



ATTORNEY-GENERAL

CANBERRA

21 March 2016

His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd)
Governor-General of the Commonwealth of Australia
Government House
Canberra ACT 2600

Handwritten note:
21 March 2016
at 0915 hrs

Your Excellency

I understand that the Prime Minister, by a letter dated 21 March 2016, has advised you to prorogue the Parliament and to call it back for a new session commencing on 18 April.

I am writing to give Your Excellency my assurance that the course advised by the Prime Minister is soundly based in constitutional law and well-supported by a large and uniform body of constitutional precedents.

Your Excellency's power is set out in section 5 of the Constitution, which provides:


"The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives."

I am enclosing with this letter a paper which demonstrates by reference to legal authorities and precedent that Your Excellency's power to prorogue and summon the Parliament has been well recognised by the High Court, former Governors-General, and constitutional scholars.

As the paper also shows, the prorogation and recall of Parliament on the advice of the Prime Minister has been common. Parliament has been prorogued and recalled 28 times since federation (as well as 17 other occasions on which Parliament has been prorogued prior to dissolution, and summoned following the subsequent election). The numerous precedents are listed in the attached document.

In line with the principles and conventions of responsible government, these powers are, of course, exercised on ministerial advice.

It would therefore be clearly within your constitutional power and consistent with your duty for you to make the Proclamation which the Prime Minister has advised you to make, proroguing and appointing a time for the next session of the Parliament.

Yours faithfully 

(George Brandis QC) 

THE PRACTICE AND PRECEDENTS OF RECALL OF PARLIAMENT FOLLOWING PROROGATION

Grounds for, and nature of, the power of prorogation and recall of Parliament

1. Section 5 of the *Constitution* provides:

“The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.”

2. *Odgers' Australian Senate Practice* commences its chapter on “Meetings of the Senate” (chapter 7) with a subsection headed “Executive government’s power to determine sessions”. It quotes section 5 of the Constitution and continues: ¹

“Under this section the Governor-General may terminate a session of the Parliament by proroguing it, and may then appoint the time for its next meeting. In practice these powers are exercised on the advice of the government.

“When the Governor-General has specified a time for commencing a session of the Parliament, a formal opening of Parliament takes place. The procedures for the opening of Parliament vary according to whether the opening follows a prorogation of a session of Parliament, or a dissolution of the House of Representatives or of the two Houses under section 57 of the Constitution.”

3. *House of Representatives Practice* states:²

“While section 5 of the Constitution gives the Governor-General authority to prorogue the Parliament, the decision to prorogue follows the advice of the Government of the day. ... The proclamation proroguing Parliament may set down the day for the next meeting and summon all Senators and Members to be present at an hour appointed on that day.”

4. *House of Representatives Practice* also points out that the “recess” between prorogation and the new session of Parliament “need only be very short, for example, over a weekend”.³
5. The High Court has recognised the practice of prorogation and recall of Parliament. In *Western Australia v Commonwealth* (*‘First Territorial Senators Case’*) (1975) 134 CLR 201, a number of justices commented on the powers to prorogue and recall the Parliament.

¹ *Odgers' Australian Senate Practice* (edited by Harry Evans and Rosemary Laing), 13th edition, 2012, page 177.

² *House of Representatives Practice* (edited by B. C. Wright), 6th edition, 2012, pages 228-9.

³ *Ibid*, page 230.

6. Gibbs J said: “The right to prorogue the Parliament is given to his Excellency by s.5 of the Constitution”.⁴ His Honour expressly recognised the power of the Senate to make a Standing Order providing for the restoration in the next session of Parliament of Bills which had lapsed through prorogation.⁵

7. Stephen J referred to “the long history of prorogation and dissolution”:⁶

“The two were in origin, and in the United Kingdom still are, distinct prerogative powers, one employed to bring to an end a parliamentary session, the other to bring the existing Parliament itself to an end, to be followed by a general election in the case of elective chambers.”

8. Murphy J said: “Prorogation ends a session of Parliament. It is a prelude usually to the appointment of another session and sometimes to the dissolution of the House of Representatives.”⁷

9. Jacobs J referred to the fact that such powers are exercised on ministerial advice.

“Neither the Queen nor the Governor-General acts personally.”⁸

10. Professor Geoffrey Sawer explained the distinction between prorogation and dissolution as follows:⁹

“A *session* of parliament commences at the time appointed by the Governor-General. It is ended by a proclamation of the Governor-General; this is called “prorogation”. A *parliament* is ended by “dissolution”, also carried out by proclamation of the Governor-General, unless the parliament ends automatically by the expiry of its three-year term under sec. 28 of the Constitution.”

