OPINION

Re: S. 40 of the Commonwealth Constitution;

Ex parte Oakeshott

1. I have been asked to consider the constitutional implications of statements by the Independent Member for Lyne, Mr. Rob Oakeshott MP, concerning the availability to him of pairing arrangements in the event that he were to be elected Speaker of the House of Representatives. Mr Oakeshott asserts that were he to be the Speaker, pairing arrangements should be extended to him. Evidently, he wishes that to be done in order for him to take a public position on questions before the chair.

2. For the purposes of this advice, I take "pairing" to be the practice whereby members proposing to vote on opposite sides of a question before the chair abstain from voting so that their votes, in effect, cancel each other out; this is usually done in order to enable members to be absent from the House without affecting the result of a division. The pairing arrangements are made by the Whips.

3. The office of Speaker of the House of Representatives is created by s. 35 of the *Constitution*, which provides:

> "The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.
>
> The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General."

4. S. 40 of the *Constitution* deals with the manner in which voting in the House of Representatives is conducted:

> "Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote."

This provision contrasts with s. 23, the equivalent provision for voting in the Senate, which provides that the President shall be entitled to a vote, but does not provide for a casting vote:

> "Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative."

5. Neither s. 40, nor the issues raised by the question I have been asked to address, have been the subject of direct consideration by the High Court.

6. The *Constitution* does not provide for pairing. Nor do the Standing Orders of the House of Representatives. Nevertheless, both *Hansard* and *Votes and Proceedings of the House of Representatives* record pairs; therefore, the

practice may be regarded as having some official status. In my view, it is properly to be regarded as a custom or practice of the House of Representatives, but would not be regarded as having the status of a constitutional convention.

7. In my opinion, pairing arrangements cannot be extended to the Speaker. Pairing arrangements contemplate that a vote (commonly described as a "deliberative vote", although that term is not used in s. 40) *could* have been cast and, indeed, but for the existence of the pairing arrangement, would have been cast. However, s. 40 provides, in terms which do not admit of ambiguity, that the Speaker may not vote on the question before the chair, unless the numbers are equal, in which event he has a casting vote. The words in the first sentence of s. 40 make a clear distinction between an ordinary ("deliberative") vote – which is prohibited - and the Speaker's casting vote. To extend pairing arrangements to the Speaker would, in effect, be to treat the Speaker's casting vote, proleptically, as if it were a deliberative vote, which is a plain violation of the prohibition in s. 40 ("The Speaker shall not vote…"). If the framers had intended the operation of the House of Representatives to be otherwise, they would have provided for votes to be cast in the same manner as in the Senate. The clear difference between ss. 40 and 23 further supports the view that the effect of s. 40 is to withdraw from the Speaker the capacity to exercise a deliberative vote.

8. Another reason why I do not consider it is constitutionally proper to "pair" the Speaker follows from the fact that the Speaker's vote is only counted in the

event of an equality of votes, when he exercises his casting vote. If there were an arrangement equivalent to pairing Mr Oakeshott – perhaps an informal arrangement which would not be recorded officially in the list of pairs – then it would only make a difference if the result of the arrangement were to create an equality of deliberative votes. Mr Oakeshott could only give effect to his side of the "pair" by then refraining from exercising his casting vote. Yet plainly, s. 40 has created a mechanism for the resolution of a tie by giving the Speaker a casting vote; an arrangement whereby he would refrain from exercising that vote so as to give effect to an informal "pairing" arrangement would seem to be directly at variance from the purpose of s. 40. Indeed, it would only operate if the constitutional mechanism established by s. 40 were thereby subverted. In that regard, I should point out that s. 40 does not provide, as s. 23 does, that "when the votes are equal the questions shall pass in the negative." The reason it does not contain such a provision is that it contains its own mechanism for resolving tied votes – i.e. the Speaker's casting vote. It was never contemplated by the framers that the Speaker could, for reasons to suit himself and given effect to by arrangements with another member, derogate from the constitutional mechanism for resolving the tie. Indeed, it might even be argued that the provisions of s. 40 impose an *obligation* upon the Speaker to resolve the tie.

