2

House, Government and Opposition

A knowledge of the structure of the House of Representatives is important to an understanding of its mode of operation. The components or groups which make up the House and which are described in the text that follows are common to most parliamentary systems based on the Westminster model. The relationship and interaction between these components is at the heart of parliamentary activity. The nature of the relationships between the groups largely determines the operational effectiveness of the Parliament, particularly in relation to the Executive Government.

GOVERNMENT AND PARLIAMENT

Relationships

The relationship between the groups is governed by a combination of constitutional provisions, convention and political reality, which can be simplified as follows:

- Members are individually elected to represent constituents within each electoral division and collectively form the House of Representatives.[1]
- In most cases Members belong to and support a particular political party.
- The party (or parties[2]) having the support of the majority of Members becomes the government party.
- The party (or parties) opposed to the party supporting the government forms the 'official' Opposition.
- The party having the support of the majority of Members elects one of its members as leader, who is commissioned by the Governor-General as Prime Minister to form a Government.
- The party supporting the Government may elect,[3] or the Prime Minister may appoint, a specified number of its members to be Ministers of State (the Ministry) who form the Federal Executive Council (the body which, in a formal sense, advises the Governor-General in the executive government of the Commonwealth) and who administer the Departments of State of the Commonwealth.
- The full Ministry,[4] or a selected group from within the Ministry, becomes the principal policy and decision-making group of government which is commonly known as the Cabinet.

With its membership drawn from the Parliament, the Executive Government is required to seek the Parliament's approval of new legislation, including financial legislation. Thus, as many of the more important executive actions are subject to parliamentary approval, the Government is responsible to the Parliament and through it to

1 For discussion of the Member as the basic unit of the House *see* Ch. on 'Members'.
2 That is, two or more parties which combine their numbers to form a coalition government.
3 The method formerly used by the Australian Labor Party when in government with the exception of the first Labor Government in 1904 when Prime Minister Watson chose the members of his Ministry. The Caucus rules requiring election changed in 2008.
4 The practice until 1956, and from 1972 to 1975.

the electors. In this lies the distinctiveness of the Westminster model—the interrelation of the Executive Government and the Parliament. It is the essence of what in Westminster terms is called 'parliamentary government'.

A Government is subject to the judgment of the electors at periodical general elections, but between elections a Government can only maintain office while it retains the confidence of the House of Representatives. In 1975 a third element came into play when the Government was effectively subjected to the will of the Senate which, in the circumstances, forced the Government to the electors.[5]

This basic dissection of the way Government relates to Parliament points to the fact that our system of parliamentary government is not entirely based on provisions of the written Constitution (*see* page 48). A full analysis can only be made from an understanding of the development of the Westminster system of responsible government adopted by Australia.[6]

A note on separation of powers and checks and balances

The doctrine of separation of powers was popularised by Montesquieu in 1748 in his work *L'Esprit des Lois*. The doctrine held that there were three essentially different powers of government: legislative, executive and judicial; and that a country's liberty depended on each of these powers being vested in a separate body. This theory had a marked effect on subsequent parliamentary and governmental development in democratic societies.

The doctrine of the separation of powers influenced the framing of the Australian Constitution to the extent that the powers of the main arms of government were set down in three separate chapters (s. 1, The Legislature; s. 61, The Executive; s. 71, The Judicature). However, as Ministers must be, or become, members of the legislature, there is a combining and overlapping of the legislative and executive functions.

According to Bagehot, the relationship between the legislative and executive powers in the Westminster system is better described as a 'fusion of powers':

> The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.[7]

This fusion takes place in a Cabinet, which:

> . . . is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other.[8]

Although this fusion of powers in the Westminster tradition may be regarded as a strength, it is also recognised as a potential danger. It is accepted to be undesirable for all or any two of the three powers to come under the absolute control of a single body. There are therefore checks and balances which prevent the fusion of executive and legislative powers from being complete. The essence of a democratic Parliament is that the policy and performance of government must be open to scrutiny, open to criticism, and finally open to the judgment of the electors. When the Government puts its policy and legislation before Parliament it exposes itself to the scrutiny and criticism of an organised Opposition

5 *See* Ch. on 'Disagreements between the Houses'.

6 For recent commentaries on the relationship between Government and Parliament *see*, for example, J. Uhr, 'Parliament' in *Government, politics, power and policy in Australia*, Longman Cheshire, 1994; and J. Uhr, *Deliberative democracy in Australia: The changing place of Parliament*, Cambridge University Press, 1998.

7 Walter Bagehot, *The English Constitution*, 4th edn, Fontana, London, 1965, p. 65.

8 Bagehot, pp. 67–8.

and of its own Members, who may be critical of, and suggest changes to, government policy and administration. Parliament is an important brake on the misuse of executive power of the Government collectively, or Ministers individually. It is essential that there be no erosion of Parliament's role in scrutinising the actions of government, such as might cause the Parliament to become a mere 'rubber stamp' in respect of government policy. Through the procedures of the House and the will of individual Members, and especially through the institutionalised Opposition, the executive and legislative functions remain sufficiently distinct.

The Government and House proceedings

The Executive Government exercises a controlling influence over the decisions of the House of Representatives. The principal factors in this are that:

- the Ministry is drawn from the legislature;
- for the Government to continue in office it depends on the support of the majority of the Members of the House; and
- the party system and its strong discipline help the Government to maintain its majority.

The capacity of the parties to control the votes of the majority of Members provides the means by which the Government, either directly or indirectly, may exercise its control over the House. At the same time the Government's control is constrained by its accountability and responsibility to the Parliament in which the Opposition (the significance of which is discussed at page 78) and the Senate play vital and at times determining roles. Notwithstanding these factors, as all decisions of the House are taken by majority vote, the Government is able to exert substantial influence over the operations of the House.

Indicative of the significance of some of the matters governed by standing orders but subject to the will of the majority are:

- the election of the Speaker and Deputy Speakers;
- decisions on legislation;
- additions to, and amendments of, standing and sessional orders;
- the curtailment of debate under the various closure and guillotine provisions;
- the suspension of standing orders;
- the determination of the days and hours of sitting; and
- the establishment and operation of parliamentary committees.

Other significant ways in which the business of the House is controlled by the Government under the standing orders include the requirements:

- that government business takes precedence of all other business on each sitting day except the period on Mondays when non-government business has precedence;[9] and
- that the Leader of the House may arrange the order of government business as he or she thinks fit.[10]

Priority for government business acknowledges the need for the Government to be provided with sufficient parliamentary time for the pursuit of its legislative program and the communication of its policies.

9 S.O. 35.
10 S.O. 45.

Other provisions of the standing orders which give a preference or latitude to Ministers[11] are:

- a motion for fixing the next meeting of the House (S.O. 30) may be moved by a Minister without notice;
- a motion for the adjournment of the House (S.O. 32) may be moved only by a Minister;
- a motion (or amendment) of no confidence in or censure of the Government may be allowed precedence over other business only if accepted by a Minister (S.O. 48);
- a motion to discuss a matter of special interest (S.O. 50) may only be initiated by a Minister;
- the initiation of financial proposals (partly for constitutional reasons) is restricted to Ministers (S.O.s 178–179);
- documents may be presented by Ministers at any time when there is no other business before the House (S.O. 199); and
- a motion to take note of a document, or to make it a Parliamentary Paper, at the time of presentation (S.O. 202) may be moved by a Minister without notice.

The principle of responsibility and accountability of Ministers to Parliament is to some extent recognised by standing orders in that:

- a motion or an amendment which expresses a censure of or no confidence in the Government may be moved (S.O. 48) (there is no specific provision for a motion of censure of or no confidence in an individual Minister);
- questions with or without notice may be asked of Ministers in accordance with the rules of the House governing questions (S.O.s 97–105);
- the procedures in relation to grievance debate and matters of public importance (S.O.s 192B and 46) are used for the purposes of ministerial accountability;
- by order of the House a Minister may be required to present documents for tabling (S.O. 200);
- a document relating to public affairs quoted from by a Minister (unless stated to be confidential[12]) shall, if required, be presented (S.O. 201); and
- the Petitions Committee may refer a petition received by the House to the responsible Minister, and Ministers are expected to respond to the committee within 90 days[13] (S.O. 209).

The Constitution and Executive Government

The executive power of the Commonwealth, although vested in the Queen, is exercisable by the Governor-General, and in the words of section 61 of the Constitution 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.[14]

The significance of this section is expressed by *Quick and Garran*:

11 Including Parliamentary Secretaries, *see* p. 70.

12 This is an important exception as it has regard to the concept of 'executive privilege' which has been invoked in respect of the publication of government documents and information. *See* Chs on 'Documents' and 'Parliamentary committees'.

13 Since the inception of the Petitions Committee in 2008 its practice has been that the majority of petitions received are referred. Before 2008 there was no obligation for a Minister to respond.

14 Constitution, s. 61; *and see* 'Governor-General' in Ch. on 'The Parliament and the role of the House'.

> This statement stereotypes the theory of the British Constitution that the Crown is the source and fountain of Executive authority, and that every administrative act must be done by and in the name of the Crown . . .
>
> The Governor-General appointed by the Queen is authorized to execute, in the Commonwealth, during the Queen's pleasure and subject to the Constitution, such powers and functions as may be assigned to him by Her Majesty (sec. 2) and by the Constitution (sec. 61). Foremost amongst those powers and functions will necessarily be the execution and maintenance of the Constitution, and the execution and maintenance of the laws passed in pursuance of the Constitution.[15]

The succeeding sections of the Constitution supplement section 61 by establishing in broad terms how and by whom the executive power is in practice to be executed:

First (section 62)—There is a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council are chosen and summoned by the Governor-General and sworn as Executive Councillors. They hold office during the Governor-General's pleasure.

The essence of this provision, read in conjunction with the succeeding provisions, is in the words of *Quick and Garran*:

> Whilst the Constitution, in sec. 61, recognizes the ancient principle of the Government of England that the Executive power is vested in the Crown, it adds as a graft to that principle the modern political institution, known as responsible government, which shortly expressed means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative according to the advice of ministers, having the confidence of that branch of the legislature which immediately represents the people. The practical result is that the Executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman of the Cabinet, or in other words the Prime Minister.[16]
>
> Ever since the resignation of Sir Robert Walpole in 1742, it has been recognized that the Crown could not for any length of time continue to carry on the government of the country, except through Ministers having the confidence of the House of Commons. That constitutes the essence of Responsible Government.[17]

Although there is no constitutional restriction on who shall be appointed to the Executive Council, it has been composed, with a few exceptions, of Ministers of State.[18] (For discussion of the Federal Executive Council, *see* page 76.)

Second (section 63)—The provisions of the Constitution referring to the Governor-General in Council are to be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

This section makes it mandatory, as a constitutional principle, that in such matters the Governor-General acts only with the advice of the Federal Executive Council which, by virtue of section 64, and by convention, is the Ministry. The import of this section is to give further constitutional recognition to the concept of responsible government.

Third (section 64)—The Governor-General may appoint officers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers hold office during the pleasure of the Governor-General. They must be members of the Federal Executive Council, and are 'the Queen's Ministers of State for the Commonwealth'. Section 64 further provides that after the first general election no Minister of State can hold office for a longer period than three months unless he or she is or becomes a Senator or a Member of the House of Representatives.

This section provides the constitutional authority for the appointment of Ministers and determines that the Ministry, for all intents and purposes, forms the Executive

15 *Quick and Garran*, p. 702.
16 *Quick and Garran*, p. 703.
17 *Quick and Garran*, p. 704.
18 Including since 2000 Ministers of State designated as Parliamentary Secretaries, *see* p. 71.

Government of the Commonwealth. The requirement that Ministers must eventually sit in Parliament brings together the executive and legislative organs of government.

Fourth (sections 65–67)—The Constitution gives further recognition to the Ministry by empowering the Parliament to determine the number of Ministers and the offices they shall hold[19] (*see* page 58) and the salaries they are to be paid (*see* page 72). The Executive Government in the broader sense is not only composed of the Ministry. The Constitution also makes provision, until the Parliament otherwise provides, for the appointment (and removal) of other officers of the Executive Government by the Governor-General in Council.

Constitutional conventions

The existence of a wide range of conventions of the Constitution[20] plays a fundamental part in Parliament/Executive Government relations. These conventions are numerous, and in some cases there is no universal agreement that they exist. Conventions are based on established precedent and practice and in many respects have their foundation in British law and practice established before 1901. They are subject to change by way of (political) interpretation or (political) circumstances and may in some instances be broken.

Constitutional conventions are of great significance in the exercise of the reserve powers of the Crown. This is particularly evident in the exercise of the power of dissolution,[21] vested by the Constitution solely in the Governor-General but not normally exercised without regard to convention.

The workings of responsible government, the concept of ministerial responsibility (collective and individual) and the existence of Cabinet (not mentioned in the Constitution) are for all practical purposes the subject of constitutional convention. The Constitution made no mention of political parties until 1977 when section 15, relating to the filling of casual vacancies in the Senate, was amended. Also majority or minority groups and the offices of Prime Minister and Leader of the Opposition are not mentioned.

Constitutional convention and the way it is interpreted and applied may, on occasions, have the same force as, but be not superior to, the Constitution itself, and its existence has been recognised by important cases of the High Court.[22] Crisp briefly defines constitutional conventions as:

> . . . extra-legal rules of structure or procedure or principle, established by precedent, consolidated by usage and generally observed by all concerned. They will affect the operation of the Constitution and may affect the working of the law but they themselves have not the force of law.[23]

Professor Gordon Reid interprets the phrase as follows:

> . . . the expression is little more than an article of political rhetoric and . . . our academic constitutional lawyers were publicly [in 1975] using it as such.
>
> It is well known that Australia's written Constitution is silent on many important aspects of government. It says nothing about the Prime Minister, the Cabinet, responsible government, ministerial responsibility, electing a government, dismissing a government, parliamentary control,

19 The Parliament has never exercised the power regarding the particular office a Minister shall hold.

20 In referring to the British constitutional framework Mill referred to these rules as 'the unwritten maxims of the constitution'. Twenty years later Dicey called them 'the conventions of the constitution' while Anson referred to them as 'the custom of the constitution'. Sir Ivor Jennings, *The law and the Constitution*, 5th edn, University of London Press, London, 1959, pp. 81 ff.

21 Also prorogation and appointing the time for holding sessions, (Constitution, s. 5) and other powers. *See* 'Governor-General' in Ch. on 'The Parliament and the role of the House'.

