

Caretaker Conventions in Australasia

Minding the Shop for Government

Caretaker Conventions in Australasia

Minding the Shop for Government

Anne Tiernan and Jennifer Menzies

Centre for Governance and Public Policy
Griffith University



E P R E S S



Published by ANU E Press
The Australian National University
Canberra ACT 0200, Australia
Email: anuepress@anu.edu.au
This title is also available online at: http://epress.anu.edu.au/caretaker_citation.html

National Library of Australia
Cataloguing-in-Publication entry

Tiernan, Anne, 1968- .
Caretaker conventions in Australasia : minding the shop for
government.

Bibliography.
ISBN 9781921313493 (pbk.).
ISBN 9781921313509 (web).

1. Public administration - Australia - Decision making. 2.
Public administration - New Zealand - Decision making. 3.
Public administration - Australia. 4. Public
administration - New Zealand. 5. Elections - Australia. 6.
Elections - New Zealand. 7. Australia - Politics and
government - 2001-. 8. New Zealand - Politics and
government - 21st century. I. Menzies, Jennifer. II.
Title. (Series : ANZSOG series).

328.9

All rights reserved. No part of this publication may be reproduced, stored in a
retrieval system or transmitted in any form or by any means, electronic, mechanical,
photocopying or otherwise, without the prior permission of the publisher.

Cover design by John Butcher.

Printed by University Printing Services, ANU

Funding for this monograph series has been provided by the Australia and New
Zealand School of Government Research Program.

This edition © 2007 ANU E Press

John Wanna, *Series Editor*



Professor John Wanna is the Sir John Bunting Chair of Public Administration at the Research School of Social Sciences at The Australian National University. He is the director of research for the Australian and New Zealand School of Government (ANZSOG). He is also a joint appointment with the Department of Politics and Public Policy at Griffith University and a principal researcher with two research centres: the Governance and Public Policy Research Centre and the nationally-funded Key Centre in Ethics, Law, Justice and

Governance at Griffith University. Professor Wanna has produced around 17 books including two national text books on policy and public management. He has produced a number of research-based studies on budgeting and financial management including: *Budgetary Management and Control* (1990); *Managing Public Expenditure* (2000), *From Accounting to Accountability* (2001) and, most recently, *Controlling Public Expenditure* (2003). He has just completed a study of state level leadership covering all the state and territory leaders — entitled *Yes Premier: Labor leadership in Australia's states and territories* — and has edited a book on Westminster Legacies in Asia and the Pacific — *Westminster Legacies: Democracy and responsible government in Asia and the Pacific*. He was a chief investigator in a major Australian Research Council funded study of the Future of Governance in Australia (1999-2001) involving Griffith and the ANU. His research interests include Australian and comparative politics, public expenditure and budgeting, and government-business relations. He also writes on Australian politics in newspapers such as *The Australian*, *Courier-Mail* and *The Canberra Times* and has been a regular state political commentator on ABC radio and TV.

Table of Contents

| | |
|--|------|
| Author Profiles | ix |
| Acknowledgements | xi |
| Foreword | xiii |
| List of abbreviations and acronyms | xv |
| Chapter 1. Introduction | 1 |
| Chapter 2. What are conventions? | 7 |
| Chapter 3. Origins of caretaker conventions | 13 |
| Chapter 4. When do the conventions apply? | 25 |
| Chapter 5. Caretaker conventions: an overview of Australian jurisdictions | 33 |
| Chapter 6. Caretaker conventions: an overview of New Zealand and local government arrangements | 53 |
| Chapter 7. Forces influencing the observance of caretaker conventions | 59 |
| Chapter 8. A changing practice? | 63 |
| Chapter 9. Caretaker conventions and the future of responsible government | 71 |
| Glossary | 75 |
| References | 77 |
| Appendix A. Different approaches – what the jurisdictional guidances say | 83 |

Author Profiles

Dr Anne Tiernan is an Australian Research Council (ARC) Postdoctoral Fellow at the Centre for Governance and Public Policy at Griffith University, and the Australia and New Zealand School of Government (ANZSOG) Research Program. She has worked in policy roles in both the Commonwealth and Queensland public sectors, and as a policy and research consultant. Dr Tiernan's research interests include: executive advisory arrangements — particularly ministerial staffing arrangements and relations between ministerial offices and the public service, policy influence and public policy agenda-setting. Her book, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* published recently by UNSW Press, examines the implications of the growth of ministerial staffing arrangements, especially its impact on the quality of information and advice to decision-makers. Dr Tiernan is currently working on a major ARC-funded research project investigating the policy advisory capacity of the Australian Public Service (APS) and its ability to support decision-makers through its policy advising functions.

Jennifer Menzies is a Director with the consultancy Policy Futures. A former senior executive and Cabinet Secretary within the Queensland Department of the Premier and Cabinet, she was responsible for the development of the government's priorities and the implementation of the government's agenda in all departments. Menzies has had extensive experience in policy development at the State and Commonwealth levels including the latest iteration of the Smart State Policy, the Capital City Policy and the E-Democracy Policy Framework. She is an M.Phil candidate in the School of Politics and Public Policy at Griffith University. Her topic is contemporary political leadership.

Acknowledgements

For an issue that so engages the attention of politicians and public servants for an intense period of about a month every few years, surprisingly little has been published on the topic of caretaker conventions. This monograph draws together research — and the guidance documents developed by public service central agencies — to address matters of practical concern in managing the business of government during an election campaign.

As we show in this monograph, conventions are dynamic. They evolve through experience and political practice. This monograph addresses the theoretical underpinnings of the caretaker principles, traces their progressive institutionalisation in recent decades and examines some contemporary challenges for their interpretation and observance. It is important to note, however, that while our treatment of the guidance documents is currently accurate, they are ‘live’ documents that will adapt and change as experience and events dictate. It will, therefore, be necessary for practitioners and others with an interest in the trajectory of the caretaker conventions to monitor such changes and to consider them in the context of our arguments as laid out here.

