



Legal briefing

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ADVANCE ISSUE

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 and 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 of the briefing.

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.

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



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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

Under the *Ministers of State Act 1952*, the number of individuals who may be ministers is not to exceed 42 (s 4). Up to 12 may be designated as parliamentary secretaries. Up to 30 may be designated as other than parliamentary secretaries. At present, 42 is the maximum possible number of ministers, but fewer ministers can be appointed. On 19 July 2010, after Parliament was prorogued and the House of Representatives was dissolved, the Gillard Ministry had 40 ministers. Those 40 ministers held between them 55 ministerial offices.

Ministers administer a department

A minister is appointed to administer a department. 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 one department. At present, for example, the Hon Chris Bowen administers both the Department of Human Services (as Minister for Human Services) and the Treasury (as Minister for Financial Services, Superannuation and Corporate Law).

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 was a common practice of the Rudd and Gillard Governments. For example, the Minister for Immigration and Citizenship and the Parliamentary Secretary for Multicultural Affairs and Settlement Services are each appointed to administer the Department of Immigration and Citizenship. Three ministers have been appointed to administer the Department of Infrastructure, Transport, Regional Development and Local Government, including two designated as parliamentary secretary. Thus, where portfolio 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 19A).

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 (*Re Patterson*) (referred to as a 'now accepted position' in *Martens v Commonwealth of Australia* [2009] FCA 207 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, the Hon Dr Craig Emerson MP has been appointed as the Minister Assisting the Finance Minister on Deregulation). These appointments are implemented by the Prime Minister, rather than the Governor-General. 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 18C and 19 of the Acts Interpretation Act.

Under s 18C 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 which the authorising minister has under an Act which he or she

administers. The authority would include functions or powers that the authorising minister has under delegated legislation made under or for the purposes of an Act.

An authorisation must be both given and revoked in writing. It is possible for a relevant authorisation given under s 18C 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 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 he or she does not administer.

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 s 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 individuals who could be 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 s 64 of the Constitution to administer departments, and are remunerated. Eleven individuals in the Gillard Ministry held offices designated as parliamentary secretary at 19 July 2010.

Commission

The form of commission now in use achieves 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 matters dealt with by a department and the legislation administered by a minister administering a department.

- The matters to be dealt with by the department include the matters set out in the order (and the order provides that the department's matters include matters arising under legislation administered by the department's minister).
- The legislation to be administered by a minister for that department is set out in the order (and it also provides that the minister administers legislation, passed before or after the order was made, 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 website of the Department of the Prime Minister and Cabinet at www.pmc.gov.au.

A new Administrative Arrangements Order provides a detailed description of matters dealt with by a department and the legislation administered by a minister administering a department.

Departments

The departments are such as the Governor-General in Council establishes 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. 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, but can occur at any stage. After the 2007 general election four departments were abolished, five departments were established and four had their names changed. In February 2010, the Department of Climate Change had its name changed to the Department of Climate Change and Energy Efficiency.

As at 19 July 2010 there were 19 departments of State.

APS employees

The *Public Service Act 1999* makes provision for the movement of APS employees associated with the machinery of government changes which usually occur following an election (see s 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 rearrangement' is defined in s 72(6) of the Public Service Act to mean any increase, reduction or reorganisation in Commonwealth functions, including one that results from an order 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 s 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 s 72 of the Public Service Act, he or she will usually be covered by the enterprise agreement of the agency into which he or she is 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 when 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 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 collective transitional instrument (e.g. an award or a certified or collective 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 enterprise agreement that could apply to transferred employees.

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 and the salary to which the employee would be entitled after the move.

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 enterprise agreement is made.

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.

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 from 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. The AWA will operate to the exclusion of the gaining agency's enterprise agreement. 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 enterprise agreement if the employee was not party to an AWA.

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 s 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 a modern award or enterprise agreement (or certified or collective agreement) 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 Part 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 three 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, an outsourcing or an in-sourcing arrangement or if the employers are 'associated entities'.

In this case, following the transfer of the function, Part 2-8 will apply and the enterprise agreement of the losing agency will transfer to the gaining agency. The transferring

Where functions are moved between APS agencies, there is no 'new employer' ...

agreement applies in relation to transferring employees and can also apply to new 'non-transferring' employees who perform the transferring work. There is no limit on the period that the transferring agreement can apply.

Sometimes this will mean that transferred employees are potentially within the coverage of two 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 employee's employment that the transferring enterprise agreement will cease to operate (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 Part 2-8 of the Fair Work Act gives powers to Fair Work Australia 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 Part 2-8 of the Fair Work Act following an administrative rearrangement are inequitable, inappropriate or uncertain, and are unable to be resolved by s 72 of the Public Service Act or action under the Public Service Regulations, an order could be sought under this Division.

MOPS Act employees

Persons employed under the *Members of Parliament (Staff) Act 1984* are not APS employees. There are different categories of MOPS Act employees – employees of office-holders (such as ministers and leader or deputy leader of the Opposition) who are employed under Part III of the MOPS Act and employees of members and senators who are employed under Part 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 old ministry to resign (even if the Government is returned). This has the effect of terminating the employment of each minister's Part III employees under s 16 of the MOPS Act.