9. It is well established that, as a general rule, the Courts will not inquire into "the intra-mural deliberative activities of the Parliament": *Victoria –v- Commonwealth* (1975) 134 CLR 81. But that principle does not apply to procedural irregularity, *a fortiori* where the effect of that irregularity is

disobedience to the requirements of a constitutional provision itself – in this case s. 40. As Barwick CJ said in *Cormack –v- Cope* (1974) 131 CLR 432:

> "Whilst it may be true the Court will not interfere in what I would call the intramural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law-making is not properly carried out." (at 452)

To similar effect is the following statement from the judgement of the Court in *Clayton –v- Heffron* (1960) 105 CLR 214:

> "The framers of the constitution may make the validity of any law depend upon any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding within Parliament the Courts must take it under the cognizance in order to determine whether the supposed law is a valid law." (at 235)

The concern I have is that an arrangement – even an informal one – whose effect is to subvert the mechanism for resolving an equality of votes provided for by s. 40, might be regarded as a "fact, event or consideration" which the Court might consider entitled it to adjudicate upon the validity of the legislative act.

10. In any event, even if, due to the informal nature of pairing arrangements, the provision of a pair to the Speaker were not viewed by the Court as providing a sufficient basis for it to judicially review the operation of the legislative process on the ground of procedural irregularity, it could nevertheless, in my view, only be viewed as an arrangement whose purpose and effect was to circumvent the plain meaning of s. 40 of the *Constitution* and, for that reason alone, should not be countenanced.

11. A further and entirely separate reason why Mr Oakeshott's position seems to me to be untenable is that pairing arrangements exist, by convention, between the Government and the Opposition. Quite apart from the constitutional hurdle posed by s. 40, it seems to me that there is an inherent conceptual difficulty about including an Independent member in the pairing arrangements, simply because there is nobody against whom to "pair" him. In any event, that issue does not arise since, for the reasons I have outlined, an arrangement to give the Speaker a *de facto* deliberative vote would be inconsistent with s. 40 of the *Constitution*.

With compliments

GEORGE BRANDIS SC

Monday 20 September 2010

CRITIQUE OF THE OPINION OF THE COMMONWEALTH SOLICITOR-GENERAL DATED 22 SEPTEMBER 2010 IN THE MATTER OF THE OFFICE OF THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

1. The Solicitor-General was requested by the Attorney-General to address a narrow question, *viz.*:

> "Is there any necessary constitutional impediment to a pairing arrangement between the Speaker of the House of Representatives and another member from an opposing political party if that arrangement has a fixed operation irrespective of any particular vote?"

In particular, it should be noted that the question is directed to the existence of "any *necessary* constitutional impediment," not any *likely* or *potential* constitutional impediment. The Solicitor-General's advice should have been sought on the question of whether arrangements to pair the Speaker were constitutionally problematic - in other words, whether there was a risk, and if so of what degree, that such arrangements were inconsistent with the *Constitution*. By phrasing the question in this deliberately circumscribed way, the Attorney-General has avoided posing the broader, and more relevant question, whether such arrangements were constitutionally doubtful or risky.

2. To this carefully circumscribed question, the Solicitor-General has provided the following answer::

> "No, subject to two provisos. The first proviso is that the arrangement could not give the Speaker a deliberative vote and could not deprive the Speaker of a casting vote. The second proviso is that adherence to the arrangement by the other Member could only be voluntary."

3. The primary answer, "No", must be understood, in light of the question asked, as the expression of an opinion that there is not any *necessary* constitutional

impediment to pairing the Speaker, not an opinion that there are no possible or even likely constitutional impediments in doing so.

4. The two provisos add nothing to the analysis; indeed, they are uncontroversial. As to the first, it is clear from s. 40 that the Speaker shall not exercise a deliberative vote and shall have a casting vote in the event of an equality of deliberative votes. The second proviso merely restates what is invariably the case, i.e. that pairing arrangements are voluntary.

5. Because of the narrowness in which the question is framed, the Solicitor-General was not asked to address the broader constitutional issues:

   (a) Whether such an arrangement is potentially problematic;
   (b) Whether, in particular, it might render legislation passed under such arrangements susceptible to challenge; and
   (c) Whether, in any event, it is constitutionally proper for the Government and the Opposition to enter into an arrangement to circumvent the plain words of s. 40.

6. Although the Solicitor-General was constrained by the narrowness of the question posed from addressing the broad substantive application of s. 40, at para. 19, he invokes the principle of constitutional interpretation that "the content of the requirements of s. 40 of the Constitution falls to be determined as a matter of substance in a manner that promotes the constitutional purpose of the section as revealed by its text read appropriately in its structural and historical context." Despite the circumscribed language of the question by

which his Opinion is limited, the conclusion which would follow from a purposive interpretative approach to the question of the "broad substantive application" of s. 40 is nevertheless implied by the observations which the Solicitor-General makes in paragraph 41. These observations support the position the Opposition has taken.

