AGS Legal briefing

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# After the election – what happens?

**Significant administrative rearrangements concerning ministers, departments and other Commonwealth bodies, and Australian Public Service employees and other Commonwealth officials, often follow a general election.**

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The purpose of this briefing is to assist those affected by administrative rearrangements following a general election to better understand the constitutional and statutory framework for those rearrangements and to successfully implement them.

The briefing also outlines the impact that the prorogation of the Parliament and the dissolution of the House of Representatives and the Senate has on particular parliamentary business. The matters discussed in this briefing often involve government practice as well as law.

This briefing is only an introduction and is structured on the basis of a legal analysis, not the order in which events occur. Contacts for further information and advice are set out at the end of the briefing.

Guidance on implementing machinery-of-government changes is also contained in the Australian Public Service Commission and Department of Finance *Implementing machinery of government changes: a good practice guide*.

**In this issue**

# Ministers

Section 64 of the Constitution provides:

> **64 Ministers of State**
>
> 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 shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.
>
> *Ministers to sit in Parliament*
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

After a general election, the Governor-General appoints as Prime Minister the person who can form a ministry that has the confidence of the House of Representatives. Other ministers are appointed by the Governor-General on the advice of the Prime Minister.

The resignation of the existing Prime Minister following a general election for the House of Representatives terminates the commissions of all other ministers in that ministry. Even where the same party or parties are returned to power, the resignation of the old ministry, followed by the appointment of a new ministry, is now accepted as the appropriate course to follow.

## Ministers must be members of the Federal Executive Council

Section 64 of the Constitution requires ministers to be members of the Federal Executive Council. Proposed ministers who are not already members are ordinarily appointed by the Governor-General under s 62 as Executive Councillors before being appointed as ministers.

## Number of ministers

Section 65 of the Constitution provides:

> **65 Number of Ministers**
>
> 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.

Parliament has 'otherwise provided' for the purposes of s 65 by enacting the *Ministers of State Act 1952*, under which the number of individuals who may be ministers is not to exceed 42. Of this 42, up to 12 may be designated as parliamentary secretaries and up to 30 may be designated differently (such as 'Treasurer' and 'Attorney-General' in addition to the usual 'Minister for X'). It is the number of people who are ministers, rather than the number of ministerial positions held by these persons, which is critical for the purposes of s 65 of the Constitution and the Ministers of State Act.

*'... the number of individuals who may be appointed as ministers is not to exceed 42.'*

The instrument of appointment provides for a person who is an Executive Councillor to hold a particular office or offices expressed as the ministerial title or titles and also directs the person to administer one or more specified departments of State.

As at 9 May 2016, after the House of Representatives and the Senate were dissolved by proclamation, the Turnbull ministry had 42 ministers. Those 42 ministers held between them 54 ministerial offices. Twelve individuals in the Turnbull ministry held offices designated as parliamentary secretary as at 9 May 2016. Consistently with arrangements approved by the Prime Minister, those parliamentary secretaries in carrying out their duties are often described as 'Assistant Ministers'.

## Ministers administer a department

A minister is appointed to administer a department of State. This requirement, when joined with the disqualification provisions in s 44 of the Constitution relating to the holding of offices of profit under the Crown, has in effect ruled out the practice followed in other jurisdictions of appointing ministers of State without portfolio. A minister may be appointed to administer more than 1 department. At present, for example, Senator the Hon Fiona Nash is appointed to the offices of Minister for Regional Development, Minister for Rural Health and Minister for Regional Communications and to administer the Department of Infrastructure and Regional Development, the Department of Health and the Department of Communications and the Arts.

## Multiple ministers for a department

There is no constitutional objection to the appointment of more than 1 minister to administer a department of State, where each minister is appointed to administer the department. In practice, this allows for the administrative workload within a particular portfolio to be distributed among a Cabinet minister and a non-Cabinet minister and parliamentary secretaries. For example, at present, the Minister for Industry, Innovation and Science, the Minister for Resources, Energy and Northern Australia, the Minister for Northern Australia, the Assistant Minister for Science and the Assistant Minister for Innovation are all appointed to administer the Department of Industry, Innovation and Science. Where legislation confers a particular power on 'the Minister', each of the administering ministers is able to exercise that power (see the *Acts Interpretation Act 1901*, s 19(1)).