22 *See*, for example, *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 (Engineers Case) and more recently *Cormack v. Cope* (1974) and others discussed in Ch. on 'Disagreements between the Houses'.

23 L. F. Crisp, *Australian national government*, 5th edn, p. 352.

> what is to be done if the Senate refuses to pass an appropriation Bill (or a supply Bill), and so on. In reality this void is filled-in by well established practice, methods, habits, maxims, usages, many of them of long-standing, which were inherited from colonial Parliaments, which in turn inherited them from Westminster. It is these practices, methods and usages which tend to be referred to, albeit vaguely, as 'conventions of the Constitution'.[24]

Although reference to constitutional conventions is made throughout this text, it is not intended to identify and separately examine in depth the full range and meaning of all of them,[25] as they have been subjected to continuing political questioning which has left the status of many so-called conventions in doubt.

Even though the division is not always clear, there are other conventions which may fall under such headings as governmental, (party) political, and parliamentary. Parliamentary convention may be considered to be synonymous with parliamentary practice which is, as the term implies, of very broad scope.

Aspects of ministerial responsibility

Ministerial responsibility takes two forms—collective cabinet responsibility (or 'cabinet solidarity') and individual ministerial responsibility. Both concepts are governed by conventions inherited from Westminster and both are central to the working of responsible government.

Collective Cabinet responsibility

Cabinet is collectively responsible to the people, through the Parliament, for determining and implementing policies for national government. Broadly, it is required by convention that all Ministers must be prepared to accept collective responsibility for, and defend publicly, the policies and actions of the Government. The Cabinet Handbook states 'Whatever the private views of Ministers, Cabinet solidarity requires that once a decision has been reached, it will be publicly supported by all Ministers'.[26]

Most importantly, the convention has also been regarded as requiring that the loss of a vote on a no-confidence motion in the House or on a major issue is expected to lead to the resignation of the whole Government (including Ministers not in the Cabinet) or, alternatively, the Prime Minister is expected to recommend to the Governor-General that the House be dissolved for an election. Such events are, in the ordinary course, unlikely, given the strength of party discipline. Further, contemporary thinking is that, should a Government lose a vote on a major issue, it would be entitled to propose a motion of confidence to test or confirm its position before resigning or recommending an election.[27]

It has been stated that among the principles implicit in the convention each Minister is required to abide by the following:[28]

- he or she must be prepared not only to refrain from publicly criticising other Ministers and their actions but also to defend them publicly, or else resign;

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24 G.S. Reid, 'The double dissolutions and joint sitting commentaries', in Gareth Evans (ed.), *Labor and the Constitution 1972–1975*, Heinemann, Melbourne, 1977, p. 244.

25 Suggested references include Sawer, *Federation under strain*; G. Evans (ed.), *Labor and the Constitution*; Cooray, *Conventions, the Australian Constitution and the future*; Saunders and Smith, *Paper prepared for Standing Committee D* (of the Australian Constitutional Convention) *identifying the conventions associated with the Commonwealth Constitution*.

26 *Department of the Prime Minister and Cabinet*, Cabinet handbook, 6th edn, 2009, p. 3. *See also* Prime Minister, *A guide on key elements of ministerial responsibility*, Dec. 1998, pp. 2, 4.

27 *See* 'Motions of no confidence or censure' in Ch. on 'Motions'.

28 *See*, for example: L. F. Crisp, *Australian national government*, 5th edn, pp. 354–6; Hugh V. Emy, *The politics of Australian democracy*, 2nd edn, Macmillan, South Melbourne, 1978, pp. 246, 312–13; S. Encel, *Cabinet government in Australia*, 2nd edn, Melbourne University Press, Carlton, 1974, p. 107.

- he or she must not announce a major new policy without previous Cabinet consent—if a Minister does, Cabinet must either provide support or request his or her resignation;
- he or she must not express private views on government policies nor speak about or otherwise become involved in a ministerial colleague's portfolio without first consulting that colleague and possibly the Prime Minister; and
- government advice to the Governor-General must be assumed to be unanimous.

Not all principles associated with the convention have always been scrupulously upheld. At times governments have perhaps chosen to espouse the convention for political expediency or have chosen not to follow it for the same reason. Where crucial political advantage or disadvantage has been involved party political considerations have sometimes predominated over strict adherence to the convention.

While there have been departures from the convention the following comment on the controversy concerning the vitality of the convention places the matter in perspective:

> Most of the current disagreement turns on degree. Some critics have been concerned to point to the increasing number of deviations from the traditional rules; this article has been emphasising the overwhelming majority of cases in which the rules are still followed. The break with the past is less than has been thought.[29]

For precedents of resignations by individual Ministers in accordance with the convention *see* page 66.

Individual ministerial responsibility

During this century there has been a change in the perceptions of both Ministers and informed commentators as to what is required by the convention of individual ministerial responsibility. The real practical limitations on strict adherence to the convention as it was traditionally conceived are now openly acknowledged.

The 1976 report of the Royal Commission on Australian Government Administration stated:

> It is through ministers that the whole of the administration—departments, statutory bodies and agencies of one kind and another—is responsible to the Parliament and thus, ultimately, to the people. Ministerial responsibility to the Parliament is a matter of constitutional convention rather than law. It is not tied to any authoritative text, or amenable to judicial interpretation or resolution. Because of its conventional character, the principles and values on which it rests may undergo change, and their very status as conventions be placed in doubt. In recent times the vitality of some of the traditional conceptions of ministerial responsibility has been called into question, and there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.[30]

As the Royal Commission and other authorities have noted, there are still circumstances in which a Minister is expected to accept personal responsibility and to resign (or be dismissed):

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29 David Butler, 'Ministerial responsibility in Australia and Britain', *Parliamentary Affairs* XXVI, 4, 1973, pp. 413–14.

30 Royal Commission into Australian Government Administration, *Report*, PP 185 (1976) 59–60; *see also* B. M. Snedden, 'Ministerial responsibility in modern parliamentary government', paper presented to the Third Commonwealth and Empire Law Conference, *Record*, Law Book Co., Sydney, 1966; R. V. Garland, 'Relations between Ministers and departments', *Royal Institute of Public Administration (ACT Group), Newsletter*, 3 August 1976, p. 24.

> Resignation is still a valid sanction where ministers have been indiscreet or arbitrary in exercising power. In cases where the minister has misled parliament, condoned or authorized a blatantly unreasonable use of executive power, or more vaguely, where the minister's behaviour contravenes established standards of morality, resignation or dismissal is the appropriate action. In these cases, the factors which may often excuse the minister from blame for administrative blunders do not operate to the same degree: the minister's personal responsibility may be more easily isolated.[31]
>
> The responsibility of ministers individually to parliament is not mere fiction. An individual can be disciplined whereas the whole cannot. The events of recent years show that a minister can become too great a burden to carry. The parliament's role has been to expose and demean. Forced ministerial resignations and dismissals have been the decision of the prime minister not the parliament by its vote. The chief of the executive has judged that the public would accept no less. The credibility of a number of other ministers has been rightly challenged in parliament. Whether the challenges were merited or not the right of parliamentary inquiry cannot be denied. For a government to deny the right may prove to be suicidal. Parliament is the correct forum, the only forum, to test or expose ministerial administrative competence or fitness to hold office. However, allegations of a different kind, that is, offences against the law, should not be tried by parliament. The proper forum for those allegations is the courts. In cases of moral misconduct by a minister, the sanction should be political, in the form of resignation or defeat.
>
> I continue to believe that in the matter of ministerial responsibility, in the strict sense of actions done in his name for him or on his behalf in his role as a minister, his responsibility is to answer and explain *to* parliament for errors or misdeeds but there is no convention which would make him absolutely responsible so that he must answer *for*, that is, to be liable to censure for all actions done under his administration.
>
> . . . If the compelling penalty for a 'mistake' is resignation then the compelling prerequisite for punishment is the establishment of proof. This is not easily done in the political arena. The gravity of the 'mistake' would be an essential factor to any requirement of resignation. Equally the premise is only as sound as 'personal fault' or 'lack of reasonable diligence' can be established. Penalty by compulsion is dependent on the establishment of guilt. For the purposes of political advantage, allegations of ministerial 'mistakes' of a baseless or minor nature are no less possible than ministerial or government defence in the interests of self-preservation. Executives and ministers will always find it hard to permanently cover-up allegations of serious maladministration or misconduct.[32]

In a practical sense, a Minister may resign, not as an admission of culpability, but rather to remove pressure from the Government while serious criticisms of his or her capacity or integrity are properly and dispassionately assessed. Alternatively, a Minister may be given leave from ministerial duties for the same purpose (*see* page 69).

When responsibility for a serious matter can be clearly attached to a particular Minister personally, it is of fundamental importance to the effective operation of responsible government that he or she adhere to the convention of individual responsibility. However, the prime consideration in determining whether a Minister should resign or be dismissed has sometimes been the assessment of the likely political repercussions on the Government.[33]

Excluding the most serious cases and those where a Minister is clearly culpable the records have shown that a Government can rely on party discipline to ensure that a Minister's resignation is not forced by a direct vote of the House. Indeed there has been no occasion of an adverse resolution of the House in the nature of a no confidence or censure motion in an individual Minister (excluding the unusual events on 11 November 1975) on which resignation or dismissal would be expected. Some ministerial resignations, however, have been forced by pressure applied through questioning and

31 H. V. Emy, *The politics of Australian democracy*, 2nd edn, Macmillan, South Melbourne, 1978, p. 280.

32 Sir Billy M. Snedden, 'Ministers in Parliament—A Speaker's eye view'. In *Responsible government in Australia*, Patrick Weller & Dean Jaensch (eds), Drummond, Richmond, 1980, p. 76. *See also* Sir Robert Garran oration, (1988) by the Hon. R. J. L. Hawke.

33 *See* R. V. Garland, *Relations between Ministers and departments*, p. 24.

criticism in the House. The effects of this pressure on public opinion have been such that the Minister concerned or the Prime Minister has been forced to take action.

The Senate has on several occasions passed motions of censure of Ministers (both Senate and House Ministers).[34] It appears that in none of these cases did the Minister concerned feel compelled to resign as a result. These instances would seem to reinforce the principle inherent in the system of responsible government that Ministers collectively and individually (unless they are Senators) are responsible to the lower House.

POLITICAL PARTIES

Although political parties were not recognised by the Constitution until 1977,[35] their existence has since Federation, and more particularly since 1910, dominated the operation of the House of Representatives.

Political parties are not formally recognised in the standing orders of the House yet the proceedings of the House turn on the interaction of the major parties forming the Government and Opposition.[36] In the Commonwealth Parliament party loyalty and discipline are strong, with the effect of Members generally voting in accordance with the decision taken by the party unless a 'free' vote has been permitted.[37] Failure to vote along party lines on important issues may seriously jeopardise a Member's chances of re-election in the event of the party organisation withdrawing its support.[38] Party discipline is essential to the governing party in order to retain the support of the majority of the Members of the House, without which it could not continue to govern. Conversely, the basic strength of the private Member lies in the dependence of ministries and shadow ministries on the support of the individual Members of the parliamentary party. While it can be said that in some respects a private Member does not, for practical purposes, normally exercise great authority in the House, where party solidarity is usually exhibited, he or she has many opportunities to put a matter before the House under the opportunities available under the standing orders or to put a personal point of view within the party (*see* page 56).

From the practical point of view, the working of the House is greatly facilitated by the existence of political parties, as they create a degree of certainty and add stability. Parties create 'numbers', or blocks of votes, on many issues which come before the House and it is around these 'numbers' on each side of a question that parliamentary activity often revolves. However, when from time to time the governing party is not able to maintain a majority of votes, the immediate consequences of this inability fall on the party, and the machinery of the House is not affected.

Between 1901 and 1910 allegiances to party, particularly in respect of the groups known as protectionists and free traders, were fluid and governments were made and unmade on the floor of the House.[39] Following the defeat of the Deakin 'Fusion' Ministry at the general election of 1910 a two party situation developed in the ensuing Parliament—Labour and Liberal.[40] With the formation of the Country Party in 1919 a

34 *See* 'Motions of no confidence or censure' in Ch. on 'Motions'.
35 Section 15 of the Constitution altered with respect to filling of casual vacancies in the Senate.
36 For discussion of the private Member's conflicting responsibilities *see* Ch. on 'Members'.
37 *See* Ch. on 'Order of business and the sitting day'.
38 The discipline exercised by the Labor Party has generally been considered to be more direct and greater than that exercised by the coalition parties.
39 VP 1904/49, 149–51; VP 1905/9; VP 1908/79, 81–3; VP 1909/11–13.
40 This earlier Liberal Party later formed part of the Nationalist Party in 1917.

third party was introduced into the House.[41] Since then representation in the House of Representatives has been composed almost entirely of these three political parties and their successors, namely, the Australian Labor Party,[42] the Liberal Party of Australia (under various names) and the National Party of Australia (under various names). Since 1910 Australia has generally had majority Governments under which either the Australian Labor Party or a coalition of non-Labor parties has held office.[43]

The Labor Party is Australia's oldest political party, having evolved in the 1890s as the political wing of the trade union movement. The present Liberal Party was formed in October 1944 out of the United Australia Party and its earlier predecessor, the Nationalist Party. Since the general election of 1949 the Liberal Party and the National Country Party (later renamed the National Party of Australia and since 2003 known as the Nationals) when forming government have done so as a coalition.[44]

The three major political parties are organised at a national, State and sometimes at local level. While there are important differences in the structure of the parties represented in Parliament, at the national level they all have an organisational and a parliamentary wing. The extra-parliamentary or organisational wings of the political parties are not recognised in a procedural sense and have no role in the formal parliamentary structure and workings of the Parliament. Parliamentary activity revolves in a large measure around the parliamentary wings of the political parties—that is, the elected representatives.

Leaders and office holders

The parliamentary parties determine who shall be their leaders and deputy leaders in both Houses; hence they determine who shall be Prime Minister and Leader of the Opposition. Leaders and other office holders receive a salary additional to their salary as a Member of Parliament.[45] While Ministers are in fact holders of (ministerial) office, those offices are strictly positions of government under the Crown.[46] For constitutional and statutory reasons therefore, and for the purposes of the Remuneration Tribunal, Ministers are not defined as office holders of the Parliament.

41 Renamed National Country Party of Australia in 1975, VP 1974–75/624. Renamed National Party of Australia in 1982, H.R. Deb. (19.10.1982) 2163. Known as the Nationals since 2003.

