



Teacher Reference Document 62



AUSTRALIAN
CONSTITUTION
CENTRE

Unit 7: The Australian Constitution and its three key institutions of government and how the Separation of Powers (SoP) protects democracy and the people – Years 6 and 7 -
C & C Strand: Government & Democracy

Topic 6.3 & 7.1: The Australian Constitution and its three Key Institutions of Government

Executive power – the powers and role of the Governor-General, from cutting ribbons to dismissing governments

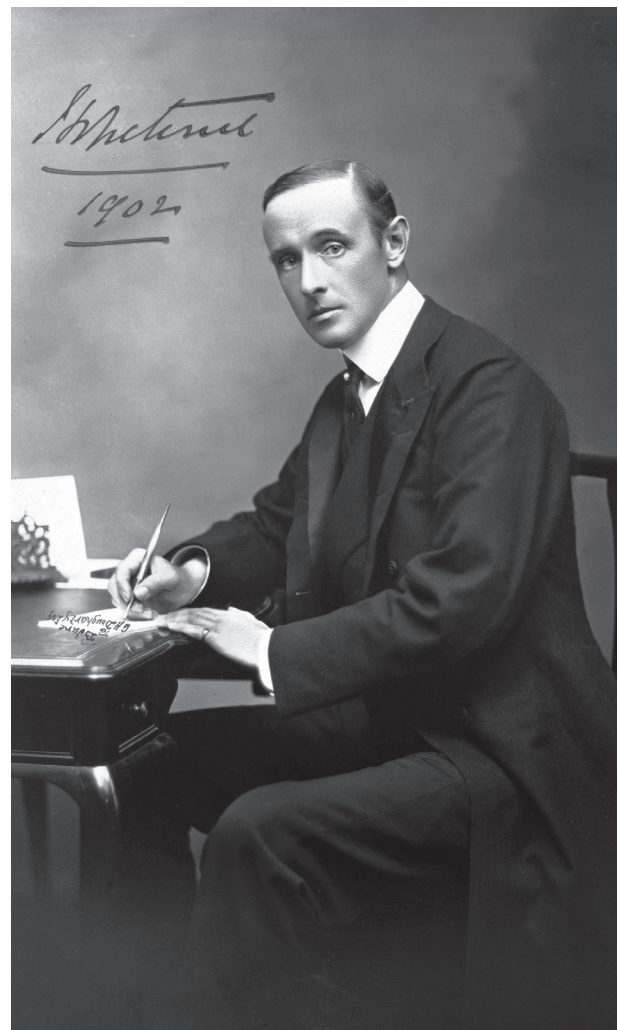
Under the Constitution, the Governor-General is the representative of the Sovereign. The Governor-General fulfils many of the functions of a head of state. Some of them are given directly to the Governor-General and others are exercised by the Governor-General as the Sovereign's representative. Most of those functions are symbolic and ceremonial, but some have a legal and constitutional status.

The Governor-General also has a particular responsibility to uphold the Constitution. When the Governor-General is given a choice as to how to act, he or she must still act in a way that upholds fundamental constitutional principles, such as representative and responsible government, the rule of law and the separation of powers.

The Governor-General's symbolic and ceremonial role

Much of the [role of the Governor-General](#) is ceremonial and symbolic. The Governor-General awards honours and bravery decorations. He or she represents the country at important ceremonies, such as Anzac Day and Australia Day, in overseas visits, and at funerals of national and international figures. The Governor-General hosts visiting royalty and heads of state and meets with each incoming Ambassador to Australia to recognise and accept their status.

The Governor-General also plays a community engagement role. He or she travels to places around Australia, meeting local people and organisations, supporting charities, giving awards, opening new buildings and talking to school groups. The Governor-General is patron of many charitable organisations, including Constitution Education Fund Australia (CEFA).