The validity of this practice, adopted by successive governments since 1987, was upheld by the High Court of Australia in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (referred to as a 'now accepted position' in *Martens v Commonwealth of Australia* (2009) 174 FCR 114 at para 29).

Recent governments of both persuasions have also adopted the practice of having a minister authorised to assist another minister in the latter's performance of statutory powers and functions. For example, in the most recent Turnbull ministry, Senator the Hon Michaelia Cash was sworn in as Minister for Employment and Minister for Women but also appointed as the Minister Assisting the Prime Minister for the Public Service. These 'minister assisting' appointments are made by the Prime Minister rather than the Governor-General and are not reflected in the minister's instrument of appointment. In so assisting, the authorised minister acts for or on behalf of the latter minister. In relation to statutory powers and functions, this is made possible by ss 34AAB and 19(4) of the Acts Interpretation Act.

Under s 34AAB it is possible, for example, for a portfolio minister to authorise a non-portfolio minister to perform or exercise, on behalf of the authorising minister, functions or powers that the authorising minister has under an Act which he or she administers.

An authorisation under s 34AAB extends to the performance of functions or the exercise of powers that the authorising minister has under delegated legislation made under or for the purposes of an Act.

An authorisation must be given and must be revoked in writing. It is possible for a relevant authorisation given under s 34AAB to continue to have effect after the authorising minister ceases to hold office (for example, because of resignation or death) and before another person is appointed to fill the office.

Under s 19(4) it is possible for a minister to authorise another minister (whether in the same portfolio or not) to perform or exercise statutory functions or powers conferred on the authorising minister by legislation which they do not administer.

## Administrative Arrangements Order

*'The AAO lists the matters to be dealt with by each department of State, and the legislation to be administered by a minister ...'*

Prior to the Governor-General directing and appointing a minister to administer a department of State, the Governor-General makes a new Administrative Arrangements Order (AAO).

The AAO lists the matters to be dealt with by each department of State and the legislation to be administered by a minister administering that department which can include legislation relating to bodies within the portfolio.

Where there is more than one minister administering a department the AAO operates so that each minister administers all the legislation relevant to that department. Arrangements for the allocation of responsibilities between ministers are made at a political level.

The current AAO can be accessed through the website of the Department of the Prime Minister and Cabinet at www.dpmc.gov.au.

## Departments

The departments of State are those established by the Governor-General in Council from time to time under s 64 of the Constitution. This authority to establish departments carries with it the power to abolish existing departments and to alter existing departments by changing their names. This power is often exercised immediately after a general election but can occur at any stage in the life of a Government. The last department to be abolished (in September 2013) was the Department of Regional Australia, Local Government, Arts, and Sport. The Department's arts functions were transferred to the Attorney-General's Department, its sports and recreation functions were transferred to the renamed Department of Health, and its regional development functions were transferred to the renamed Department of Infrastructure and Regional Development. The arts functions were subsequently transferred (in September 2015) to the renamed Department of Communications and the Arts.

As at 9 May 2016, there were 18 departments of State.

# Terms and conditions of employment following a rearrangement

## Australian Public Service employees

The *Public Service Act 1999* makes provision for the movement of Australian Public Service (APS) employees associated with the machinery-of-government changes which usually occur following an election (see s 72). In particular, the Australian Public Service Commissioner (the Commissioner) is able to move APS employees from one agency to another without anyone's consent if the Commissioner is satisfied that it is necessary or desirable in order to give effect to an administrative rearrangement.

*The Australian Public Service Commissioner is able to move APS employees from one agency to another (without anyone's consent) to give effect to an administrative rearrangement.*

The term 'administrative rearrangement' is defined in s 72(6) of the Public Service Act to mean any increase, reduction or re-organisation in Commonwealth functions, including one that results from an order by the Governor-General. This would include the AAO referred to above.

'Agencies' for the purposes of the Public Service Act are staffed by persons employed under that Act. A department established by the Governor-General (see above), excluding any part that is itself an executive agency or statutory agency, is an agency. Executive agencies (established under s 65 of the Public Service Act) and statutory agencies (established under other legislation) are also agencies.