42 Unofficial spelling changed from 'Labour' to 'Labor' from circa 1912. Now recognised as 'Labor'.

43 Hung Parliaments—that is, where no party or coalition has obtained a majority of seats in the House of Representatives—occurred following the 1940 and 2010 general elections. In 1940 the United Australia Party–Country Party coalition led by Prime Minister Menzies formed a minority Government with the support of two independents. However, in 1941, following coalition leadership changes which brought Country Party leader Fadden to the Prime Ministership, the two independents transferred their support to the Labor Party. The Labor Party then formed a minority Government led by Prime Minister Curtin for the remainder of the Parliament. In 2010 the Australian Labor Party led by Prime Minister Gillard formed a minority Government with the support of a minor party Member (Australian Greens) and three independents.

44 Since the general election in 1949 the other parties represented in the House have been: 1) the Australian Labour Party (Anti-Communist) in 1955 which comprised seven former members of the Australian Labor Party, VP 1954–55/161; H.R. Deb. (19.4.1955) 3; 2) One Nation in 1997 (a single former independent); 3) Australian Greens (one Member elected at a by-election in 2002, one Member elected in 2010); and 4) the Nationals–WA (one Member elected in 2010). In recent Parliaments there have been up to five independents elected. (Most Parliaments since 1996 have also had a Member from the Northern Territory based Country Liberal Party, however this party has been formally part of the Liberal–Nationals coalition.) For a record of party representation in the House since 1901 *see* Appendix 10.

45 *See also* Ch. on 'Members'.

46 This is an important distinction for the purpose of the constitutional provision regarding 'office of profit', *see* p.72.

The Remuneration Tribunal regards the occupants of the following positions as office holders of the Parliament for the purposes of payment of salaries in addition to their salary as a Member:[47]

Speaker of the House of Representatives
President of the Senate
Deputy Speaker in the House of Representatives
Deputy President and Chair of Committees in the Senate
Second Deputy Speaker in the House of Representatives
Temporary Chair of Committees in the Senate
Member of the Speaker's Panel in the House of Representatives
Chair or Deputy Chair of a parliamentary committee[48]
Leader of the Opposition
Deputy Leader of the Opposition
Leader of the Opposition in the Senate
Deputy Leader of the Opposition in the Senate
Leader of a recognised party[49]
Head of a recognised party where Leader of party sits in other house[50]
Manager of Opposition Business in the House of Representatives
Shadow Minister
Chief Government Whip in the House of Representatives
Chief Opposition Whip in the House of Representatives
Chief Government Whip in the Senate
Chief Opposition Whip in the Senate
Whip[51]
(The Leader of the House and the Leader of the Government in the Senate, who also have parliamentary roles, receive additional salary as Ministers—*see* page 72.)

For parliamentary purposes the Remuneration Tribunal's definition of office holders of the Parliament needs some qualification to distinguish their parliamentary or party relationship:

- The Presiding Officers and their deputies[52] are elected by their respective Houses and are correctly known as Officers of the House and the Senate respectively. These are strictly parliamentary offices.
- Temporary Chairs of Committees in the Senate and members of the Speaker's Panel in the House are nominated by the Presiding Officers in consultation with the respective parties. These are parliamentary positions.

47 For level of additional salary *see* latest Remuneration Tribunal determination. In 2012 amounts ranged from 85% for the Leader of the Opposition to 2% for a minor party deputy whip. Note that these positions are not regarded as offices of profit under the Crown by virtue of section 44(iv) of the Constitution; the persons are neither appointed by nor are they servants of the Crown. Those officers not in bold type are not strictly *parliamentary* office holders.

48 Level of additional remuneration varies.

49 Other than a party whose leader is the Prime Minister or Leader of the Opposition. Level of additional remuneration depends on number of party members in the Parliament (minimum 5).

50 Other than a party whose leader is the Prime Minister or Leader of the Opposition. Minimum 5 party members in each House.

51 Including specified Deputy Whips. Level of additional remuneration varies.

52 The occupants however are pre-selected for nomination by the parliamentary parties; *and see* Ch. on 'The Speaker, Deputy Speakers and officers'.

- Chairs and Deputy Chairs of parliamentary committees may be either elected by the committee[53] or, occasionally, nominated by the Prime Minister. These are parliamentary positions.
- Leaders and deputy leaders of the political parties, although receiving parliamentary recognition, hold party positions determined within the parliamentary parties.
- Whips and deputy whips strictly hold party positions determined within the parliamentary parties.[54]

At the commencement of each Parliament (or whenever a change occurs) the leader of each party makes a formal announcement to the House as to its leadership and whips.[55]

Party whips

All parties have whips whose main functions are to act as administrative officers to their parliamentary parties. Although whips, and especially the Chief Government Whip, have duties in relation to the proceedings of the House, they occupy essentially party political positions. Outside the Chamber the whips may be required to provide support for such matters as party meetings and consultations, party committees, arranging party nominations to parliamentary committees and organising any party balloting which may be required.[56]

The term 'whip' is derived from the English hunting expression 'whipper-in', which was the title for the person responsible for preventing the hunting hounds from straying from the pack. The first use of the term in a parliamentary context has been attributed to Edmund Burke who, in 1769, described the intense lobbying over a particular division as a 'whipping-in' of Members.[57] Wilding and Laundy, however, trace the use of the term back even further, when they refer to Porritt's claim that the whip, meaning a document instructing persons which side to take on a particular question, was in vogue as early as 1621. In the House of Commons, whips of all parties supply their Members with information on forthcoming business with each item of business underlined according to its importance, hence the use of the term 'whip' in relation to the document, for example, a 'three line whip'.[58]

In recent Parliaments the Government and Opposition have each had a Chief Whip and two other whips. In the case of a coalition the whips of the senior party have taken the various government whip positions when in government and the various opposition whip positions when in opposition. The National Party, the junior coalition party, has had its own Chief Whip and another whip. The positions of Chief Government Whip and Chief Opposition Whip[59] were created in 1994 with the establishment of the Main Committee (later renamed Federation Chamber) and the consequential additional workload on the whips. Whips are either elected by the parliamentary party or appointed

53 However, the occupants are normally selected for nomination by the parliamentary parties in the first instance; *and see* Ch. on 'Parliamentary committees'.

54 The Parliamentary Labor Party nominates or elects its members to occupy all parliamentary and party positions. The parliamentary wing of the Liberal Party elects its leader (and deputy leader) who appoints its Senate leaders, and whips in the House. Liberal Party whips in the Senate are elected. The Nationals elect their leaders and whips.

55 E.g. VP 2008–10/7–9.

56 The whips may be assisted by a returning officer or a secretary to the parliamentary party (also members of the parliamentary party). They are party internal positions which have no formal recognition within the Parliament itself.

57 *Odgers*, 6th edn, p. 417.

58 N. Wilding & P. Laundy, *An encyclopaedia of Parliament*, 4th edn, Cassell, London, 1972, pp. 785–7, including reference to Porritt, *The unreformed House of Commons*.

59 In the Labor Party the Chief Opposition Whip has been designated Deputy Manager of Opposition Business.

by the parliamentary leader of the party. Whips do not have any administrative responsibility or control in relation to the parliamentary or government administrations. The Chief Government Whip in the House of Representatives is not a Minister as he or she is in the House of Commons. In recognition of their party duties, not shared by other private Members, whips and their deputies receive an additional salary in addition to their salary as Members.

Within the parliamentary process a whip is required to perform a multitude of tasks including:

- arrangement of the number and order of Members who wish to speak in debate;[60] this may be done in consultation with the Leader of the House in respect of government Members and his or her counterpart in the Opposition or the party leader(s) in respect of opposition Members;
- ensuring the attendance of party members for divisions and quorum calls (this responsibility is more onerous on the government whips as it has been considered that the Government should ensure that a quorum is maintained[61]);
- in conjunction with other whips, the arrangement of 'pairs'[62] for Members who are, or who may desire to be, absent from the House; and
- in divisions, by convention on appointment from the Chair, to act as a teller.

The Chief Government Whip has the added responsibility of assisting the Leader of the House in ensuring that the timetable for the Government's legislative program is met and regularly moves procedural motions such as the motion for the closure. On the creation of the position in 1994 the Chief Government Whip was empowered to move motions, without the requirement for a seconder, relating to the conduct of the business or the sitting arrangements of the House or the then Main Committee (now Federation Chamber).[63] The Chief Government Whip exercises these functions, previously the preserve of the Leader of the House, principally in relation to the business of the Federation Chamber. The Chief Government Whip has primary responsibility for determining the Federation Chamber's agenda in relation to government business, following consultation with Ministers, opposition whips and independent Members, and normally moves the motions referring bills and other orders of the day to the Federation Chamber. The Chief Government Whip, Chief Opposition Whip and the Third Party Whip, or their nominees, are members of the Selection Committee. Any procedural function of a Chief Whip under the standing orders can be performed by another whip acting on his or her behalf.[64]

Party committees and meetings

Both the government and the opposition parties have backbench committees to assist them in the consideration of legislative proposals and other issues of political significance allied to each committee's function. These committees, which consist of Members having a special interest in the subject matter of the committee, provide a forum in which a

60 The 'list of speakers' is advisory only and does not bind the Chair in allocating the call.

61 Although the Procedure Committee has expressed the view that it is incumbent on all Members to maintain a quorum, as it is generally government business which is before the House, it is to the Government's advantage to see that it does not lapse through lack of a quorum. *See* Ch. on 'Order of business and the sitting day'.

62 *See* Ch. on 'Order of business and the sitting day'.

63 The presentation or moving of the stages of government bills specifically excluded. VP 1993–95/982–3.

64 S.O. 2 (definitions)—relevant to SOs 41A and 116(c).

Member is able to discuss on a party basis matters of importance to his or her party and possibly to the Member's electoral division. These committees have been shown to influence (and in some cases directly or indirectly overturn) government policy or decisions.

All parties have party meetings in sitting weeks but usually at times when the House is not sitting. The proceedings of party meetings are regarded as confidential, and the detail of discussions is not normally made public. These meetings provide the forum, particularly for backbenchers, for internal party discussion of party policy, parliamentary activity, parliamentary tactics, the resolution of internal party disputes, the election of officers, and they provide a means of exerting backbench pressure on, and communication with, its leaders.

Party meetings of the Parliamentary Labor Party are commonly referred to as 'caucus' meetings.[65] Used in its collective sense the 'caucus' of the Labor Party is composed of all Labor Members of the House and the Senate meeting together. In its extended sense the 'caucus system', as applying to all parties, has developed from the development of formalised party arrangements and rules.

Important differences between the two main parties in their caucus arrangements are:

- The Chair of the Labor Party caucus is elected from among its members and is usually a backbencher, while in the Liberal Party the leader traditionally presides over party meetings, including joint party meetings.
- The Labor Party caucus historically has elected its members to all positions of office including Ministers, while the leader of the Liberal Party has appointed members to most offices, including Ministers. However, in 2008 Labor Party rules were changed to provide for the Prime Minister to make appointments.
- Party discipline, in particular voting requirements, may be more formal in the Labor Party and the Nationals than the Liberal Party, but in each case party discipline is strong.

Parties and their effect on the House

In many respects the functioning of the House is based on the clear-cut division between Government and Opposition, that is, the opposing political parties, and the working arrangements and conduct of business reflect this. An obvious recognition of this historical development is the seating arrangement in the House with government Members sitting to the right of the Speaker's Chair and opposition Members to the left. Procedural recognition is exemplified by the practice of the Chair of alternating the call between government and non-government Members.

The important functions performed by the parties are mostly unrecognised by the standing orders in the working of procedure, although the standing orders recognise the Government's control in arranging the business of the House (*see* page 45).[66]

The party system has a strong influence on the day-to-day workings and decision-making of the modern legislature. This has not been without criticism; one commentator has written:

65 The word 'caucus' was originally an American term meaning in its broadest sense simply a meeting of parliamentary members of a particular party to consult. *See* Patrick Weller (ed.), *Caucus minutes 1901–1949*; Vol. I, Melbourne University Press, 1975, pp. 5–7.

66 *See also* Ch. on 'Order of business and the sitting day'.

> The implications of a predominantly team approach to parliamentary matters even to the abrogation of any effective rights of the individual representative raises important questions about the nature of our modern parliamentary system and the extent to which public frustration with it as an institution may relate to undue party cohesiveness.[67]

To facilitate the management and programming of the business of the House, a Government/Opposition consultative arrangement has existed since 195l. The Leader of the House, generally a senior Minister, consults, or ensures that consultations are held, with a member of the shadow ministry nominated by the Leader of the Opposition (the Manager of Opposition Business) and is assisted by the Chief Government Whip. They are jointly responsible, within the requirements of the standing orders, for the daily programming of the House, although the final responsibility remains with the Leader of the House acting on behalf of the Government (*see* page 65).

THE MINISTRY

Number of Ministers

The Constitution provides for the number of Ministers as follows:

> Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.[68]

The Parliament increased the number of Ministers of State from seven to eight in 1915.[69] Further statutory increases have brought the number up to the present limit of 30. In addition, twelve positions of Minister of State to be designated as Parliamentary Secretary were created in 2000 (*see* page 70).[70] These constitutional and statutory limitations apply to the number of Ministers administering a Department of State. In earlier years 'Ministers' who did not administer a department were also appointed—*see* 'Ministerial assistance' at page 70.

Composition of the Ministry

The allocation of portfolios—that is, the Departments of State that Ministers shall administer—has never been determined by the Parliament although there have been unsuccessful attempts in the House to have the Parliament elect the Ministry.[71] In practice the Governor-General determines the allocation of portfolios on the advice of the Prime Minister. In the case of a Liberal–Nationals coalition the Prime Minister, following consultation with the Leader of the Nationals, nominates Ministers and decides the allocation of portfolios for recommendation to the Governor-General. Between the formation of the Fisher Ministry in 1908 and the Rudd Ministry in 2007, the Australian Labor Party caucus elected its Ministers and the Prime Minister allocated portfolios for recommendation to the Governor-General; Labor Party Ministers are now also appointed by the Prime Minister.

The approval of the Governor-General to the composition of the Ministry, the creation of departments, the allocation of portfolios and any ministerial and departmental change

67 K. Jackson, 'Caucus—the anti-Parliament system', *The Parliamentarian* LIX, 3, 1978, p. 159.
68 Constitution, s. 65.
69 *Ministers of State Act 1915*.
70 *Ministers of State Act 1952*, s. 4; for a schedule of statutory increases in the number of Ministers *see* Appendix 9; for a list of Ministries *see* Appendix 7.
71 VP 1905/47, 89, 146; VP 1909/66; VP 1910/122; VP 1925/42, 73.

is notified publicly[72] and announced in the House.[73] The principal areas of departmental responsibility and enactments administered by the respective Ministers are notified publicly by order of the Governor-General.[74] Temporary ministerial arrangements may be made by the Prime Minister without reference to the Governor-General.

