with monopolies and government enterprises struck down by the High Court. The Liberal Party, on coming into office for the first time in 1949,
carried out its promise to ban the Communist Party. The court said it could not do it.

When the court rules on a common law matter, it can be overruled by parliament. When a court interprets an Act of parliament in a way parliament did not intend, parliament can change the law. But when the High Court strikes down a law as unconstitutional, only a change to the constitution will enable parliament to override the court.

The Australian constitution is changed by parliament putting an amendment to the people at referendum. If a majority of people support the change and if a majority of the States support the change, then the constitution is altered. When this scheme was adopted at the 1897–8 convention, it seemed ultra-democratic. The direct involvement of the people was highly unusual. But it has proved very hard to change the constitution. Forty-two changes have been put to the people and only eight have been agreed to.

Six of these changes have been ‘housekeeping’ matters, changes which tidied up the constitution rather than really altering it. Two have increased the Commonwealth’s powers. In 1946 it gained the power over social security payments, student allowances and health services. In 1967 it gained power over Aboriginal affairs. Many proposals have been put to the people to increase the Commonwealth’s powers in other areas. They have all been defeated.

The founders of the constitution planned a small Commonwealth government. They listed the powers it should have, and left everything else to the States. And yet the Commonwealth’s powers have grown enormously. One of the chief reasons for this is the way the High Court has interpreted the constitution. Interpreting constitutions is a tricky business. Consider these five rules. The judges have followed one or more of these in different combinations.

1. Follow the words of the constitution exactly.
2. Consider what the document as a whole implies.
3. Do what the founders intended.
4. Apply the document to today’s circumstances.
5. Consider national needs and the people’s wishes.

Which rules would help in the expansion of Commonwealth power? Not rule 1: that is a very cautious approach. Rules 2 and 3 give more flexibility but since the founders wanted a small central government and strong States, you won’t get far with them. Rules 4 and 5 look more promising. You could argue that the constitution must not be treated as a dead document; as times change and needs alter, it has to be looked at differently.
The judges who have expanded the Commonwealth’s power have drawn a little on rules 4 and 5, but it is by laying great stress on rule 1 that they have transformed the constitution. How can this be? They have followed the founders’ words and produced a result the founders would not recognise!

The first judges had been founders of the constitution. The first chief justice was Samuel Griffith who had written the first draft of the document. They regarded rule 2 as important. It was a federal constitution which means that the Commonwealth and the States must be supreme in their spheres and not interfere with each other. So the court ruled that a State government could not make a post office worker pay a tax on his salary because the salary came from the Commonwealth. This judgement did not depend on the words of the constitution; there were no words which put this limit on the States’ powers. The judges applied this principle both ways. Workers in the State railways were not allowed to register with the Commonwealth Arbitration Court because then a Commonwealth body would be fixing the wages of State workers.

The court changed its approach in 1920, after the founders had left the court, with its ruling in the Engineers case. Engineers working for a government sawmill in Western Australia wanted to have their wages determined by the Commonwealth Arbitration Court. They seemed to have little chance of success. The union hired a 25–year-old barrister called Robert Menzies who had not been in the High Court before. During the case, he was interrupted by one of the judges who said his argument was rubbish. Menzies agreed with him, but said that if the court gave him time he would put a case which would convince them. He did convince them, made his name and, since his future was secure, got married.

The court accepted that when a power was given to the Commonwealth, the full meaning should be given to the words. So if the Commonwealth had power to settle interstate industrial disputes, it should be read as all such disputes, whether they involved State government workers or not. Read the words; don’t bother about the consequences. This was interpretation by rule 1, which was not good news for the States.

In the 1920s and 1930s there were State income taxes and a federal income tax. The constitution gave the power to tax to both levels of government. During World War II the Commonwealth government wanted to raise income tax levels, have one rate for the whole country, and control all the proceeds itself. It planned to force the States to stop taxing incomes. It would raise the level of Commonwealth tax, but give some of the proceeds back to the States on condition that they dropped their tax. A State could ignore this offer. It could keep up its own tax which would mean that its people would be paying as well the very high Commonwealth tax, none of the proceeds of
which would go to the State. This was politically impossible. The High Court ruled in the Uniform Tax case (1942) that this scheme was constitutional even though it used Commonwealth powers to deny, in effect, a State power.

The scheme depended on section 96 of the constitution, which allows the Commonwealth government to make grants to the States on such terms and conditions as it thinks fit. This was included in the document at the last minute and was intended to allow for minor adjustments in financial arrangements. It has been used by the Commonwealth to influence policy in areas which the constitution left to the States. The Commonwealth has no power over universities or schools, but by giving money to the States for these and putting conditions on the grant, it in effect obtains power over them. As the Commonwealth has become the affluent government, helped by the Uniform Tax case, it has been able to exercise this power more and more. The High Court has used rule 1 (follow the words exactly) to interpret section 96.

The Tasmanian Dam case (1983) gave Commonwealth power a further boost. The High Court ruled that a heritage law passed by the Commonwealth parliament could stop a State building a dam in a World Heritage area because the Commonwealth government had signed a treaty on world heritage.

Protestors against the damming of the Franklin River in Tasmania: they finally won their case when the High Court ruled that the Commonwealth had the power to override the States on the use of World Heritage areas.

Coo-ee Picture Library
When the constitution was drawn up treaties dealt with peace terms and trade. Now they deal with many matters which in Australia are the responsibilities of the States. By signing these treaties the Commonwealth can gain the right to interfere in State matters. The court, sticking to rule 1, would not divide external affairs into what were truly international and what were domestic. This verdict was supported by four judges and opposed by three. The three thought the court must also consider rule 2 (what the whole document implies). If the Commonwealth could claim every State power by signing a treaty, the federal principle was exploded.