### Moving to an existing agency

Where an APS employee is moved from one APS agency to another under s 72 of the Public Service Act, they will usually be covered by the enterprise agreement of the agency into which they are moved. However, the terms and conditions of employment for these employees can be affected by the *Public Service Regulations 1999*. The Regulations ensure that an employee's salary on the day that the move occurs will be the greater of the salary that applied immediately before the move and the salary to which the employee would be entitled after the move (reg 8.1(2)). The Regulations thus ensure that an employee who is moved between APS agencies will not suffer any disadvantage in terms of salary as a result of an administrative rearrangement.

With respect to terms and conditions of employment other than salary, the Public Service Regulations allow for the making of a determination preserving some or all of the employee's existing conditions of employment (reg 8.1(3)). The Regulations thus provide a means for preserving an employee's status quo where this is considered necessary or desirable after an administrative rearrangement. However, conditions that applied in the losing agency cannot be preserved where that would involve a reduction of any individual term or condition applicable to the employee under a fair work instrument (a modern award or an enterprise agreement) or a Workplace Relations Act transitional instrument (for example, an award or a certified or collective agreement) that applies to the employee in the gaining agency.

### Moving to a new agency

Sometimes new departments are created after an election to carry out functions that were previously the responsibility of existing APS agencies. In these cases there will be no existing enterprise agreement that could apply to transferred employees.

In this case, a determination made by the agency head under s 24 and in accordance with the Public Service Regulations may be made to ensure that appropriate terms and conditions exist for the transferred employees until a new enterprise agreement is made, for example, to preserve the employee's terms and conditions from the losing agency.

A determination made in accordance with the Public Service Regulations only applies to an employee until a new enterprise agreement that applies to the employee starts operating.

Section 72(5A) of the Public Service Act gives the Commissioner the discretion to determine how a range of employment-related matters that may be affected by APS employees moving to another APS agency (prescribed in the Regulations) will be handled after the movement. These matters include conditions of engagement, enduring conditions of employment, code of conduct investigations and performance management processes (reg 8.3).

The determination may relate to how the matters will be handled (for example, how an unexpired period of probation will be treated) or it may include a determination of matters on a case-by-case basis. When identifying employees to be moved as a result of the transfer, the transferring agency must advise the Commission of any employment matters covered by reg 8.3.

**Position for Senior Executive Service employees**

Senior Executive Service (SES) employees are generally not covered by enterprise agreements but instead have their terms and conditions set by common law contract or by a s 24 determination. A s 24 determination made in the losing agency will cease to apply when the SES employee moves and the SES employee's terms and conditions will need to be provided for in the gaining agency (for example, by the new agency head making a s 24 determination). Where the terms and conditions are set by contract, the terms of the contract will determine whether it continues to apply in the gaining agency. Agencies should seek legal advice if clarification is required.

**Movement to and from the Australian Public Service**

As well as administrative rearrangements where functions are moved between APS agencies, functions may be moved from APS agencies to non-APS bodies and vice versa. These types of rearrangements tend to be less common immediately after an election than moves between APS agencies but, when they occur, affected employees are usually (but not always) moved under s 72 of the Public Service Act.

Section 72 ensures that the remuneration and other conditions of an employee who is moved out of the APS into a non-APS Commonwealth body are not less favourable than those the employee enjoyed as an APS employee. This protection continues until the next occasion when a modern award or enterprise agreement, determination or written contract of employment that applies to the transferred employee is made or varied. When employees are moved from a non-APS body into an APS agency, the Public Service Regulations provide for the making of determinations to preserve the pre-transfer terms and conditions. However, unlike employees who are moved between APS agencies, no provision is made for the higher of the pre-transfer and post-transfer salaries to apply automatically.

## Transfer of business issues

Where functions are moved between APS agencies, there is no 'new employer' for the purposes of the transfer of business provisions of the *Fair Work Act 2009*. The Commonwealth is the employer of all APS employees. This means that an enterprise agreement that applies in the losing agency will not 'transfer' to the gaining agency by virtue of Pt 2-8 of the Fair Work Act.

However, when there is a transfer of functions between an APS agency and a statutory body that employs employees on its own behalf (rather than on behalf of the Commonwealth) there may be a transfer of business. Section 311 of the Fair Work Act sets out the test for transfer of business. There is a transfer of business if:

- the employee's employment with the old employer has been terminated
- within 3 months of the termination, the employee becomes employed by the new employer
- the work performed by the employee for the new employer is the same or substantially the same as the work performed for the old employer
- there is a relevant connection between the old employer and the new employer.