Since the formation of the first Commonwealth Government on 1 January 1901 the Ministry has always included a Prime Minister, a Treasurer, an Attorney-General and a Minister for Defence.[75] The titles and functions of other Ministers have varied over the years. A Vice-President of the Executive Council has always been appointed and, since the early 1930s, has usually administered a Department of State in addition to performing Executive Council duties.[76] A Minister may administer more than one department.

The two-level Ministry

In September 1987 the 3rd Hawke Government instigated a two-level ministerial structure accompanied by a reorganisation of the public service which considerably reduced the number of government departments. Each of the major departments so created[77] was headed by a senior or 'portfolio' Minister, who was also a member of Cabinet. Senior Ministers were assisted in the administration of their portfolios by junior Ministers with specific titles and responsibilities for designated areas of departmental operations.

In announcing the new administrative arrangements the Prime Minister stated that under the new system portfolio Ministers were released from some of the detailed administrative work, enabling them to give greater attention to policy. All portfolios were represented in Cabinet without the need for the Cabinet to be expanded to an unmanageable size. Portfolio Ministers were ultimately responsible for the administration of their entire portfolios and were accountable to Parliament for their overall operation. All Ministers, however, had a clear accountability within specific responsibilities allocated to them, which included responding to questions without notice.[78] This approach has been followed in later Parliaments.[79]

Coalition Ministries

On occasions Governments have been formed from the combined membership of two (or more) political parties. Coalition Governments have occurred when the numerical strength of one party is less than an absolute majority of the House, or for political reasons by agreement between the parties. The Ministry is composed of members of the coalition parties determined by agreement. Between 1949 and 1972, between 1975 and 1983, and between 1996 and 2007, Liberal–National Party (formerly Country Party, later Nationals) coalition Governments were in office.

The Free Trade–Protectionist coalition between August 1904 and July 1905 was known as the Reid–McLean Ministry. Between February 1923 and October 1929 the Nationalist–Country Party coalition was known as the Bruce–Page Ministry. Between

72 E.g. Gazette S248 (3.12.2007); Gazette S254 (4.12.2007); Gazette S102 (10.6.2009).
73 E.g. VP 2008–10/7–8.
74 Known as the Administrative Arrangements Order; e.g. Gazette S21 (25.1.2008).
75 Except for a re-organisation of the Department of Defence between 1939 and 1942.
76 In the early Ministries the Vice-President was a member of the Executive Council without ministerial portfolio. Prime Minister Lyons filled the position between 1935 and 1937.
77 The number of departments was reduced by amalgamation from 28 to 18; 16 major departments were so created, with two small departments remaining administratively distinct under junior Ministers, H.R. Deb. (15.9.1987) 43–4.
78 H.R. Deb. (15.9.1987) 43–6.
79 E.g. VP 1996–98/10–11; VP 1998–2001/9–11; VP 2004–07/7–8; VP 2008–10/7–8.

June 1909 and April 1910 the existing three non-Labour groups formed a Protectionist–Free Trade–Tariff Reform coalition which was known as the 'Fusion' Ministry.

Interim Ministries

In order that the government of the country continues uninterrupted there have been occasions when the Governor-General has found it necessary to appoint an interim or 'caretaker' Government pending the resolution of political matters, for example, the election of party leaders or a general election (*and see* page 96 of second edition).

On the dismissal of the Whitlam Australian Labor Party Government on 11 November 1975, the Governor-General commissioned the Leader of the Opposition, Mr Fraser (Liberal Party), to form a 'caretaker' Government (Liberal–National Country Party coalition) until a general election was held. The 'caretaker' Ministry, consisting of 15 Ministers, was formed on the basis that it 'makes no appointments or dismissals and initiates no policies'[80] and held office until 22 December 1975.

Caretaker conventions

By convention, Governments ensure that important decisions are not made during the period immediately prior to a general election which would bind an incoming Government and limit its freedom of action. The conventions require a Government to avoid implementing major policy initiatives, making appointments of significance or entering into major contracts or undertakings during the caretaker period, and also to avoid involving departmental employees in election activities. The Ministry, Cabinet or Cabinet committees may meet, if necessary, for the normal business of Government, but the matters considered are constrained by the conventions. Normally efforts are made to clear necessary business prior to the caretaker period. The 'caretaker' period applies formally from the dissolution of the House until the election results are clear, or in the event of a change of Government, until the new Government is appointed. However, it is also accepted that care should be exercised in the period between the announcement of the election and dissolution.

Other practices applying to the election period, usually regarded as being part of the caretaker conventions, are aimed at ensuring that departments avoid partisanship during an election campaign and that government resources are not directed to supporting a particular political party. They address matters such as the nature of requests that Ministers may make of their departments, procedures for consultation by the Opposition with departmental officers, travel by Ministers and their opposition counterparts and the continuation of government advertising campaigns.[81]

The Ministry and the Senate

The composition of the Ministry has always included some Senators to represent the Government by presenting its policies and facilitating the passage of its legislation in the Senate. Senate Ministers initiate bills (other than financial bills) and make policy statements to the Senate connected with their portfolios. In addition each Senate Minister represents in the Senate one or more Ministers located in the House. Likewise each Senate Minister is represented by a Minister in the House of Representatives.

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80 Statement by Governor-General on 11 November 1975. *See* Ch. on 'Disagreements between the Houses'.

81 Department of the Prime Minister and Cabinet, *Cabinet handbook*, 6th edn, 2009, pp. 33–4. *See also* Department of the Prime Minister and Cabinet, *Guidance on caretaker conventions*, updated August 2007.

The House from which Ministers shall be drawn is not mentioned in the Constitution. In practice the number of Senate Ministers is determined by the Prime Minister or the parliamentary party, as the case may be, and in recent years has varied between four and nine. A large component of Senate Ministers may be seen as running counter to the concept of responsible government and the Senate's traditional role as a 'House of review'. In keeping with constitutional principles and the constitutional limitations on the Senate regarding the initiation of financial legislation, the majority of the Ministry, including the Prime Minister and the Treasurer, has always been drawn from the House of Representatives.

Following the presumed death of Prime Minister Holt on 17 December 1967, the Liberal Party chose Senator Gorton as its leader on 10 January 1968 and he was sworn in as Prime Minister the same day. Although there had been previous occasions of Senate Ministers acting as Prime Minister,[82] this is the only occasion on which a sitting Senator has been commissioned to form a Government. Senator Gorton did not sit in the Senate as Prime Minister because neither House met during the period between his election as Prime Minister and his subsequent election as a Member of the House of Representatives. Prime Minister Gorton resigned his place as a Senator on 1 February 1968, in order to seek election to the House of Representatives. He was elected on 24 February 1968 at the by-election for the division of Higgins left vacant by Mr Holt's death. Between 1 February and 24 February Mr Gorton was a Member of neither House but, as permitted by the Constitution, was able to remain Prime Minister during this period.[83]

From time to time the view has been put that the presence of Ministers in the Senate is incompatible with its effective performance as a House of review and a States House. In 1979 a motion was moved in the Senate, but remained unresolved, to the effect that Senators should no longer hold office as Ministers of State, with the exception of the Leader of the Government in the Senate, and that chairmen of the Senate's Legislative and General Purpose Standing Committees should be granted allowances, staff and other entitlements similar to Ministers.[84] In 1986 the House Standing Committee on Procedure expressed the opinion that all Ministers should be Members of and responsible to the House of Representatives.[85] In 1988 a private Member's motion was debated in the House, but remained unresolved, urging the party winning the next and subsequent elections to appoint all Ministers from the House of Representatives and urging the Senate to further expand its committee system and adopt greater powers of investigation and inquiry.[86]

Prime Minister

The origin of the title of Prime Minister[87] is to be found in English constitutional history with the title being first attributed to Sir Robert Walpole in 1721.[88] The Cabinet system of government and the position within it of the Prime Minister was established

82 (i) H.R. Deb. (9.5.1916) 7686, (ii) during adjournment of the Houses between 30 August 1962 and 2 October 1962.
83 Constitution, s. 64.
84 J 1978–80/571; S. Deb. (22.2.1979) 229–40. A notice of motion with similar intent was later given in the House on 3 May 1979, NP 96 (8.5.1979) 5205.
85 PP 354 (1986) 25.
86 H.R. Deb. (24.3.1988) 1292–8.
87 For a list of Australian Prime Ministers *see* Appendix 6. For a commentary on the Prime Ministership in recent times *see* J. Uhr, 'Prime Ministers and Parliament: patterns of control' in *Menzies to Keating—the development of the Australian Prime Ministership*, Melbourne University Press, 1992.
88 N. Wilding & P. Laundy, *An encyclopaedia of Parliament*, 4th edn, Cassell, London, 1972, p. 581.

Westminster practice at the time of the establishment of the Commonwealth. The occupant of the position has been variously described as the First Minister, primus inter pares (first among equals),[89] Chairman of the Cabinet,[90] Chief Adviser to the Crown and in contemporary usage Head (or Leader) of the Government. The Prime Minister is placed third in the Commonwealth of Australia Table of Precedence, immediately after the Governor-General and State Governors.

The first Prime Minister (Mr Barton) was officially appointed as Minister for External Affairs and it was not until 1913 that the Prime Minister (Mr Fisher) was appointed by the Governor-General to administer his own department.

In Australia the appointment (and removal) of a Prime Minister clearly rests with the Governor-General and the Governor-General alone, whose prerogative power is nevertheless limited by the rules of established constitutional conventions with the result that the choice is made for him or her. The selection of the Prime Minister is in practice made in the party political and parliamentary arenas. Since the appointment of Prime Minister Barton, excepting the 1975 incident noted below, the choice of Prime Minister has been limited to the person, for the time being, elected as leader of the party having the support, directly or indirectly, of the majority of Members of the House of Representatives.

The constitutional convention is that the Prime Minister remains in office while maintaining the support (leadership) of the majority party (or coalition) and the support of a majority of the Members of the House of Representatives. The only exception to this convention occurred in 1975 when Prime Minister Whitlam was dismissed as Prime Minister even though he retained the leadership of the majority party and majority support in the House of Representatives. (A deadlock had arisen between the House and the Senate over the appropriation bills, with the actions of the Senate in failing to pass the bills threatening the availability of funds necessary for the operation of government departments and programs.)[91]

Apart from dismissal, Prime Ministers have ceased to hold office as a result of death,[92] failure to be re-elected as a Member of the House,[93] removal as leader of the majority party,[94] failure to maintain majority support of the House of Representatives[95] and retirement.[96]

The Prime Minister's prestige and power are largely due to the authority and control enjoyed as Chair of Cabinet and the ability, not available to other Ministers in the same manner, to make important decisions outside Cabinet. One of the most significant powers is the control over the composition of the Cabinet and the Ministry. The appointment and

89 Attributed to Keith, *British Cabinet system*, referred to in Wilding & Laundy, p. 580. With the development of Cabinet government and growth in power and prestige of the Prime Minister, this term can no longer be strictly acceptable terminology.

90 *Quick and Garran*, p. 703.

91 *See* Ch. on 'Disagreements between the Houses'.

92 Three Prime Ministers have died while in office —Mr Lyons in 1939, Mr Curtin in 1945 and Mr Holt in 1967.

93 The only Prime Ministers defeated at an election were Mr Bruce in 1929 and Mr Howard in 2007.

94 Most recently Mr Gorton in 1971, Mr Hawke in 1991 and Mr Rudd in 2010.

95 (i) Loss of majority on floor of the House without general election, most recently Mr Fadden in 1941, (ii) loss of majority following general election, most recently Mr Fraser in 1983, Mr Keating in 1996, and Mr Howard in 2007 (himself defeated), and (iii) loss of majority in House and failure to regain majority at general election, most recently Mr Bruce in 1929 (himself defeated), and Mr Hughes in 1923.

96 Most recently Sir Robert Menzies in 1966.

removal of Ministers, changes in the Ministry and the allocation of portfolios are made by the Governor-General on the advice of the Prime Minister.[97]

A Ministry's existence depends on the Prime Minister's continuance in office. The resignation or dismissal of the Prime Minister, by convention, causes the resignation of the full Ministry. A Prime Minister may resign, hence causing the resignation of all Ministers, in order to reconstruct a new Ministry[98] and continue in office.

The Prime Minister may make temporary ministerial arrangements without reference to the Governor-General.[99] A Minister may act for another Minister on account of absence from Australia or from the Ministry or due to ill health. The Acts Interpretation Act confers upon an Acting Minister the same power and authority with respect to the absent Minister's statutory responsibilities.[100]

Another example of personal Prime Ministerial power is advice to the Governor-General on dissolving the House of Representatives, as this advice may be given by the Prime Minister without reference to the Cabinet.[101] Most other major matters of State are subject to the collective decision of Cabinet (*see* page 74), but nevertheless the Prime Minister would exercise considerable authority and control.

In the past Prime Ministers frequently held an additional portfolio, usually that of Treasury or Foreign Affairs. Prime Minister Hughes was also Attorney-General between 1915 and 1921. Other than for brief periods, and with the exceptions of Prime Ministers Menzies and Whitlam, who also held the portfolio of External Affairs and Foreign Affairs respectively for substantial periods,[102] the modern practice is for Prime Ministers not to administer more than one Department of State (the Department of the Prime Minister and Cabinet).

Prime Ministers of both the coalition parties and the Australian Labor Party have been assisted by another Minister who is appointed as Deputy Prime Minister. In the case of a coalition Government the Deputy Prime Minister has been the Leader of the Nationals, and in the case of a Labor Government the Deputy Leader of the party. The position is a formal one without portfolio per se for which the occupant is paid a higher salary than other Ministers (*see* page 72). It is the practice for the Deputy Prime Minister to be Acting Prime Minister when the Prime Minister is absent from Australia or absent on account of leave (for illness or brief recreation periods). The Deputy Prime Minister would normally be commissioned to become Prime Minister in a caretaker capacity in cases of emergency, for example, the death of the Prime Minister.[103]

Treasurer

A Treasurer has been included in all Ministries since Federation, the first Treasurer being Sir George Turner. The requirement of a separate Department of State is implied by section 83 of the Constitution which provides, in part:

> No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

97 Before changes to Caucus rules in 2008, ALP Ministries were elected by the parliamentary party and the Prime Minister allocated portfolios.
98 For example, Mr Fraser in 1977.
99 VP 1978–80/530.
100 *Acts Interpretation Act 1901*, s. 19.
101 L. F. Crisp, *Australian national government*, 5th edn, p. 368.
102 Prime Minister Menzies was also Minister for External Affairs between 4 February 1960 and 22 December 1961. Prime Minister Whitlam was also Minister for Foreign Affairs between 5 December 1972 and 6 November 1973.
103 Most recently Mr McEwen in 1967.

