AGS

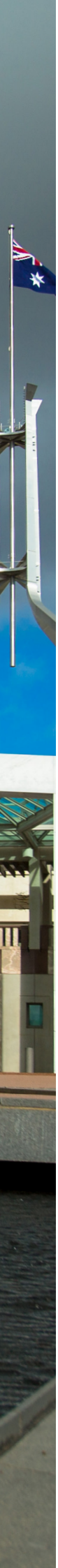
28 April 2025

Legal briefing

After the election – what happens?

Significant administrative rearrangements often follow a general election. This Legal briefing describes the legal framework for those rearrangements and suggests actions that need to be taken in agencies to ensure a smooth transition through machinery-of-government changes.

In this issue



Ministers

Section 64 of the Constitution[1] provides:

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

After a general election, the Governor-General appoints as Prime Minister the person who can form a ministry that has the confidence of the House of Representatives. Other ministers are appointed by the Governor-General on the advice of the Prime Minister. The resignation of the existing Prime Minister following a general election for the House of Representatives terminates the commissions of all other ministers in that ministry. Even where the same party or parties are returned to power, the resignation of the old ministry, followed by the appointment of a new ministry, is now accepted as the appropriate course to follow.

Ministers must be members of the Federal Executive Council

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

Number of ministers

Section 65 of the Constitution provides:

> **65 Number of Ministers**
>
> Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

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

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

As at 28 March 2025, after the Parliament was prorogued and the House of Representatives was dissolved, the Albanese ministry had 41 ministers, including the Prime Minister. Those 41 ministers held between them 72 ministerial offices. Twelve individuals in the Albanese ministry held offices designated as parliamentary secretary as at 28 March 2025. Consistent with arrangements approved by the Prime Minister, those parliamentary secretaries in carrying out their duties are often described as 'Assistant Ministers'.

Ministers administer a department

A minister is appointed to administer a department of State. This requirement, when joined with the disqualification provisions in s 44 of the Constitution relating to the holding of offices of profit under the Crown, has in effect ruled out the practice followed in other jurisdictions of appointing ministers of State without portfolios.

A minister may be appointed to administer more than one department. At present, for example, Senator the Honourable Katy Gallagher is appointed to the offices of Minister for Finance, Minister for the Public Service, Minister for Women and Minister for Government Services, and administers the Department of Finance, the Department of the Prime Minister and Cabinet (PM&C), and the Department of Social Services.

1 These are properties declared under the *Convention for the Protection of the World Cultural and Natural Heritage* [1975] ATS 47 (World Heritage Convention) (see Pt 3, Div 1, Subdiv A of the EPBC Act; also see Pt 15, Div 1 of the EPBC Act).

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 the administrative workload within a particular portfolio to be distributed among one or more Cabinet ministers, non-Cabinet ministers and parliamentary secretaries. For example, at present, the Minister for Infrastructure, Transport, Regional Development and Local Government, the Minister for Communications, the Minister for the Arts, the Minister for Northern Australia, the Minister for Regional Development, Local Government and Territories, the Minister for Cities, and the Assistant Minister for Regional Development are all appointed to administer the Department of Infrastructure, Transport, Regional Development, Communications and the Arts.

Where legislation confers a particular power on 'the Minister', each of the administering ministers is able to exercise that power (see the *Acts Interpretation Act 1901* (Acts Interpretation Act), s 19(1)). The validity of this practice, adopted by successive governments since 1987, was upheld by the High Court of Australia in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (see also *Attorney-General (Cth) v Foster* (1999) 84 FCR 582 at 594).

> 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.

Recent governments of both persuasions have also adopted the practice of having a minister authorised to assist another minister in the latter's performance of statutory powers and functions. For example, in the Albanese ministry, the Honourable Dr Anne Aly MP was sworn in as the Minister for Early Childhood Education and the Minister for Youth, but also appointed as the Minister Assisting the Minister for the National Disability Insurance Scheme. These 'minister assisting' appointments are made by the Prime Minister rather than the Governor-General and are not reflected in the minister's instrument of appointment. In so assisting, the authorised minister acts for or on behalf of the latter minister. For statutory powers and functions, this is made possible by ss 34AAB and 19(4) of the Acts Interpretation Act.