A relevant connection will exist if there is a transfer of assets or an outsourcing or an in-sourcing arrangement or if the employers are 'associated entities'.

*If there is a 'transfer of business', the enterprise agreement of the losing agency will transfer to the gaining agency.*

In this case, following the transfer of the function, Pt 2-8 will apply and the enterprise agreement of the losing agency will transfer to the gaining agency. The transferring agreement applies to transferring employees and can also apply to new 'non-transferring' employees who perform the transferring work. There is no specific time limit on the period that the transferring agreement can apply.

Usually this will mean that transferred employees are potentially within the coverage of 2 enterprise agreements, one applying by transfer and the other applying on its face to employees in the gaining agency. Section 313 of the Fair Work Act provides that the transferring instrument covers the transferring employee and not the new employer's existing enterprise agreement. It is only when the new agency makes a new enterprise agreement that covers the transferring employees' employment that the transferring enterprise agreement will cease to operate in relation to the transferring employees (even if it has not passed its nominal expiry date).

However, this relationship may be affected by s 72 of the Public Service Act (where employees are moved out of the APS) or a determination made in accordance with reg 8.2 of the Public Service Regulations (where employees are moved into the APS).

Division 3 of Pt 2-8 of the Fair Work Act gives powers to the Fair Work Commission to make orders that will stop a new employer being bound by an enterprise agreement because of a transfer of business. Where the outcomes under Pt 2-8 of the Fair Work Act following an administrative rearrangement are inequitable, inappropriate or uncertain, and where they are unable to be resolved by action under s 72 of the Public Service

Act or action under the Public Service Regulations, an order could be sought under this Division.

### Members of Parliament (Staff) Act employees

Persons employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act) are not APS employees. There are different categories of MOPS Act employees – employees of office holders (such as ministers and the leader or the deputy leader of the Opposition) who are employed under Pt III of the MOPS Act and employees of members and senators who are employed under Pt IV. Each employee is employed by the office holder or member or senator on behalf of the Commonwealth.

As discussed above, after the election, the practice is for the Prime Minister to resign which terminates the appointment of ministers. As a consequence, the employment of each minister's Pt III employees under s 16 of the MOPS Act ceases.

When the House of Representatives is dissolved, the members of the House cease to be members; however, the MOPS Act preserves the Pt IV employees' employments for the periods that the members continue to be entitled to their parliamentary allowances. For senators, Pt IV employees also continue in employment for the periods that the senators are entitled to their parliamentary allowances.

If a member is not re-elected, the employment of his or her Pt IV employees is terminated automatically under s 23 of the MOPS Act.

Under the MOPS Act the Prime Minister has power to override the effect of the automatic termination of employment. The Prime Minister is able to direct, in effect, that the employment will continue until a later date specified by the Prime Minister.

## Appointment and termination of appointment of secretaries

When a new department is established, the office of secretary of that department is also established (Public Service Act, s 56(1)). When a department is abolished, the office of secretary is also abolished (s 56(2)). When a department is simply renamed, the office of secretary is not abolished, but the name of the office is updated. Under s 58, secretaries are appointed by the Governor-General on the recommendation of the Prime Minister. Before making a recommendation, the Prime Minister must have received a relevant report – in the case of the appointment of the Secretary of the Department of the Prime Minister and Cabinet (PM&C), the report is from the Commissioner; and for all other secretaries, from the Secretary of PM&C, prepared in consultation with the Commissioner and the agency minister. The appointment as secretary of a department must be for a period of 5 years unless the person has requested a shorter period (s 58(3)). The Governor-General, acting on the recommendation of the Prime Minister, may terminate the appointment of a secretary at any time (s 59(1)).

## References to ministers and departments in legislation

### References to ministers

Both a general reference to 'the Minister' and a reference to a particular minister (including where there is no longer such a minister) in legislation generally means the minister administering the provision under the AAO or any one of the ministers administering the provision if there is more than one (Acts Interpretation Act, s 19(1), table items 1 and 3). (If different ministers administer the provision in relation to different matters, the reference is to the minister or any one of the ministers who administer the provision in relation to the relevant matter.)