The Treasurer has always been a senior member of the Government and is responsible for economic and financial matters. Although the Cabinet takes collective decisions and assumes collective responsibility, the Treasurer is nevertheless the focal point of the financial deliberations of Cabinet, not only within the scope of his or her own portfolio, but in relation to the financial implications of all other matters that come before Cabinet. The Treasurer introduces major financial proposals into the House as the responsible Minister, the preparation and presentation of the annual Budget being the most obvious manifestation of this responsibility.

That the duties of Treasurer have been considered to be more demanding than most other portfolios is recognised by the Remuneration Tribunal which grants the Treasurer a higher salary than other Cabinet Ministers excepting the Prime Minister and Deputy Prime Minister (*see* page 72).

A unique feature of the office of Treasurer is that it must always reside in the House of Representatives since under the Constitution it is in that House that financial legislation must be initiated.[104]

In 1976 the functions of the Department of the Treasury were redefined resulting in the establishment of a separate Department of Finance (later Finance and Administration, then Finance and Deregulation). Initially the Treasurer administered both Departments but in 1977 a Minister for Finance was appointed to administer the new department. This portfolio has been held by both Members of the House and Senators.

Attorney-General

The Attorney-General was another of the seven original Ministers appointed in 1901, the first Attorney-General being Alfred Deakin. The origins of the office of Attorney-General can be traced back in English history to the 13th century and many of the traditions surrounding it have continued to characterise the office in Australia.

The Attorney-General is the chief legal adviser to the Commonwealth Government and has overall responsibility for the conduct of actions brought by the Commonwealth Government in the legal system.[105] He or she is the Minister responsible for the Office of Parliamentary Counsel[106] the duties of which include the drafting of government bills and amendments.

Historically, the Attorney-General has been the First Law Officer of the Crown, having responsibilities in relation to the laws of the Commonwealth, and needing to make decisions about whether the laws of the Federal Parliament are being properly observed and whether people should be prosecuted for not observing the law (although since 1983 day-to-day responsibilities for the prosecution of offences have been given, by statute, to the Director of Public Prosecutions). As First Law Officer the Attorney-General gives advice on the basis of what is just, and must separate the advice from any political considerations. The principle of this independence of the office of Attorney-General was the subject of the resignation of Attorney-General Ellicott on 6 September 1977.[107] In his letter of resignation to the Prime Minister he stated:

> It is with great regret that I am forwarding herewith my resignation as Attorney-General.

104 In April 1995 a Member of the NSW Legislative Council, Mr Egan, became Treasurer of New South Wales. Special arrangements were made for him to address the Legislative Assembly on the State Budget.

105 The Attorney may appear in court personally, e.g. *Re Patterson Ex parte Taylor* [2001] HCA 51 (2001) 182 ALR 657.

106 *Parliamentary Counsel Act 1970*; *see also* Ch. on 'Legislation'.

107 VP 1977/249; H.R. Deb. (6.9.1977) 721–32.

> I am doing so because decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney-General of my discretion in relation to the criminal proceedings *Sankey v. Whitlam and others*.
>
> In the circumstances I feel that I have no other course but to resign my office. I regard it as vital to our system of government that the Attorney-General's discretion in criminal matters remains completely independent.[108]

This resignation illustrates one Attorney-General's view of the independent nature of the office of Attorney-General, notwithstanding the general concept of Cabinet responsibility.

The Second Law Officer is the Solicitor-General. The Solicitor-General may appear in court in the major cases in which the Government is involved, but importantly is a statutory appointee and not a Member of the Parliament. The Solicitor-General gives independent legal advice to the Government. This independence is reflected in the *Law Officers Act 1964*.

Leader of the House

The office of Leader of the House was created without legislation and without any formal decision of the House. By convention, it is now accepted as an office which is necessary for the proper functioning of the House. Because of the demands placed on the incumbent during the sittings of the House, the office has received special consideration by the Remuneration Tribunal by way of payment of an additional salary greater than that paid to other members of Cabinet.

The position of Leader of the House as a defined and separate office originated in 1951.[109] In a press statement on 10 May 1951, Prime Minister Menzies announced the appointment of the first Leader of the House, the Hon. E. J. Harrison, then Vice President of the Executive Council and Minister for Defence Production. The Prime Minister's aim was to improve the organisation and conduct of business in the House of Representatives, from which both he and the Deputy Prime Minister were of necessity often absent.

The appointment is made by the Prime Minister, and the Leader of the House is responsible to the Prime Minister who has ultimate authority and responsibility for government business. As it is a delegated function, it is not unusual for the Prime Minister, when in attendance, to intervene in the proceedings of the House and even to move procedural motions.

In broad terms the Leader of the House is responsible for the arrangement and management of government business in the House of Representatives. In respect of the daily business of the House, it is his or her responsibility, in consultation, as necessary, with the Prime Minister and other Ministers, and the Opposition, to determine the order in which the items of government business will be dealt with, and to ensure that, as far as practicable, the passage of government business is not unduly delayed or disrupted. The majority of formal or general procedural motions are moved on behalf of the Government by the Leader of the House.[110]

The Leader of the House works closely with the government whips and consults with them regarding the selection of speakers from the government parties. He or she arranges

108 H.R. Deb. (6.9.1977) 721.

109 For a list of Leaders of the House *see* Appendix 8.

110 For example, motions for leave of absence to Members, suspension of standing orders, alterations in the order of business, changes in days and hours of sitting, and often motions for the closure, declarations of urgency (guillotines), the adjournment, etc.

the allocation of time for debates and, where problems arise in regard to the program, determines the tactics to be followed by the Government.

An important function of the Leader of the House is to undertake or oversee negotiations (often resulting in a 'trading' of available parliamentary time) with the opposition counterpart, the Manager of Opposition Business, on matters relating to the programming of the House. In respect of the programming of Federation Chamber business this function has been delegated to the Chief Government Whip.

There is a continuing process of negotiation with the Opposition on such matters as the order in which bills will be debated; arranging for cognate debates to be held on related bills; the making of, and the Opposition's reply to, ministerial statements; the amount of time to be made available for particular debates; and on any other matter that may arise during the course of proceedings that may have a bearing on the progress of government business.

It is essential for the Leader of the House to ensure that a constant liaison is maintained with the Speaker and the staff of the House in regard to the arrangements for programming government business,[111] and in regard to the wide range of procedural questions which arise from time to time. The Leader of the House must also be kept in touch with developments in the Senate that may have a bearing on the future programming of the House—for example, where it appears that the Senate may return a bill to the House with requests and/or amendments—and must also take into account the Senate's own programming requirements when planning the program for the House. The Leader of the House is assisted in carrying out these responsibilities by the Parliamentary Liaison Officer, an employee of the Department of the Prime Minister and Cabinet.

Day-to-day functions must be set against the longer term policy objectives of the Government. The principal body concerned with these longer term objectives, apart from the Cabinet itself, is the Parliamentary Business Committee of Cabinet of which the Leader of the House is a member. This committee decides the composition of the Government's legislation program for a period of sittings and undertakes a general supervisory role over the progress of legislation.

The office, combined as it is with a ministerial portfolio, can be demanding, especially during the sittings of the Parliament when the Leader of the House normally gives some priority to the functions of the office and spends a great deal of time in the Chamber itself.[112] The Manager of Government Business in the Senate, also a Minister, performs an equivalent function in the Senate.

Cessation of ministerial office

Resignation

Ministers may resign for personal reasons, or following defeat at a general election or resignation from Parliament.[113] When a Government loses office, the Prime Minister resigns and, therefore, so do Ministers.[114] A Prime Minister may resign and then be reappointed in order to form another Ministry.[115] Ministers have also resigned in order for

111 *See also* Ch. on 'Order of business and the sitting day'.

112 Another Minister is appointed Deputy Leader of the House to assist the Leader of the House in these duties. This position receives no additional salary.

113 Sir Garfield Barwick resigned his seat to become Chief Justice of the High Court of Australia, VP 1964–66/76.

114 *See* Gazettes 98 (19.12.1949) 3831, 124A (5.12.1972) 1, and S94 (11.3.1996).

115 Gazette S290 (20.12.1977) 1.

ministerial rearrangements to be made and, while remaining members of the Executive Council, have been subsequently reappointed as Ministers to administer other or new Departments of State.[116] On occasions Prime Ministers, on questions of principle, have refused to accept voluntary resignations of Ministers who have then remained in the Ministry.[117]

Convention requires that Ministers accept collective responsibility for the policies and performance of the Government (*see* page 49). If any Minister is unable to accept or publicly dissents from the opinion and policy of Cabinet, it has been said that it is his or her duty to resign.[118]

Examples[119] of ministerial resignations, other than for personal reasons, based on individual or collective ministerial responsibility and accountability to Parliament and the people,[120] have been:

- publishing or expressing views opposed to government policy;[121]
- disagreement with government policy;[122]
- breaching Cabinet confidentiality;[123]
- misleading the Parliament;[124]
- misleading the Prime Minister, and through him the Parliament;[125]
- a Minister's department entering into contracts with a company in which the Minister held a position;[126]
- initiation of legal action against a Minister for an alleged breach of the Commonwealth Electoral Act;[127]
- private dealings with an officer of a company negotiating with a Minister's department;[128]
- disagreement with actions of the Prime Minister;[129]
- adverse reflections on a Minister's integrity in a Royal Commission report;[130]
- allegations concerning the propriety of possible conflicts between a Minister's public duty and personal and family financial interests;[131]
- perceived attempts by Cabinet to control or direct a Minister's independence and integrity as Attorney-General;[132]

116 Gazette S268 (5.12.1978); *see also* Gazettes 32 (22.3.1971) 2007 and 48B (12.6.1974) 1–2, but the Minister's appointments on these occasions were 'determined'.

117 E.g. Cases of the Hon. Peter Howson, H.R. Deb. (8.11.1967) 2775–80; the Hon. P. Nixon, H.R. Deb. (21.9.1982) 1674.

118 *Quick and Garran*, pp. 705–6.

119 For a more complete listing (to 1991) *see* M. Healy. *That's it—I'm leaving, and other Kirribilli tales: Ministerial resignations and dismissals 1901–1991*. AGPS, Canberra, 1992.

120 As a duty to the Parliament and the people, reasons for resignation or dismissal are normally made public. *See also* Sir Robert Garran oration (1988), by the Hon. R. J. L. Hawke, for comment on the grounds justifying resignation.

121 Case of the Rt Hon. W. M. Hughes, H.R. Deb. (6.11.1935) 1306–7; *see also* case of the Hon. L. H. E. Bury in 1962 who was asked to resign by the Prime Minister, L. F. Crisp, *Australian national government*, 5th edn, p. 355.

122 Case of the Rt Hon. R. G. Menzies on 20 March 1939. *See* H.R. Deb. (20.4.1939) 18.

123 Case of the Hon. M. J. Young, H.R. Deb. (23.8.1983) 16; subsequently reappointed, H.R. Deb. (28.2.1984) 1.

124 Case of the Hon. J. Brown, S. Deb. (17.12.1987) 3390.

125 Case of the Hon. R. F. X. Connor, H.R. Deb. (14.10.1975) 2031–2, 2033, 2038.

126 Case of Senator the Hon. A. J. McLachlan, H.R. Deb. (4.11.1938) 1322; S. Deb. (3.11.1938) 1189.

127 Case of the Hon. R. V. Garland in 1976, *The Parliamentarian* LVII, 4, 1976, p. 253.

128 Case of the Hon. J. N. Lawson in 1940, G. Sawer, *Australian federal politics and law 1929–1949*, Melbourne University Press, 1963, p. 104.

129 Case of the Hon. J. M. Fraser, H.R. Deb. (9.3.1971) 679–84; case of the Hon. A. S. Peacock, H.R. Deb. (28.4.1981) 1607–14.

130 Case of the Hon. E. G. Theodore, H.R. Deb. (8.7.1930) 3749–53. Mr Theodore submitted his resignation to the Prime Minister on 5 July 1930 following certain allegations against himself contained in the report of a Royal Commission appointed by the Government of the State of Queensland.

131 Case of the Rt Hon. P. R. Lynch, *Commonwealth Record* 2, 45, 14–20 November 1977, pp. 1662–4.

132 Case of the Hon. R. J. Ellicott, H.R. Deb. (6.9.1977) 721–32.

- allegations that a Minister had used his official position to assist business dealings of a relative and that he had misled the Senate about the matter;[133]
- allegations of irregular payments of election and electorate office funds to a business partner;[134]
- reports of the Auditor-General and a House of Representatives committee finding inadequacies in administrative procedures relating to the distribution of funds;[135]
- breach of Prime Minister's guidelines in relation to shareholdings of Ministers;[136]
- following allegations of conflict of interest with the Minister's private business affairs;[137]
- allegations of irregularities in relation to travel allowance claims.[138]
- breach of Prime Minister's *Standards of ministerial ethics*.[139]

Ministers have also resigned following disagreements with the Prime Minister over organisational and party matters[140] and following allegations of impropriety in matters unrelated to parliamentary or ministerial duties.[141]

Dismissal

Although there is no constitutional distinction between resignation and dismissal, reasons for ministerial dismissal would be expected to concern questions of ministerial responsibility and accountability. Resignation implies voluntary action, at least publicly, on the part of a Minister whereas dismissal implies involuntary removal or may reflect the seriousness of the situation or offence.

In 1918 the Hon. J. A. Jensen was 'removed' from the office of Minister for Trade and Customs having received unfavourable mention in the report of the Royal Commission on Navy and Defence Administration.[142]

In 1975 the Hon. C. R. Cameron had his appointment as Minister for Labor and Immigration 'determined' after he had refused to resign during a rearrangement of the Ministry. Later, on the same day, he was appointed to another portfolio.[143] Also in that year the appointment of the Hon. J. F. Cairns as Minister for the Environment was formally 'determined'.[144] Prime Minister Whitlam informed the House that this action was because of a total discrepancy between information supplied to the House by the

133 Case of Senator G. F. Richardson on 19.5.1992 (the Senator had earlier been censured by the Senate on the matter). Senator Richardson later returned to the Ministry.