You see what has happened. If you forget rule 2 on what the document implies and rule 3 on what the founders intended, rule 1 turns out not to be a cautious approach at all. It looks cautious, of course. That explains how even conservative judges have produced radical change.

Should this be told as a sorry story of the defeat of the States? Perhaps the majority of Australians don’t care for the balance of the constitution. They are happy that the Commonwealth can protect the environment in the States and influence schools (this book is a part of a federal program). The court has caught the public mood. It is an odd outcome since referendums to increase Commonwealth power have usually been defeated. The defenders of the High Court say that if the people were unhappy with what has happened they could change the constitution. The defenders of the States point out that only the Commonwealth parliament can propose a change to the constitution.

The States still possess some weapons they can use against the Commonwealth. State premiers can call on State loyalty and suspicion of Canberra. The major parties are themselves federal bodies. If the Commonwealth government becomes too domineering, the State party organisation can warn federal ministers and members to back off, threatening that they might not be chosen by the party to run at the next elections.

There are three levels of government in Australia: federal, State and local. The Commonwealth constitution, as interpreted by the judges, divides federal power from State power. Local government is not mentioned in the Commonwealth constitution. Cities, shires and councils are created by State parliaments which decide what duties they will perform and have to approve the local laws (by-laws) they make. If a State government considers a local government body is inefficient or corrupt, it can suspend it and appoint an administrator to run its affairs. Theoretically a State parliament could decide not to have local government at all.

Local government bodies have not performed as many functions in Australia as elsewhere. They have not run the police or the schools. For a long time their chief business was the making and maintaining of local roads. Now
they are more involved in welfare and community services, helped by Commonwealth money. There is a strong local government association which wants local government to be recognised in the constitution. In 1988 a proposal was put to the people which would have obliged State parliaments to establish and continue a system of local government. This was overwhelmingly defeated. This does not show that Australians don’t want local government. The proposal was one of four and the opponents of the others made things simple by campaigning for a No vote on all.

This is an indication of how hard it is to get the people to change the constitution. It is much easier for judges to change it, though they say they are only interpreting it.

**Human rights**

Human institutions – kings, tribes or parliaments – make laws, but are all the laws they make truly law? And is that all the law there is? There is a very old and long-lasting belief that in addition to human law there is natural law, which gives us a standard to judge human law.

The Roman scholar lawyers used the idea of natural law. As they compared Rome’s laws with the laws of the people they conquered, they saw common principles and standards. This common element they called ‘natural law’. They also used the term for what was reasonable and right even if it was no part of any one law system. The Roman lawyers were practical scholars. The inventors of natural law were Greek philosophers and they were much more philosophical about it. They saw natural law as the perfect model of law, a sort of divine standard, which was supreme over human law.

This idea was taken up by the Christian church. The church preserved the learning of the Greeks and Romans, even though they were pagans. So many of their ideas seemed close to Christianity or could be used by it. In Christianity natural law became part of God’s law. It was not the law you found in the Bible; it was the law you could work out by your God-given reason and which was a fundamental law for human beings and their society. It started with the seeking of good rather than evil, and included the need to preserve life, to have children, and to bring them up. The Catholic church today uses natural law to condemn birth control and abortion. According to this teaching, the laws which allow these things are not true laws because they break God’s law.

Natural law took a new direction with John Locke and the Enlightenment thinkers of the eighteenth century. It was used to support the idea of natural rights which had been no part of the natural law before. The starting point of these thinkers was not perfect law or God’s law, but the individual person.
They wanted man to have rights as part of his nature, something which he had before there was government and which governments had to protect. By calling these rights natural rights they gained for them the authority of natural law, as supreme, above normal law, and which normal law had to respect.

This was the thinking which led to the first great modern declarations of human rights. The English Bill of Rights of 1688 claimed rights as given by the laws and customs of England. They were ancient. The revolutionaries in the American colonies in 1776 and in France in 1789 claimed rights because they were natural. So natural that you did not need to argue that they existed. The American Declaration of Independence says the rights to life, liberty and the pursuit of happiness are ‘self-evident’. The French Declaration of the Rights of Man and Citizen says its principles are ‘simple and incontestable’.

When the revolutions were over and the rights they had proclaimed became accepted and part of ordinary law, there was less need for the idea of natural law and natural rights. Legal experts said they did not really exist. The only law was that made by human institutions and the only rights were those that legal systems provided for and protected. There was no outside standard.

But the world looked for outside standards when it faced the horrors done by Hitler and his Nazi party in Germany. Hitler came to power legally. He was appointed chancellor by the president in January 1933. In February the parliament (the Reichstag) was burned down. Hitler put the blame on the communists and got the president to sign an emergency decree which took away freedom of speech and freedom of the press and allowed prisoners to be held without trial. In July the parliament passed a law which gave Hitler the power to make law. The parliament still met and passed laws, and elections were held, but the only candidates were Nazis. It was parliament which passed the Law for the Protection of German Blood and German Honour which made Jews non-citizens and forbade marriage and sexual relations between Germans and Jews.

With power given into his hands by law, Hitler locked up and tortured all opponents to his rule in Germany and, when he controlled most of Europe during World War II, killed nearly all its Jews. Five million were shot or gassed.