Our research and understanding of the issues canvassed in this monograph has been assisted by the many Commonwealth, State and Territory officials who generously spoke to us about their experience of the caretaker conventions and reviewed sections of the manuscript. The 2006 Queensland election provided an opportunity to test some of our ideas and arguments through workshops organised by the Institute for Public Administration Australia (IPAA) Queensland Division. Thanks to IPAA and the Department of the Premier and Cabinet.

We are grateful to Professor John Wanna of the ANZSOG research program, who engaged us to undertake this research with a practitioner readership in mind and helped conceptualise and shape the manuscript. Special thanks to John Nethercote and Jonathan Boston for helpful comments on the draft and to John Butcher for his editing and deft management of the production process. Finally, we would like to acknowledge the generous support of the Centre for Governance and Public Policy at Griffith University for allowing us to complete this work alongside other research commitments.

Anne Tiernan and Jennifer Menzies
September 2007

Foreword

Andrew Podger
National President
Institute of Public Administration Australia

This monograph is the first of a planned series over the next few years as a joint venture between IPAA and ANZSOG.

ANZSOG is a unique collaboration amongst Australasian governments and higher education institutions to develop emerging leaders in the public sector and to support research on contemporary public policy and management issues. IPAA is the national association of those whose profession is public administration, promoting high standards and continuous professional development and disseminating research and practitioner experience through its journals and its seminars and conferences.

The two organisations are natural partners. Participants in ANZSOG programs are encouraged to be members and supporters of IPAA. Both are keen to promote research and to share lessons from practical experience.

IPAA is particularly keen to sponsor work that provides guidance on professional standards in public administration. IPAA's Queensland Division has been taking the lead in developing some initial documents canvassing the standards that might apply today in such fields as values-based management and whistleblower arrangements.

This monograph by Anne Tiernan and Jennifer Menzies represents a substantial review of the rules and conventions applying in the lead-up to elections. Standards of behaviour at these times, including processes of decision-making, are important to our democratic system. They protect the apolitical and professional nature of the public service, ensuring it is well placed to serve whichever party wins the ensuing election and they ensure the incoming government has maximum capacity to pursue its mandate without being unduly constrained by decisions taken immediately before the election.

Guidance has long been available to public servants working for the Australian Government but has not been so widely known at State and local government levels. This monograph provides guidance on appropriate professional standards for those working at all levels of government in Australia (and New Zealand).

IPAA is pleased to co-sponsor this research with ANZSOG and looks forward to cooperating on further monographs that promote high standards in public administration.

List of abbreviations and acronyms

| | |
|---------|--|
| ACT | Australian Capital Territory |
| AFP | Australian Federal Police |
| AFR | Australian Financial Review |
| AGIMO | Australian Government Information Management Office |
| ALP | Australian Labor Party |
| APS | Australian Public Service |
| APSC | Australian Public Service Commission |
| CEO | Chief Executive Officer |
| CMC | Crime and Misconduct Commission (Queensland) |
| DPM&C | Department of the Prime Minister and Cabinet (Australia) |
| MMP | Mixed Member Proportional |
| NZ | New Zealand |
| NZDPM&C | New Zealand Department of the Prime Minister and Cabinet |
| NZSSC | New Zealand State Services Commission |
| RCAGA | Royal Commission on Australian Government Administration |
| SAS | Special Air Service |
| SSCF&PA | Senate Standing Committee on Finance and Public Administration |
| SMH | Sydney Morning Herald |

Chapter 1. Introduction

In 2004, elections were held in the Australian Commonwealth and in the state of Queensland. During the course of both campaigns, incumbent governments were accused of breaching ‘caretaker conventions’ — the principles and practices that guide the conduct of ministers and officials during an election campaign.

Caretaker conventions have evolved as a check on executive power in circumstances where there is no parliament to which it can be held accountable. They are observed during an election period, in a situation where, for example, a government has lost the support of the legislature, or there is a delay in forming a government after an election. Although the business of government continues, because of the potential for a change of government, caretaker arrangements require that no new policy decisions be taken, no major contracts should be entered into, and that significant appointments should not be made. Caretaker conventions are based on shared understandings of how politicians should behave. They are not law and are not adjudicated by the courts.

The Federal election on October 9 2004 was a bitter contest between the Coalition Government led by Prime Minister John Howard, and the Australian Labor Party under the leadership of Mark Latham. It was an unusually long campaign of 39 days duration; the usual length in recent years has been 33 days. The election was called on Sunday 29 August, although the caretaker period commenced formally following the issuing of writs at around 6 pm on Tuesday 31 August. The result was clear on election night, with the Government returned and normal business resuming on Monday 11 October.

Opposition complaints during the Federal campaign included claims that caretaker conventions had been breached by actions including:

- *The posting of ministerial press releases and transcripts on departmental websites.* The Departments of Defence and Foreign Affairs and Trade were the subject of specific complaints from Opposition Finance spokesman, Bob McMullan MP (Kerin 2004).
- *The Prime Minister’s failure to consult the Opposition Leader* over a decision to deploy a ‘contingency team’ to Iraq in response to reports that two Australian nationals had been taken hostage by insurgents. Latham accused the Government of ‘playing politics while Australians could be at risk’ and attacked his opponent for not involving Labor in the decision, nor briefing it about the team’s activities (*Sydney Morning Herald* 16 September 2004). Howard rejected the claims, arguing the decision was consistent with contingency arrangements for hostage situations agreed by the National Security Committee of Cabinet in August 2004, before the commencement of the caretaker period. He accused Latham of trying to convert the caretaker

convention into a form of 'dual government', noting his Government was 'not obliged to talk to them [the Opposition] every minute of the day' (*Australian Financial Review* 16 September 2004).

