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After a General Election – Some Legal Issues

INTRODUCTION

This Briefing discusses a number of legal issues which arise after a federal general election. It supersedes the previous Briefing on these issues published on 23 September 1998 (*Legal Briefing* Number 43), to take account of changes that have occurred since then, including in relation to Parliamentary Secretaries and the enactment of the *Public Service Act 1999*. Because of their governmental nature, these issues often involve administration and 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.

MINISTERS

Sections 64 and 65 of the Constitution provide:

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

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 section 62 as Executive Councillors before being appointed as

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Ministers. This enables them immediately to participate in meetings of the Executive Council relating to departmental changes proposed following a general election.

NUMBER OF MINISTERS Under the *Ministers of State Act 1952* the number of Ministers is not to exceed 42 (section 4). Up to 12 may be designated as Parliamentary Secretary. Up to 30 may be designated as other than Parliamentary Secretary. At present, that is the maximum possible number of Ministers. But fewer Ministers could be appointed.

MINISTERS ADMINISTER A DEPARTMENT A Minister is appointed to administer a department. This requirement, when joined with the disqualification provisions in section 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 one department.

MULTIPLE MINISTERS FOR A DEPARTMENT There is no constitutional objection to the appointment of more than one Minister to administer a department of State, where each Minister is appointed to administer the department. In practice, this allows for a 'senior' Minister and a 'junior' Minister or Ministers to distribute amongst themselves the administrative workload within a particular portfolio. Thus, where portfolio legislation confers a particular power on 'the Minister', each of the administering Ministers is able to exercise that power (see section 19A of the *Acts Interpretation Act 1901*). The validity of this practice adopted by successive governments since 1987 was recently upheld by the High Court of Australia in *Re Patterson; Ex parte Taylor* (2001) 182 ALR 657.

On some occasions the practice of having a Minister authorised to assist another Minister in the latter's performance of statutory powers and functions has continued. In so assisting, the Minister authorised acts for or on behalf of the latter Minister. In relation to statutory powers and functions, this is made possible by sections 18C and 19 of the Acts Interpretation Act.

More detailed information about sections 18C and 19 of the Acts Interpretation Act is contained in *Legal Briefing* No. 44 'Ministerial Authorisations: Foster and Beyond' which can be accessed through AGS on the Web http://www.ags.gov.au/publications/briefings/index.html.

PARLIAMENTARY SECRETARIES Parliamentary Secretaries are Ministers. Prior to 2000, Parliamentary Secretaries were appointed to statutory offices under the *Parliamentary Secretaries Act 1980*. They were not Ministers and were not remunerated because of the office of profit disqualification provisions in section 44 of the Constitution. However, they received reimbursement for reasonable expenses.

However, the responsibilities of Parliamentary Secretaries have increased over time. In early 2000 the Parliamentary Secretaries Act was repealed by the *Ministers of State and Other Legislation Amendment Act 2000*. This Act amended the Ministers of State Act to increase the number of Ministers to a maximum of 42. Twelve of these may have the title 'Parliamentary Secretary'.

These changes to the Ministers of State Act, including providing for the designation of some ministerial offices as 'Parliamentary Secretary', were also upheld by the High Court in *Re Patterson*. Accordingly, like other Ministers, Parliamentary Secretaries are appointed under section 64 of the Constitution to administer departments and are remunerated.

COMMISSION The form of commission now in use provides that the Minister concerned is directed and appointed to hold the office of (naming the Ministerial designation, including the designation 'Parliamentary Secretary' as appropriate – see above) and to administer the department of (naming the appropriate department). This, at the one stroke, provides the designation of the Minister and identifies the department he or she is to administer.

Administrative Arrangements Order

In addition to the Governor-General directing and appointing a Minister to administer a department, the Governor-General makes a new Administrative Arrangements Order.

The Order provides a detailed description of each department's and Minister's responsibilities. This Order sets out for each department:

- the matters to be dealt with by the department (and provides that the department also deals with matters arising under legislation administered by the department's Minister); and
- legislation to be administered by the Minister for that department (and provides that the Minister administers legislation, passed before or after, that relates to a matter dealt with by the Minister's department).

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

Departments

The departments are such as the Governor-General in Council establishes from time to time under section 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. The power to establish departments, abolish existing departments and to alter existing departments by changing their names is often exercised immediately after a general election. For example, after the 1998 general election the name of the Department of Health and Family Services was changed to the Department of Health and Aged Care.