So were all these actions lawful? No one could think so. The countries which combined to beat Hitler (Britain, the United States and Russia) put the Nazi leaders on trial for crimes ‘against humanity’ which was a modern version of ‘against natural law’. The United Nations, formed after the war, issued a Universal Declaration of Human Rights. This is the modern version of natural rights. We do believe that human beings because they are human
cannot be treated in certain ways. We believe this no matter what the law of any particular country may be.

The United Nations declaration drew on the Bill of Rights of England (1688), of the United States (1791) and on the French Declaration of the Rights of Man (1789). Most of the civil and political rights in the UN declaration came from these documents and sometimes the same words were used. Rights were now for ‘everyone’, women as well as men. There were new social and economic rights such as equal pay for equal work, protection against unemployment, and a decent standard of living.

The big three powers were not at first very interested in a declaration of human rights. The small nations, Australia among them, were more responsible for pushing the UN in this direction. Australia’s foreign minister at this time was Dr HV Evatt, a brilliant lawyer who believed passionately in the United Nations and the need for a declaration on human rights, particularly economic and social rights. He was closely involved in the planning of the organisation and in drawing up the declaration. He was president of the General Assembly when the declaration was adopted in 1948.

The United Nations can’t make countries respect human rights. Over 100 countries have signed a UN covenant promising that they will. They have to
report regularly to the UN on human rights in their territory and the UN checks up on countries where human rights are being abused. Asking questions and publicity are its chief weapons. Publicity works because around the globe people are interested in human rights. Organisations such as Amnesty International make a difference because they report on abuses and their letter-writing campaigns to governments which hold political prisoners reminds them that they are being watched.

This does not mean that the governments stop the abuses and let their people hold demonstrations and criticise them in the media. But it is now harder for governments to ignore outside pressure. They have to explain, or tell lies, or change a bit.

Countries acting alone or in groups can also put pressure on countries where human rights are being abused. This is a change from the old rule in foreign affairs which was that you did not criticise a nation for what it did in its own territory. The pressure is usually the stopping of trade or investment. Pressure of this sort from many countries forced the white South African government to stop apartheid, which denied civil and political rights to blacks.

It is much harder for one country on its own to bring pressure to bear. If it stops trade or investment, the country abusing human rights simply gets what it needs from somewhere else. While the caring country is losing money, others are making more, and the country abusing rights goes on as before.

There has been a debate in Australia over how much we should stress human rights in our relations with other countries. When abuses are taking place in our own region, those who care about human rights naturally want to do something about it. They say how can we treat as friends, governments which are locking up and torturing people? Our government says that it raises these matters privately with the governments concerned. Human rights activists want them to do more than this. But it is hard for one country, particularly a not very powerful country such as Australia, to exert great pressure on its own. It would be silly to harm our own interests, make an enemy of one of our neighbours, and still make no difference to how it treated human rights.

Australia does not have to give up its opposition to human rights abuses. We need to choose the methods that will work to advance the human rights cause. If nations are taking joint action, we can participate. If they are not, private protests may be all that our government can do. The strongest new force for change is the worldwide interest in human rights. We can and have contributed to that through the United Nations. Individual citizens can contribute through organisations such as Amnesty International.
Though Australia helped draw up the UN Declaration of Human Rights, it does not have a bill of rights of its own. The founders of the constitution did not think it was necessary. Scattered through the constitution there are a few rights, but there is no general statement of rights. For a long time few people in Australia were worried about this absence. Sir Robert Menzies in 1966 gave the same reasons for Australia’s not needing a bill of rights as the founders gave seventy years before. Australians had the protection of the common law and of responsible government. If a government denied the human rights of any citizen, ministers had to answer to parliament, which could vote them out of office.

In the thirty years since, more and more Australians have come to believe that we do need a bill of rights. They do not have confidence that politicians in parliament will protect them. They are more likely to think that politicians are the danger.

We have developed new ways of protecting rights. The ombudsman will examine any citizen’s complaint about how they have been treated by the government. If any citizen believes they have suffered discrimination because of their gender, race or ethnic background they can appeal to the Equal Opportunity Commission. A Human Rights Commission examines and reports on human rights.

Still the demand for a bill of rights in the constitution continues. People are shocked to find that so few rights are protected in the constitution. They should not be too alarmed. Australian society believes in human rights and has many institutions, old and new, which protect them. The best protection for human rights is not a bill of rights but a long tradition of respecting them.

That does not satisfy those who want a bill of rights. They say the existing protections can be easily pushed aside. Habeas corpus, our protection against detention without trial, can be suspended by parliament. Commissions on human rights and equal opportunity can be abolished by parliament. The only way to guarantee rights is to have them written into the constitution.

All right. So rights will be safe in the constitution. But they still have to be interpreted. Rights are not straightforward. The right to free speech does not allow you to slander other people or stir up racial hatred. The right to privacy does not mean that you can hide your affairs from the tax office. Rights clash with each other and with the public good. If rights are made safe in the constitution, it will be unelected judges who have to decide these difficult questions. Isn’t it better that politicians elected by the people and answerable to the people decide the balance between rights and the common good?
No, No, so say those who want a bill of rights. They are the last people we would trust.

While Australians were debating the question, the High Court found that one right which would be part of any bill of rights was already in the constitution. The court declared invalid a law which banned political advertisements on television during election campaigns (Australian Capital Television case, 1992) because it limited the free speech that democracy requires. There is not a single word about free speech in the constitution. However, the court decided that since the constitution sets up a representative democracy, the document implies that there will be freedom of political comment. Looking for the implication of the document is an acceptable way of interpreting it. What was strange in this case is that we know the writers of the document had deliberately excluded a bill of rights from the constitution.