Administrative Arrangements Order

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

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

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

The current AAO can be accessed through the Department of the Prime Minister and Cabinet's website.

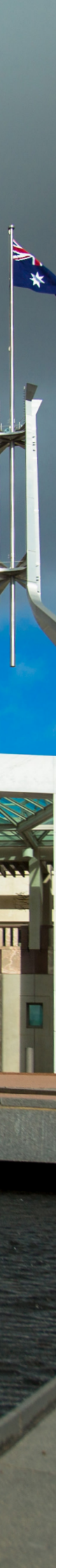
Departments

The departments of State are those established by the Governor-General from time to time under s 64 of the Constitution. This authority to establish departments carries with it the power to abolish existing departments and to alter existing departments by changing their names. This power is often exercised immediately after a general election but can occur at any time. For example, in July 2022, the Department of Education, Skills and Employment became the Department of Education and the Department of Employment and Workplace Relations, the latter Department incorporating the transferred workplace relations functions of the Attorney-General's Department.

As at 28 March 2025, there were 16 departments of State.

Appointment and termination of appointment of secretaries

When a new department is established, the office of Secretary of that department is also established (*Public Service Act 1999* (Public Service Act), s 56(1)). When a department is abolished, the office of Secretary is also abolished (s 56(2)). When a department is simply renamed, the office of Secretary is not abolished, but the name of the office is updated. Under s 58 of the Public Service Act, secretaries are appointed by the Governor-General on the recommendation of the Prime Minister. Before making a recommendation, the Prime Minister must have received a relevant report. In the case of the appointment of the Secretary of PM&C the report is from the



Australian Public Service Commissioner (the Commissioner). For all other secretaries it is from the Secretary of PM&C (prepared in consultation with the Commissioner and the agency minister). The initial appointment as secretary of a department must be for 5 years unless the person has requested a shorter period (s 58(3)). The Governor-General, acting on the recommendation of the Prime Minister, may terminate the appointment of a secretary at any time (s 59(1)).

Terms and conditions of employment of staff following a rearrangement

Australian Public Service employees

The Public Service Act makes provision for the movement of Australian Public Service (APS) employees associated with the machinery-of-government changes which usually occur following an election (see s 72). In particular, the 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 re-organisation in Commonwealth functions, including one that results from an order by the Governor-General. This would include the AAO referred to above.

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

Moving to an existing APS agency

Where an APS employee is moved from one APS agency to another APS agency under s 72(1)(a) of the Public Service Act, they will usually be covered by the enterprise agreement of the agency into which they are moved. However, the terms and conditions of employment for these employees can be affected by the *Public Service Regulations 2023* (Public Service Regulations). The Public Service Regulations ensure that an employee's salary on the day that the move occurs will be the greater of the salary that applied immediately before the move and the salary to which the employee would be entitled after the move (s 85(2)). The Public Service Regulations ensure that an employee who is moved between APS agencies will not suffer any disadvantage in terms of salary as a result of an administrative rearrangement.

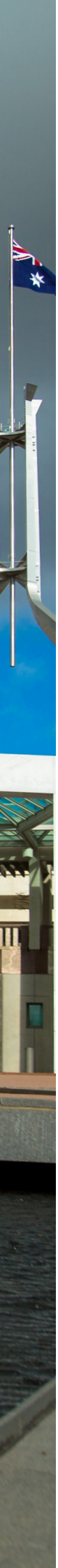
With respect to terms and conditions of employment other than salary, the Public Service Regulations allow for the making of a determination preserving some or all of the employee's existing conditions of employment (s 85(4)). They provide a means for the agency head of the gaining agency to preserve 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 (for example, a modern award or an enterprise agreement) that applies to the employee on their move to the gaining agency.

Moving to a newly created APS agency

Sometimes new departments (or other agencies) 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 APS employees. Where no enterprise agreement applies to an agency and its employees, the Australian Public Service Enterprise Award 2015 (APS Award) will apply.

In exceptional circumstances, the Public Service Minister may make a determination under s 24(3) of the Public Service Act to ensure that appropriate terms and conditions exist for the transferred employees until a new enterprise agreement is made (for example, to preserve the employees' terms and conditions from the losing agency).