134 Case of the Hon. A. Griffiths on 22.1.1994. Police investigation subsequently found no evidence of criminal offences by Mr Griffiths and an inquiry concluded that, in one respect Mr Griffiths' conduct was improper, but that it would properly be open to the Prime Minister to accept the return of Mr Griffiths to the Ministry (Report by M. H. Codd, AC, July 1995) .

135 Case of the Hon. R. Kelly, H.R. Deb. (28.2.1994) 1365.

136 Case of Senator the Hon. J. R. Short on 13.10.1996.

137 Case of the Hon. G. D. Prosser, H.R. Deb. (25.8.11997) 6701.

138 Case of the Hon. J. R. Sharp (claimant) and the Hon. D. F. Jull (administratively responsible), H.R. Deb. (24.9.1997) 8318–23; case of the Hon. P. J. McGauran, H.R. Deb. (24.9.1997) 8318–23 (Mr McGauran later returned to the Ministry).

139 Case of the Hon. J. Fitzgibbon on 4.6.2009 (Minister's office use for, and Minister's staff members' involvement with, relative's business meetings).

140 Case of the Hon. E. L. Robinson, VP 1978–80/645, 648; H.R. Deb. (22.2.1979) 334. Mr Robinson was reappointed a few days later, H.R. Deb. (27.2.1979) 345–6. Case of the Hon. P. J. Keating (following unsuccessful leadership challenge), H.R. Deb. (3.6.1991) 4507.

141 Case of the Rt Hon. I. McC. Sinclair, *Commonwealth Record* 4, 38, 24–30 September 1979, p. 1444; Gazette S192 (27.9.1979). Mr Sinclair was reinstated to the Ministry following acquittal from criminal charges, Gazette S180 (19.8.1980) .

142 Gazette 193 (13.12.1918) 2353; VP 1917–19/411; H.R. Deb. (13.12.1918) 9296. *See* H.R. Deb. (17.12.1918) 9614–39 for Mr Jensen's comments.

143 Gazettes S104 (6.6.1975) and S106 (6.6.1975); *see also* John Kerr, *Matters for judgment*, Macmillan, Melbourne, 1978, pp. 242–3. Sir John Kerr discusses also the power of the Governor-General to dismiss Ministers and the attempt by Mr Cameron to be heard by the Governor-General before being dismissed.

144 Gazette S133 (2.7.1975) .

Minister and a letter he had written earlier, and because reported activities of an officer of the Minister's staff would make it possible for that officer to make a profit from his position. The Prime Minister had received no satisfactory explanation of these matters.[145]

On 11 November 1975 the Governor-General 'determined' the appointment of the Hon. E. G. Whitlam as his Chief Adviser and Head of Government as, in view of the prevailing circumstances, he had refused to resign or advise an election. Concomitantly the appointments of all the Ministers of his Government were also 'determined'.[146]

Following the finding of the Royal Commission of Inquiry into Matters in Relation to Electoral Redistribution of Queensland, 1977, that a certain action of Senator the Rt Hon. R. G. Withers constituted 'an impropriety' within the meaning of the Letters Patent appointing the Royal Commission,[147] his appointment as Minister for Administrative Services was 'determined' and his appointment as Vice-President of the Executive Council was 'terminated'.[148]

Ministers' appointments have also been 'determined' by reason of ill health;[149] and following defeat at a general election.[150]

Leave of absence

The Hon. E. J. Ward, Minister for Labour and National Service, was 'relieved of his administrative duties' on 24 June 1943 during the inquiry of a Royal Commission into allegations by the Minister that an important document, relating to 'The Brisbane Line', was missing from the official files.[151] The report of the Royal Commission was made public on 14 July 1943 and, on the same date, the Prime Minister directed Mr Ward by letter to continue to abstain from the administration of his office until the Parliament had dealt with matters arising from the report.[152] A general election followed and Mr Ward continued on leave until his appointment to the new Ministry on 21 September 1943.[153]

On a second occasion, in 1949, Mr Ward, as Minister for Transport and Minister for External Territories, was relieved of the administration of his ministerial offices from 1 January 1949 to 24 June 1949 while a Royal Commission investigated allegations of corrupt practices in relation to the handling of timber leases in Papua New Guinea. The findings of the Royal Commission were that the charges were completely without foundation.[154]

The Hon. E. L. Robinson, Minister for Finance, was granted 'leave from ministerial duties' on 24 April 1978 while allegations against him were being examined by an inquiry into the 1977 electoral redistribution of Queensland. The report of the Royal Commission exonerated the Minister and he resumed his ministerial duties on 8 August 1978.[155]

145 H.R. Deb. (9.7.1975) 3556–7.

146 *Simultaneous dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 11 November 1975*, PP 15 (1979) 1.

147 'Matters in relation to electoral redistribution, Queensland, 1977', *Report of the Royal Commission of Inquiry*, PP 263 (1978) 243.

148 Gazette S149 (8.8.1978); H.R. Deb. (15.8.1978) 16–19.

149 On 8 July 1976 the appointment of Senator the Hon. I. J. Greenwood was 'determined' because of his continuing ill health, VP 1976–77/253.

150 The appointment of the Hon. A. J. Grassby was 'determined' almost a month after his defeat at a general election. Gazette 48B (12.6.1974) 1.

151 H.R. Deb. (24.6.1943) 333; H.R. Deb. (30.6.1943) 572.

152 H.R. Deb. (15.10.1943) 673–4.

153 H.R. Deb. (23.9.1943) 18; *also* information from the 'Register of Executive Councillors' maintained by the Department of the Prime Minister and Cabinet.

154 VP 1948–49/335; *also* information from the 'Register of Executive Councillors'.

155 VP 1978–80/156; H.R. Deb. (2.5.1978) 1584; H.R. Deb. (15.8.1978) 18; PP 263 (1978); *also* information from the 'Register of Executive Councillors'.

Ministerial assistance

For 50 years following Federation it was not uncommon for Executive Councillors, formally or informally, to assist the Ministry without administering a Department of State. These positions have been referred to generically as that of 'Assistant Minister'.[156] At various times they were known as 'Member of the Executive Council',[157] 'Honorary Minister',[158] 'Assistant Minister',[159] 'Assistant Minister' to assist a specified Minister or with specific duties,[160] 'Minister without portfolio'[161] and 'Minister in charge of' certain responsibilities.[162] Further discussion of the role of Assistant Ministers historically is provided in earlier editions.

Assistance to Ministers was also provided by Members not appointed as Executive Councillors. They were known as Parliamentary Under-Secretaries or Parliamentary Secretaries (*see below*). Members have been 'appointed' to assist Ministers while not being given any title or recognition in the House.[163] A more recent method of sharing the ministerial work-load has been the formal appointment of a Minister to assist a more senior Minister, such an appointment being in addition to the Minister's appointment to a particular portfolio.[164]

Parliamentary Secretaries

In earlier years Parliamentary Under-Secretaries and Parliamentary Secretaries (the latter term becoming preferred) were on occasions appointed to assist Ministers in the performance of their duties, but their function was never well established.[165] They were not paid a salary for the duties they performed[166] but did receive an allowance to reimburse them for expenses incurred.[167] They did not have a 'ministerial' role in Chamber proceedings and did not answer questions in the House.[168] The *Parliamentary Secretaries Act 1980* provided, for the first time, a clear authority for appointment, by the Prime Minister, of Members or Senators to become Parliamentary Secretaries to Ministers.[169]

In May 1990 the Government announced its intention of reinstituting, on a systematic basis, the institution of Parliamentary Secretaries. In contrast to previous practice, the new

156 S. Encel, *Cabinet government in Australia*, 2nd edn, Melbourne University Press, Carlton, 1974, p. 176.

157 VP 1905/11; VP 1907–08/271.

158 VP 1909/13; VP 1911/82; VP 1914–17/568; VP 1917–19/157; VP 1920–21/5, 221; VP 1922/2; VP 1923/5; VP 1925/2; VP 1926–28/491; VP 1929/5; VP 1929–31/5. In 1918 one Honorary Minister acted as Minister for the Navy and had charge of shipping and ship building and another was given complete control of recruiting, H.R. Deb. (10.4.1918) 3724. In 1934 the Hon. C. W. Marr was appointed an Honorary Minister in charge of the Royal Visit then in progress, VP 1934–37/19.

159 VP 1914–17/381, 513; VP 1932–34/436.

160 VP 1929–31/484; VP 1934–37/6; VP 1970–72/708.

161 VP 1934–37/6. In the coalition Ministry of 1909–10 Prime Minister Deakin did not administer a Department of State, VP 1909/13. There have also been appointments of Ministers without portfolios with specific duties, VP 1934–37/6, 262, 641; VP 1937–40/5, 241.

162 VP 1937–40/349; VP 1940/2.

163 VP 1940–43/279; H.R. Deb. (20.5.1942) 1455.

164 For example 'Minister for Employment and Youth Affairs and Minister Assisting the Prime Minister'. There have also been 'Ministers appointed only to assist' a specified Minister, VP 1937–40/349; VP 1940/2. In *Zoeller v. Attorney-General (Commonwealth) and others* (76 ALR 279) it was held that s. 64 did not require that only one Minister could administer each department and that it was lawful to appoint two Ministers.

165 For a summary of earlier precedents *see* pp. 108–9 of the second edition.

166 As a recognition of their duties the Nicholas Committee on the salaries and allowances of Members of Parliament recommended 'Subject to the proper interpretation of Section 44 of the Constitution' that an under-secretary or an assistant minister be paid an additional salary of £500 per annum. 'Salaries and Allowances of Members of the National Parliament', *Report of Committee of Enquiry*, 1952, p. 19 (not made a Parliamentary Paper).

167 H.R. Deb. (27.8.1952) 619. Outside Australia on ministerial business all expenses were an official charge, H.R. Deb. (26–27.10.1961) 2647.

168 *But see* H.R. Deb. (12.7.1922) 324; H.R. Deb. (5.12.1934) 786; H.R. Deb. (29.11.1934) 650.

169 *Parliamentary Secretaries Act 1980*.

Parliamentary Secretaries were to have ministerial responsibilities in the Chamber. A resolution of the House gave authority to this innovation.[170] The resolution was amended the following year to remove a qualification relating to bills,[171] leaving Parliamentary Secretaries with the ability to take the role of Ministers in the Chamber in all respects (other than that of being able to answer questions on portfolio matters), including being in charge of the business of the House. The provisions of this resolution are now integrated into the standing orders.[172]

In 1992 the Speaker issued guidelines on the role of Parliamentary Secretaries in relation to the procedures of the House and its committees.[173] The guidelines may be summarised by saying that Parliamentary Secretaries may substitute for Ministers in the Chamber in all respects (apart from answering questions), and are subject to the same constraints—for example, Parliamentary Secretaries may not ask questions and are prevented from participating in Private Members' business[174] and Members' 90 second statements. In relation to committees the guidelines state that, as a general rule, Parliamentary Secretaries should not be members of a committee of inquiry, but recognise that there may be occasions when special reasons make a strong case for them to serve.

Parliamentary Secretaries sit in the row of seats immediately behind the ministerial front bench. They address the House from the despatch box when in charge of the business before the House on behalf of a Minister, and from their places at other times.

Four Parliamentary Secretaries were appointed in 1990. Their number increased steadily and since 2000 there has been a legislated maximum of 12 (*see below*). In contrast to previous practice, since 1990 Parliamentary Secretaries have been members of the Executive Council. A Parliamentary Secretary may be appointed to assist more than one Minister.

For many years, as was formerly the case with Assistant Ministers, only strictly limited payments could be made to Parliamentary Secretaries because of the constitutional limitations relating to offices of profit under the Crown. These restrictions were circumvented when the *Ministers of State Act 1952* was amended in 2000 to increase the number of Ministers appointed to administer a department of State by 12 additional positions, to be designated by the Governor-General as Parliamentary Secretary.[175] Although Parliamentary Secretaries were now technically 'Ministers of State' for constitutional purposes, their functions of assisting Ministers inside and outside the House were not changed.

In January 2007 Prime Minister Howard announced the appointment of two senior Parliamentary Secretaries to be designated Assistant Ministers. As far as the procedures of the House were concerned the new Assistant Ministers had exactly the same rights and responsibilities as Parliamentary Secretaries and standing orders were amended to make this clear.[176]

170 H.R. Deb. (9.5.1990) 154.
171 H.R. Deb. (16.10.1991) 2045. The resolution was later repassed with continuing effect, VP 1993–95/25.
172 S.O.s 2, 98(b) and 99.
173 H.R. Deb. (26.3.1992) 1247.
174 The restriction is interpreted as relating to sponsorship of Private Members' business. Parliamentary Secretaries and Ministers are not prevented from taking part in debate on a private Members' motion or bill.
175 *Ministers of State and Other Legislation Amendment Act 2000*. The Act repealed the Parliamentary Secretaries Act. The validity of these appointments was upheld by the High Court in *Re Patterson Ex Parte Taylor* [2001] HCA 51 (2001); 182 ALR 657.
176 VP 2004–07/1702–3.

Ministerial salaries

All Ministers receive a salary in addition to their salary and allowance as a Member of Parliament.[177] Ministers are not parliamentary office holders (*see* page 53) but holders of (ministerial) office under the Crown. Authority is made in the Executive Government provisions (Part II) of the Constitution for salaries to be paid to Ministers of State in the following terms:

> There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.[178]

In addition to determining the number of Ministers (*see* page 58), the Ministers of State Act appropriates a sum of money, in lieu of the sum stated in the Constitution, for the payment of ministerial salaries.[179]

Increases in ministerial salaries can only be made by amending the Act to increase the annual sum appropriated. However, the manner in which the total appropriated is apportioned is a matter for the Government. The Remuneration Tribunal is required to report to the Government annually on the additional salary payable to Ministers.[180]

The amount of additional salary[181] varies according to each Minister's level of responsibility, in the following descending scale:

Prime Minister
Deputy Prime Minister
Treasurer, Leader of the Government in the Senate
Leader of the House
Other Ministers in Cabinet
Other Ministers
Parliamentary Secretaries.[182]

Office of profit

The Constitution disqualifies any person who 'holds any office of profit under the Crown' from being chosen or sitting as a Member of Parliament.[183] The Constitution goes on to provide that this restriction does not apply 'to the office of any of the Queen's Ministers of State for the Commonwealth'[184] who of necessity sit as Members of Parliament. There is therefore no constitutional inconsistency between this section and the later section which authorises the payment of salaries to Ministers of State.[185]

No exemption exists, and no payment of salary can be authorised, for a Member of Parliament, who is not a Minister, performing the duties of Assistant Minister or similarly termed appointee, whether sworn of the Federal Executive Council or not. To be a Minister, and therefore constitutionally eligible to receive a ministerial salary of office, a

177 *See* Ch. on 'Members'.
178 Constitution, s. 66.
179 *Ministers of State Act 1952*, s. 5.
180 *Remuneration Tribunal Act 1973*, ss 6, 8.
181 Expressed as a percentage of a parliamentarian's base salary (in 2012 ranging from 160% for the Prime Minister to 25% for a Parliamentary Secretary).
182 The Manager of Government Business in the Senate receives an additional amount which varies depending on whether he or she is a Cabinet Minister, other Minister, or a Parliamentary Secretary.
183 Constitution, s. 44(iv).
184 Constitution, s. 44.
185 Constitution, s. 66.

