



SG No. 33 of 2010

IN THE MATTER OF THE GOVERNOR-GENERAL

OPINION

1. The Governor-General of Australia, Her Excellency Ms Quentin Bryce AC, has requested my advice on whether there exists any constitutional or other legal impediment to the proper discharge of her functions of office while there remains uncertainty as to the formation of government following the recent general election. Her Excellency's request arises from suggestions that her ability to perform those functions may be impugned by reference to perceptions arising from the marriage of her daughter to the Honourable Bill Shorten MP who appears likely to be re-elected to the House of Representatives as the Member for Maribyrnong and who is currently Parliamentary Secretary for Disabilities and Children's Services and Parliamentary Secretary for Victorian Bushfire Reconstruction.
2. The office of the Governor-General is created by section 2 of the Constitution of the Commonwealth of Australia and has bestowed on it by sections 5 and 64 the functions

of summoning and proroguing the Parliament, of dissolving the House of Representatives and of appointing, as Ministers and Parliamentary Secretaries, officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish who hold office during the pleasure of the Governor-General and who must be, or become within three months of their appointment, senators or members of the House of Representatives. In ordinary circumstances, by unbroken tradition, the Governor-General acts in the discharge of those functions on the advice of the Prime Minister who is the member who has the confidence of the House of Representatives. In extraordinary circumstances, the Governor-General may be impelled to assume the profound responsibility of considering the exercise of a function on the basis of her own deliberative judgment. The possibility of extraordinary circumstances of that nature arising in the current state of uncertainty cannot wholly be excluded.

3. Neither the office of the Governor-General nor the functions constitutionally bestowed on that office admits of any close analogy save for those of the Queen and State Governors. The Governor-General herself is appointed by the Queen and holds office during the Queen's pleasure. The functions of the Governor-General are of the highest constitutional order. The circumstances in which the Governor-General might conceivably come to perform those functions in the exercise of the Governor-General's own deliberative judgment are, by definition, extraordinary: the circumstances are certain to be politically charged; though assisted by established conventions, the judgment is certain to be delicate; and the consequences are certain to be far-reaching. Yet the maintenance of the capacity of the Governor-General to act in such circumstances is critical. The notion that the Governor-General might in such circumstances be constitutionally inhibited in the performance of her functions by reason of a perception of bias or of a conflict of interest is one that, in my opinion, finds no foothold in the structure or text of the Constitution. To imply such a constitutional inhibition, in my

opinion, would not enhance the performance of the high constitutional functions of the Governor-General. To the contrary, it would have the potential to undermine them.

4. Section 4 of the Constitution extends the provisions of the Constitution relating to the Governor-General for the time being to such person as the Queen may appoint to administer the Government of the Commonwealth. In addition, section 126 of the Constitution allows the Queen to authorise the Governor-General to appoint any person to be a deputy and in that capacity to exercise during the pleasure of the Governor-General such functions of the Governor-General as the Governor-General thinks fit to assign. The section goes on to provide that the appointment of such a deputy does not prevent the Governor-General personally exercising a function. By letters patent dated 21 August 2008, the Queen has, with certain limitations, made provision for the functions of the Governor-General to be vested temporarily in an administrator and has given authority to the Governor-General to appoint a deputy. Neither the existence of the capacity for the functions of the Governor-General to be vested temporarily in an administrator nor the authority of the Governor-General to appoint a deputy impacts on my view that there exists no constitutional impediment to the Governor-General personally exercising the Governor-General's functions.

5. In "The Office of the Governor General" (Melbourne University Press, 1979) at 46, Sir Paul Hasluck observed that it had become the pattern for Governors-General to be appointed with experience in a field, such as law or politics, "which qualified them for the constitutional duties of the office". Sir Paul went on at 46-47 to stress the importance of a Governor-General doing nothing that "would imperil the reputation for detachment and independence necessary for [the] office". His counsel was one of prudence, not of law. There has in the history of the Commonwealth of Australia been a number of Governors-General who have had significant prior political careers and a number of Governors-General who have had continuing personal relationships with

senators and members of the House of Representatives. In my opinion, the existence of connections and relationships of that kind can give rise to no disqualification from holding the office nor to any legal impediment to the performance of the functions of the office. Where they exist, connections and relationships of that kind must be recognised as realities. They fall to be managed as a matter of prudence, not of legal obligation or legal impediment.

6. The marriage of Her Excellency's daughter to Mr Shorten falls into no different category. The fact of the marriage of a member of Her Excellency's family to a person who, as a member of the House of Representatives and as a Parliamentary Secretary, would stand to be directly affected were a decision to be made by Her Excellency in the exercise of her own deliberative judgment to exercise a function conferred on her by sections 5 or 64 of the Constitution cannot in law in any way impede Her Excellency in the possible performance of those high constitutional functions. There is, of course, no question that it would do so in fact.

7. My advice to Her Excellency is that the marriage of her daughter to Mr Shorten gives rise to no constitutional or other legal impediment to the proper discharge of her functions of office.

Dated: 26 August, 2010



STEPHEN GAGELER

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THE GOVERNOR-GENERAL

OPINION

Her Excellency Ms Quentin Bryce AC
Governor-General of the
Commonwealth of Australia
Government House
CANBERRA ACT 2600