



Senate FPA Committee
Additional Estimates 2012-13
Tabled by Senator Brandis
11/2/2013

The Hon Tony Abbott MHR
Leader of the Opposition

7 February 2013

Dr Ian Watt AO
Secretary
Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

Dear Dr Watt *la*

I am seeking your guidance on the application of the caretaker conventions in your capacity as the nation's senior Commonwealth public servant.

As you know, during an address to the National Press Club on 30 January, the Prime Minister named Saturday 14 September 2013 as the date of the next election, and declared that she would advise the Governor-General to dissolve the House of Representatives and cause writs to be issued for an election of the House and half the Senate on 12 August 2012.

Strictly speaking, the decision whether to dissolve the House is a matter for the Governor-General. Nevertheless, since the election date announced by the Prime Minister falls some 24 days after the third anniversary of the 2010 election, and only 14 days before the expiry and dissolution of the House of Representatives by effluxion of time under s. 28 of the *Constitution*, there is no practical possibility that the advice would not be accepted. The obvious discourtesy to the Governor-General involved in the Prime Minister's announcement is another matter.

On behalf of the Coalition, I seek your urgent advice in relation to the following matters now that the election date has been announced.

Consultation with the Opposition

The *Guidance on Caretaker Conventions*, most recently issued by your Department in 2010, states that "[t]he caretaker period begins at the time the House of Representatives is dissolved..." [para. 1.2]. However, the same document incorporates Guidelines, originally tabled in 1976 and most recently updated on 5 June 1987, providing for pre-election consultation with the Opposition.

Para 7.5.2 of *Guidance on Caretaker Conventions* states:

“The Guidelines are distinct from the caretaker conventions and commence on a different date. *They apply as soon as an election for the House of Representatives is announced* or three months before the expiry of the House of Representatives, whichever is earlier.” [Emphasis added]

The Guidelines, which are reprinted in para. 7.5.3, provide for significantly greater access by Shadow Ministers to officials for consultation and discussions. Paragraph (v) of the Guidelines provides that:

“The subject matter of the discussions would relate to the machinery of government and administration. The discussions may include the administrative and technical practicalities and procedures involved in implementation of policies proposed by the non-Government parties.”

The Guidelines also provide that discussions with the Opposition “will be confidential”.

It is clear that these Guidelines came into operation when the Prime Minister announced the date of the election. Accordingly, the Opposition is now entitled to have discussions with officials of the kind set out in paragraph (v). The language of paragraph (v) is broad. The subject-matter of the permitted discussions falls into two categories:

- The machinery of government and administration; and
- The administrative and technical practicalities and procedures involved in the implementation of policies proposed by the Opposition.

Discussions falling into the first category would include:

- The operation and administration of departments and agencies;
- All draft departmental and agency budgets, and compliance by all departments and agencies with current budgets;
- The operation and administration of all programmes conducted by departments and agencies;
- The amount of expenditure by departments and agencies on all programmes and other outlays;
- The amount and source of funding by departments and agencies of all programmes and other outlays;
- The existence and amount of all funds within each department and agency which are unallocated;
- The number of staff of each department and agency, and their allocation to programmes and other activities;
- Organisational charts for all departments and agencies;
- Current and proposed contracts and tenders by all departments and agencies;
- Current and proposed advertising programmes by all departments and agencies;
- Engagement of consultations and contractors by all departments and agencies;
- Details of all current or foreshadowed litigation by all departments and agencies, and details of actual or proposed expenditure on legal costs; and

- The officials' appraisal of the effectiveness and efficiency of all programmes and other outlays;

Discussions falling into the second category would include:

- The time, methods and resources required to give effect to Opposition policies in the event of a change of government; and
- The capacity to use existing programmes in order to give effect to Opposition policies.

Obviously, the Guidelines envisage the provision to the Opposition of sufficient information to enable meaningful discussion of the matters provided for in paragraph (v).

Although the Guidelines state that the discussions are subject to approval, as you know, Ministers can at any time approve discussions between officials and Shadow Ministers. The adoption of explicit Guidelines, for the stated purpose of "providing for pre-election consultation with the Opposition", plainly indicates that the Guidelines are intended to provide for a greater level of access by the Opposition than normal. Further, capricious or unreasonable refusal by Ministers to co-operate would make the Guidelines inoperable.

I request an urgent meeting so that the operation and implementation of the Guidelines can be discussed. In particular, how does your Department intend to observe the Guidelines and what instructions will be issued to other departments and agencies.

Application of the Broadcasting Services Act 1992

The *Broadcasting Services Act 1992* governs the broadcasting of political material by commercial television licensees, commercial radio licensees, community broadcasting licensees and subscription television broadcasting licensees. The Act requires that during an election period, if a broadcaster broadcasts election matter, the broadcaster must give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election: the so called 'equal time' rule.

The application of this rule requiring broadcasters to provide equal time occurs during the "election period". This is a defined term, to be found in s. 1 of Schedule 2. So far as concerns elections for the House of Representatives, the relevant definition is sub-paragraph (b):

"... the period that starts on:

- (i) the day on which the proposed polling day for the election is publicly announced; or
- (ii) the day on which the writs for the election are issued

whichever happens first..."

There can be no doubt that the Prime Minister's announcement of the election date on 30 January satisfies the requirements to sub-paragraph (i). Accordingly, the obligations upon commercial broadcasters arising from Schedule 2 of the *Broadcasting Services Act*, regarding equal time, commenced on that day.

It has been claimed that the Government has received legal advice to the effect that the Schedule 2 obligations have not yet commenced, since (so it is said), the provisions of s. 1 must be "read down" by other provisions of the *Act*.

Advice to the Coalition is that this is an untenable proposition. A definition provision in a statute cannot be 'read down' for it is the definition provisions which establish the meaning of all of the substantive provisions which follow. If there were an ambiguity in the *Act*, that ambiguity would itself be resolved by reference to the definition. There is, I submit, no ambiguity at all about the definition itself.

I would be grateful if you would provide me with a copy of any advice the Government may have received to contrary effect. Otherwise, I would be grateful for your confirmation that provisions of Schedule 2 of the *Broadcasting Services Act* are now in effect.

Yours sincerely

TONY ABBOTT