It may also be possible for a determination made by the agency head under s 24(1) of the Public Service Act and in accordance with the Public Service Regulations to ensure that appropriate terms and conditions exist for the transferred employees until a new enterprise agreement is made. However, because of s 24(1A) of the Act, a determination made under s 24(1) will be of no effect to the extent that it would reduce the benefit to an APS employee of an individual term or condition applicable to the employee under a fair work instrument, such as the APS Award.



Senior Executive Service employees

Senior Executive Service (SES) employees are generally not covered by enterprise agreements but instead have their terms and conditions set by common law contract or by a determination made by the agency head under s 24(1) of the Public Service Act. A s 24(1) determination made in the losing agency will cease to apply when the SES employee moves and the SES employee's terms and conditions will need to be provided for in the gaining agency (for example, by the new agency head making a s 24 determination). Where the terms and conditions are set by contract, the terms of the contract will determine whether it continues to apply in the gaining agency.

Movement to and from the Australian Public Service

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

Section 72(3) ensures that the remuneration and other conditions of an employee who is moved out of the APS into a non-APS Commonwealth body are not less favourable than those the employee enjoyed as an APS employee. This protection continues until the next occasion when a modern award or enterprise agreement, determination or written contract of employment that applies to the transferred employee is made or varied (s 72(4)). 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* (Fair Work Act). The Commonwealth is the employer of all APS employees. This means that an enterprise agreement that applies in the losing agency will not 'transfer' to the gaining agency by virtue of Pt 2–8 of the Fair Work Act.

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

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

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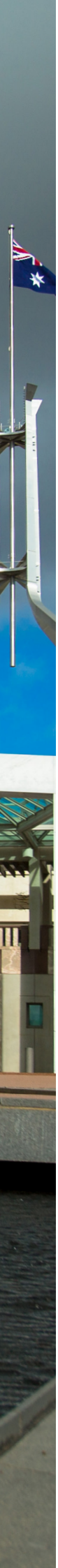
A relevant connection will exist if there is an 'arrangement' for the transfer of assets (whether tangible or intangible), or an outsourcing or an in-sourcing arrangement, or if the employers are 'associated entities'.

If all of the elements of the test in s 311 are met, the transfer of business provisions in the Fair Work Act will apply, and the transferring employees and new employer will be covered by the 'transferable instrument' of the old employer in relation to the transferring work (s 313). The classes of instruments that are 'transferable instruments' include enterprise agreements and workplace determinations (s 312). The transferable instrument may also, in certain circumstances, apply to new 'non-transferring' employees who are employed by the new employer to perform the transferring work (s 314).

There is no specific time limit on the period for which the transferable instrument can apply. It is only when the new employer makes a new enterprise agreement that is expressed to cover the transferring employees, or the Fair Work Commission (FWC) makes an order to that effect, that the transferable instrument will cease to operate in respect of the transferring employees (even if it has not passed its nominal expiry date). The Fair Work Act enables the FWC to make orders that will (among other things) stop a new employer being bound by an enterprise agreement because of a transfer of business.



Members of Parliament (Staff) Act employees

Persons employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act) are not APS employees. There are different categories of MOPS Act employees – electorate employees who are employed by senators or members of the House of Representatives, and personal employees who are employed by ministers or by other office-holders (s 11). MOPS Act employees are employed on behalf of the Commonwealth.

A MOPS Act employee's employment can be automatically terminated by the operation of the Act due to the events set out in s 14, including where the employing individual:

- ceases to be a parliamentarian and is no longer entitled to remuneration under s 49 of the *Parliamentary Business Resources Act 2017* (see table item 2 in s 14(1) and s 14(2)), or
- ceases to hold the office of Minister (see table items 3 and 4 in s 14(1) and s 14(3)).

As discussed above, after the election, the practice is for the Prime Minister to resign. This terminates the appointment of ministers and, consequently, the employment of each minister's electorate employees and personal employees.

References to ministers and departments in legislation

References to ministers

Both a general reference to 'the Minister' and a reference to a particular minister (including where there is no longer such a minister) in legislation generally means:

- the minister administering the provision under the AAO, or
- if there is more than one such minister – any one of the ministers administering the provision (Acts Interpretation Act, s 19(1), table items 1 and 3).

If different ministers administer the provision in relation to different matters, the reference is to the minister (or any one of the ministers) who administers the provision for the relevant matter.