If legislation refers to a minister by reference to the fact that the minister administers a particular law, the reference means the minister (or ministers) administering that law in relation to the relevant matter (table item 2 in s 19(1)).

If legislation refers to a minister by describing a matter for which the minister is responsible (eg 'the Minister responsible for the environment') the reference means the minister (or ministers) administering the department of State that deals with that matter (table item 4 in s 19(1)).

These provisions generally allow the relevant minister or ministers to be determined by reference to the AAO without the need for an order to be made under s 19B. The circumstances in which orders under s 19B will be required are generally limited to where:

- legislation refers to a minister by title who, at the time the provision commenced or the reference to the minister was inserted in the legislation, did not administer the legislation
- no minister is currently identified by that title (table item 3 in s 19(1)).

## References to departments

Where legislation refers to 'the Department' or a particular department (including a department that no longer exists), that will generally be taken to be a reference to the department of State administered by the minister (or ministers) identified in the AAO as administering that legislation in relation to the relevant matter (s 19A(1), table items 1 and 2)).

If a provision refers to a department by describing a matter for which the department is responsible (eg 'the Department responsible for the environment') the reference means the department of State that deals with that matter (table item 3 in s 19A(1)). This would generally be determined by reference to the AAO.

These provisions generally allow the relevant department to be determined by reference to the AAO without the need for an order to be made under s 19B. The circumstances in which orders under s 19B will be required are generally limited to where:

- legislation refers to a department by title that, at the time the provision commenced or the reference to the department was inserted in the legislation, was administered by a minister (or ministers) who did not administer the legislation in relation to the relevant matter
- no department is currently identified by that title (table item 2 in s 19A(1)).

## Section 19B orders

Section 19B of the Acts Interpretation Act enables the Governor-General to make an order altering a reference in a provision of an Act to a particular 'authority' (a minister, a department of state, any other Public Service Act agency, an office or the holder of an office (s 19B(7)). The orders enable a reference in a provision to a particular authority to be read as a reference to a different authority, as specified in the order, avoiding the need to amend the legislation.

Orders can be made under s 19B if an authority is abolished, the name or title of the authority is changed, there is a change in the matters dealt with by the authority because of the effect of an AAO, or the reference to the authority is no longer appropriate for any other reason. Orders may be made to have retrospective effect. As noted above, the circumstances in which s 19B orders will be required are relatively limited.

## Instruments under Acts

The powers conferred on the Governor-General by s 19B of the Acts Interpretation Act may also be exercised by virtue of s 13(1)(a) of the *Legislation Act 2003* and s 46(1)(a) of the Acts Interpretation Act to change specific references to ministers, departments and secretaries which are contained in legislative and other instruments made under Acts.

Section 13 of the Legislation Act governs the construction of legislative instruments and notifiable instruments (within the meaning of that Act). Section 46 of the Acts Interpretation Act is concerned with instruments that are not legislative instruments, notifiable instruments or rules of court.

The Attorney-General's Department contacts all departments for the purpose of determining the references to specific ministers, departments and secretaries which will need to be changed by orders made under s 19B. A copy of previous orders (the *Acts Interpretation (Substituted References – Section 19B) Order 1997* and the *Acts Interpretation (Substituted References – Section 19BA) Order 2004*) can be accessed through the Federal Register of Legislation at www.legislation.gov.au Those orders are in the form of running lists of substitutions that have been made in relation to ministers, departments and secretaries since 1997 and 2004.

*The Acts Interpretation Act contains detailed rules about reading references in legislation to departments and ministers following machinery-of-government changes.*

## Delegations and authorisations

The changes in ministers, departments and secretaries that occur following an election make it essential that each department review its instruments of delegation and authorisation.