The first Governor-General of Australia, Lord Hopetoun
Source: State Library of Victoria

Commander-in-Chief

[Section 68](#) of the Commonwealth Constitution makes the Governor-General commander-in-chief of the Australian Defence Force. This is of symbolic importance, as it ensures that the Defence Force is headed by a civilian (even though the Governor-General is sometimes an ex-military officer). In fulfilling this role, the Governor-General is obliged by convention to act upon the advice of relevant Ministers, such as the Defence Minister and the Prime Minister. The Governor-General's powers as Commander-in-Chief are not regarded as 'reserve powers' that can be exercised as he or she chooses. The Governor-General cannot call out the Defence Forces at will and use them to assume command over the country.

When Sir Ninian Stephen, a former High Court judge, was Governor-General, he gave a [speech](#) in which he analysed the interpretation of section 68 of the Constitution. Sir Ninian, who had seen where military power could lead, having [attended](#) Hitler's 1938 Nuremberg rally as a tourist while a teenager and having fought for Australia during World War II, was careful in his analysis of the control of military power in Australia. His speech on the subject is now the primary source that is relied upon when people consider the scope of section 68.

Sir Ninian considered the colourful history of the relationship between vice-regal office and the role of commander-in-chief throughout colonial times and how the role had become a purely titular one. He discussed the debates over the drafting of section 68, which were held at the 1898 Constitutional Convention. Alfred Deakin, in particular, wanted express words included stating that the Governor-General could only exercise the powers of Commander-in-Chief upon the advice of ministers in the Federal Executive Council. Edmund Barton considered that these words were unnecessary because it was clear that the Governor-General's powers were only titular. Everyone agreed that the Governor-General would have no substantive military power – it was just a matter of how this was described. Barton won the dispute, so there is no mention of the Executive Council in section 68. But it is still the case that the Governor-General must act on ministerial advice when exercising the powers of the Commander-in-Chief.

The Governor-General, upon the advice of Ministers, appoints the Chief of the Defence Force and other senior officers. He or she visits military units and presents them with colours, banners and other honours. The Governor-General commemorates Australia's war dead and military action in different ceremonies throughout the year.

Constitutional role

The Governor-General presides over meetings of the Federal Executive Council. This is the formal body, otherwise comprised of Ministers, which advises the Governor-General to give legal effect to certain types of decisions that have either been made by Cabinet or individual Ministers. This includes making appointments of judges, making statutory instruments, making proclamations and entering into treaties.

Wherever the Constitution confers a power on the 'Governor-General in Council', this means the Governor-General acting upon the advice of the Federal Executive Council. This has been extended by section 16A of the [Acts Interpretation Act 1901](#) (Cth), which says that wherever the Governor-General is referred to in a Commonwealth statute, it means the Governor-General acting with the advice of the Executive Council. In practice, Executive Council meetings are held fortnightly, with two Ministers rostered on to represent the ministry as a whole in advising the Governor-General.

Under the Constitution, the Governor-General has the power to summon Parliament, prorogue Parliament (ie suspend its operation for a period) and dissolve it (sections 5 and 57).

The Governor-General issues the writs for a general election of the House of Representatives (which means he or she orders electoral officials to start the election process – section 32). The Governor-General puts constitutional amendments, passed by Parliament, to the people in a referendum (section 128).

The Governor-General can appoint and remove High Court and federal judges (section 72) and gives assent to bills passed by Parliament, turning them into laws (section 58).

Before Parliament passes a law to appropriate' (i.e. withdraw) government funds so they can be spent, the Governor-General must give the Houses a message approving of the appropriation (which ensures that the Government retains control over the spending of public money – section 56).

Most importantly, the Governor-General appoints the Prime Minister, and on his or her advice, appoints and removes Ministers (section 64) and members of the Federal Executive Council (section 62). The Governor-General can also create public service departments (section 64).

In almost all cases, the Governor-General acts upon the advice of ministers, either directly or through the Federal Executive Council.