- The announcement by ministers and government MPs of grants and new facilities in marginal electorates during the election campaign. Particular controversy surrounded grants made under the Regional Partnerships Program – a Senate inquiry found that 50% of the grant approvals under the program occurred in the three months leading up to the 2004 election, fuelling perceptions of 'pork-barrelling' (SSCF&PA 2005).
- *Government advertising campaigns*, notably saturation television, radio and print advertising for the 'Help Protect Australia from Terrorism' campaign, begrudgingly approved by Labor, since it was run during the caretaker period (*The Australian*, 5 October 2004). Centrelink's decision to proceed with a mail-out to families on the government's \$600 family tax benefit during the caretaker period was also controversial (*Canberra Times*, 24 October 2004). The Joint Standing Committee on Electoral Matters inquiry into the conduct of the 2004 election campaign heard evidence of significantly increased government expenditure on advertising in the months leading up to the calling of the election (Young 2005), prompting the Committee to recommend that the 'blackout' on advertising being extended to apply from 1 July preceding the likely date of the election in the House of Representatives (JSCEM 2005, p. 424).

Occasionally, ministers have complained that shadow ministers had also misused the conventions relating to consultation between the Opposition and the public service in the pre-election period. Specifically, they have expressed concerns that requests for information from government departments and agencies have been used as a basis for political attacks rather than as part of their legitimate preparation for government.

In the case of the 2004 Queensland State election, controversy over caretaker conventions erupted after an announcement by then Premier Peter Beattie of a proposed new route for the Tugun Bypass motoway at the southern end of the Gold Coast. The announcement came just two days before polling day – some 24 days into the caretaker period. Long a controversial political issue, the proposed new route would require the compulsory resumption of 14 privately owned dwellings. Officers of the Department of Main Roads were advised of the announcement on 4 February 2004, the night before the Premier's announcement, and asked by their minister to inform affected residents and discuss with them the impacts on their properties. They did so immediately, hand delivering letters to each of the residents prior to the Premier's announcement at 10 am. After the election, which saw the Beattie government returned, the Queensland Crime and Misconduct Commission (CMC) received a complaint from the then Leader

of the Opposition, Lawrence Springborg MP, alleging the announcement of the Tugun Bypass involved a breach of ‘both the spirit and the letter’ of the caretaker conventions as set out in the Queensland Cabinet Handbook (CMC 2004, p. vii). He alleged a lack of impartiality on the part of officers of the Department of Main Roads, accusing them of ‘acting in a politically partisan manner to implement a major government decision during an election campaign’ (quoted in CMC 2004, p. 2).

The CMC accepted Mr Springborg’s complaint, launching an investigation, the report of which was published in July 2004. It found that the letter from the Department of Main Roads breached caretaker conventions because it lacked the impartiality required of public servants during an election campaign (CMC 2004, p. 26). Although it did not recommend disciplinary action against any of the officers involved, the CMC made 24 recommendations about how the observation of the caretaker conventions could be strengthened in the future, and about how public servants should conduct themselves during an election campaign.

Complaints that incumbent parties have breached caretaker conventions during election campaigns are legion. Arguably, a more adversarial political context has made these complaints more frequent and bitter, with the conflict aggravated through media coverage. Although such complaints rarely gain much popular traction, they pose significant difficulties for public servants who are expected to walk the line of impartiality in the heated and intensely partisan atmosphere of an election campaign.

The 2004 cases offer interesting insights into some of the challenges of applying and interpreting caretaker conventions, and raise questions about:

- the nature and status of caretaker conventions;
- when they apply;
- some of the forces affecting their nature and observance;
- the consequences that new modes of regulation and oversight might have for the interpretation and adjudication of the actions of key actors during the caretaker period; and
- the future of caretaker conventions given pressures on their adjudication and interpretation.

These questions are explored in this ANZSOG/IPAA research monograph.

A detailed exploration of recently promulgated caretaker conventions highlights the dilemmas associated with codifying and formalising practices that derive from shared understandings about what constitutes ‘appropriate’ political behaviour. It also exposes a fundamental transformation in their scope and intent. Historically, caretaker conventions were developed as simple guidances for ministers, reminding them of the need to moderate their conduct during the

election period because of the lack of an operating parliament to which they were accountable. Over time, responsibility for maintaining and updating the guidance documents has been taken over by the bureaucracy. As a result, the focus of guidance documents has shifted from an emphasis on ministerial constraint to one of supporting bureaucratic decision-making in uncertain times. This has added complexity to the guidances with the result that they have become documents that perform dual and potentially irreconcilable functions — in seeking to provide, on the one hand, guidelines about what constitutes appropriate political behaviour and, on the other, advice aimed at protecting the bureaucracy from controversy and claims of partisanship.

The crafting and updating of documents by public servants has added detail on issues primarily of concern to the bureaucracy. The traditional purpose of the guidance documents has become conflated with bureaucratic attempts to shield public servants from potentially inappropriate ministerial demands for responsiveness during an election campaign. One conservative commentator has observed that caretaker conventions are a good example of A.F. Davies' claim that Australians have a particular 'talent for bureaucracy'. Instead of ministers being required to act responsibly during an election campaign, the onus is now on how the bureaucracy deals with ministerial requests as well as their access to, and use of, government infrastructure.