There are 3 kinds of instrument that departments will need to review following an election:

- an instrument of delegation made under an express statutory power of delegation ('instruments of delegation'). A person to whom a power is delegated in accordance with an instrument of delegation exercises the delegated power in his or her own right.
- an instrument made in accordance with an express statutory provision that enables a person to be designated as the recipient of a statutory function or power ('statutory authorisations'). For example, legislation sometimes expressly confers functions and powers on an 'authorised officer' and provides for the making of an instrument which designates an identified person or persons as an 'authorised officer'. As is the case with a person acting pursuant to an instrument of delegation, a person acting pursuant to a statutory authorisation performs the relevant function or exercises the relevant power in their own right.
- an instrument made by a person ('the first person') in whom a statutory power is vested authorising another person to exercise that power for and on behalf of the first person (*Carltona* authorisations). In contrast to a person acting pursuant to an instrument of delegation or a statutory authorisation, a person acting pursuant to a *Carltona* authorisation does not act in their own right but, rather, as the 'alter ego' or agent of the first person. The power to make an authorisation of this kind is, in most cases, implied from the terms of the statute that confers the relevant power on the first person. Occasionally, however, the first person's power to authorise another to act for and on the first person's behalf is conferred expressly by legislation.

### Instruments of delegation

An instrument of delegation made by a minister or a secretary will continue to have effect following a general election if the only substantive administrative change is the person who holds the office of minister or secretary of the department. Similarly, a delegation continues in effect where there has simply been a change in the designation of a minister, secretary or department. However, in both cases, it is clearly good administrative practice to provide new office-holders with the opportunity to reconsider arrangements for delegated decision-making and issue new instruments of delegation.

In the case of a transfer of functions from one department (the old department) to another department, delegations of power to persons within the old department who are responsible for performing those functions may cease to have effect at the time the functions, together with relevant staff, are transferred. Whether delegations survive in these circumstances may depend on the relevant power of delegation (including how the delegate and the persons to whom a power can be delegated are identified). Delegations should ordinarily be remade in these circumstances.

Similar considerations apply in the case of departments that are abolished. Delegations of power to persons within that department will cease to have effect at the time of the department's abolition. New instruments of delegation should be made without delay in favour of persons performing the relevant functions in any department which takes over the functions of the abolished department.

### Statutory authorisations

The information on delegations applies equally to statutory authorisations.

### *Carltona* authorisations

The position is less clear where instruments of authorisation provide for specified persons to exercise relevant powers 'for and on behalf of' an officeholder. On one view, authorisations of this kind cease to have effect when the person holding the relevant office changes, so the authorisations must be remade. However, the Full Federal Court decision in *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185 has indicated that such steps are not necessary in the context of particular powers in the *Income Tax Assessment Act 1936*. The ramifications of this decision in the context of other legislation and other powers are not clear. The safest course is for departments to ensure that *Carltona* authorisations are remade without delay where the person holding the relevant office has changed as a result of the election and the changes in the administrative arrangements. More detailed information about delegations and authorisations is contained in AGS Legal Briefing No 74, Delegations, authorisations and the Carltona principle, which can be accessed through the AGS website at www.ags.gov.au.

## Availability of appropriations

### Orders under the Acts Interpretation Act

There are 2 ways in which appropriations can be available after a change in departments. Where s 19A has effect or an applicable order has been made under s 19B of the Acts Interpretation Act, a reference in an appropriation Act to the former department is to be read as a reference to the new department. This follows from the terms of ss 19A and 19B themselves.

### Public Governance, Performance and Accountability Act

Section 75 of the *Public Governance, Performance and Accountability Act 2013* applies if a function of a non-corporate Commonwealth entity (including a department) is transferred to another non-corporate Commonwealth entity, either because the transferring entity is abolished or for any other reason. In these circumstances, the Finance Minister (or their delegate) may determine that one or more Schedules to one or more appropriation Acts are amended in a specified way. The amendment must be related to the transfer of the function. Following a s 75 determination, each Appropriation Act concerned has effect as if the relevant Schedules were amended in accordance with the determination.

Importantly, a determination under s 75 cannot result in a change to the total amount appropriated by Appropriation Acts.

Section 75 determinations are legislative instruments for the purposes of the Legislation Act. However, they are not subject to disallowance.

Section 75 determinations may be expressed to operate retrospectively. This would enable them to operate, for example, from the date an AAO is made. Of course, any expenditure that occurred in the period after the order was made but before the determination was made would need to have been supported by an existing appropriation.

A minister cannot issue s 75 determinations about transfers of functions between parliamentary departments unless it is in accordance with written recommendations of the presiding officers.

## Double dissolution

The Constitution provides a mechanism for resolving deadlocks between the 2 Houses on legislation. The mechanism involves a double dissolution and a joint sitting of both Houses.