Why bother with this system and not just let the ministers decide instead? First, having other sets of eyes, from an independent person and their staff, look over decisions and consider whether they are being done properly and within power, helps to prevent both errors and corruption.

Secondly, while the Governor-General ultimately acts upon advice, he or she is entitled to query that advice, request a legal opinion about its validity, and warn the government if it appears to be behaving inappropriately. This can cause a government to adjust and moderate its behaviour. In almost all cases a query, request for further advice or a warning will resolve the matter without any dispute arising.

The reserve powers of the Governor-General

In limited circumstances, the Governor-General can exercise discretion by acting, without ministerial advice, or contrary to ministerial advice. This is known as exercising a 'reserve power'.

Appointing the Prime Minister: The most commonly exercised reserve power is the power to appoint a Prime Minister. This is because the outgoing Prime Minister, as he or she is leaving office, cannot be 'responsible' to Parliament for advice as to their successor. They may well give informal advice to the Governor-General as to who their successor should be, but this is not treated as binding advice. It is just the sort of advice that any informed person could give.

The first Australian born Governor-General Sir Isaac Isaacs receives VIPs | Government House Yarralumla | c. 1931–36
Source: State Library of NSW

But while a Governor-General does not act upon ministerial advice in deciding who to commission as Prime Minister, the Governor-General still has very little discretion. This is because convention requires the Governor-General to appoint as Prime Minister the person who commands the confidence of the House of Representatives (i.e. the leader who won the election or whoever has the support of a majority in the lower House). Discretion only arises if no one has majority support in the lower House – known as a 'hung Parliament'. The Governor-General will then have to consider which leader is most likely to command the confidence of the House. This could even be the leader of a minor party, if he or she has sufficient support from a larger party to govern.

Refusing to dissolve Parliament: The Governor-General also has a reserve power to refuse to dissolve Parliament. This might be done, for example, if an election has only recently been held and someone else could form a government that has majority support without the need for a fresh election. The vote of the people has to be respected and Parliament has to be given a chance to function.



The people should not be asked to vote again, 'to get it right', just because a defeated Prime Minister is unhappy with the outcome. A recent example occurred in Canada in the province of [British Columbia, in 2017](#) (relying on the same conventions that apply in Australia). An election produced a hung Parliament. The Liberal Government continued in office but two months later a vote of no confidence in the Government was passed in the legislature. The Premier, Christy Clark, asked for a dissolution and a new election. The [Lieutenant-Governor refused](#), forcing Clark's resignation and appointing the Opposition Leader as the new Premier.

There may also be other reasons for refusing an election. For example, it may be dangerous or inappropriate to hold an election during a war or pandemic. Normally, this will be something for a Prime Minister to judge, but if he or she has lost confidence, the Governor-General has greater discretion to reject the Prime Minister's advice.

Dismissing the Prime Minister: In extreme circumstances, the Governor-General may dismiss a Prime Minister. This could happen, for example, if a Prime Minister has lost the confidence of the lower House but seeks to continue governing without resigning or being granted an election. This would defy the principles of responsible and representative government, and the Governor-General would be entitled to dismiss the Prime Minister. The dismissal of a Prime Minister has

Governor-General Sir Ninian Stephen begins his address at the Uluru National Park Handover/Leaseback Ceremony | 1985
Source: © National Library of Australia

the effect of dismissing the entire ministry, as it was the Prime Minister who was commissioned to form the Government and who advised who the Ministers should be. Once that commission is withdrawn by the Governor-General, the Government goes too and must be replaced.

Another possible ground for dismissing the Government is if it is breaching the rule of law by persisting in serious unlawful or unconstitutional behaviour. For example, in 1932 the NSW Governor, Sir Philip Game, [dismissed](#) the Lang Labor Government. This was because it issued an instruction to public servants to behave in a way that breached an instrument made under a federal law. When the Governor asked that the instruction be withdrawn, the Premier, Jack [Lang](#), refused. The Governor also asked for legal advice to establish that the Premier was behaving lawfully, but the Premier wouldn't give it. The Governor concluded that this was because he knew he was acting unlawfully and could not defend his actions.