This subtle shift of emphasis from the behaviour of ministers to public servants has created additional constraints on the activities of public administration during the caretaker period. For example, the original intent of the guidance *not* to undertake significant appointments in the caretaker period was directed towards governments and was aimed at deterring them from 'stacking' boards and statutory authorities with sympathetic appointees, particularly if they were in danger of losing office. Although guidance was aimed at major appointments, meaning appointments in which a minister has a role (usually statutory appointments), some jurisdictions now provide advice to administrators on limiting the appointment of senior bureaucrats, including down to mid-levels. Anxious to avoid criticism and controversy, public officials sometimes choose to constrain their administrative prerogatives, even in areas that are not subject to ministerial oversight or intervention under normal circumstances. The dual nature of the conventions has led to continuing confusion over where responsibility lies in preventing breaches and who should enforce the conventions. Is it the role of the public service to patrol the boundaries of acceptable ministerial behaviour or should responsibility for observing the conventions lie primarily with ministers?

Given the inherent dilemmas of the caretaker period, there has been an increasing tendency to codify and formalise guidance on the caretaker conventions. As the comparative overview of caretaker arrangements in Appendix A of this

monograph demonstrates, there is significant policy transfer and learning between jurisdictions, although there are local differences in the application of caretaker principles.

Of course, elections are a fraught time for public administrators in Westminster-style political systems. For the duration of the ‘caretaker period’—the period between the calling of an election and the return of the existing government or the commissioning of a new government—public servants must tread a careful line: they must be seen to be apolitical; although they may be required to brief the government’s political opponents, they must maintain the policy status quo and ensure administrative continuity until the election result is known. In this context, they must administer policy, provide advice and manage programs in a highly charged and adversarial political environment in which key actors—ministers, ministerial staff, shadow ministers, the Opposition, its staff and journalists—can be expected to have varying degrees of familiarity and appreciation of the application (and nuances) of the practices and procedures developed to regulate how a government should operate once an election is called.

Paradoxically, the application of the caretaker conventions becomes enormously significant, if only for a short period of time, each three or four years. For the vast majority of public sector employees this means they only have a sporadic and limited contact with the conventions and, at any election, many officers are working in a caretaker environment for the first time.

This monograph collects that knowledge about and explores some of the judgements that public sector employees might be required to make in order to give a comprehensive overview of the principles and practice of caretaker conventions in Australian and New Zealand jurisdictions. It examines what our caretaker conventions are, where they originated and how they have evolved and includes a glossary of key terms and concepts. Using cases and examples from recent elections, it explores some of the pressures on the interpretation and management of caretaker conventions. This ANZSOG/IPAA monograph collates and consolidates, for the first time, current guidance documents on the caretaker period and presents a comparative analysis of caretaker arrangements as they stand in Australian Commonwealth, State, Territory and local governments, and New Zealand. The monograph addresses issues of practical concern to politicians in both government and opposition, as well as to public servants, to assist them in managing during the caretaker period. It aims to demystify and critically assess many of the practices that have evolved.

Chapter 2. What are conventions?

Australia's political system is founded on the principle of 'responsible government'. Its basic tenets are that, subject to the Constitution, Parliament is supreme; the government is responsible to Parliament; ministers have to be in Parliament; regular elections will be held; and there is a professional bureaucracy that is independent but accountable to ministers. Australia, unlike the United Kingdom, has a written constitution and some of these principles are captured in that document.¹ The provisions of the Constitution comprise the formal rules of government. But formal rules are only part of the story about how a system of government operates. In areas about which the Constitution is silent, political behaviour is guided by 'well established practice, methods, habits, maxims and usages'—many of them long-standing— which were inherited from colonial parliaments, which in turn inherited them from Westminster. It is these practices, methods and usages which tend to be referred to as 'conventions of the Constitution' (Reid 1977, p. 244).

Conventions have become an integral part of Westminster-style democracies—filling in the detail and helping political practice to adhere to the principles of responsible government (Heard 1991, p. 1). For example, conventions cover:

- rules about the relationship between the Prime Minister or Premier and Cabinet,
- the role of Cabinet;
- relations between the Crown and the Parliament;
- relations between the two Houses of Parliament (Marshall 1984, p. 4);²
- how budgets are appropriated; and
- ceremonial etiquette and protocols (for example, both the Prime Minister and Leader of the Opposition are represented at major events, funerals, openings and military parades during the caretaker period).

New Zealand conventions also rest on a mixture of written and unwritten constitutional precepts. McLeay (1999, p. 12) reports that:

The conduct of a caretaker government, for example, is guided by: the *Constitution Act 1986* (which defines, among other things, the tenure of Ministers); the core convention that Parliament is sovereign and that governments must command the confidence of the House ...

There is a range of definitions on what constitutes a constitutional convention. Most definitions refer to the early work of British scholars A.V. Dicey and Sir Ivor Jennings who investigated the differences between the law of the Constitution and the conventions of the Constitution (Heard 1991, p. 4). Jennings

(1959, p. 159) famously identified three questions to be asked as the precondition to the existence of a convention. Firstly, what are the precedents? Secondly, did the actors in the precedents believe they were bound by a rule? And thirdly, is there a good reason for the rule?

For Jaconelli (2005, p. 151), conventions are ‘social rules that possess a constitutional — and not merely a political — significance’. He argues that emphasising their social nature captures two of their fundamental features: their normative quality in prescribing standards of behaviour, and the fact that they are not enforced in the courts. Their specific constitutional character ‘bears out, in addition, the role that they play, akin to that performed by written (and legally enforceable) constitutions in allocating power and controlling the manner of its exercise as between the organs of government and political parties’ (Jaconelli 2005, pp. 151-152).

The nature of conventions and their relationships to the law is highly contested. It is not our intention to rehearse the various debates here. A useful summary can be found in Marshall (2004, pp. 37-44).