Weren’t the unelected judges going too far this time? If we want a bill of rights, we will put it in the constitution. And is it clear that in this case the judges made the right decision? There is a democratic argument for such a ban. If parties have to collect millions of dollars to pay for ads, the rich people and companies which give the money may come to have too much influence over the parties. Doesn’t this show the disadvantage of judges determining the extent of rights?

Most people don’t think so. A recent opinion poll showed that 70 per cent of Australians wanted a bill of rights and wanted judges to be the protectors of it. The faith in representative democracy and responsible government is in decline. The trust in unelected judges is on the rise.
One of the famous speeches on democracy was given by Pericles who was the leader of Athens in its war against Sparta. He gave it in a cemetery where Athenian soldiers killed in the war had been buried. So much of the speech sounds modern, though it was given 2,500 years ago. These ideals are our ideals.

‘We call our state a democracy’, said Pericles, ‘because power is not in the hands of a minority, but the whole people’. Yes, we agree.

‘Everyone is equal before the law.’ Yes.

‘It doesn’t matter what class you come from, it’s your ability that counts.’ Yes, a wonderful ideal, though hard to reach.

‘Everyone must be interested in politics.’ Eh? Say that again. Pericles said: ‘We do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all.’

That we don’t agree with. We value our democracy because of the freedom it gives us. We can make our own life, and if we don’t want to be interested in boring and irrelevant politics, we don’t have to be. Imagine being made to go to meetings and sit on committees!

The Greek democrats did not have the idea of private individual rights. You had the duty to participate in government and that gave you rights – to vote in the assembly, to sit on a jury, to stand for office. The Greek city-states were small and citizens wanted to belong to the state. It was like belonging to a tribe or a club. You didn’t want to be finding ways to keep apart; being together was comforting and rewarding.

Our concern with rights began as a way of reducing the claims of kings and avoiding the teaching that they always had to be obeyed. We used rights to escape. We have claimed more and more rights; we are escaping further and further. But what are we running from? No longer from kings. Now in a democracy we are running away from … ourselves. Why don’t we trust each other more and concentrate on building a strong community, not on securing our private space?

We have carried our concern with rights too far or it has not been balanced by an acceptance of our responsibilities. A society in which everyone demanded their rights and no one treated other people decently would be a
most unpleasant place. A group of leading statesmen from around the world has now drawn up a Declaration of Responsibilities which it wants the UN to place alongside its Declaration of Human Rights. One of its key clauses is the old rule: act towards others as you would have them act towards you.

Still, we cannot give up our concern with rights. Democratic states can be heavy-handed. Our governments are more powerful and more remote than the government in Athens. We don’t have a weekly assembly where we can control what a government does. Our society is also larger and more diverse. We are all Australians and sometimes that gives us the feeling of belonging to a club or a tribe, but day to day we live in very different ways and have different values. We need our individual rights so that we can live as we like.

But if we were all concerned only with our rights and our lifestyle, our democracy would not work. Governments want us to vote for them and they will try to be popular enough to get re-elected, but day by day they are influenced by what they learn of our views and interests. Citizens with the same economic interests – farmers, workers, employers – form associations which regularly put their views to government. Citizens with similar concerns do the same – they may be concerned about the environment, or education, or overseas aid.

When governments don’t act as a particular group may want, there will be protests and demonstrations or letters to the newspapers and calls to talkback radio. If all this were to stop, if governments governed and there was silence, they would not at first know what to do. Soon they would realise that nobody cared what they did, and then governments would govern for their close supporters, their families and themselves.

As reporters of protests and as critics of government themselves, the media play a crucial role. In a large-scale society the media is the only way we learn about the protests – and the proposals – of our fellow citizens. The media are the gatekeepers of democracy. If they narrow the range of what they will report or what they will investigate, they rob citizens of knowledge and with that, the capacity to act or exert influence. One way to ensure that the media remain open to a range of views is to ensure competition between media outlets and diversity of ownership. Another way is for the government itself to own, say, a broadcasting organisation which will not be concerned with profit and will be bipartisan in the political battle and not a barracker for any particular view. An independent, government-financed broadcaster is one of the miracles of a liberal democracy, like an officially recognised leader of the opposition and judges who may defy the government which appointed them.
It is very easy to reach the view that citizens exert little influence over modern government. We commonly complain that governments ignore us or that the parties are too much alike or that politicians break promises. In fact our governments are still very responsive to citizens’ pressures. Think of some of the issues which concern governments today – the environment, heritage, equal opportunity, child care. Thirty years ago governments took little or no interest in these matters. They have been made important by citizens’ efforts. Conservation groups have been particularly effective in finding new ways to protest and to bring issues to our notice. In Tasmania in the 1980s the Wilderness Society stopped the damming of the Franklin River even though both political parties in the State were in favour of it.

When we form associations, whether they are to influence government or not, we are being democratic citizens. Imagine a new club of bicycle riders is being formed. Their chief business will be to organise bike trips, but they may also lobby the government for more bike tracks. Who will run the club? The richest, the oldest, the best bike riders? No. No one group will be automatically leaders. There will be an election for a committee. The committee will then elect a president to be in charge, a secretary to keep the records, and a treasurer to control the funds.

Before democracy established a state of equal citizens, associations were run very differently. The local landowner would be in charge and his relations and hangers-on would assist and get the paid position of secretary. In the towns, when middle-class people formed associations, you got onto the committee if you paid more in subscriptions. The open public meeting and elections to committees were new ways of doing politics in Britain and Australia in the nineteenth century. They allowed ordinary people to exercise influence and become public persons.