The Governor dismissed Lang and appointed the Opposition Leader to form a caretaker government that would advise an immediate

election, so the voters could decide (which is essential to support the principle of representative government). The Governor was criticised by some, however, for not waiting for a court to decide that the instruction was illegal. They pointed to the separation of powers and the need for the courts, not the Governor, to decide on legality. But others noted that the courts had recently upheld the validity of the federal law, under which the instrument was made, in long running court cases. They pointed out that the illegality was plain, any litigation would take a long time, and Lang didn't even attempt to argue that his actions were legally valid. The dismissal remains controversial to this day.

Another ground for dismissal has been the failure to secure the passage of supply (i.e. the failure to get both Houses to pass an appropriation to allow the government to spend the money necessary to run the government). At the State level, supply has been blocked a number of times, particularly in Victoria. For example, in Victoria in 1945, the Labor Party blocked supply to the conservative Dunstan Government. When supply was about to run out, Dunstan went to the Governor and requested a dissolution. The Governor said he would grant a dissolution if Dunstan obtained a vote of sufficient supply to avoid illegal spending or depriving public servants of their pay during the election period. But Parliament again refused to grant even temporary supply to Dunstan, so he again asked for a dissolution. The Governor said he would not be party to the illegal application of public moneys and that he required Dunstan's resignation. Dunstan was effectively dismissed, as he had no choice, but it was described publicly as 'resignation'. The Governor commissioned a caretaker Government to pass supply and then advise an election, which occurred.

In 1952, it happened again. Labor joined with renegade Liberals in the Victorian upper House to block supply to the McDonald Country Party government. Supply was about to run out. The Premier sought a dissolution, pointing out that he still controlled the lower House and no other government could obtain its confidence. The Governor refused the dissolution to McDonald, who was forced to resign. The Governor appointed Thomas Hollway, a former Liberal, to form a Government upon the assurance that he could obtain supply with Labor's support. Supply was passed by the upper House but Hollway's Government was defeated in the lower House. Hollway then sought a dissolution. After consulting the Chief Justices of both the Supreme Court and the High Court, the Governor refused the dissolution to Hollway and forced his resignation, which was described as 'involuntary'. McDonald was then re-commissioned as Premier on the

condition that he would advise the holding of a general election. The election was held and Labor won a majority.

These two examples provide a context for the very controversial [dismissal of the Whitlam Labor Government](#) in 1975. Whitlam was dismissed by the Governor-General, Sir John Kerr, for failing to secure the passage of supply. After a number of scandals and economic crises, the Senate, which was controlled by the Opposition, deferred voting on supply, and said it would continue to do so until Whitlam agreed to a general election. Whitlam refused to hold a general election, and told the Governor-General that the only way it could occur was if Whitlam was dismissed from office. Once supply ran out in late November, Whitlam planned to get the banks to loan public servants and others the money they needed to get by. The banks, however, thought this would be illegal and did not agree to participate in the plan.

The last day that a general election could be held before the Christmas break was 13 December. To achieve that, Kerr had to issue the election writs by 11 November. If Kerr had waited until supply had run out later in November, there would have been no possibility of holding an election until late January or early February, leaving many people in financial hardship for months.

On the morning of 11 November, the Opposition Leader, Malcolm Fraser, offered to pass supply if Whitlam agreed to hold a general election for the House of Representatives, with the half-Senate election, by June 1976. Whitlam refused the offer. Whitlam instead wanted only to hold a half-Senate election, but it was unlikely to change the composition of the Senate immediately, because most Senators would not take up their new offices until 1 July the following year (because the Senate works on fixed terms, except for Territory Senators and, at that time, replacement Senators filling casual vacancies).