Member, by definition, must administer a Department of State of the Commonwealth.[186] Parliamentary Secretaries have been able to receive salaries since they became legally defined as Ministers of State in 2000 (*see* page 71).

Personal or pecuniary interest and related matters

Declarations of interests

In the House of Representatives the treatment of the personal and pecuniary interests of Members of Parliament is governed by precedent and practice established in accordance with sections 44 and 45 of the Constitution, standing orders 134 and 231 and resolutions of the House.[187] The question of the interests of Ministers is of greater importance than that of other Members, having regard to the paramount place of Ministers in the decision-making process. The question has arisen from time to time in the House of Representatives and, on occasions, the Prime Minister of the day has stated the general understanding which the Ministers in his Government have had in the matter. (For detail on earlier precedents in this area *see* pages 111–2 of the second edition.)

Ministers are required to make full declarations of their own private interests and those of their immediate families as far as they are aware of them. In 1983 the Hawke Government instigated the practice of periodically tabling copies of Ministers' statements of their interests, more detailed information including the actual values of such interests being retained by the Prime Minister on a confidential basis.[188]

Following the adoption by the House in 1984 of standing orders and resolutions relating to the registration and declaration of Members' interests,[189] details of the interests of Ministers from the House of Representatives have been included with those of other Members in the Register of Members' Interests presented at the commencement of each Parliament.

As well as the requirement for the formal registration of their interests, Ministers attending meetings of the Ministry, Cabinet or Cabinet committees are required to declare any private interests in matters under discussion which conflict or might conflict with their public duty as Ministers. Generally, declarations are required in all cases where an interest exists which could not be said to be shared with the rest of the community. Following such a declaration, which is recorded by Cabinet staff, it is open to the meeting to excuse the Minister from the discussion or to agree to his or her participation. Ministers should advise the Prime Minister if they have any concern about a conflict or potential conflict of interest in any area of their responsibilities. The same requirements apply to Parliamentary Secretaries.[190]

Standards of ministerial ethics

Standards expected of Ministers have been made more explicit in recent years. In June 1995 Speaker Martin, on behalf of an all party working group, presented a draft framework of ethical principles for Members and Senators (*see* Chapter on 'Members') and a draft framework of ethical principles for Ministers and Presiding Officers.[191]

186 For fuller discussion of this issue *see* Senate Standing Committee on Constitutional and Legal Affairs, *The constitutional qualifications of Members of Parliament*. PP 131 (1981) Ch. 6.
187 *See* Ch. on 'Members' for discussion generally.
188 H.R. Deb. (22.9.1983) 1172–4.
189 S*ee* 'Pecuniary interest' in Chapter on 'Members'.
190 Department of the Prime Minister and Cabinet, *Cabinet handbook,* 6th edn, 2009, p. 6.
191 VP 1993–95/2203.

At the commencement of the 38th Parliament in 1996 Prime Minister Howard presented a ministerial guide, which set out practices and principles to be followed by members of his administration.[192] The section of the guide covering ministerial conduct stressed the importance of Ministers avoiding any appearance of using public office for private purposes, and imposed specific prohibitions or restrictions on engaging in professional practice, directorships of and shareholdings in companies, appointments of relatives or associates, and the acceptance of benefits or gifts.

In 2007 newly elected Prime Minister Rudd issued *Standards of ministerial ethics* to replace the section of his predecessor's guide covering ministerial conduct. The Standards impose stricter requirements, and included additional restrictions on post-ministerial employment and on contact with lobbyists. The Standards state that Ministers will be required to stand aside if charged with a criminal offence, or if the Prime Minister regards their conduct as constituting a prima facie breach of the Standards. Ministers will be required to resign if convicted of a criminal offence, and may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with the Standards in a substantive and material manner.[193]

Code of conduct for ministerial staff

In 2008 the Government issued the *Code of conduct for ministerial staff*, which sets out standards of behaviour expected from ministerial employees employed under the *Members of Parliament (Staff) Act 1984,* including ministerial advisers, Ministers' electorate office staff, and consultants. It also covers the relationship between ministerial advisers and public servants.[194]

Register and code of conduct for lobbyists

Since 2008 lobbyists seeking contact with government representatives have been required to be registered on a publicly accessible Register of Lobbyists, and to agree to comply with the *Lobbying code of conduct*.[195]

CABINET

The Cabinet is the focal point of the decision-making process of government. It is composed of either the full Ministry, or a specified group of Ministers selected by the Prime Minister.[196] The latter has been the practice of non-Labor Governments since 1956 and Labor Governments since 1983. This practice resembles more closely the model of Cabinet Government developed in the United Kingdom. The group of Ministers known as the Cabinet is not explicitly provided for in the Constitution nor by any other law. The relationship between Cabinet and Parliament is of no greater or lesser significance than the relationship between the Ministry as a whole and Parliament.[197] In a purely parliamentary context the existence of a Cabinet is of little procedural consequence. It is in basic terms an administrative mechanism to facilitate the decision-making process of the Executive Government.

192 *A guide on key elements of ministerial responsibility*, Prime Minister, April 1996; H.R. Deb. (30.4.1996) 14. Reissued in slightly amended form December 1998; H.R. Deb. (9.2.1999) 2196.

193 Australian Government, *Standards of ministerial ethics,* December 2007.

194 Australian Government, *Code of conduct for ministerial staff*, June 2008.

195 *See* http://lobbyists.pmc.gov.au/lobbyistsregister.

196 Originally referred to as an 'Inner Cabinet'.

197 On a point of terminology 'Cabinet government' in parliamentary terms has been equated with 'responsible government'; 'Cabinet solidarity' and 'collective Cabinet responsibility' with 'collective ministerial responsibility'.

The Australian Cabinet system between 1956 and 1972 and since 1975 has followed the British practice of including only selected Ministers in the Cabinet. The periods of government when the Cabinet was composed of the full Ministry were due in part to its relatively small size (11 in number in 1941), but may also have been influenced by the provision of the Constitution which determines that a Federal Executive Council, which constitutionally and in practice is composed of all Ministers of State, is to advise the Governor-General.

A Cabinet is an administrative arrangement for government decision-making. In constitutional terms certain decisions of government may be made by Cabinet but can only be formally implemented via the Federal Executive Council (*see* page 76).

Quick and Garran describes the Cabinet as:

> . . . an informal body having no definite legal status; it is in fact an institution unknown to the law; it exists by custom alone, and yet is the dominant force in the Executive Government of every British country . . .
>
> There are thus two commonly recognized qualifications necessary for ministerial appointment, (1) membership of the Privy or Executive Council, (2) membership of Parliament. From the point of view of the first qualification the ministry may be described as a select committee of the Privy or Executive Council; the remaining members of that body not being summoned to attend either the meetings of committees or the ordinary meetings of the Council. From the point of view of the second qualification the ministry may be called a Parliamentary committee, whose composition and policy is determined by the party commanding a majority in the national chamber.[198]

Quick and Garran also states some of the time-honoured and pre-eminent features of Cabinet organisation and some of the rules of Cabinet discipline and government:

> The proceedings of the Cabinet are conducted in secret and apart from the Crown. The deliberations of the Executive Council are presided over by the representative of the Crown. Resolutions and matters of administrative policy requiring the concurrence of the Crown, decided at meetings of the Cabinet, are formally and officially submitted to the Executive Council, where they are recorded and confirmed. The principle of the corporate unity and solidarity of the Cabinet requires that the Cabinet should have one harmonious policy, both in administration and in legislation; that the advice tendered by the Cabinet to the Crown should be unanimous and consistent; that the Cabinet should stand or fall together.
>
> The Cabinet as a whole is responsible for the advice and conduct of each of its members. If any member of the Cabinet seriously dissents from the opinion and policy approved by the majority of his colleagues it is his duty as a man of honour to resign.
>
> Advice is generally communicated to the Crown by the Prime Minister, either personally or by Cabinet minute. Through the Prime Minister the Cabinet speaks with united voice.[199]

This concise statement of principles attaching to Cabinet organisation is regarded as having continuing validity, even though the rules have from time to time been broken or qualified under exceptional political circumstances.[200]

Select Cabinets

On a number of occasions Prime Ministers have organised their Ministry to form small Cabinet groups composed of selected Ministers. Following the reconstruction of the Lyons Ministry on 7 November 1938, Prime Minister Lyons reorganised Cabinet to form an 'inner group' of Ministers to examine and formulate policy prior to submission to the full Cabinet.[201] This scheme ceased with Lyons' death on 7 April 1939 but later found an equivalent in the War Cabinet formed on 15 September 1939 by Prime Minister Menzies.

198 *Quick and Garran*, pp. 704–5.
199 *Quick and Garran*, pp. 705–6.
200 For a detailed exposition of the role, functioning and organisation of Cabinet the reader is referred to Jennings, *Cabinet government*; Crisp, *Australian national government*; Encel, *Cabinet government in Australia*.
201 H.R. Deb. (8.11.1938) 1323 ff.

As noted by Sawer, the War Cabinet, which originally consisted of six Ministers:

> . . . was the inverse of the Lyons scheme for an 'inner group', because full Cabinet remained responsible for general policy and the function of War Cabinet was detail and execution; however, in practice War Cabinet tended to become the first formulator of general policies having a relation to the war, which came to mean most issues of political significance. The War Cabinet developed secretarial and recording procedures which profoundly influenced the subsequent development of federal Cabinet as a whole.[202]

The War Cabinet was continued by successive Governments until January 1946 when the powers vested in it reverted to the Cabinet composed of the full Ministry. Other forms of Cabinet committee organisation have occurred to facilitate the work of Cabinet[203] including an 'Economic Cabinet' instituted in 1939. World War II also produced an Advisory War Council which included senior Ministers and senior opposition Members.

The Inner Cabinet system was first introduced informally by Prime Minister Menzies in 1954, primarily in the form of a Cabinet committee structure.[204] The present practice, whereby the Cabinet is comprised of some but not all Ministers, was formally adopted on 11 January 1956 and has characterised all Governments since, with the exception of the Whitlam Government when all Ministers comprised the Cabinet, thereby reverting to the pre-1956 practice.

Subsequently, the size of Cabinet has ranged between 11 and 22 Ministers, while the Ministry has ranged from 22 to 30 Ministers.

In 1976 the Remuneration Tribunal reinstated the pre-1973 practice of dividing the Ministry, for the purposes of salary of office, into two groups.[205] During the period of office of the Labor Government 1983–96, the practice again reverted to Cabinet and non-Cabinet Ministers receiving equal salaries.[206] The two-tier system was reinstated following the change of government in 1996.

Under the Inner Cabinet system, a Minister not in Cabinet may be called to Cabinet meetings when affairs relating to his or her own department are under discussion. The work of Cabinet under this system is facilitated by the formation of various Cabinet committees on which Ministers not in Cabinet may serve.

Under the two-tier ministerial arrangements introduced in 1987 (*see* page 59) each senior or 'portfolio' Minister was a member of the Cabinet. The system was modified in 1996 by the Howard coalition Government; two portfolio Ministers (including the Attorney-General) were not members of Cabinet and one portfolio had two Cabinet Ministers. In the second and later Howard Ministries, and the subsequent Rudd Labor Ministry (2007), all portfolio Ministers were Cabinet Ministers.[207] In the second Gillard Ministry, where the Cabinet had expanded to 22 Ministers, several portfolios had two Cabinet Ministers and several Cabinet Ministers had responsibilities in more than one portfolio.

FEDERAL EXECUTIVE COUNCIL

The Federal Executive Council was established by the Constitution to perform similar functions in Australia to those performed by the Privy Council in the United Kingdom,

202 Sawer, *Australian federal politics and law 1929–1949*, p. 103.
203 L. F. Crisp, *Australian national government*, 5th edn, pp. 374–83.
204 Announced outside the House; *but see* H.R. Deb. (10.8.1954) l16.
205 Remuneration Tribunal, *Salaries payable to Ministers of State*, PP 221 (1976) 3.
206 Remuneration Tribunal, *Salaries payable to Ministers of State*, PP 52 (1984) 13.
207 One or two portfolios had more than one Cabinet Minister.

that is, to advise the Crown.[208] It is the formal, constitutional and legal body responsible for advising the Governor-General (as distinct from Cabinet). The Executive Council is the legal means of ratifying executive acts (as distinct from prerogative acts) by or on behalf of the Governor-General. Any reference to the Governor-General in Council in the Constitution or elsewhere refers to the Governor-General acting on and with the advice of the Executive Council. The Acts Interpretation Act provides that where the Governor-General is referred to in an Act, the reference shall, unless the contrary intention appears, be read as referring to the Governor-General acting with the advice of the Executive Council.[209] The Governor-General's advice, however, does not come from the total membership of the Executive Council, but is limited to that group of members who are currently Ministers or Parliamentary Secretaries, the Chief Adviser being the Prime Minister.

Members of the Federal Executive Council are chosen, summoned and sworn in by the Governor-General[210] and hold office during the Governor-General's pleasure which, generally, is for life. An exception was Senator Sheil who was appointed to the Executive Council on 20 December 1977 without portfolio but following certain public statements on policy matters had his appointment terminated on 22 December 1977.[211] There have been instances of Honorary Ministers and Assistant Ministers being appointed to the Executive Council. Parliamentary Secretaries have been appointed since 1990. At any one time there are many Executive Councillors no longer holding executive office and in practice the only Executive Councillors who are summoned to Council meetings are those who are, currently, Ministers of State or Parliamentary Secretaries. Members of the Executive Council may use the title 'Honourable' while they are Executive Councillors, that is, usually for life.