Before they got the vote, women were beginning to be public persons, even at a time when women’s place was thought to be in the home. In the nineteenth century when there was no government welfare system, women’s organisations collected donations and distributed them to those in need. Women were prominent in the movement to limit the number of pubs and their opening hours. The women who claimed the right to vote claimed, quite properly, that they were already citizens.

Our associations, run democratically, support the larger democracy. We practise treating each other as equals, and voting, and accepting that the majority will rule, and not getting our own way, and thinking of the common good. We are associating with people whom otherwise we would not know.
are not relations or living close by. This helps us to build up trust in the honesty and decency of our fellow citizens. We also in our clubs and associations meet with people who may be of a different religion or a different social class. This helps to bind society together.

These associations of citizens are called civil society. You can have a democracy without a civil society. This is the situation in many countries which have overthrown communism and established democracy. Under communism the government was in full control of the society. Opposition was forbidden. Organisations of ordinary citizens were forbidden. There were chess clubs, but they were run by the government. People only trusted those they knew very well. Now the old governments have been replaced by governments elected by the people, but the societies are not working well. People are suspicious of each other and there is no longer a tyrannical government to keep order. If you send goods to market, you have to travel with them, otherwise the railway workers or the delivery men will steal them. Stand-over men frighten traders into paying protection money. Bribery is the way to get something done in the government.

When trust and honest dealing break down, we see how important they are for the operation of a democracy. We have our freedoms and security because, consciously or unconsciously, we are citizens, watching and influencing governments, associating with each other, making society itself more democratic.
How the system works

Governments
Constitution
Parliaments
Functions of parliaments
  Representation
  Choosing governments
  Passing laws
  Scrutiny
The arrangement of parliaments
The voting systems for parliaments
Cabinet
Public service
Shadow cabinet
The courts
The head of state

Governments
Australia is a federation with a national government, the Commonwealth, and six State governments. Governing in a federation is always complicated because there are disputes and confusion of responsibility between the two spheres of government. Other federations include the United States, Germany and India.

In a unitary state such as France or New Zealand, there is only one government. It has power over all matters, though it allocates some of its powers to local or regional government. In Australia State governments allocate some of their powers to local government. This is sometimes referred to as a third sphere of government, but unlike the other two it has no guaranteed right to exist.

The Commonwealth possesses two substantial territories on the Australian mainland, the Northern Territory and the Australian Capital Territory. These largely govern themselves, but are still subject to Commonwealth authority.

Constitution
The Commonwealth constitution, which came into operation in 1901, set up the machinery of the central government and allocated powers between the Commonwealth and the States. The powers of the Commonwealth were
listed and all other powers remained with the States. The High Court was created to be the interpreter of the constitution. So the Commonwealth and the States can take each other to court if they think the other is trespassing on their law-making territory. If the court upholds the complaint, the law in question is declared unconstitutional and of no effect. The judges of the High Court are appointed by the Commonwealth government.

The constitution is amended by the Commonwealth parliament proposing a change which is then submitted to the electors at a referendum. If a majority of the electors and a majority of the States approve the change, it becomes law.

Much of the Commonwealth constitution was borrowed from the United States constitution, but not its Bill of Rights. Only four rights are guaranteed in the constitution – freedom of religion (but only in the Commonwealth, not the States); just compensation for property acquired by the Commonwealth; trial by jury for serious Commonwealth offences. The fourth right applies only in regard to the States: they are not to discriminate against residents of other States.

**Parliaments**

There are seven parliaments, one Commonwealth and six State. They are the legislatures, or law-making bodies. Except for Queensland, they are bicameral, which means they consist of two houses (from the Latin ‘bi’ two, and ‘camera’ a chamber). The houses are labelled upper and lower; the more important house, contrary to the implication of the name, is the lower. The names have been taken from the English parliament where the House of Lords was known as the upper house and the House of Commons the lower house. The Lords was made up of the heads of aristocratic families and the bishops of the established church; the Commons was made up of non-noble people who were elected. Beginning as very much the inferior house, the Commons over the centuries became the more important house where governments were made and unmade. The Lords remained as a conservative brake on the Commons.

In the States the upper houses are called Legislative Councils. The lower houses are called the Legislative Assembly or House of Assembly. Originally the Councils were designed to be conservative houses and so fulfil the function of the House of Lords. They were elected by property holders or nominated by the governor. Now the same people vote for them as for the Assembly. Their electorates are larger than Assembly electorates (in South Australia and New South Wales the whole State is one electorate) and the members serve for a longer period (except in Western Australia).

In Queensland there is only one house, the Legislative Assembly. The Legislative Council was abolished in 1922.
In the Commonwealth the lower house is the House of Representatives. The upper house is the Senate. Members of the House of Representatives are allocated to the States according to their population. Hence the majority of the members come from New South Wales and Victoria. The States are divided into electorates and each electorate returns one member. For the Senate each State elects the same number of members (currently 12). The electorate is the whole State. From the beginning in 1901 the same people voted for the Senate as for the House of Representatives. So the Senate was thought of more as a States’ house than a conservative house. Its conservative element is that members serve for six years, twice as long as members of the house.

In the Northern Territory and the Australian Capital Territory there is a single house, the Assembly. The Territories return two members to the Senate. The Northern Territory elects one member to the House of Representatives and the Australian Capital Territory three.

Members of the legislatures are described as holding a seat. Electorates are also called seats – the seat of Casey, for instance.