For an ordinary general election, the House of Representatives is dissolved by the Governor-General, on the advice of the Prime Minister, under s 5 of the Constitution, but the Senate is not dissolved. The usual term of a State senator is 6 years and in an ordinary general election, only 6 of the 12 senators for each State must stand for election. The 2 senators for the Northern Territory and the 2 senators for the Australian Capital Territory must stand at each election.

However, the forthcoming general election is a double dissolution election as allowed by s 57 of the Constitution. In such an election, all senators' places become vacant and all senators must stand for re-election. Following the election, the Senate divides all senators into 2 categories and those in the first category have a 3-year term and those in the second have a normal 6-year term (s 13 of the Constitution).

In summary, under s 57, the Prime Minister may advise the Governor-General to dissolve the House of Representatives and the Senate if:

- the House of Representatives passes a Bill
- the Senate rejects or fails to pass the Bill
- at least 3 months after the Senate rejects or fails to pass the Bill, the House of Representatives passes the Bill again (see *Victoria v Commonwealth* (1975) 134 CLR 81)
- the Senate rejects or fails to pass the Bill again.

Also, under s 57, a double dissolution must not take place within 6 months before the date of the expiry of the House of Representatives by effluxion of time. Under s 28 of the Constitution, the House expires 3 years after the first meeting of the House after an election, if it is not dissolved sooner by the Governor-General.

After the double dissolution election, the House of Representatives may pass the Bill again. If the Senate again rejects or fails to pass the Bill, the Governor-General may convene a joint sitting of members of the Senate and the House of Representatives. The Bill may be passed by an absolute majority of the total number of the members of the Senate and House of Representatives at the joint sitting.

A joint sitting following a double dissolution may consider multiple Bills if those Bills have met the requirements to trigger s 57 of the Constitution (see *Cormack v Cope* (1974) 131 CLR 432).

In the present case, the Prime Minister wrote to the Governor-General on 8 May 2016 advising that all conditions for a double dissolution had been met by 3 Bills: the Building and Construction Industry (Improving Productivity) Bill 2013, the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and the Fair Work (Registered Organisations) Amendment Bill 2014. The first 2 Bills were rejected a second time by the Senate on 18 April 2016, after the Parliament was prorogued and a new session summoned by the Governor-General issuing a proclamation under s 5 of the Constitution on 21 March 2016. Such a proroguing of Parliament does not affect the operation of s 57 of the Constitution (see *Western Australia v Commonwealth* (1975) 134 CLR 201).

There have been 6 previous double dissolution elections: in 1914, 1951, 1974, 1975, 1983 and 1987 (see *House of Representatives practice*, 6th ed, Chapter 13; *Odgers' Australian Senate practice*, 13th ed, Chapter 21). The only time that a joint sitting has been held following a double dissolution was in 1974.

*Prior to a double dissolution election, both Houses of Parliament are dissolved. All senators' places become vacant and all senators must stand for re-election.*

## Status of bills

Under s 5 of the Constitution, the Governor-General may, by proclamation or otherwise, prorogue the Parliament. Under s 5, the Governor-General may also dissolve the House of Representatives. Prorogation terminates a session of Parliament and dissolution terminates the House of Representatives and leads to a general election.

*Odgers' Australian Senate practice* (p 178) states:

> Prorogation has the effect of terminating all business pending before the Houses and Parliament does not meet again until the date specified in the proroguing proclamation or until the Houses are summoned to meet again by the Governor-General.

This is what ordinarily occurs when there is a general election. For example, for the general elections held in 2004, 2007, 2010 and 2013, Parliament was prorogued and the House of Representatives was dissolved.

However, the process is different for an election following a double dissolution. As discussed above, where the conditions for a double dissolution election have been met, the Governor-General may also dissolve the Senate under s 57 of the Constitution. In these circumstances both Houses of Parliament are dissolved prior to an election being held. This occurred in 2016, where both Houses were dissolved with effect from 9 May 2016.

The discussion below relates to what happens when there is an ordinary general election. The position is generally the same in the case of a double dissolution election. The main difference is that all Bills lapse on the dissolution of the Houses.

In the usual case where Parliament is prorogued and there is an ordinary general election, all Bills before the House of Representatives and the Senate lapse, although timing of this varies. In the House, Bills lapse on the day of dissolution. In the Senate, Bills lapse immediately before the commencement of the next Parliament.