There is nothing in the Constitution which determines the modus operandi of the Executive Council, which is for the Council itself to decide. In practice formal processes have been established. Two Ministers or Parliamentary Secretaries, in addition to the person presiding, are rostered to attend its meetings, which are held regularly throughout the year (normally fortnightly in Government House, Canberra). The matters dealt with are recommendations by Ministers, for the approval of the Governor-General in Council, that something be done—for example, that a regulation be made, a treaty be ratified, or a person be appointed to a position. The processes involved in bringing each matter before the Council ensure that it is properly documented and that the action has legal authority.[212]

Meetings of the Executive Council are presided over by the Governor-General or, if the Governor-General is unable to be present, by a Deputy appointed by the Governor-General.[213] The Deputy is usually the Vice-President of the Executive Council or, in the absence of the Vice-President, the senior member of the Executive Council present at the meeting may preside if so authorised.[214] This delegation of authority is limited to

208 *Quick and Garran*, pp. 704–5.
209 *Acts Interpretation Act 1901*, s. 16A.
210 *See* generally Constitution and particularly ss. 62–4. Having been sworn (once) as Executive Councillor, each Minister or Parliamentary Secretary also takes the oath or affirmation of office for each specific ministerial appointment.
211 Gazettes S290 (20.12.1977) 1 and S295 (22.12.1977).
212 The secretariat of the Executive Council is located in the Department of the Prime Minister and Cabinet. For more detail *see* Department of the Prime Minister and Cabinet, *Federal Executive Council handbook*, Canberra, 2009.
213 Constitution, s. 126.
214 Gazette S184 (24.7.1987) 6.

presiding over meetings and signifying approval of the proceedings. The delegation does not carry with it authority to make appointments and perform other acts on behalf of the Governor-General; it is limited to signifying to the Governor-General the approval of the Council to the recommendation (minute) placed before the Council.[215]

The provisions of the Constitution applying to the Governor-General also apply to any person appointed by the Queen to administer the Government of the Commonwealth.[216] Hence, in the absence of the Governor-General, the Administrator presides over meetings of the Executive Council and signs Executive Council Minutes.

THE (OFFICIAL) OPPOSITION

The Opposition is the party or group which has the greatest number of non-government Members in the House of Representatives. It is organised as a body with the officially recognised function of opposing the Government. The party (or sometimes coalition of parties) is recognised as the 'alternative Government'—that is, the body which would form the Government, with its leader as Prime Minister, if the existing Government were to lose the confidence of the House or the people. The concept of 'alternative Government' is very relevant in Australia. Every Opposition can realistically hope, eventually, to form government, and every Government knows that, sooner or later, it is likely to again be in opposition.

The Opposition is an important component in the structure of the House and is considered to be essential for the proper working of democratic government and the parliamentary process in the Westminster system.

The recognition of 'Her Majesty's Opposition' in Britain is believed to have originated in the early 19th century.[217] Essentially the term is based on the constitutional convention that, in the parliamentary system, the Crown recognises that Her Majesty's Government exists, for the time being, as the preference of the House over Her Majesty's Opposition.

Composition

In the period of the 2nd and 3rd Parliaments between 1904 and 1910, the Governor-General looked to the non-government groups (parties) for the formation of the Government on five separate occasions.[218] During the circumstances of the frequent rearrangement of alliances in this period, the acknowledged concept of the Leader of the Opposition being commissioned to form the Government did not necessarily prevail because he may have lacked sufficient support to maintain Government.[219]

In more recent times with the development and stability of the party structure, the division between Government and Opposition has become clear and constant. The nature of Australia's party system and the existing electoral system has historically produced an almost total absence of representation of minor parties in the House of Representatives.

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215 Advice from Attorney-General's Department, dated 8 January 1948, relating to execution of instruments by the Governor-General; *and see* G. Sawer, *Federation under strain*, pp. 100–2.

216 Constitution, s. 4.

217 N. Wilding & P. Laundy, *An encyclopaedia of Parliament*, 4th edn, Cassell, London, 1972, p. 509. The term 'Her Majesty's Loyal Opposition' was also used.

218 (i) On 27 April 1904 Watson (ALP) was commissioned in place of Deakin (Protectionist), (ii) on 18 August 1904 Reid (Free Trade–Protectionist) was commissioned in place of Watson, (iii) on 5 July 1905 Deakin was commissioned in place of Reid, (iv) on 13 November 1908 Fisher (ALP) was commissioned in place of Deakin, and (v) on 2 June 1909 Deakin (Fusion) was commissioned in place of Fisher.

219 On 27 April 1904 Reid (Free Trade) was Leader of the Opposition; on 5 July 1905 Watson (ALP) was Leader; on 13 November 1908 Reid was Leader; *and see* Appendix 4.

On 7 October 1941 following the defeat on a vote and the consequent resignation of the Fadden (Country Party–United Australia Party) Government, the Governor-General called on Leader of the Opposition Curtin to form a Government. On 11 November 1975 following the dismissal of the Whitlam (Australian Labor Party) Government, the Governor-General asked Leader of the Opposition Fraser to form a 'caretaker' Government.

When the Opposition consists of more than one party opposed to the Government, and the parties prefer to remain distinct, the single party having the largest number of members is recognised as the 'official Opposition'. If the official Opposition is not clear by virtue of numbers, it is for the Speaker to decide which group shall be so called, and who will be recognised by the Chair as the Leader of the Opposition.

During the period of the Australian Labor Party Government between 1972 and 1975 the Opposition was composed of the Liberal Party and the National Country Party. During the 28th Parliament (1973 and 1974), the Leader and the Deputy Leader of the Opposition together with the Shadow Ministry came from the Liberal Party. In the 29th Parliament (1974 and 1975), a 'coalition' Opposition was formed and, while the offices of Leader and Deputy Leader of the Opposition remained with the Liberal Party, the Shadow Ministry was composed of Members from both parties. Following the return of the Labor Party Government in 1983, the Liberal Party–National Party coalition Opposition again shared shadow ministry positions.[220] This also occurred following the election of the Labor Government in 2007.

Leader of the Opposition

The House took no official cognisance in its records of the appointment of a Leader of the Opposition[221] prior to 1920, even though the role of the office was firmly established. The position had no constitutional base and was not recognised by the standing orders.

In 1920 the office was statutorily recognised for the purposes of the payment of an allowance.[222] Since then the status of the office has risen as reflected by the recognition of the duties of the office by way of remuneration[223] and resources, and the Leader of the Opposition has been remunerated at a rate above that for the majority of Ministers. The Leader of the Opposition is placed tenth in the Commonwealth Table of Precedence.

It was not until 1931 that the office was recognised in the standing orders, when the Leader of the Opposition was granted special rights with regard to speech time limits in specific instances.[224] The Deputy Leader of the Opposition is also recognised in the standing orders with ex officio membership of the Committee of Privileges and Members' Interests.[225]

It is the practice of the House for the Leader of the Opposition and the Deputy Leader to receive a degree of special latitude or preference from the Chair by virtue of their offices with respect to:

220 Except for a period of separation prior to the 1987 election, from 29.4.87.

221 There is only one Leader of the Opposition. The Senate Leader is 'Leader of the Opposition in the Senate'. For a list of Leaders *see* Appendix 4.

222 *Parliamentary Allowances Act 1920*.

223 Particularly as a result of an enquiry into the salaries and allowances of Members of the National Parliament in 1952 (and later inquiries). This inquiry also resulted in special remuneration for the Deputy Leader of the Opposition for the first time.

224 VP 1929–31/587–90; S.O. 1.

225 S.O. 216.

- receiving the call of the Chair in preference over other non-government Members, particularly in asking questions without notice; and
- indulgence of the Chair in order to explain or clarify matters before the House or to make a personal explanation.

The special role played by the Leader of the Opposition has been recognised in the following comments made in reports by independent inquiries into the parliamentary salary structure:

> A Leader of the Opposition is an essential figure in parliamentary government. In most English-speaking countries he receives a salary in addition to his salary as a private member. In Canada his salary is the same as that of a Cabinet Minister. His duties are arduous, for he has to be prepared to discuss every Bill introduced by the Government, subject to his right of delegation, and to do this he has not the power to call on departmental officers for information or assistance. His responsibility is not equal to that of the Prime Minister but it is a responsibility to his Party, to the country which he informs and which he aspires to lead. His entertainment expenses are less but are by no means negligible, for overseas visitors frequently wish to interview one whom they regard as the possible head of a government.[226]

> An effective Opposition is essential for the proper functioning of a democracy. Its Leader has possibly the most difficult job in the Parliament. A Minister must, of course, be thoroughly conversant with the details of Bills or other matters which affect his own department, but the advice and resources of the departmental staff are constantly at his call. The Leader of the Opposition has to make himself master of all the business which comes before the House (not merely that of one or two departments); he has to do this at times at short notice and under constant pressure; and he gets no help from permanent officials. At all times he is the spokesman for those who are critical of or opposed to the Government, and he must be unceasingly vigilant and active. He and the Prime Minister should be the most powerful agents in guiding and forming public opinion on issues of policy.[227]

Shadow Ministry

The Leader of the Opposition leads a group of Members, elected by the party or nominated by the leader, which is known as the Opposition Executive or the Shadow Ministry or the Shadow Cabinet. In past years the Opposition Executive was less than the number of Ministers but at the beginning of the 35th Parliament consisted of a total of 30 members in both Houses, making the Shadow Ministry the same size as the Ministry. Since then the Shadow Ministry has had at times more members than the Ministry itself. After the routine appointment of Parliamentary Secretaries in 1990 the opposition parties designated certain of their members 'parliamentary secretaries' to shadow ministers. Again, at times there have been more shadow parliamentary secretaries than Parliamentary Secretaries. In the 40th Parliament there were 32 shadow ministers and 13 shadow parliamentary secretaries.

Each shadow minister covers the responsibilities of one or possibly more Ministers or areas of administration and acts as the opposition spokesperson in respect of his or her designated areas. The positions of shadow minister and shadow parliamentary secretary attract no additional remuneration.[228] As potential Ministers, shadow ministers attract closer public and media scrutiny than other private Members. Because of the politically sensitive nature of their positions, for example, allegations of impropriety may cause them to stand down from the Shadow Ministry while matters are under investigation.

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226 *Enquiry into the Salaries and Allowances of Members of the National Parliament 1952*, p. 18 (not made a Parliamentary Paper).

227 *Inquiry into the Salaries and Allowances of Members of the Commonwealth Parliament*, PP 15 (1959–60) 31.

228 This statement was correct at the start of 2012. However, in 2011 the Remuneration Tribunal had proposed additional salaries for shadow ministers and the Manager of Opposition Business, *see* Remuneration Tribunal, *Review of the remuneration of Members of Parliament: initial report*, December 2011.

As with Cabinet, which is assisted by a system of standing committees and government members' party committees, the Opposition Executive has a system of opposition members' committees to develop attitudes to government policy and to develop alternative policies for presentation to the Parliament.

A senior and experienced member of the Opposition Executive is appointed Manager of Opposition Business with the responsibility, in consultation with his or her leaders and colleagues, of regularly consulting and negotiating with the Leader of the House in relation to such matters as the allocation of time for debates, and the order and priority of consideration of items of business (*see* page 65). In recent Parliaments a Deputy Manager of Opposition Business has also been appointed.

Role of the Opposition

A primary function of the whole House, through its role of scrutiny and criticism, is to exercise an oversight of the actions of the Government. In modern times the Opposition has a critical role in this and, thus, the functions of the Opposition have become identified and linked with the role and more important functions of the House. These functions include:

- unmaking the Government—the Opposition, by definition, seeks to defeat a Government or cause a Government to resign. Theoretically, it could be said that an Opposition endeavours to achieve this by persuading government supporters to accept its viewpoint but, in reality, it looks to a general election for defeat of the Government and endeavours to achieve this by public persuasion;
- scrutiny of, criticism of, and suggestion of improvements to, legislation and financial proposals;
- examination of expenditure and public accounts;
- seeking information on and clarification of government policy (principally questions in writing and without notice);
- surveillance, appraisal and criticism of government administration;
- ventilating grievances; and
- examination of delegated legislation.

While all private Members are to some extent involved in such functions as petitions, grievances, questions, and participation in committee work, the effective performance of the functions listed above is largely dependent on a vigilant, industrious and organised Opposition. Members supporting the Government are able to play an effective part in this parliamentary process but the Opposition may be expected to do so and to articulate, for example, the views of various groups within the community.

While government business dominates the agenda and the time of the House, the Opposition has the opportunity to express its views on all issues debated. The procedures of the House are based on the unquestioned premise that government and non-government Members have a claim to equal speaking time in debates and that the call of the chair to speak (or to ask questions) should alternate between government and non-government Members. In addition, the Opposition is not without opportunity to initiate debate on subjects of its own choosing. Most discussions of matters of public importance are on topics proposed by the Opposition. Opposition Members may use the private Members' business procedures and the other opportunities to raise matters which are open to all private Members. The Opposition is also able to move censure motions or to

move to suspend standing orders to debate matters.[229] Outside the Chamber of the House, opposition Members serve on all committees and their views are taken account of in the committees' reports.[230]

Fair, democratic and efficient parliamentary government calls for:

- the provision of reasonable parliamentary time for opposition purposes;
- the protection of the rights of minorities in the House by the Speaker;
- the provision of information and resources[231] (to reduce the wide gap in information availability between Government and Opposition); and
- the provision of procedural advice and drafting assistance when necessary.

There are two points relating to the role of the Opposition which require qualification. First, there is normally a good deal of co-operation between the parties in dealing with business, and in arranging the program of the House, so that good use is made of the time available. Secondly, its role is not only one of criticism but, at times, it also offers agreement, assistance or improvements to the actions and policies of the Government in the interests of the people and the nation.[232] Nevertheless, despite this very necessary qualification, there is more than a grain of truth in the proposition that 'We rely for good government, not on the wisdom and probity of the House, but on the adversary relationship between the Government and the Opposition'.[233]

229 That censure motions are invariably unsuccessful, and opposition attempts to suspend standing orders often so, is beside the point—the matter of concern is either raised or publicly highlighted as one that a Government is reluctant to debate.

230 If not, they have the opportunity to add dissenting reports.

231 Staff assistance to the Leader of the Opposition, provided at government expense, has increased especially since the period of the ALP Government of 1974–75.

232 This is especially so in times of national emergency: in World War II senior opposition members had close involvement with the conduct of the war through their membership of the Advisory War Council.

233 J. Stewart, *The Canadian House of Commons*, Montreal, McGill–Queen's University Press, 1977, p. 168.