When the House of Representatives is dissolved, the members of the House cease to be members; however, the MOPS Act preserves the Part IV employees' employments for the periods that the members continue to be entitled to their parliamentary allowances. For senators, Part 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 Part IV employees will be 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 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. The Prime Minister, having received a relevant report, may appoint a person to be the secretary of a department for a period up to five years (s 58(1)) and, having received a relevant report about a proposed termination, may also terminate the appointment of a secretary at any time (s 59(1)).

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19B and 19BA orders

A general reference to 'the Minister' in legislation means the ministers administering the legislation under the Administrative Arrangements Order (Acts Interpretation Act, s 19A). 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 the rearrangements following a general election.

It is not necessary, however, to amend each and every reference to a specific minister, department or secretary contained in an Act or instrument. Rather, ss 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

Section 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.

Section 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, s 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 s 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 s 19BA.

Instruments under Acts

The powers conferred on the Governor-General by ss 19B and 19BA of the Acts Interpretation Act may also be exercised by virtue of s 13(1)(a) of the *Legislative Instruments 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 instruments made under Acts. The Legislative Instruments Act deals generally with instruments made under Acts that are of a legislative character determined in accordance with that Act and the *Legislative Instruments Regulations 2004*. Section 46(1)(a) of the Acts Interpretation Act is concerned with instruments that are not legislative instruments for the purposes of the Legislative Instruments Act 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 ss 19B and 19BA. A copy of the *Acts Interpretation (Substituted References – Section 19B) Order 1997* and the *Acts Interpretation (Substituted References – Section 19BA) Order 2004* can be accessed through ComLaw at www.comlaw.gov.au. Those orders are in the form of running lists of substitutions that have been made in respect of ministers, departments and secretaries since 1997 and 2004, respectively.

It is not necessary, however, to amend each and every reference to a specific minister, department or secretary contained in an Act or instrument.

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 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 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 officeholders 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 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

The information 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 officeholder. On

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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 two ways in which appropriations can be available after a change in departments. Where an applicable order under s 19B or s 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 ss 19B and 19BA themselves.

Financial Management and Accountability Act

Section 32 of the *Financial Management and Accountability Act 1997* in its present form applies if a function of an agency, including a department, (the transferring agency) is transferred to another agency, either because the transferring agency is 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 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.

It was intended that s 32 would provide clearer legislative authority to address a range of practical situations that can arise following a transfer of functions or machinery of government changes. Notably, because it provides for each Appropriation Act concerned to have effect as if it were amended in accordance with the minister's determination, agencies are able to assess their financial position more clearly (see the Replacement Explanatory Memorandum to the Financial Framework Legislation Amendment Bill (No. 1) 2007).

Importantly, a ministerial determination under s 32 cannot result in a change to the total amount appropriated.

Section 32 determinations are legislative instruments for the purposes of the Legislative Instruments Act. However, they are not subject to disallowance or sunseting.

Section 32 determinations may be expressed to operate retrospectively. This would enable them to operate, for example, from the date an Administrative Arrangements Order 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 32 determinations in respect of transfers of functions between parliamentary departments unless it is in accordance with written recommendations of the presiding officers.

Guidance on financial framework issues is also contained in *Implementing Machinery of Government Changes: A Good Practice Guide*. The guide was developed jointly by the Australian Public Service Commission and the then Departments of Finance and Administration and Employment and Workplace Relations and can be accessed through the Australian Public Service Commission website at www.apsc.gov.au. The Guide is presently being reviewed and a revised edition is expected to be released shortly.

Section 32 determinations may be expressed to operate retrospectively.

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.

For the purposes of the 2001, 2004 and 2007 general elections, Parliament was prorogued and the House of Representatives was dissolved. This practice was also adopted for the 2010 general election. Prorogation and dissolution both occurred on the same day, 19 July 2010. This was the practice prior to the 2007 general election. In 2007, prorogation and dissolution did not occur on the same day. Prorogation terminates a session of Parliament. Dissolution terminates the House of Representatives; therefore, there must be a general election.

Odgers' Australian Senate Practice (12 ed, pp 141–142) 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.

Where Parliament is prorogued, all bills before the House of Representatives and the Senate 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 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, a bill may not be revived.

Odgers' Australian Senate Practice (p 263) 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, 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.

The *House of Representatives Practice* (5 ed, p 227) states:

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

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 assent to the bill (*House of Representatives Practice*, pp 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*, pp 550 and 555).

Where Parliament is prorogued, all bills before the House of Representatives and the Senate lapse.

Senate

In the Senate, prorogation has the consequence ‘that all business on the Notice Paper lapses on *the day before the next sitting*’ (*Odgers’ Australian Senate Practice*, p 496) (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 496)).

Agencies, including departments, are advised to prepare answers to questions outstanding at prorogation and to submit them to their ministers in accordance with their usual practice, during the caretaker period.

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 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, 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 it had taken that evidence (see, for example, s 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 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 a general election (*Odgers’ Australian Senate Practice*, p 505). 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 506). 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 510).

Committees of the House and joint committees cease to exist.

Peter Lahy is a Deputy General Counsel who specialises in providing advice on complex constitutional and statutory interpretation matters. Peter has provided ongoing advice to many clients on a wide range of machinery of government issues including delegations and authorisations, the making of orders under the Acts Interpretation Act necessitated by changes in administrative arrangements, and the relationship between the executive government and Parliament.

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(Legislation)

For general information about s 19B and s 19BA orders under the Acts Interpretation Act, please contact:

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