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Legal briefing

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After the election – what happens?

Significant administrative rearrangements concerning ministers, departments and other Commonwealth bodies, and APS employees and other Commonwealth officials, often follow a general election. The purpose of this briefing is to assist those affected by these rearrangements to better understand the constitutional and statutory framework that governs action taken to ensure the successful implementation of the proposed changes.

The briefing also outlines the impact that the prorogation of the Parliament and the dissolution of the House of Representatives has had 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.

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Ministers

Sections 64 and 65 of the Constitution provide:

> **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.
>
> **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.

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.

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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 ministers.

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. At 31 August 2004 when Parliament was prorogued and the House of Representatives was dissolved the Third Howard Ministry had 42 ministerial offices.

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. At present, for example, the Minister for Veterans' Affairs administers both the Department of Defence and the Department of Veterans' Affairs.

There is no constitutional objection to the appointment of more than one minister to administer a department of State ...

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. This has been a common practice of the Third Howard Government. For example, the Minister for Employment and Workplace Relations and the Minister for Employment Services were each appointed to administer the Department of Employment and Workplace Relations. 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 upheld by the High Court of Australia in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

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 the AGS web site at <www.ags.gov.au>.

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. 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. Eleven individuals in the Third Howard Ministry held offices designated as parliamentary secretary at 31 August 2004.

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Commission

The form of commission now in use does two things. It provides for a person who is an Executive Councillor to hold a particular office; in the case of a parliamentary secretary he or she is directed to hold the office of parliamentary secretary to a particular minister. It also directs the person to administer a particular department. Thus, at the one stroke, there is a designation of an Executive Councillor as a minister and an identification of 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.

The current Order can be accessed through the web site of the Department of the Prime Minister and Cabinet at <www.pmc.gov.au>.

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, to abolish existing departments and to alter existing departments by changing their names is often exercised immediately after a general election. For example, after the 2001 general election the name of the Department of Health and Aged Care was changed to the Department of Health and Ageing. As at 31 August 2004 there were 17 departments of State.

APS employees

The *Public Service Act 1999* 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 rearrangement.

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.

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

Terms and conditions of employment

Where an APS employee is moved from one APS agency to another under section 72 of the Public Service Act, he or she will usually be covered by the certified 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. The regulations ensure that an employee's salary on the day when the move occurs will be the greater of the salary that applied immediately before the move or the salary to which the employee would be entitled after the move. 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.

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With respect to terms and conditions 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. Such a determination prevails, to the extent of any inconsistency, over any award, certified agreement or AWA that would otherwise apply. 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 certified agreement that applies to the employee in the gaining 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 certified agreement that could apply to transferred employees. A determination made in accordance with the Public Service Regulations will be needed to ensure that appropriate terms and conditions exist for the transferred employees until a new certified agreement and/or AWAs are made.

A determination made in accordance with the Public Service Regulations only applies to an employee until a new award, certified agreement or AWA that applies to the employee starts operating. Thus if an employee who is covered by a determination makes an AWA after the move, the determination will cease applying to that employee even though it may continue applying to other employees who were subject to the section 72 transfer.

APS employees who are parties to AWAs will usually continue to be covered by their AWAs if they are moved into a different agency, unless express provision is made in the AWA to prevent this occurring. Consequently, any determinations made in accordance with the Public Service Regulations to preserve pre-transfer terms and conditions of employment will typically be expressed as not applying to employees who are parties to AWAs. In most circumstances the AWA will operate to the exclusion of the gaining agency's certified agreement. Also in most circumstances, the salary of the employee immediately after the move will be their AWA salary, even if it is lower than the salary that would have applied to the employee under the certified agreement if they were not party to an AWA.

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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 moved under section 72 of the Public Service Act.

Section 72 ensures that the salary 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 an award, certified agreement or AWA is made or varied that applies to the transferred employee. 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.

Transmission of business issues

Where functions are moved between APS agencies, there is no 'new employer' for the purposes of the transmission of business provisions of the *Workplace Relations Act 1996*. The Commonwealth is the employer of all APS employees. This means that a certified agreement that applies in the losing agency will not 'transmit' to the gaining agency by virtue of section 170MB of the Workplace Relations 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 will usually be a transmission

of business. This means that following the transfer of the function, section 170MB will apply and the certified agreement of the losing agency will 'transmit' to the gaining agency.

Sometimes this will mean that transferred employees are within the coverage of two certified agreements, one applying by transmission and the other applying on its face to employees in the gaining agency. Where this occurs, section 170LY of the Workplace Relations Act sorts out the interaction between the agreements. Where neither certified agreement has passed its nominal expiry date, the agreement certified first will prevail over a later-certified agreement. However, this relationship may be affected by section 72 of the Public Service Act (where employees are moved out of the APS) or a determination made in accordance with regulation 8.2 of the Public Service Regulations (where employees are moved into the APS).

Section 170MBA of the Workplace Relations Act gives power to the Australian Industrial Relations Commission to make orders that will stop a new employer being bound by a certified agreement because of a transmission of business. Where the outcomes under section 170MB following an administrative rearrangement are inequitable, inappropriate or uncertain, and are unable to be resolved by section 72 of the Public Service Act or action under the Public Service Regulations, consideration could be given to applying for an order under section 170MBA.

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)).

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

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 particular 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

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.

The Attorney-General's Department contacts all departments for the purposes of determining the references to specific ministers, departments and secretaries which will need to be changed by orders made under sections 19B and 19BA. A copy of the *Acts Interpretation (Substituted References – Section 19B) Order 1997* can be accessed on the web at <http://scaleplus.law.gov.au/html/instruments/0/27/top.htm>. That Order contains a running list of substitutions that have been made in respect of ministers, departments and secretaries since 1997.

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

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.

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 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.

The safest course is for departments to ensure that Carltona authorisations are re-made without delay where the person holding the relevant office has changed ...

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 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 less clear in relation to instruments of authorisation which provide for specified persons to exercise relevant powers *for and on behalf of* an office-holder. On one view, authorisations of that kind cease to have effect when the person holding the relevant office changes, and must be re-made. However, the recent Full Federal Court decision in *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185 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 is not clear. The safest course is for departments to ensure that *Carltona* authorisations are 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 a secretary for another person to enter into AWAs under section 170WK of the Workplace Relations Act on his or her behalf should 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 the AGS web site <http://www.ags.gov.au>. This briefing is being updated to take account, for example, of the decision of the Federal Court in *Mochkin*.

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 section 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 or his or her delegate 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.

The Finance Minister is able to adjust amounts being transferred between departments.

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.

Guidance on financial framework issues can also be accessed through the Financial Management Guidelines No. 5 – Guidelines for Implementation of Administrative Arrangements Orders and Other Machinery of Government Changes, September 2003 – published by the Department of Finance and Administration.

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 1996, 1998 and 2001 general elections Parliament was prorogued and the House of Representatives was dissolved. This practice was also adopted for the 2004 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.

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'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).

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* at 537 and 541).

Senate

In the Senate, prorogation has the consequence 'that all business on the Notice Paper lapses on *the day before the next sitting*' (*Australian Senate Practice* at 506) (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'. 'Ministerial departments are advised to answer questions outstanding at prorogation' (*Australian Senate Practice* at 506).

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).

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.

House committees are able to make use of evidence taken by similar committees appointed during previous Parliaments.

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*).

Senate

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, 1996 and 2001 general elections (*Australian Senate Practice* at 521–522).

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