Recall after prorogation

11. The Senate Standing Orders expressly provide for the commencement of a new session of Parliament after prorogation:

- Senate Standing Orders 1(2), 2, and 3 set out the “Proceedings on opening” of such a new session, including a speech by the Governor-General in which “the Governor-General will declare the cause of calling the Parliament together”, and
- Senate Standing Order 136 sets out how a “bill which lapses by reason of a prorogation ... may be proceeded with in the next session”.

⁴ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 238.

⁵ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 238-9.

⁶ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 253.

⁷ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 290.

⁸ *Western Australia v Commonwealth* (1975) 134 CLR 201 at 278.

⁹ Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, page 13. Only one parliament has ever ended by expiry of its term, in 1910.

12. The effect of prorogation is that Bills on the Notice Paper will lapse but can be restored in the manner set out in the Standing Orders. As the High Court said in the *First Territorial Senators Case*, the cleansing of the Notice Paper has no effect on the operation of section 57 of the Constitution.
13. Similarly, House of Representatives Standing Orders provide for the commencement of a new session of Parliament after prorogation:
- House of Representatives Standing Order 8 sets out the procedure for the “First meeting for new session following prorogation other than for a new Parliament”, and
 - House of Representatives Standing Order 174 provides for “Restoration after prorogation” of “lapsed bills”.

Historical practice with respect to prorogation and recall of Parliament

14. The power under section 5 of the *Constitution* to prorogue and recall Parliament is well-established and has been frequently used.
15. The practice of *proroguing and recalling* the Parliament has occurred 28 times since federation. Such prorogations have occurred in the following years, with the new session starting in that or the following year: 1902, 1904, 1905, 1907, 1908 (twice), 1910, 1911, 1913 (with recall in 1914: see below), 1917, 1922, 1923, 1925, 1937, 1940, 1944, 1945, 1948, 1953, 1954, 1957, 1958, 1960, 1961, 1968, 1970, 1974, and 1977.¹⁰
16. Since February 1993, every Parliament has been prorogued prior to dissolution of the House of Representatives. In February 1993, Governor-General Hayden prorogued the Parliament on the advice of Prime Minister Keating, as a means of preventing the Senate from sitting after dissolution of the House of Representatives. Such prorogation has occurred in 1993, 1996, 1998, 2001, 2004, 2007, 2010, and 2013. This resumed an earlier practice of prorogation prior to dissolution which took place in 1903, 1906, 1909, 1913, 1914, 1917, 1919, 1922, and 1925.
17. In fact, there have been many more proclamations of prorogation than those mentioned above, as on several occasions a number of successive prorogations have occurred

¹⁰ Details of each instance may be found in the relevant Hansard, *Votes and Proceedings*, and/or *Commonwealth Government Gazette*. See also the table appended to this document.

between sessions of the Parliament.¹¹ All prorogations since 1901 are listed in *House of Representatives Practice*.¹²

18. Since federation, the power of prorogation and recall of Parliament has been exercised by the Governor-General, on ministerial advice, because ministers have believed that the proposed arrangement of sessions of Parliament is the best way, in the circumstances of the time, to manage government business.
19. For example, Sir Paul Hasluck, Governor-General from 1969 to 1974, twice prorogued and recalled the Parliament, in February 1970 on advice from Prime Minister Gorton and in February 1974 on advice from Prime Minister Whitlam. In the first case, when Sir Paul opened the new Parliament after the 1969 election in a one-day sitting on 25 November 1969, he delivered a four-paragraph speech prepared by the Government, in which he said: "My advisers intend to seek the prorogation of the Parliament and it is proposed that you will be called again together as soon as possible next year."¹³ On the advice of Prime Minister Gorton, Governor-General Hasluck prorogued the Parliament on 23 February 1970 in a proclamation that also summoned it to sit on 3 March 1970.
20. To take another example of prorogation and recall of Parliament: in the fifth Parliament, the House of Representatives elected on 31 May 1913 saw the Cook Government with a majority of one in the House of Representatives but considerably outnumbered in the Senate. Government Bills were defeated in the Senate in the first session of the Parliament, which commenced on 9 July 1913 and ran to 19 December 1913. The Parliament was then prorogued three times, with the Governor-General's proclamation of 11 March 1914 proroguing the Parliament further and simultaneously summoning it to sit on 15 April 1914. This was a much earlier sitting than was then common.
21. In his address opening the new session of the Parliament, on 15 April 1914, the Governor-General said:¹⁴

"The exigencies of public affairs have caused me to summon you to resume your deliberations earlier than usual. My Advisers consider that under existing circumstances a prolonged recess is not advisable, and that Parliament should be given an early opportunity of considering the best means of expediting the despatch of urgent public business.