7. In paragraph 41, the Solicitor-General addresses the broader issue of the possible inconsistency with the prohibition by s. 40 upon the Speaker exercising a deliberative vote, of a pairing arrangement with another Member. He states the broader issue in these terms:

> "An argument can be mounted that the prohibition is properly to be construed as having a broad substantive operation so as to deprive the Speaker of any capacity to exert influence over the determination of a question in the House through the exercise or non-exercise of any deliberative vote, including by exerting influence over the exercise or non-exercise of a deliberative vote by another member."

His conclusion is:

> "If the prohibition were to be construed as having that broad substantive application, the application of the prohibition to particular circumstances would necessarily turn on questions of fact and degree. Were even a voluntary arrangement to give to the Speaker the substance of a deliberative vote, *the potential for the application of the constitutional prohibition could not be ruled out*." (emphasis added)

Although the language is deliberately elliptical, the opinion expressed in the italicized words can only be read as meaning that, if the broader question ("the broad substantive application" of s. 40) were addressed, it may be, depending

"on questions of fact and degree" that the constitutional prohibition has been violated. That is precisely the same point made, in less elliptical language, by my Opinion of 20 September at paragraph 9.

8. Turning to the narrow question, there is, with respect, a flaw in the Solicitor-General's reasoning. In paras. 8 - 13 and 26 - 33, he discusses the nature of "pairs". At para. 32 he opines, following both Canadian and Australian House of Representatives practice, that "at its highest, a pairing arrangement can operate as a matter of moral or political obligation." In other words, since the "pair" may not be enforced by the Parliament because to do so would interfere with the right of a Member to cast his vote, its binding force comes from the mutuality of the private arrangement between Members, "as a matter of moral or political obligation". Yet in the substantive conclusion about "pairing" the Speaker, which is to be found in para. 42 of his Opinion, the Solicitor-General entirely disregards the requirement of mutuality. The discussion in para. 42 equates "pairing" with the voluntary abstention of a Member from a question before the chair in anticipation of "how the Speaker might be expected to have exercised his deliberative vote if the Speaker had a deliberative vote". He says:

> "Although not inappropriately described as 'pairing', the arrangement, in substance and effect, would involve *nothing more than the other member choosing not to exercise that member's constitutional entitlement to cast a deliberative vote* and to maintain that choice without regard to the question for determination. It would not in any meaningful sense involve the Speaker exerting influence over the exercise or non-exercise of the deliberative vote of that other member."(emphasis added)

9. The Solicitor-General's reasoning is (with respect) striking in its circularity. Having abandoned his definition of "pairing" as an arrangement between two Members based on "moral and political obligation", and replaced it with a description of what amounts to nothing more than the unilateral act of a single Member in abstaining from a vote ("not inappropriately described as 'pairing'"), the Solicitor-General concludes that, because of the unilateral character of the other Member's action, it would not involve the Speaker "exerting influence over the exercise or non-exercise of the deliberative vote of that other member", and is therefore not (necessarily) inconsistent with the prohibition in s. 40. In other words, a Speaker's "pair" is only not inconsistent with s. 40 if it involves no element of mutuality; yet it is in terms of mutuality that the Solicitor-General has, earlier in his Opinion, defined the character of a "pair". According to this argument, a Speaker's "pair" only avoids the constitutional prohibition if it is not really a "pair" at all, because the element of mutual obligation between the Speaker and the other Member is lacking.

10. In the end, the conclusion the Solicitor-General expresses does not rise beyond the proposition that the unilateral act of a Member of the House of Representatives in abstaining from a vote, in anticipation of how the Speaker might have been expected to cast a deliberative vote (if he had one), is not necessarily a violation of s. 40. Indeed it is not. But a "pairing" arrangement containing the element of mutuality of moral or political obligation which the Solicitor-General identifies (para. 32), because it would "in [a] meaningful sense involve the Speaker exerting influence over the exercise or non-exercise of the deliberative vote of [another] member" (para. 42), may well constitute

such a violation of the constitutional prohibition in its "substantive operation", as the Solicitor-General appears to acknowledge (para. 41), *a fortiori* where the purposive approach to constitutional interpretation (which the Solicitor-General recommends, para. 19) is adopted.

GEORGE BRANDIS, SC

23 September 2010