Conventions arise in several ways: through practice acquiring a strong obligatory character over time; and/or through the explicit agreement of the relevant actors (Heard 1991 p. 10). Sampford (1987, p. 386) cites as an example of the latter, the former convention dating from 1952 on the filling of Australian Senate vacancies (with a member of the same political party). The question of whether this was, in fact, a convention, was hotly contested, although it had been established practice since 1952 (Hanks 1977, pp.183-190). Controversy over the ‘breaching’ of this convention by the NSW government in 1975,³ and by the Queensland government later the same year,⁴ was the catalyst for an amendment to Section 15 of the Constitution in 1977 to specify more clearly how casual Senate vacancies should be dealt with by State parliaments.⁵

Marshall (1984, p. 8) notes that conventions arise from ‘a series of precedents that are agreed to have given rise to a binding rule of behaviour’. Alternatively, a convention may derive from some ‘acknowledged principle of government which provides a reason or justification for it’ (Marshall 1984, p. 9). In practice, conventions may be confirmed after the event. He observes that many conventions are negative in form — connoting that political actors should constrain their behaviour or refrain from certain courses of action.

A key characteristic of conventions is their flexibility. Since they are not subject to judicial interpretation, they evolve in response to changing circumstances and political values. This lack of legal definition permits ‘the adaptation of constitutional rules to changes in the general political principles and values of the day, without the need for formal amendment to existing positive law’ (Cooray 1979, p. 5). Rhodes et al. (forthcoming, Chapter 3) note that Australian politicians have consistently rejected proposals to codify many constitutional conventions,

preferring to rely instead on the resilient and evolving traditions of responsible government.⁶

Morality, obligation and reciprocity

Conventions have been described by Marshall (1984) as the ‘critical morality’ of the Constitution. They impose a series of obligations that are morally and politically binding rather than legally imposed (Marshall 1984, p. 17). The courts can recognise the existence of conventions and refer to them in judicial interpretation of laws, but they are not enforceable through the legal system.⁷ They operate as a normative force for political actors to conduct themselves in specific ways (Jaconelli 2005, p. 151). Political actors recognise and abide by conventions because ‘they are believed to formulate valid rules of obligation’ (Marshall, cited in Jaconelli 2005, p. 150) and they are regarded by all sides of politics as useful and generally worth observing. They are observed because political actors find them helpful and functional. For example, it is generally accepted that responsible parliamentary government in Australia is underpinned by adherence to a number of key conventions, including:

- governments recognise a loyal opposition;
- ministers must answer for their departments or provide explanations if questioned;
- ministers must not mislead Parliament – or if they do inadvertently, then they must correct the record immediately; and
- ministers should attend Question Time unless urgent business prevents them from doing so.

For a convention to exist, actors must be aware of an obligation to behave in particular ways, and believe they are bound to adhere to its prescriptions. If this occurs then the continuation of the practice of adhering to the convention remains high. Agreement and acceptance are important considerations in this context, as are expectations of reciprocity and mutuality. As Jaconelli (2005, p. 171) notes:

... the party that is in power at the moment respects the constraints that are imposed on it by constitutional conventions in the expectation that the Opposition parties, when they attain office, will likewise respect the same constraints.

The observance of conventions forms a restraint on the abuse of power by the government or the Crown (Hood, Phillips and Jackson 1978, p. 108). For example, the application of caretaker conventions during an election campaign formalises the rights of the Opposition as a potential future government and voluntarily restrains the governing party from exploiting the advantages of incumbency. Adherence to conventions can be seen as a constitutional compact of ‘mutual

forbearance' where each party, as it gains government, is schooled in the discipline of observing the constraints imposed by conventions (Jaconelli 2005, p. 173).

A further safeguard to observance of constitutional conventions in the Australian context is the role of the Governor-General. Hasluck (1979, p. 12) argues that the Governor-General 'occupies a position where he can help ensure that those who conduct the affairs of the nation do so strictly in accordance with the Constitution and the laws of the Commonwealth and with due regard to the public interest'. According to Hasluck (1979, p. 18), because of his close and regular contact with Ministers through Executive Council, the Governor-General 'is both a watchdog over the Constitution and laws for the nation as a whole and a watchdog for the government considered as a whole (whatever government may be in power)'.

Moral sanctions against continued and deliberate breaches include the diminution of the system of government as a whole and the loss of 'respect for the established distribution of authority' (Marshall and Moodie 1971, p. 32). Breaches diminish the power of the convention and the loss of restraint on the abuse of power undermines the principle of reciprocity and mutuality which underpins the adherence to conventions.

It is generally accepted that the main sanction against the abuse of conventions is political. Dicey (1959, p. 444) argues that the power of public opinion ensures obedience. Ongoing media and public scrutiny of political behaviour ensures that breaches are well-publicised by journalists, commentators and the Opposition. It has been observed that where a 'breach' of a convention is likely to be politically costly, the convention is far more secure (Sampford 1987, p. 375). However, voter cynicism and disengagement from politics raises questions about whether political sanctions are a sufficient deterrent to a breach of conventions. Sometimes, concerns that conventions have been breached reveal a complainant's lack of familiarity with the nature and status of conventions rather than a deliberate substantive breach (as, for instance, did occur with the Bjelke-Petersen calculation).

The application of conventions relies on judgement, knowledge of precedents and a desire to see the continuation and upholding of the convention. It is this exercise of prudence that creates uncertainty for many politicians and bureaucrats, since interpretation is inevitably subjective, situational and context-dependent. However, the application of conventions remains critical to adhering to the Westminster principles of responsible government.

ENDNOTES

¹ Proposals to formally include some aspects of responsible government in the written Constitution were formally rejected during the constitutional debates before federation (Rhodes, Wanna and Weller forthcoming, Ch. 3).

² Standing Orders of in the Commonwealth Parliament are the rules and orders made by each House under section 50 of the Constitution concerning, inter alia, the order and conduct of business and proceedings. They also cover the 'mode in which its power, privileges and immunities may be exercised and upheld'.

³ A joint sitting of the NSW Parliament chose an independent, Cleaver Bunton, to replace outgoing Labor Senator, Lionel Murphy, who resigned when he was appointed to the High Court of Australia.