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

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

These rules operate to determine how a reference to a minister in legislation should be read in most cases. But in some limited cases there may be a need for the Governor-General to make a substituted reference order under s 19B of the Acts Interpretation Act (discussed further below), to substitute a reference to a minister in legislation for a reference to another minister (see table item 3 in s 19(1)).

References to departments

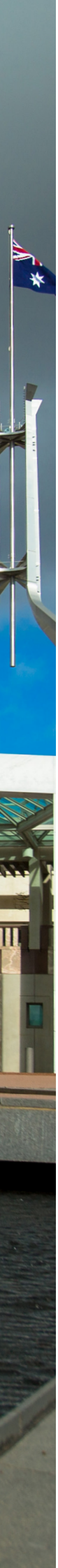
Where legislation refers to 'the Department' or a particular department (including a department that no longer exists), that will generally be taken to be a reference to the department of State administered by the minister (or ministers) identified in the AAO as administering that legislation in relation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

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

Again, these rules operate to determine how a reference to a department in legislation should be read in most cases. But in some limited cases there may be a need for the Governor-General to make a substituted reference order under s 19B of the Acts Interpretation Act, to substitute a reference to a department in legislation for a reference to another department or agency (see table item 2 in s 19A(1)).

Substituted reference orders under s 19B of the Acts Interpretation Act

Section 19B of the Acts Interpretation Act enables the Governor-General to make an order altering a reference in a provision of an Act to a particular 'authority' (a minister, a department of State, any other Public Service Act



agency, an office or the holder of an office (s 19B(7)). The orders enable a reference in a provision to a particular authority to be read as a reference to a different authority, as specified in the order, avoiding the need to amend the legislation.

Orders can be made under s 19B if:

- an authority is abolished
- the name or title of the authority is changed
- there is a change in the matters dealt with by the authority because of the effect of an AAO, or
- the reference to the authority is no longer appropriate for any other reason.

Orders may be made to have retrospective effect.

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

The Attorney-General's Department contacts all departments to determine the references to specific ministers, departments and secretaries which will need to be changed by orders made under s 19B. A copy of previous orders can be accessed through the Federal Register of Legislation at www.legislation.gov.au (see, for example, the *Acts Interpretation Substituted Reference Order 2017*, the *Acts Interpretation Amendment Substituted Reference Order 2019*, and the *Acts Interpretation Amendment Substituted Reference Order 2022*). The orders are in the form of running lists of substitutions that have been made in relation to ministers, departments and secretaries.

Impact on agreements and associated processes

Machinery-of-government changes may have a range of implications for existing agreements to which Commonwealth entities are party (that is, existing contracts, leases, deeds and other agreements), as well as for proposed agreements and associated (for example, procurement, grant or other) processes.

Usually no change to parties for entities legally forming part of the Commonwealth

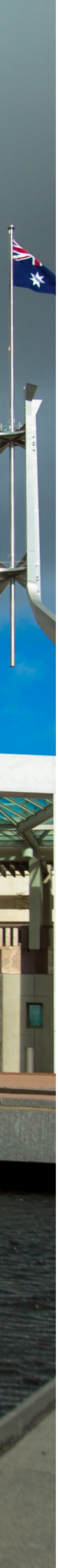
A key question is whether a machinery-of-government change will involve a change in the Commonwealth party to an agreement. The answer to this will depend on 'who' the Commonwealth party is immediately before the change, and which agency or agencies are to gain responsibility for the agreement following the change.

Where the current party is the Commonwealth of Australia itself (for example, the Commonwealth 'as represented by' a non-corporate Commonwealth entity), there will be no change in the party if a machinery-of-government change merely involves responsibility for the agreement being shifted to a different non-corporate Commonwealth entity or being split between multiple non-corporate Commonwealth entities. For example, this would be the case where a contract has been entered into by the Commonwealth as represented by a particular department and the relevant functions of the department (including responsibility for administering the contract) are subsequently moved to a different department.

This is because the Commonwealth is a single legal entity and nominating a non-corporate Commonwealth entity as the Commonwealth's representative under an agreement is normally only done for administrative convenience. Where a machinery-of-government change merely shifts administrative responsibility for an agreement 'within' the Commonwealth (that is, between different non-corporate Commonwealth entities), this does not change the fact that it is the Commonwealth itself which is party to the agreement. From a legal perspective, this means that there is no need to 'assign' or 'novate' the agreement as between the relevant agencies.