The Public Service Act makes provision for the movement of APS employees associated with machinery of government changes which usually occur following an election (see section 72). In particular, the Public Service 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 re-arrangement.

'Agencies' are usually staffed by persons employed under the Public Service 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 section 65 of the Public Service Act) and Statutory Agencies (established under other legislation) are also 'agencies'.

Where an APS employee is moved to another APS agency under section 72, the Public Service Regulations provide for no reduction in annual salary, and allow for the making of a determination preserving some or all of the employee's existing conditions of employment, until a new award, certified agreement or Australian workplace agreement begins to apply to the employee.

Also, there is scope for APS employees to be transferred from an agency to a specified

Commonwealth authority, which includes a company in which the Commonwealth holds a controlling interest, or vice versa. Upon transfer to a Commonwealth authority an APS employee's conditions of employment, for example, under an award or certified agreement, are not to be less favourable than what he or she had immediately before the transfer. However, the conditions may later be varied when there is a relevant variation to an award or certified agreement that applies to the employee.

For the purposes of the machinery of government changes, the term 'administrative re-arrangement' is defined in section 72(6) to mean any increase, reduction or reorganisation in Commonwealth functions, including one that results from an order made by the Governor-General. This would include the Administrative Arrangements Order referred to above.

APPOINTMENT OF SECRETARIES When a new department is established, the office of Secretary of that department is also established (section 56(1) of the Public Service Act). When a department is abolished, the office of Secretary is also abolished (section 56(2)). The Prime Minister may appoint a person to be the Secretary of a department for a period up to five years (section 58(1)) and may, having received a relevant report about a proposed termination, also terminate the appointment of a Secretary at any time (section 59(1)).

19B and 19BA Orders

A general reference to 'the Minister' in legislation means the Ministers administering the legislation under the Administrative Arrangements Order (section 19A of the Acts Interpretation Act). A reference to a specific Minister in legislation generally means all the Ministers administering the legislation. Where Acts, and instruments made under Acts, refer to specific Ministers, departments and Secretaries of departments, these specific references may need to be altered to reflect the changes in Ministers, departments and Secretaries which, as discussed above, commonly result from a new Administrative Arrangements Order.

It is not, however, necessary to amend each and every reference to a specific Minister, department or Secretary contained in an Act or instrument. Rather, sections 19B and 19BA of the Acts Interpretation Act confer on the Governor-General powers to make orders which appropriately alter all specific references contained in Acts and instruments.

SECTION 19B ORDERS Subsection 19B(1) of the Acts Interpretation Act provides that the Governor-General can make an order altering a reference in a provision of an Act to a particular Minister if there is no longer any such Minister.

Subsection 19B(2) provides that the Governor-General can make an order altering a reference in a provision of an Act to a particular department if that department has been abolished or the name of the department has been changed. Similarly, subsection 19B(3) provides that the Governor-General can make an order altering a reference in a provision of an Act to a particular Secretary of a department if that office of Secretary has been abolished or the name of that office has been changed.

The changes in Ministers, departments and Secretaries which are made following an election generally necessitate the making of orders under section 19B.

SECTION 19BA ORDERS Section 19BA of the Acts Interpretation Act provides an additional power for the Governor-General to alter references in Acts to specific Ministers, departments and Secretaries. In particular, in some cases the name of a Minister,

department and Secretary will stay the same but a specific reference in a provision of an Act will nevertheless need to be changed because the administration of that provision has been changed by the Administrative Arrangements Order made by the Governor-General.

The changes in the administrative arrangements which are made following an election sometimes, but not often, necessitate the making of orders under section 19BA.

INSTRUMENTS UNDER ACTS The powers conferred on the Governor-General by sections 19B and 19BA of the Acts Interpretation Act may, by virtue of paragraph 46(1)(a) of that Act, also be exercised to change specific references to Ministers, departments and Secretaries which are contained in instruments made under Acts.

PROCESS The Attorney-General's Department will, following the making of an Administrative Arrangements Order, contact all departments to determine the references to specific Ministers, departments and Secretaries which will need to be changed by orders made under sections 19B and 19BA.

Delegations and Authorisations

The changes in Ministers, departments and Secretaries which occur following an election make it essential that each department review its instruments of delegation and authorisation following a general election.