⁴ Queensland Premier Joh Bjelke-Petersen nominated the anti-Whitlam Pat Field for the vacancy created by the death of Labor Senator Bert Milliner. Both appointments undermined the ALP Government's tenuous hold on the Senate, setting the scene for its dismissal in November 1975. As it happened, Bunton voted with the Government in the crucial votes; Field did not vote at all as his selection was challenged and referred to a Court of Disputed Returns.

⁵ For guidance on the current practice for the filling of casual vacancies, see *Odgers' Australian Senate Practice, 11th Edition*. <http://www.aph.gov.au/senate/pubs/odgers/chap0421.htm>

⁶ For a discussion of efforts to formalise and codify key conventions of the Australian Constitution, see Sampford (1987).

⁷ See, for example, Marshall (2004 pp. 38-42); Heard (1991); Twomey and Wilkins (2007).

Chapter 3. Origins of caretaker conventions

The source of a convention is frequently difficult to trace because of the lack of an authoritative text and the lack of an established authority to issue or adjudicate conventions (Sampford 1987, p. 369). Most of the conventions guiding political life in Australia and New Zealand derive from the Westminster tradition and the logic of parliamentary government (Davis et al. 2001, p. 12).

Turning specifically to caretaker conventions, these guide the conduct of governments and the bureaucracy during election periods (until a new government is sworn in)¹ or in circumstances, for example, where a government has lost its parliamentary majority. These conventions ensure that somebody has a 'hold of the formal levers of power until a new government can be formed' (Laver and Shepsle 1994, pp. 291-292). Boston et al. (1998, p. 631) note that while periods of caretaker government occur in all parliamentary democracies, they tend to be both more frequent and protracted in countries with proportional representation because election outcomes are often less clear cut, and the need to form coalition or minority governments can cause significant delays.

Within Westminster systems, caretaker conventions sit within a subset of conventions about the accountability of the elected Government to Parliament (Marshall 1984, p. 18). Rhodes and Weller (2005, p. 2) note that the Westminster model comprises 'a set of beliefs and a shared inheritance that creates expectations and hands down rules that guide and justify behaviour.' The belief that the party in opposition is an alternative executive-in-waiting and, therefore, entitled to a smooth transition to office should voters award it an electoral majority, is fundamental. This belief is lent weight by the progressive institutionalisation of the Opposition's role through entitlements (and, in some cases, salaries) for shadow ministers and office-holders, the provision of staff, specific arrangements in the Standing Orders and so on. Caretaker conventions moderate the substantial advantages of incumbency by constraining the power of the political executive during the election campaign and until a new government is appointed. They provide guidance to ministers, the Opposition and public servants about how the business of government should be conducted during the caretaker period.

Broadly, caretaker conventions specify that during the caretaker period:

- governments should avoid making major policy decisions that are likely to commit an incoming government—the government and the public service should thus maintain the policy 'status quo' (Boston et al. 1998);
- governments should also avoid making significant appointments or signing major contracts; and

- governments should not include public servants in election activities.

Like other types of conventions discussed above, caretaker conventions have evolved to add detail to the administrative practices derived from the Constitution. In common with other aspects of the Westminster tradition, they adapt to reflect changing practices and political mores. They evolved through experience, from observation of practices elsewhere and on the basis of advice from constitutional experts and commentators, political leaders and the Cabinet Office (McLeay 1999, p. 12). This means the application of the conventions is both simple and complex at the same time. The application of conventions is in some ways simple, because they are based on two principles:

- with the dissolution of the House, there is no popular chamber to which the Executive government can be responsible; and
- every general election brings with it the possibility of a change of government (Department of the Prime Minister and Cabinet, *Annual Report 1986-1987*, p. 39).

Applying the conventions can also be complex because difficult judgements sometimes have to be made about whether an action will cause a breach of those underlying principles. Unlike laws, the interpretation of which can be tested in courts, conventions reflect the beliefs and practices of political actors — their interpretation is fluid, often contested and subject to a dynamic and constantly evolving political environment. New challenges or technical possibilities, such as the use of the departmental internet by the incumbent party, can arise during an election campaign. The administration of caretaker conventions depends on a body of corporate knowledge about past application combined with sound judgement to deal with new issues as they arise.

The highly charged atmosphere of general elections in Australia and New Zealand means that caretaker conventions have not been without their controversies. Debate generally has been around their application in specific circumstances rather than the fundamentals of the principles that define them. The evolution of caretaker conventions in these two countries has focused on increasing detail on 'guidance' on how to apply them. Challenges to their application during an election campaign have led to further additions to formal guides about their application to clarify and remove existing ambiguities. The intention is not to change the 'rules' but to reduce breaches by a more precise statement of the application (Sampford 1987, p. 373).

Breaches and sanctions in the caretaker period

Claimed breaches of caretaker conventions are a mainstay of election campaigns. In Australia, responsibility for the administration of the caretaker conventions rests with the Prime Minister, the Premier or the Chief Minister who are required

to 'self-police' the rules (Jaconelli 2005, p. 176). Self-policing is not always the preferred option for an Opposition that may suspect a breach of the conventions by those in power. In the heat of an election campaign, an Opposition is understandably reluctant to have the leader of the party they are challenging arbitrating on complaints about their own behaviour. A disgruntled complainant has but two sanctions to call on—moral sanctions or political sanctions.

Alleged breaches of caretaker conventions during an election campaign revolve around the perception that the government has benefited from using the resources of office to give them an unfair advantage over the Opposition (see, for example, McMullan 2007, pp. 27-31). The weight of public condemnation may be sufficient to embarrass and politically damage the government for the perceived breach, especially if the issue is taken up vigorously by the media. The intention is to harm the political capital of the government by showing their moral deficiency and their inability to be trusted with handling the delicate niceties of the system of government.