Functions of parliaments

Representation
The Commonwealth and the States are representative democracies. The people do not rule directly but through elected members of parliament who represent their views and interests. Members of parliament, speaking in the house, are protected by parliamentary privilege which means they cannot be taken to court for anything they say. This enables them to comment freely on public affairs and to make accusations against individuals.

Choosing governments
Parliament determines who will be the government. The party which holds a majority of seats in the lower house of parliament, or the single house where there is only one, will form the government. If a party is short of a majority it might rely on the support of another party or independent members to form a government.

Governments are made up of ministers who are in charge of the various government departments (health, police, education and so on) under the leadership of a prime minister (the Commonwealth), a premier (the States), or a chief minister (the Territories). The group of ministers is known as the ministry. A ministry constitutes a government which is referred to formally as the executive.

Ministers must be members of parliament and the ministry must retain the support of the house which has formed it. This is known as the Westminster
system (after the place of meeting of the English parliament which first developed this way of governing) or the system of responsible government (since the ministers are responsible to the parliament).

The best known alternative to this system is the United States constitution under which the president, as head of government, is elected by the people and chooses ministers who are not members of the Congress. The executive and the legislature are firmly separated in the United States; in a Westminster system the executive is formed in the legislature.

Before there were political parties, ministries changed more regularly than they do now and sometimes without there being an election. The members of parliament would withdraw their support from a ministry; it would resign; and a new ministry would be formed. With strong party discipline, once a ministry is formed, it will be supported in office by the members who are of the same party as the ministers.

Governments usually change when a party loses an election and what was formerly the opposition party wins a majority of seats and forms a government.

Members of parliament of the same party (from both houses) meet regularly together in the party room. They elect their leader. If a party wins an election the leader becomes the prime minister. The leader of the largest party in opposition to the government becomes the leader of the opposition. Parties can change their leader at any time. If a prime minister is unpopular the party may replace him or her, with the party itself remaining in government.

In the Liberal Party the leader, on becoming prime minister, has the right to choose who will be the ministers. Usually the Liberal Party governs in coalition with the National Party whose leader will be given an important ministry and the position of deputy prime minister. The National Party leader is consulted by the prime minister on what ministries National Party members are to receive.

In the Labor Party ministers are elected by the Labor members in the party room. The prime minister allocates the ministers to the ministries.

**Passing laws**
Parliaments make laws which are known as statute law. A proposed law is called ‘a bill’. A bill must be agreed to by both houses in a bicameral parliament before it can become law. A bill which has become law is known as ‘an act’. So a land bill, for instance, becomes, after it is passed, a land act and part of the statute law.

In each house a bill passes through three stages which are called ‘readings’. At the first reading the bill is presented, usually now without explanation. The
passing of a motion that the bill be read a first time merely puts it on the agenda. At the second reading the person proposing the bill (usually a minister) explains its purpose and how it will operate. Then a general debate follows. If the bill passes its second reading it is then considered clause by clause in committee. The committee is usually ‘of the whole’ (that is, all the members of the house) or it may be a smaller body. Debate is more informal. There are no set speeches and members can speak more than once. Debate is on the detail of each clause, not the principle of the bill. This is where amendments are introduced. The final stage is the third reading, usually a formality, but members opposed to the bill have a last chance to speak against it and those who don’t like what has happened in committee may now oppose it.

After the second reading a bill may be referred to a select committee specially constituted from the members of the house to examine and take evidence on this one measure. More commonly bills are referred to a standing committee of the house, a body which considers all bills within a particular policy area, say health and community welfare. Committees make their reports to the house and their recommendations can then be considered at the committee stage of the bill.

In a bicameral parliament each house has to agree to the amendments made by the other. If agreement cannot be reached the bill lapses. In the Commonwealth parliament and in some of the States upper houses cannot amend money and taxation bills.

In the Commonwealth parliament if the two houses cannot agree on a bill there is a deadlock provision for resolving the dispute. If the Senate rejects a bill or makes amendments not acceptable to the House of Representatives and does so again after a lapse of three months, the Senate can be dissolved along with the House of Representatives. This is a double dissolution and in the election which follows the membership of both houses is entirely reconstituted. Usually only half the Senate retires at each election. After a double dissolution election, if the Senate still rejects the bill, both houses sit together and the bill can be passed if it is supported by an absolute majority (a majority of the total membership, not simply of those present).

**Scrutiny**

A parliament is meant to control a government by scrutinising its actions. Its final sanction is to pass a vote of no-confidence in the ministry whereupon it is required to resign. A government which has a majority made up of members of the one party is unlikely to suffer in this way unless enough of its supporters ‘cross the floor’: that is, go over to the opposition. Nevertheless the parliament can put a government under pressure and force it to change policy or administration. The opposition party can, at
the daily question time, cross-examine ministers on their performance and bring on debates to criticise the government. These tactics are more effective if they are given media publicity. If the upper house is not controlled by the ministry, it can in its committee reports critically review the government’s proposals and record. In the party room a government’s own supporters have the opportunity to be critical and a government more often changes its plans because of criticism here rather than in parliament proper.

One of parliament’s chief functions is to ‘vote supply’ which means to agree to the government’s spending proposals. It also scrutinises the spending of the money which has been granted. It does this through a public accounts committee and the auditor general, an officer who reports to the parliament, not the government, on whether money has been properly spent.

**The arrangement of parliaments**
The meetings of the lower house are presided over by the Speaker; the upper house by a president. They are meant to conduct business impartially according to the standing orders of the house, but they are appointed by the governing party and so it is difficult for them to be truly independent.