Accordingly, from a legal perspective it is not usually necessary to amend an existing agreement to address machinery-of-government changes within the Commonwealth. It will normally be sufficient to:

- update the ABN and notice details (for the Commonwealth or its various representatives) under the agreement (which can normally be done by notice to any counterparties), and
- ensure that the Commonwealth complies with any other formalities under the agreement that may apply where such a change occurs – for example, a requirement to notify any counterparties of that change.



However, there may be some situations where the subject matter of the agreement or its terms may require amendment following a machinery-of-government change, because the agreement is no longer fit for purpose following the change. For example:

- an agency may hold a lease with a particular permitted purpose but the premises may need to be used for a different purpose following the change, or
- the terms of a software licence may not on their terms cover the ongoing operations of the agency.

References to Ministers, departments, agencies or offices in agreements

Commonwealth agreements often contain references to Commonwealth Ministers, Departments or other Commonwealth agencies or offices. Section 19C of the Acts Interpretation Act deals with those references where an 'authority'[2] is abolished, changes its name, the matters dealt with by the authority are changed because of the AAO or a reference to the authority is no longer appropriate for any other reason.

In broad terms, s 19C provides that a reference to:

- a Minister is taken to refer to the Minister, or any of the Ministers, administering the Department that deals with the relevant matter on the relevant day
- a Department is taken to refer to the Department that deals with the relevant matter on the relevant day, and
- any other authority (the 'relevant authority') is taken to refer to an authority exercising the powers or performing the functions of the relevant authority on the relevant day, or an authority determined by the Minister.

For example, where an agreement describes the Commonwealth party as the 'Commonwealth of Australia as represented by Department A' and administrative responsibility for the agreement is subsequently moved to Department B, the agreement would then be taken to refer to Department B as the Commonwealth's new representative (without the need to negotiate a variation or amendment to the agreement).

However, the parties might sometimes prefer to update the agreement to specifically refer to the new non-corporate Commonwealth entity (or part of it) particularly if other variations to the agreement are required – so that the ongoing commercial arrangements are clear from the face of the agreement.

Contracts moving between legal entities

Where a machinery-of-government change shifts responsibility for a particular agreement from one legal entity to another (for example, from the Commonwealth, as represented by a non-corporate Commonwealth entity, to a corporate Commonwealth entity (or vice versa)), then this *will* involve a change in the Commonwealth party. This means that it will usually then be necessary to assign or novate the agreement to the new agency (or agencies) unless this occurs through a statutory mechanism. This is because, unlike non-corporate Commonwealth entities (which all legally form part of the Commonwealth), each corporate Commonwealth entity has its own legal personality.

For further information on the difference between assignment and novation and when each should be used, please refer to the AGS Legal briefing on Novation and assignment of contracts.

Variations to agreements because of changes in Commonwealth policies

Elections and associated machinery-of-government changes sometimes result in Commonwealth policy changes that may require changes to existing agreements. Depending on the form of agreement and the type of change required, the change may be able to be made using existing mechanisms provided for in the agreement (such as provisions which allow the agency the discretion to scale up or down) or may require a formal variation to the agreement.

There are a number of important matters that should be considered by agencies before changes are made to an agreement to address policy changes. This includes ensuring that:

- the revised agreement will still have appropriate constitutional and legislative support – for example, if the agreement is made under an item of the *Financial Framework (Supplementary Powers) Regulations 1997* the revised agreement will still be covered by that item

2 'Authority' is defined in s 19C(6) to mean a Minister, Department of State of the Commonwealth, any other agency within the meaning of the Public Service Act or an office (including an APS employee's office and any other appointment or position), or the holder of an office.

- the program is still covered by any necessary authorisations – for example, any authorisation needed for the acquisition of an interest in land under the *Lands Acquisition Act 1989* or any approval for an indemnity under s 60 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act)
- the revised program is also still supported by the relevant (procurement, grant or other) process for the initial agreement – noting that agencies may need to consider undertaking a new process where the revised program would involve a material change in scope, and
- any relevant delegations or authorisations for the purposes of entering into a proposed agreement and committing Commonwealth funds are still appropriate, or whether they need to be remade (we discuss delegation and authorisation instruments in further detail below).