Where prorogation of Parliament is not followed by a general election, a Bill that has lapsed before it has been finally passed by a House may be revived in the following session under certain conditions – that is, it may be proceeded with in the next session at the stage it had reached in the preceding session (*House of Representatives Standing and Sessional Orders* (House of Representatives Standing Orders), Order 174; *Standing Orders and Other Orders of the Senate* (Senate Standing Orders), Order 136). However, where there has been a prorogation followed by a dissolution and general election, the relevant standing orders provide that a Bill may not be revived.

*Odgers' Australian Senate practice* (p 333) states:

> The rationale of this rule is that a bill which has been agreed to by one House should not be taken to have been passed again by that House if the membership of that House has changed.

However, the Senate did occasionally suspend relevant standing orders so as to allow for some Bills to be restored to the Notice Paper after an election. This approach is no longer adopted by the Senate because the House of Representatives made clear that it will not accept any Bills restored by the Senate after an election. Hence, all Bills that are still required will need to be reintroduced and proceeded with in the ordinary manner.

The *House of Representatives practice* (p 230) states:

> Bills agreed to by both Houses during a session are in practice assented to prior to the signing of the prorogation proclamation.

*All Bills before the House of Representatives and the Senate lapse when an election is held.*

However, if a Bill had been passed by both Houses and was awaiting royal assent at the time Parliament was prorogued, and the House of Representatives dissolved for the purpose of a general election, the better view is that it would nevertheless be possible for the Governor-General to give assent to the Bill. It is, however, considered desirable for Bills passed during a session to be assented to before a dissolution proclamation is made (House of Representatives practice, pp 224 and 230).

# Questions on notice

## House of Representatives

Any unanswered questions that are still on the Notice Paper at prorogation of the Parliament or the dissolution of the House lapse, and answers received by the Clerk of the House after that time cannot be accepted (*House of Representatives practice*, pp 565 and 570).

## Senate

In the Senate, in the case of an ordinary general election, prorogation has the consequence 'that all business on the Notice Paper lapses on *the day before the next sitting*' (*Odgers' Australian Senate practice*, p 634) (emphasis added). It appears that, if answers are not given before the next sitting day, the Department of the Senate

would inquire of senators whether they wish to 'renew the questions when the Senate resumes' (*Odgers' Australian Senate practice*, p 634).

In the case of a double dissolution, all questions on notice lapse at the time of the dissolution of the Senate. Although the requirement to answer questions lapses on the dissolution, replies may continue to be provided.

## Inquiries by parliamentary committees

### House of Representatives

Where the House of Representatives has been dissolved, committees of the House and joint committees appointed by standing order or by resolution cease to exist (*House of Representatives practice*, p 224).

A committee appointed by the House in the next Parliament to inquire into the same matter as that inquired into by a previous committee is nevertheless a different committee. However, committees are empowered to consider and make use of the evidence and records of similar committees appointed during previous parliaments (*House of Representatives Standing Orders*, Order 237).

Joint committees established by legislation – for example, the Joint Committee of Public Accounts and Audit and the Parliamentary Standing Committee on Public Works – also cease to exist. The Acts establishing those committees provide that members cease to hold office when the House is dissolved.

The constituting legislation of joint statutory committees also commonly provides for the new committee to be able to consider evidence taken by the previous committee as if the new committee had taken that evidence (see, for example, s 24 of the *Public Works Committee Act 1969*).

### Senate

While the position on committees of the House of Representatives is clear, the position on Senate committees, in the case of an ordinary election, is not completely settled. Questions have been raised as to whether Senate committees have power to meet in the period following prorogation and dissolution of the House of Representatives and the next meeting of Parliament following an ordinary general election (*Odgers' Australian Senate practice*, p 646). The Senate 'has not asserted its right to meet after a prorogation, but has regularly authorised its committees to do so' (*Odgers' Australian Senate practice*, p 647). Consistently with this, Senate committees have regularly met after the prorogation of Parliament and dissolution of the House of Representatives for the purposes of private meetings and public hearings (*Odgers' Australian Senate practice*, p 653).

However, where there is a double dissolution election, as is presently the case, Senate committees cease to exist and cannot meet after the dissolution of the Senate.

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