The seats or benches in the house are arranged in the form of a U, with Speaker or president at the top. On the Speaker’s right sit the ministers and members of the governing party. The ministers are on the front bench; all the other members supporting them are known as government backbenchers. The chief opposition party sits to the Speaker’s left. Again there are front-benchers (the leading members of the party who will be ministers if the party wins office) and backbenchers. On the cross-benches at the base of the U sit minor parties and independents.

This seating arrangement means that government and opposition, prime minister and leader of the opposition, face each other across the chamber, which encourages an adversarial mode of proceeding. They are separated by a table on which documents of which the house takes official notice are placed or ‘tabled’.

**The voting systems for parliaments**
Voting is compulsory in Australia, a highly unusual procedure internationally but well accepted here.

Except in Tasmania, for the lower houses each electorate returns one member and the voting system is preferential. With first-past-the-post voting a member may be elected with less than a majority support. Evatt may win 40 votes, Menzies 35 votes and Santamaria 25 votes. Evatt will be elected though he received only 40 votes out of a possible 100. Under a preferential system voters indicate not only their favoured candidate but their second-best
candidate and so on right through the list. A number in every square is the instruction. If no candidate wins a majority (more than half the votes cast), preferences are considered. The candidate with the fewest number of votes is eliminated and his or her preferences are distributed to the candidates still in the running. In the above example, Santamaria’s preferences would be distributed. If of these 25 votes, 20 went to Menzies and only 5 to Evatt, then the total votes gained by those two gentlemen would now be: Evatt 40 + 5 = 45; Menzies 35 + 20 = 55. Menzies would be elected though he obtained fewer first preference votes than Evatt. But most of those voting for Santamaria wanted Menzies as second-best, so overall Menzies had more support and deserves his win.

Proportional representation is used for the Senate and some State upper houses. Its basic principle is that the members returned for the different parties and groups should be in proportion to their support in the electorate. So if Liberals win 50 per cent of the vote, Labor 40 per cent and Democrats 10 per cent, Liberals should have 50 per cent of the parliamentary seats, Labor 40 per cent and Democrats 10 per cent. Obviously the system requires that people be voting for a number of members and not just one. In a normal Senate election six members are elected by the whole State voting in a single electorate. The same occurs for the upper houses in New South Wales and South Australia. In Western Australia members are elected from regions, some returning five and others seven members.

In Tasmania the usual pattern for electing the two houses is reversed. Proportional representation, the Hare Clark system, is used to elect its lower house. The electorates are the five electorates for the House of Representatives, returning five members each. The upper house has single-member electorates and preferential voting.

The Australian Capital Territory uses proportional representation for its Assembly election. The Northern Territory Assembly is elected like the State lower houses.

Preferential voting in single electorates usually results in one or other of the major parties winning the seats. Either Labor or Liberal in combination with National secures a majority and so forms a government. With proportional representation it is much harder for one party to secure a majority of the seats. Upper houses elected on this basis contain minor party members and independents who deny a government an automatic majority. This ensures that the upper house will be a true house of review.

**Cabinet**
Ministers meet together as the cabinet. In the Commonwealth government where there are a large number of ministers, there is an inner and outer
ministry. Only the members of the inner group constitute the cabinet. If it is to work effectively it cannot be too large; at more than 13 or 14 members it becomes a meeting rather than a working body. Ministers who are outside the cabinet are called in to meetings when a decision has to be taken in the area of their portfolio (the name of a minister’s responsibility). In the States and Territories all ministers are members of the cabinet.

The meetings of a cabinet are where the decisions of the executive government are taken. ‘To execute’ means simply to carry out, but the executive now does much more than administer the laws passed by parliament.

It decides what bills will be introduced into parliament. Theoretically any member may introduce a bill for a new law, but except in very rare circumstances only those bills introduced and backed by the government have any chance of becoming law. This is the effect of the government having a guaranteed majority in at least the lower house due to the strength of party discipline. This kills off bills coming from any other quarter: the opposition or minor parties. Unless the government controls both houses, it cannot be sure its bills will become law. It can be sure that no one else’s will.

On moral questions sometimes both major parties will agree to give their members a free vote. Then a law on abortion or euthanasia, for example, may be introduced by a backbencher and become law. This is called ‘a private member’s bill’.

Modern laws delegate much power to ministers which is exercised by the issuing of regulations. So ministers individually or meeting together as cabinet can vary laws by issuing new regulations. Sometimes if a government bill has been defeated in the upper house, the minister may announce that some of the changes it was going to make will be done instead by regulation.

Public service

The administration of the law is performed by public servants who work in the various government departments. A department also advises its minister about policy; it may explain that a policy that the minister has advocated cannot be made to work or will cost much more than was expected. It will also advise the minister on how proposals being put forward by other ministers will affect the matters dealt with by his or her department. This will enable the minister to be better informed for a debate in cabinet.

In order that public servants could give impartial advice to ministers, and if necessary speak against their policies, they used to enjoy security in their job. The department remained the same and ministers came and went. Now the public service is run more like a business. Ministers appoint the people to be
in charge of their departments and expect them to carry out their wishes. Senior public servants no longer enjoy security in their job.

**Shadow cabinet**
The leading members of the chief opposition party form a shadow cabinet with individual members being appointed as shadow ministers. They watch or ‘shadow’ the real ministers. A shadow minister must learn about the responsibilities of the real minister and be able to criticise the minister’s actions and show that the opposition party would handle matters better. The shadow ministry is one of the great strengths of the parliamentary system. Electors and the media can watch and assess the alternative government and decide whether it would be better than the ministers who hold office.