Further general guidance on the variation of Commonwealth procurement contracts is available on the Contract Variations.

Existing agreements – early termination or reduction in scope

Following an election and any associated machinery-of-government changes, agencies may sometimes wish to end or reduce the scope of their existing agreements – for example, due to a change in government policy resulting in the cancellation of a program. Agencies may then wish to consider whether they can achieve this by exercising an early termination or reduction in scope right under the relevant agreement. A common example of this would be the Commonwealth's right to terminate 'for convenience' (that is, without fault or other cause) that is included in many Commonwealth agreements, including the standard contract terms in the Commonwealth Contracting Suite.

There are a range of contractual, legal, commercial, reputational and policy issues that agencies should consider before deciding to exercise such rights. For a discussion of some of the key issues (as well as other possible bases for ending a Commonwealth agreement), see AGS Commercial notes No. 42 (Termination of Commonwealth contracts).

Cancelling procurement, grant and other processes

It is possible that a program may be cancelled after an election in circumstances where a process is in train but agreements have not been entered into.

In this situation, the relevant agency may need to terminate a process or withdraw from contract negotiations. It will then be important for the agency to consider whether they can do so without liability or other legal consequence – for example, without an obligation to pay compensation to any relevant tenderers. There may be a range of factors to consider including the terms and conditions of the associated approach to market or other process documentation (noting that these will typically provide that the relevant agency is entitled to suspend or discontinue the process). Agencies should consider taking legal advice before terminating a process in these circumstances.

Delegations and authorisations

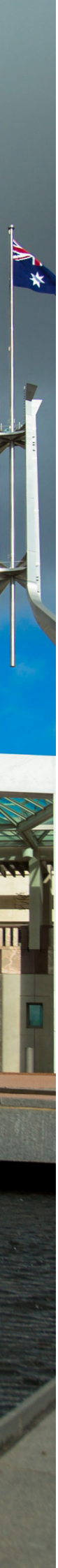
The changes in ministers, departments and secretaries that occur following an election make it essential that each department reviews its instruments of delegation and authorisation.

Instruments of delegation

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

In the case of a transfer of functions from one department (the old department) to another department, delegations of power to persons within the old department who are responsible for performing those functions may cease to have effect at the time the functions, together with relevant staff, are transferred. Whether



delegations survive in these circumstances may depend on the relevant power of delegation (including how the delegate and the persons to whom a power can be delegated are identified). Delegations should ordinarily be remade in these circumstances.

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

Statutory authorisations

Statutory authorisations are made in accordance with an express statutory provision that enables a person to be designated as the recipient of a statutory function or power. For example, some legislation expressly provides for the appointment of 'authorised officers', or the authorisation of persons, to exercise specified statutory powers. These statutory authorisations operate in a similar way to delegations, and an authorised officer exercises the power in their own right.

The information on delegations immediately above applies equally to statutory authorisations.

Carltona authorisations

'Carltona' authorisations are made by a person in whom a statutory power is vested relying on an implied power to authorise an official to exercise the statutory power on their behalf. In contrast to a person acting pursuant to an instrument of delegation or a statutory authorisation, a person acting pursuant to a Carltona authorisation does not act in their own right but, rather, as the 'alter ego' or agent of the first person. The power to make an authorisation of this kind is, in most cases, implied from the terms of the statute that confers the relevant power on the first person.

There is conflicting authority on whether a Carltona authorisation will survive a change in office holder. On one view, authorisations of this kind cease to have effect when the person holding the relevant office changes, so the authorisations must be remade (see, for example, *Kelly v Watson* (1985) 10 FCR 305 cited in *Johnson v Veterans' Review Board* (2002) 71 ALD 16 at 27 and *Aban v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 93 at 98–99). 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 agencies 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.

Availability of appropriations

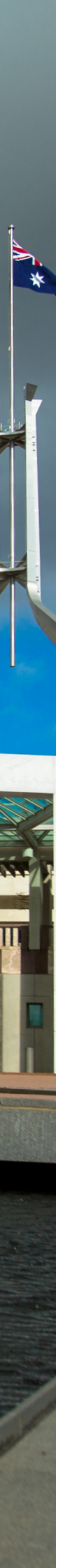
There are 2 ways appropriations can be available after a change in departments.