"During the first session of this Parliament, my Ministers, for reasons which they advise me were beyond their control, were unable to pass legislation on many subjects

¹¹ This is explained in *House of Representatives Practice, op cit*, pages 228-9.

¹² *Ibid*, Appendix 15, pages 808-12.

¹³ Senate Hansard, 25 November 1969, page 8.

¹⁴ Senate Hansard, 15 April 1914, pages 5-6.

outlined in their policy statement presented to you on 12th August last. Those subjects comprised Bills dealing with the prohibition of preference or favouritism in Government employment, and the restoration of the electoral provisions for voting by post.

“These matters failed to pass, and it is intended to make a further effort to pass them in the short session now commencing.”

(The relevant Bill was again rejected by the Senate, and the first double dissolution followed.)

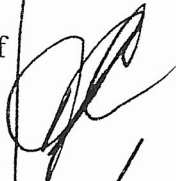
Mechanism of prorogation and recall

22. When Parliament is being prorogued and summoned to meet at a nominated date, a single Proclamation to this effect is typically made by the Governor-General. Numerous examples may be found. A proclamation of prorogation, though often expressed as having immediate effect, can also be expressed as having effect at a later date. For example, this was done in:

- the proclamation of prorogation and dissolution signed by Governor-General Michael Jeffery on 29 August 2004,
- the proclamation of prorogation signed by Governor-General Michael Jeffery on 14 October 2007,
- the proclamation of prorogation and dissolution signed by Governor-General Quentin Bryce on 17 July 2010, and
- the proclamation of prorogation and dissolution signed by Governor-General Quentin Bryce on 4 August 2013.

Further authorities on prorogation and recall of Parliament, and the role of ministerial advice

23. It has been clear from the earliest authorities that the powers of prorogation and recall of Parliament are exercised on ministerial advice. There is no known example of such advice being rejected, and no known suggestion that there is a “reserve power” to reject advice to prorogue and recall the Parliament. For example, no such suggestion can be found in the two most important studies of the reserve powers — Dr H. V. Evatt’s *The King and His Dominion Governors*¹⁵, and Dr Eugene Forsey’s *The Royal Power of Dissolution of Parliament in the British Commonwealth*¹⁶.

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¹⁵ H. V. Evatt, *The King and His Dominion Governors* (1936, 1967, 1990).

¹⁶ Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943, 1968, 1990).

24. Professor George Winterton, in *Parliament, the Executive and the Governor-General*, in a discussion of the principles of responsible government, states the well-established position that, other than arguably under extraordinary circumstances on dissolution of Parliament, the powers given to the Governor-General in section 5 of the Constitution must be exercised on, and only on, ministerial advice.¹⁷
25. This view has been endorsed by several of Your Excellency's predecessors, including Sir Paul Hasluck and Sir Zelman Cowen.
26. Sir Paul Hasluck said in his Queale Lecture (1972, republished 1979) on *The Office of Governor-General* that "The Governor-General may: appoint times for holding sessions of Parliament; prorogue Parliament; dissolve the House of Representatives."¹⁸ Sir Paul also said: "The Governor-General acts on advice, whether he is acting in his own name or as Governor-General-in-Council".¹⁹
27. Sir Zelman Cowen wrote in his paper on "The Office of Governor-General":²⁰
- "The constitution ... vested important functions in the governor-general *without* reference to the queen, and these included powers to appoint and dismiss ministers, to summon, prorogue, and dissolve Parliament, and to appoint judges. ... By the time the constitution came into operation it was clearly established, in accordance with Westminster principles, that the governor-general normally acted on ministerial advice and that this did not necessarily depend on whether the function was assigned in terms to the governor-general-in-council."
28. As well, as already referred to, Sir Ninian Stephen, speaking in his judicial capacity prior to his appointment as Governor-General, expressed views to similar effect.
29. The Australian Constitutional Convention that met in Adelaide in April 1983 "recognise[d] and declare[d]" several "practices" that "should be observed as conventions in Australia". One of these was:
- "Subject to the requirements of the Constitution as to sittings of Parliament, the Governor-General acts on Prime Ministerial advice in exercising his powers to summon and prorogue Parliament."
30. The Australian Constitutional Convention that met in Brisbane in July-August 1985 also "recognise[d] and declare[d]" several "principles and practices [that] should be observed

¹⁷ George Winterton, *Parliament, the Executive and the Governor-General*, Melbourne University Press, 1983, pages 15-16; see also, e.g., page 2.