It would be true to say that almost every election sees a public skirmish about an alleged breach of the caretaker conventions. It is now part of the political grist of election tactics. It is always difficult to resolve these allegations as decisions are made on the basis of fine judgements about the applicability of the conventions in a particular circumstance. The lack of an authoritative mediation process means that it can never be ascertained whether a violation has, in fact, occurred (Jaconelli 2005, p. 163).

An area which has received little attention is the accusation of a breach against a public servant. Ironically, the sanctions for a breach by the bureaucracy are more real and enforceable than the moral or political sanctions applying to politicians. For example, at the commencement of this monograph, we noted that the Queensland Crime and Misconduct Commission (CMC) was asked to investigate a complaint from the Leader of the Opposition that departmental officers had acted in a politically partisan way (CMC 2004, p. 2).² Although it was clear that the CMC had no jurisdictional power over the Premier (CMC 2004, p. 3), it was considered that a deliberate breach of the caretaker conventions could amount to misconduct and be grounds for possible disciplinary action under the *Public Service Act* (CMC 2004, p. 5). A detailed analysis of this case is undertaken in Chapter 7.

So, periodically, caretaker conventions are one of the more scrutinised of constitutional conventions because alleged breaches occur in the heated atmosphere of an election campaign with the attendant media attention upon the unfolding political process. This has led to increased documentation, the development of guidance documents for governments and—in particular—the public service to explain and assist with decision-making during this time. The next section of this monograph identifies and explores the elements which make

up the caretaker conventions of the Commonwealth and New Zealand governments, the Australian States and Territories.

Caretaker conventions — guidelines and application

Australia

Although there is evidence of earlier informal acceptance of the need for caution during the caretaker period (Wilson 1995), the first public record of caretaker conventions in Australia is in the form of a letter from the Prime Minister, Robert Menzies, to his ministers at the outset of the 1951 double dissolution elections, stating:

I should also be glad if you would note that whilst continuing to take whatever action you deem necessary in connection with the ordinary administration of your Department, you should not make decisions on matters of policy or those of a contentious nature without first referring the matter to myself (quoted in DPM&C 1987, p. 40).

By 1961, the established practice was that the Prime Minister would write to all ministers advising them explicitly of the need to avoid ‘major policy decisions or important appointments’ in the relevant period. The ball was firmly in the ministers' court, it being their responsibility to behave accordingly.

The need for more detailed guidance, particularly on consultations with the Opposition, became relevant when, after two decades of Coalition government, the 1969 election raised the prospect of a change of government. In the event, three more years would elapse before it became a reality. The 1972 election saw the public service confront a transition for the first time in 23 years.

Former Governor-General, Sir Paul Hasluck, added to the sparse material on caretaker conventions by identifying what he thought was the key intent of the convention in his Queale Memorial Lecture in 1972:

... no new decisions on matters of major policy should be taken and no appointments to high office should be made. The common-sense of this convention is to avoid a situation in which an expiring government may do something, which a month or so later, an incoming government may immediately try to cancel. The philosophy of it is that if a question on major policy is being put to the electorate at an election, a government should not make final decisions on that question before the electorate has given its answer (Hasluck 1979, p. 18).

In 1983 and 1985 the Constitutional Conventions—meetings of Commonwealth, State and local government politicians—sought to codify and declare the conventions that guide the Australian political system.³ Resolution 32, adopted

at the 1983 meeting, is based on the Hasluck pronouncement (Lindell 1988, p. 322), and is the only resolution on the caretaker convention. It stated:

No important new initiative is taken, and no appointment to high office is made, by a government in the period immediately prior to a general election for the House of Representatives unless it can be publicly justified as necessary in the national interest. (*Proceedings of the Australian Constitutional Convention*, 1983).

Marshall (2004, p. 42) notes, however, that unlike the courts, the Australian Convention:

... had no particular hold on the public imagination or claim to deference and it is unclear what the effect or significance of promulgating a declaration of this kind can be. Unless or until the committee's conclusions are embodied in legislation (when they would cease to be conventions), there seems no very good reason for anyone to defer to the views of such a body.

The Governor-General *can* require additional restrictions during an election campaign, but these are rare: with the only example in the Australian context related to the double dissolution elections in 1975 when the 'caretaker Prime Minister', Malcolm Fraser, appointed after the Whitlam government was sacked, gave specific undertakings to then Governor-General Sir John Kerr that no appointments or dismissals would be made and no policies would be initiated (DPM&C 1987 p. 40). More usually, the Governor-General's role in caretaker arrangements might be exercised through Executive Council. Hasluck (1979, p. 18) gives a flavour of this potential in the following observation:

Of course the business of the country cannot be wholly suspended and there may be emergencies in which action should be taken at once, but, if a single Minister overlooks the convention, it is customary to defer his recommendation and draw the attention of the Prime Minister to the fact so that it becomes a matter for the Prime Minister or his Cabinet to decide whether the urgency is so great that action must be taken at once.

Documentation and guidance

The conventions were gradually refined over the years (Codd 1996, p. 23). The first detailed text of their intent and application was published in 1987 as a special article in the Department of Prime Minister and Cabinet's *Annual Report 1986-87*. Noting the relative lack of written material on the conventions, it reflected 'the Department's experience in relation to the conventions and associated practices, arising from its advisory and coordinating role' (DPM&C 1987, p. 39). Arguably, it indicates that the imperative for clarifying caretaker arrangements had shifted from the realm of the *political* (guidance to Ministers

about what they could and should do) to the *administrative*. It also meant that political conventions have become 'legalistic', with lawyers increasingly brought in to administer or comment on them.