The Governor-General considered that a half-Senate election would not solve the crisis and he was not prepared to let supply run out or to sanction illegal spending. So he [dismissed the Whitlam Government](#) and appointed Fraser to run a [caretaker government](#) on the condition that he secure the passage of supply and then immediately advise the dissolution of both Houses of Parliament, so that the people could decide who should govern. Whitlam inexplicably failed to tell his Senators that the Government had been dismissed, so they agreed to the passage of supply. This meant that Fraser had complied with Kerr's conditions and could be granted a dissolution. The House of Representatives voted no confidence in Fraser, which meant Fraser,

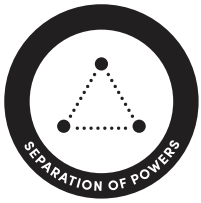


by convention, had to resign or be granted a dissolution. But as he was granted a dissolution, he could remain as caretaker Prime Minister. The election was held, and Labor was [comprehensively defeated](#).

A good ABC News overview of the Whitlam Government era and dismissal can be viewed [here](#). After a long court battle, the letters that Sir John Kerr wrote to the Palace during the constitutional crisis have been released by the National Archives and can be found [here](#).

Other possible reserve powers: There may be other cases where a reserve power may be exercised, such as refusing assent to a bill or to prorogue Parliament. The Governor-General is entitled to reject advice from Ministers who have ceased to be responsible (because they no longer command the confidence of the lower House) or advice to act in a manner that is plainly unlawful or unconstitutional, because the Governor-General remains obliged to obey the law and the Constitution. But in most cases, due to the separation of powers, it will be up to the courts to decide what is unlawful or unconstitutional.

The first female Prime Minister Julia Gillard being sworn in as 27th Prime Minister of Australia by the first female Governor-General of Australia Quentin Bryce | 24 June 2010 | Government House, Canberra Source: © Governor-General of Australia



Topic 6.3 and 7.1: Lesson/Activities Nine



AUSTRALIAN
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Executive Power – the
powers and role of the
Governor-General

Time/Lesson

- 1 hour

Learning Goal

For students to understand the powers and role of the Governor-General, from cutting ribbons to dismissing governments.

Rationale

Students will understand the constitutional, ceremonial and symbolic roles of the Governor-General.

Teaching Reference Document

- TRD 62 Executive Power – the powers and role of the Governor-General from cutting ribbons to dismissing governments

Resources

- Internet classroom access
- Library access to books about Governors-General and Governors
- [A Day in the Life of the Governor General](#)

Teacher Instruction

- Teacher discusses TRD 62 Executive Power – the powers and role of the Governor-General, from cutting ribbons to dismissing governments.
 - Student watch the CEFA Yaba video - [A Day in the Life of the Governor General](#)
 - What are the Governor-General's symbolic and ceremonial roles?
 - What does the Commander-in-Chief do?
 - What is the constitutional role of the Governor-General?
 - What are the reserve powers of the Governor-General?
 - Can the Governor-General dismiss the Prime Minister?
 - Who was the first female Governor-General of Australia?
- Students research the story of a Governor-General or a Governor from their State and write a report about it. What did they do before they were Governor-General or Governor and how did this prepare them for their vice-regal role? Why were they chosen? What did they say about the role? What was hard about it and what did they find inspiring about it?

Extension

Students research the 'Dismissal' of the Whitlam Government in 1975. Link to the Whitlam Dismissal Case Study in the Australian Constitution Centre at the High Court. Why was the Governor-General's actions so controversial? What were the arguments for and against exercising the reserve power to dismiss the government, or waiting longer before acting? Students imagine that they were the Governor-General on 10 November 1975. Write a diary entry describing your concerns about the situation and what will happen when the Government runs out of money, what the risks are of acting or failing to act, the factors you think you should take into account, your hopes about how the political controversy might be resolved and what you think you might do.

Assessment

Teachers assess student knowledge and understanding based either on their report about a Governor-General or Governor or their extension diary entry as the Governor-General on 10 November 1975.

