2. What are Conventions?

Australia’s political system is founded on the principle of ‘responsible government’. Its basic tenets are that, subject to the Constitution, Parliament is supreme; the government is responsible to Parliament; ministers have to be in Parliament; regular elections will be held; and there is a professional bureaucracy that is independent of but accountable to ministers. Unlike the United Kingdom, Australia has a written Constitution, and some of these principles are captured in that document.¹ The provisions of the Constitution comprise the formal rules of government. But formal rules are only part of the story about how a system of government operates. In areas about which the Constitution is silent, political behaviour is guided by ‘well established practice, methods, habits, maxims and usages’ — many of them long-standing — which were inherited from colonial parliaments, which in turn inherited them from Westminster. It is these practices, methods and usages that tend to be referred to as ‘conventions of the Constitution’ (Reid 1977, p. 244).

Conventions have become an integral part of Westminster-style democracies, filling in the detail and helping political practice to adhere to the principles of responsible government (Heard 1991, p. 1). For example, conventions cover:

- rules about the relationship between the Prime Minister or Premier and Cabinet
- the role of Cabinet
- relations between the Crown and the Parliament
- relations between the two Houses of Parliament (Marshall 1984, p. 4)²
- how budgets are appropriated
- ceremonial etiquette and protocols (for example, both the Prime Minister and Leader of the Opposition are represented at major events, funerals, openings and military parades during the caretaker period).

New Zealand conventions also rest on a mixture of written and unwritten constitutional precepts. McLeay (1999, p. 12) reports that:

The conduct of a caretaker government, for example, is guided by: the Constitution Act 1986 (which defines, among other things, the tenure of Ministers); the core convention that Parliament is sovereign and that governments must command the confidence of the House …

¹ Proposals to formally include some aspects of responsible government in the written Constitution were formally rejected during the constitutional debates before federation (Rhodes et al. 2009, Ch. 3).
² Standing Orders of the Commonwealth Parliament are the rules and orders made by each House under section 50 of the Constitution concerning, inter alia, the order and conduct of business and proceedings. They also cover the ‘mode in which its power, privileges and immunities may be exercised and upheld’.
Various definitions exist regarding what constitutes a constitutional convention. Most definitions refer to the early work of British scholars A.V. Dicey and Sir Ivor Jennings, who investigated the differences between the law of the Constitution and the conventions of the Constitution (Heard 1991, p. 4). Jennings (1959, p. 159) famously identified three questions to be asked as the precondition to the existence of a convention. Firstly:

- what are the precedents?
- secondly, did the actors in the precedents believe they were bound by a rule?
- and thirdly, is there a good reason for the rule?

For Jaconelli (2005, p. 151), conventions are ‘social rules that possess a constitutional — and not merely a political — significance’. He argues that emphasising their social nature captures two of their fundamental features: their normative quality in prescribing standards of behaviour, and the fact that they are not enforced in the courts. Their specific constitutional character ‘bears out, in addition, the role that they play, akin to that performed by written (and legally enforceable) constitutions in allocating power and controlling the manner of its exercise as between the organs of government and political parties’ (Jaconelli 2005, pp. 151–2). The nature of conventions and their relationships to the law is highly contested. It is not our intention to rehearse the various debates here. A useful summary can be found in Marshall (2004, pp. 37–44).

Conventions arise in several ways: through practice acquiring a strong obligatory character over time and/or through the explicit agreement of the relevant actors (Heard 1991, p. 10). As an example of the latter, Sampford (1987, p. 386) cites the former convention dating from 1952 on the filling of Australian Senate vacancies with a member of the same political party. The question of whether this was, in fact, a convention, was hotly contested, although it had been established practice since 1952. Controversy over the ‘breaching’ of this convention by the New South Wales government in 1975, and by the Queensland government later the same year, was the catalyst for an amendment to section 15 of the Constitution in 1977 to specify more clearly how casual Senate vacancies should be dealt with by state parliaments.

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3 A joint sitting of the NSW Parliament chose an independent, Cleaver Bunton, to replace outgoing Labor Senator Lionel Murphy, who resigned when he was appointed to the High Court of Australia.

4 Queensland Premier Joh Bjelke-Petersen nominated the anti-Whitlam Pat Field for the vacancy created by the death of Labor Senator Bert Milliner. Both appointments undermined the ALP government’s tenuous hold on the Senate, setting the scene for its dismissal in November 1975. As it happened, Bunton voted with the government in the crucial votes; Field did not vote at all as his selection was challenged and referred to a Court of Disputed Returns.

5 For guidance on the current practice for the filling of casual vacancies, see Odgers’ *Australian Senate Practice*, 12th edition.
Marshall (1984, p. 8) notes that conventions arise from ‘a series of precedents that are agreed to have given rise to a binding rule of behaviour’. Alternatively, a convention may derive from some ‘acknowledged principle of government which provides a reason or justification for it’ (Marshall 1984, p. 9). In practice, conventions may be confirmed after the event. He observes that many conventions are negative in form — connoting that political actors should constrain their behaviour or refrain from certain courses of action.