**The courts**
The courts are the third arm of government. The legislature (parliament) passes the laws; the executive (the ministers) carries them out; the judiciary (the judges) assesses whether the laws are being obeyed. If the laws have been broken, the courts may punish the offender or issue orders that the law must be obeyed. Governments (that is, the ministers) have to obey the law like everyone else. That goes without saying for their private actions; the more important principle is that in their governing they must also obey the law. If they don’t they can be taken to court and the court will order them to obey the law. This is the principle of the rule of law. The government has its own lawyers, the law officers, to advise on the legality of their actions.

The rule of law is a daily miracle. The government is subject to a higher power, the law. The judges, who interpret the law, are appointed by the government, but in order that they may be independent of the ministers they cannot be sacked by the government. They can be dismissed only by a vote of both houses of parliament. It is very rare for a judge to be dismissed.

Our legal system is part of the common law system which originated in England and is followed by many countries colonised by England, including the United States. In this system parts of the law have been developed by the judges, who are constantly adjusting and amending it. This part of the law is called common law and is distinct from statute law which is the law as passed by parliament.

In criminal trials the judges over the centuries have developed the rules to ensure a fair trial. The most important of these is that the accused is innocent until proved guilty. The jury system was also introduced by judges many centuries ago in England as the body which would determine guilt or innocence.
Parliament is the supreme law-making body. That is, statute law prevails over common law. Parliament can alter the common law and remove rights established by it. Some parliaments have changed the law on juries to allow for majority verdicts and to remove the jury from some trials.

The High Court, as its name suggests, is the highest court in the land. As well as interpreting the constitution it is the final court of appeal from other courts.

The head of state
The head of state for the Commonwealth and the States is the Queen of the United Kingdom whose title for these functions is Queen of Australia. The actual duties of the office are carried out for the Commonwealth by the governor-general and for the States by governors. The governor-general is appointed by the Queen on the recommendation of the prime minister. A State governor is appointed by the Queen on the advice of the premier.

The governor-general and the governors are formally the head of the executive government. They appoint the ministers and the prime minister or premier. They meet with ministers in the Executive Council which formalises those decisions of cabinet which need to be put in legal form, as in the issuing of new regulations or the appointment of a judge. The governor-general and the governors here act on the advice of ministers, though they have the right to call for more information and query what the ministers are doing. Their signature is also required on a bill before it can become law. This is called the royal assent. Again, they sign the bill if they are advised to do so by ministers.

The practice of governor-general and governors acting on advice of ministers is a convention, not a law. In strict legal terms their powers are still extensive, and by convention sometimes they can use their powers without the advice of ministers or even against the advice of ministers. These are called the reserve powers. These include the right to dismiss a government which is acting illegally or unconstitutionally, to refuse an early election to a prime minister or premier who has lost majority support in the lower house, and to choose a prime minister where no one party has a clear majority in the house (if the prime minister so chosen could not acquire majority support, he or she would have to resign). In such situations the governor-general and the governors are the stabilisers and protectors of the system.
The Commonwealth constitution is sometimes called a Washminster system because it combines elements of the Washington (US) and Westminster (UK) systems of government.

From the United States came (1) the federal system with powers divided between central and State governments, (2) a court to settle disputes over their jurisdictions and (3) the structure of the federal legislature, a House of Representatives to represent the people and a Senate to represent the States. From the United Kingdom came responsible government, the practice of ministers being members of parliament and having to obtain majority support from the lower house.

Political scientists have argued over the relative strength of the two elements. The Westminster system provides for a government responsible to the parliament. The Washington system stresses the separation of powers (legislature, executive and judiciary) and checks and balances. Which is the predominant element in our system?

The political scientist Richard Lucy has argued in *The Australian Form of Government: Models in Dispute* that this argument is misconceived. It does not take account of the parties which exercise such a strong hold on our institutions. Instead of responsible government, we should think of responsible party government (with the government being responsible to the party room rather than to the parliament as a whole). Party government is in tension with those elements of the system which a federal government may not or cannot control – the Senate, the High Court, the States – though it has some influence over them. This he calls the division of powers.

This chart is an elaboration of this idea. It shows on the one side the operation of a party government with tensions between ministers and backbenchers and on the other the institutions which can thwart a party government. Information on the relationships displayed here can be found elsewhere in the book. The relationship between ministers and members in the governing party is discussed in ‘Australian parties’. The operation of the Senate is dealt with in ‘Constitution making’; the High Court in ‘English law in Australia’ and ‘Constitutional law’; the States in ‘Constitutional law’.

Of course the chart does not display all the forces that operate in the political system. It does avoid the unreality of those charts which depict only the formal institutions.
Australian federal democracy

Governing party
- Holds majority in House of Representatives

Ministers
- (Chosen by Prime Minister or elected by party members)
  - Needs of govt.
  - Pain for gain

Prime Minister
- (Elected by party members)

Backbenchers
- Follow party policy
- Choose different Prime Minister
- Keep popular

Senate
- Controlled by opposition and minor parties
  - Blocks or amends laws
  - Holds inquiries
  - Government threatens double dissolution

High Court
- Rules laws invalid
- Imposes new legal obligations
- Government appoints judges

States
- Premiers criticise Canberra
- State parties compose federal party
- Commonwealth financial control
Listed below, organised by unit themes and titles, is a guide for those using the Discovering Democracy primary and secondary teaching and learning units. Those sections of Discovering Democracy — A Guide to Government and Law in Australia that provide relevant information for particular units are listed by page number.

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The best thing to read on Australia is still the book of that name by WK Hancock, published by Ernest Benn, London 1930.
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