The first way is that the rules in s 19A of the Acts Interpretation Act for reading references to departments (discussed above) may apply to allow a reference in an appropriation Act to a former department to be read as a reference to the new department.

The second way is via the mechanism in s 75 of the PGPA Act. Section 75 applies if a function of a non-corporate Commonwealth entity (including a department) is transferred to another non-corporate Commonwealth entity, either because the transferring entity is abolished or for any other reason. In these circumstances, the Finance Minister (or their delegate) may determine that one or more Schedules to one or more appropriation Acts are amended in a specified way. The amendment must be related to the transfer of the function.

Following a s 75 determination, each appropriation Act concerned has effect as if the relevant Schedules were amended in accordance with the determination. Importantly, a determination under s 75 cannot result in a change to the total amount appropriated by appropriation Acts.

Section 75 determinations are legislative instruments for the purposes of the Legislation Act. However, they are not subject to disallowance. Section 75 determinations may be expressed to operate retrospectively – for example, from the date an AAO is made.



Status of Bills, questions on notice and inquiries by parliamentary committees where there is an ordinary general election

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

Odgers' Australian Senate Practice (14th ed) (p 186) 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.

Bills

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

Where there has been a prorogation followed by a general election, a Bill may not be revived in the following session of Parliament. *Odgers' Australian Senate Practice* (p 348) 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.

If a Bill had been passed by both Houses and was awaiting royal assent at the time Parliament was prorogued, and the House of Representatives dissolved for the purpose of a general election, the better view is that it would nevertheless be possible for the Governor-General to give assent to the Bill. It is, however, considered desirable for Bills passed during a session to be assented to before a dissolution proclamation is made (*House of Representatives Practice* (7th ed), p 227).

Questions on notice

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

In the Senate, in the case of an ordinary general election, prorogation has the consequence 'that all business on the Notice Paper lapses on the day before the next sitting' (*Odgers' Australian Senate Practice*, p 625) (emphasis added). The Senate regards questions on notice as 'continuing' following prorogation, and it appears that if answers are not given before the next sitting day the Department of the Senate writes to senators asking whether they wish to 'renew the questions when the Senate resumes' (*Odgers' Australian Senate Practice*, p 625).

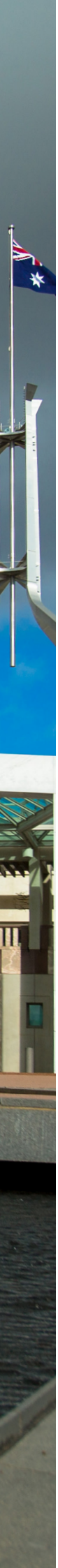
Inquiries by Parliamentary committees

Where the House of Representatives has been dissolved, committees of the House and joint committees appointed on a sessional basis by standing order or by resolution cease to exist (*House of Representatives Practice*, p 653).

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 a different committee. However, committees are empowered to consider and make use of the evidence and records of similar committees appointed during previous parliaments (*House of Representatives Standing Orders*, Order 237).

Joint committees established by legislation – for example, the Joint Committee of Public Accounts and Audit and the Parliamentary Standing Committee on Public Works – also cease to exist. The Acts establishing those committees provide that members cease to hold office when the House is dissolved. The constituting legislation of joint statutory committees also commonly provides for the new committee to be able to consider evidence taken by the previous committee as if the new committee had taken that evidence (see, for example, s 24 of the *Public Works Committee Act 1969*).

While the position on committees of the House of Representatives is clear, the position on Senate committees, in the case of an ordinary election, is not completely settled. Questions have been raised as to whether Senate committees have power to meet in the period following prorogation and dissolution of the House of



Representatives and the next meeting of Parliament following an ordinary general election (*Odgers' Australian Senate Practice*, p 606). 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 608). 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*, pp 610, 614). By contrast, where there is a double dissolution election, Senate committees cease to exist and cannot meet after the dissolution of the Senate.

More information

Guidance on implementing machinery-of-government changes is also contained in the Australian Public Service Commission and Department of Finance publication *Machinery of government changes: a guide for agencies*.

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