A key characteristic of conventions is their flexibility. Since they are not subject to judicial interpretation, they evolve in response to changing circumstances and political values. This lack of legal definition permits ‘the adaptation of constitutional rules to changes in the general political principles and values of the day, without the need for formal amendment to existing positive law’ (Cooray 1979, p. 5). Rhodes et al. (2009, p. 60) note that Australian politicians have consistently rejected proposals to codify many constitutional conventions, preferring to rely instead on the resilient and evolving traditions of responsible government.  

### Morality, obligation and reciprocity

Conventions have been described by Marshall (1984) as the ‘critical morality’ of the Constitution. They impose a series of obligations that are morally and politically binding rather than legally imposed (Marshall 1984, p. 17). The courts can recognise the existence of conventions and refer to them in judicial interpretation of laws, but they are not enforceable through the legal system. They operate as a normative force for political actors to conduct themselves in specific ways (Jaconelli 2005, p. 151). Political actors recognise and abide by conventions because ‘they are believed to formulate valid rules of obligation’ (Marshall, cited in Jaconelli 2005, p. 150), and they are regarded by all sides of politics as useful and generally worth observing. They are observed because political actors find them helpful and functional. For example, it is generally accepted that responsible parliamentary government in Australia is underpinned by adherence to a number of key conventions, including:

- governments recognise a loyal Opposition
- ministers must answer for their departments or provide explanations if questioned

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6 For a discussion of efforts to formalise and codify key conventions of the Australian Constitution, see Sampford (1987).
7 See, for example, Marshall (2004, pp. 38–42); Heard (1991); Twomey and Withers (2007).
• ministers must not mislead Parliament — or, if they do so inadvertently, they must correct the record immediately
• ministers should attend Question Time unless urgent business prevents them from doing so.

For a convention to exist, actors must be aware of an obligation to behave in particular ways, and believe they are bound to adhere to its prescriptions. If this occurs, then the continuation of the practice of adhering to the convention remains high. Agreement and acceptance are important considerations in this context, as are expectations of reciprocity and mutuality. As Jaconelli (2005, p. 171) notes: the party that is in power at the moment respects the constraints that are imposed on it by constitutional conventions in the expectation that the Opposition parties, when they attain office, will likewise respect the same constraints.

The observance of conventions forms a restraint on the abuse of power by the government or the Crown (Hood Phillips and Jackson 1978, p. 108). For example, the application of caretaker conventions during an election campaign formalises the rights of the Opposition as a potential future government, and voluntarily restrains the governing party from exploiting the advantages of incumbency. Adherence to conventions can be seen as a constitutional compact of ‘mutual forbearance’, where each party, as it gains government, is schooled in the discipline of observing the constraints imposed by conventions (Jaconelli 2005, p. 173).

A further safeguard to observance of constitutional conventions in the Australian and New Zealand context is the role of the Governor-General. Hasluck (1979, p. 12) argues that the Governor-General ‘occupies a position where he can help ensure that those who conduct the affairs of the nation do so strictly in accordance with the Constitution and the laws of the Commonwealth and with due regard to the public interest’. According to Hasluck (1979, p. 18), because of the Governor-General’s close and regular contact with ministers through Executive Council, the Governor-General ‘is both a watchdog over the Constitution and laws for the nation as a whole and a watchdog for the government considered as a whole (whatever government may be in power)’.

Moral sanctions against continued and deliberate breaches include the diminution of the system of government as a whole and the loss of ‘respect for the established distribution of authority’ (Marshall and Moodie 1971, p. 32). Breaches diminish the power of the convention and the loss of restraint on the abuse of power undermines the principle of reciprocity and mutuality that underpins the adherence to conventions.

It is generally accepted that the main sanction against the abuse of conventions is political. Dicey (1959, p. 444) argues that the power of public opinion
ensures obedience. Ongoing media and public scrutiny of political behaviour ensures that breaches are well publicised by journalists, commentators and the Opposition. It has been observed that where a ‘breach’ of a convention is likely to be politically costly, the convention is far more secure (Sampford 1987, p. 375). However, voter cynicism and disengagement from politics raise questions about whether political sanctions are a sufficient deterrent to a breach of conventions. Sometimes, concerns that conventions have been breached reveal a complainant’s lack of familiarity with the nature and status of conventions rather than a deliberate substantive breach (as, for instance, occurred with the Bjelke-Petersen calculation).

The application of conventions relies on judgement, knowledge of precedents and a desire to see the continuation and upholding of the convention. It is this exercise of prudence that creates uncertainty for many politicians and bureaucrats, since interpretation is inevitably subjective, situational and context-dependent. However, the application of conventions remains critical to adhering to the Westminster principles of responsible government.