There are three kinds of instrument which 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 their own right.
- An instrument made in accordance with an express statutory provision which 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 which 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 to 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 originating department) to another (the receiving department), delegations of power to persons within the originating department who are responsible for performing those functions will cease to have effect at the time the functions, together with relevant staff, are transferred. New delegations will need to be made in favour of persons performing the relevant functions.

Similar considerations apply in the case of departments which 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

What is said in relation to delegations applies equally to statutory authorisations.

***CARLTONA* AUTHORISATIONS**

The position is different in relation to instruments of authorisation which provide for specified persons to exercise relevant powers *for and on behalf of* an office-holder. All authorisations of that kind cease to have effect when the person holding the relevant office changes. Accordingly, all such instruments of authorisation should be re-made without delay where the person holding the relevant office has changed as a result of the election and the changes in the administrative arrangements. For example, an authorisation by an Agency Head for another person to enter into Australian workplace agreements under section 170WK of the *Workplace Relations Act 1996* on his or her behalf would need to be reviewed. More detailed information about delegations and authorisations is contained in *Legal Practice Briefing* Number 24 'Devolution of Power within Government' which can be accessed through AGS on the Web http://www.ags.gov.au/publications/briefings/index.html.

Availability of Appropriations

ORDERS UNDER THE ACTS INTERPRETATION ACT

There are two ways in which appropriations can continue to be available after a change in departments. Where an applicable order under sections 19B or 19BA of the Acts Interpretation Act has been made, a reference in an Appropriation Act to the former department is to be read as a reference to the new department translated in accordance with the order. This follows from the terms of sections 19B and 19BA themselves.

FINANCIAL MANAGEMENT AND ACCOUNTABILITY ACT

Section 32 of the *Financial Management and Accountability Act 1997* applies if a function of a department (the old department) becomes a function of another department (the new department) either because the old department was abolished or for any other reason. The section provides that the Minister administering the Financial Management and Accountability Act may issue directions to transfer from the old department to the new department some or all of an amount that has been appropriated for the performance of the function by the old department.

Under this section the Minister can make an early, interim response and transfer an amount. If it

appears that the amount needs to be adjusted, the Minister is given power to transfer an amount back to the old department.

However, the Minister cannot issue directions that transfer amounts between parliamentary departments except in accordance with a written recommendation of the presiding officers.

Status of Bills

Under section 5 of the Constitution, the Governor-General may, by proclamation or otherwise, prorogue the Parliament. Under section 5 the Governor-General may also dissolve the House of Representatives.

For the purpose of the 1993, 1996 and 1998 general elections Parliament was prorogued and the House of Representatives was dissolved. This practice was also adopted for the 2001 general election. Prorogation terminates a session of Parliament. Dissolution terminates the House of Representatives and therefore there must be a general election.

'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' (Odgers' *Australian Senate Practice,* 10th edition at 168).

Where Parliament is prorogued all bills before either House lapse.

Where prorogation of Parliament is not followed by a general election, a bill which 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 Order 264, Senate Standing Order 136). However, where there has been a prorogation followed by a dissolution and general election then a bill may not be revived. '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' (*Australian Senate Practice* at 282).

However, Senate procedures do allow for some bills to be restored to the Notice Paper after an election. This option has not been utilised by the Government after previous elections as the House of Representatives will not accept any bills restored by the Senate. Hence all bills that are still required will need to be reintroduced and proceeded with in the ordinary manner.

'Bills agreed to by both Houses during a session are in practice assented to prior to the signing of the prorogation proclamation' (*House of Representatives Practice*, 4th edition at 227).

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 accepted view is that it would nevertheless be possible for the Governor-General to give his assent to the bill (*House of Representatives Practice* at 221 and 227).

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* at 221).

SENATE 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, Standing Order 341 empowers committees to consider and make use of the evidence and records of similar committees appointed during previous Parliaments.

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 it had taken that evidence (see, for example, section 24 of the *Public Works Committee Act 1969*).

While the position in relation to committees of the House of Representatives is clear the position in relation to Senate committees is not completely settled. Questions have been raised 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 a general election (*Australian Senate Practice* at 515 and following). The Senate 'has not asserted its right to meet after a prorogation but has regularly authorised its committees to do so' (*Australian Senate Practice* at 517). Consistently with this, Senate committees were active in the period after the prorogation of Parliament and dissolution of the House of Representatives for the purpose of the 1993 and the 1996 general elections (*Australian Senate Practice* at 521–522).

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