¹⁸ Sir Paul Hasluck, *The Office of Governor-General*, Queale Lecture, 1972, published with additional material by Melbourne University Press, 1979, page 7.

¹⁹ *Ibid*, page 13.

²⁰ Sir Zelman Cowen, "The Office of Governor-General", *Daedalus*, 1985, page 132.

as Conventions in Australia”. Its list included the same wording on the Governor-General summoning and proroguing Parliament on Prime Ministerial advice as had been adopted in 1983.

31. The Constitutional Commission that reported in 1988, in its discussion of section 5, said:²¹

“The powers exercisable by the Governor-General under section 5 are powers which, in the United Kingdom, are exercisable by the Queen. ... In both Australia and the United Kingdom they are, by convention, exercised on Ministerial advice.

“During the life of any one Parliament there may be more than one session during which the Houses sit to transact their business. The Governor-General, acting on the advice of the Prime Minister, decides when those sessions should be held...”

32. I attach, for Your Excellency’s reference, a table setting out the precedents of prorogation of the Commonwealth Parliament.

George Brandis QC
Attorney-General

21 March 2016

²¹ *Final Report of the Constitutional Commission*, Canberra, 1988, Volume One, page 169.

Recall of Parliament following prorogation:

Year of prorogation prior to recall*	Prime Minister	Governor-General
1902	Edmund Barton	Lord Tennyson (Acting Governor-General)
1904	George Reid	Lord Northcote
1905	Alfred Deakin	Lord Northcote
1907	Alfred Deakin	Lord Northcote
1908	Alfred Deakin	Lord Northcote
1908	Andrew Fisher	Lord Dudley
1910	Andrew Fisher	Lord Dudley
1911	Andrew Fisher	Lord Denman
1913	Joseph Cook	Lord Denman
1917	W. M. Hughes	Sir Ronald Munro Ferguson
1922	W. M. Hughes	Lord Forster
1923	S. M. Bruce	Lord Forster
1925	S. M. Bruce	Lord Forster
1937	Joseph Lyons	Lord Gowrie
1940	Robert Menzies	Lord Gowrie
1944	John Curtin	Lord Gowrie
1945	John Curtin	Duke of Gloucester
1948	Ben Chifley	Sir William McKell
1953	Robert Menzies	Sir William Slim
1954	Robert Menzies	Sir William Slim
1957	Robert Menzies	Sir William Slim
1958	Robert Menzies	Sir William Slim
1960	Robert Menzies	Lord Dunrossil
1961	Robert Menzies	Sir Dallas Brooks (Administrator)
1968	John Gorton	Lord Casey
1970	John Gorton	Sir Paul Hasluck
1974	Gough Whitlam	Sir Paul Hasluck
1977	Malcolm Fraser	Sir John Kerr

*Recall in the same or following year. In several cases there were a number of successive prorogations prior to recall of Parliament.

Prorogations prior to dissolution of the House of Representatives:

Year of prorogation prior to dissolution**	Prime Minister	Governor-General
1903	Alfred Deakin	Lord Tennyson
1906	Alfred Deakin	Lord Northcote
1909	Alfred Deakin	Lord Dudley
1913	Andrew Fisher	Lord Denman
1914	Joseph Cook	Sir Ronald Munro Ferguson
1917	W. M. Hughes	Sir Ronald Munro Ferguson
1919	W. M. Hughes	Sir Ronald Munro Ferguson
1922	W. M. Hughes	Lord Forster
1925	S. M. Bruce	Lord Forster
1993	Paul Keating	Mr Bill Hayden
1996	Paul Keating	Mr Bill Hayden
1998	John Howard	Sir William Deane
2001	John Howard	Dr Peter Hollingworth
2004	John Howard	Major General Michael Jeffery
2007	John Howard	Major General Michael Jeffery
2010	Julia Gillard	Dame Quentin Bryce
2013	Kevin Rudd	Dame Quentin Bryce

** Dissolution in same or following year.

All prorogations since 1901 are listed in the "Chronology of Parliaments" in *House of Representatives Practice* (edited by B. C. Wright), 6th edition, 2012, Appendix 15, pages 808-12 (available online).