It has been noted that conventions evolve with political practice and reflect prevailing mores. In addition, we can state that formal guidance on their application has equally increased significantly in Australian jurisdictions since the 1980s. A major review and consolidation of the existing caretaker arrangements was undertaken by the Department of the Prime Minister and Cabinet (DPM&C) after the 1987 election. A significant addition was a set of *Guidelines for Pre-Election Consultation with Officials by the Opposition*. The issue of what kind of contact should be allowed between public servants and the alternative government had been bubbling since the 1970s. Whitlam had unsuccessfully sought permission from then Prime Minister, William McMahon, to meet with public servants prior to the 1972 election to discuss the administrative implications of Labor's policies (Hawker and Weller 1974, p. 100).

Thereafter, a summary of the guidance on caretaker conventions, with an emphasis on Cabinet matters, was incorporated as part of the 'Cabinet Handbook'. At less than two pages it is far less detailed than the DPM&C guidance document (which now runs to 10 pages). It is reviewed and updated after each election on the advice of the Government Division of DPM&C, which provides assistance to agencies in interpreting the conventions during the caretaker period.

Increasingly, guidance documents are being presented as helping 'to avoid controversies about the role of the public service' during the caretaker period (DPM&C 2004). Passage of the *Public Service Act 1999* (Cwlth), sections 10 and 13 of which set out the 'Australian Public Service (APS) Values and Code of Conduct', has formalised public servants' obligations in this respect, incorporating in legislation explicit obligations regarding the behaviour of public servants. As part of its statutory responsibility to promote and uphold the Code, the Australian Public Service Commission (APSC) has developed educational resources to assist public servants, including the recent Good Practice Guide: *Supporting Ministers: Upholding the Values*. A short section of this guide deals briefly with issues that may arise during the caretaker period (APSC 2006, pp. 48-50).

State and Territory jurisdictions have tended to follow the Commonwealth example, adopting the underlying principles and acknowledging its lead in formalising, publishing and updating caretaker conventions. But different electoral timetables, local specificities and individual experience has meant the codified conventions are not consistent across all jurisdictions. The comparative analysis of different jurisdictional arrangements in Chapter 4 shows the nature and extent of some of these local variations.

In Queensland and South Australia the caretaker conventions are spelt out in a Cabinet Handbook. In Tasmania and Victoria, they are issued as guidance documents by the respective departments of Premier and Cabinet. In New South Wales and Western Australia, they are contained in a government memorandum to ministers issued by the Premier following announcement of the general election. In the Australian Capital Territory (ACT) and the Northern Territory, guidance documents are issued by the Chief Minister's departments.

Local government

Local governments in Australia are established under State legislation and have no constitutional recognition or status. State governments have broad powers in respect of local councils, including over their governance and the distribution of financial grants from the Commonwealth (Kane 2006). The legislative and operating framework for local councils takes the form of a *Local Government Act*, and Regulations established under that Act.

Until recently, local government was distinct from other tiers of Australian government in that no formal guidance was provided about the conduct of incumbents during election periods. The Victorian government first introduced 'caretaker arrangements' to cover the conduct of council elections, through amendments to the *Local Government Act 1989* (Vic) contained in the *Local Government (Democratic Reform) Act 2003* (Vic). This legislation introduced a range of electoral reforms, including caretaker provisions. These came into use for the first time in elections for 25 Victorian local councils held in November 2004.

Victoria's caretaker arrangements require councils to observe 'special arrangements' during the period leading up to a general council election. The intent of these arrangements is to avoid the use of public resources in a way that may unduly affect the election result and minimise councils making certain types of decisions that may limit the decision-making ability of the incoming council.

Caretaker arrangements for Victorian local governments apply during the 'election period' only, which is defined in the *Local Government Act 1989* (Vic) as 'the period from entitlement day, when the voters' rolls close, until the election day ... [t]his is a 57 day period in Victorian local government elections'. Section 76(C)3 of the Act requires councils to develop and approve a Code of Conduct for the council, including a statement about caretaker procedures, while Section 76(C)4 outlines specific requirements for such procedures, with reference to Sections 93(A) and 55(D) of the *Act*.

The Queensland Government has recently followed Victoria's lead in establishing caretaker arrangements for local councils as part of a suite of reforms aimed at ensuring (*inter alia*) 'accountable and transparent local government elections' (QDLGPSR 2005). These reforms were precipitated by a CMC investigation into

the conduct of the Gold Coast City Council election in March 2004, and alleged improprieties on the part of several councillors (CMC 2006).⁴ Previously, neither the *Local Government Act 1993* (Qld) nor the *City of Brisbane Act 1924* (Qld) placed limits on the conduct of councillors during election periods.

During its inquiry, the CMC issued a discussion paper on the local government electoral process, questioning whether existing Queensland legislation was sufficient to maintain the integrity of the local government electoral process (CMC 2005). This followed the release by the Department of Local Government, Planning, Sport and Recreation (QDLGPSR) of its own discussion paper, *Queensland Council Elections*, in December 2005. *The Local Government and Other Legislation Amendment Act 2007* was passed by the Queensland Parliament in April 2007. The new caretaker provisions will be applied for the first time during Queensland local council elections, due in March 2008.

Significantly, caretaker arrangements for local government are legislated in Queensland and Victoria—they have become matters of law, adjudicated by the ministers for local government, rather than matters purely of judgement, as characterises the situation in other levels of Australian government and internationally. The implications of these developments are yet to be tested, and may indeed not yet be fully appreciated, but they represent a significant departure from practice in other Westminster-style political systems.

New Zealand

The development of New Zealand's caretaker conventions has followed a similar trajectory to that of Australia. It is broadly agreed that its arrangements have been shaped by three important experiences:

- the 1984 constitutional crisis;
- the 'hung parliament' following the 1993 general election; and
- the adoption in 1996 of the mixed member proportional (MMP) electoral system.

The 1984 constitutional crisis

The July 1984 general election delivered a landslide victory to Labour, but it was expected to be around 10 days before the return of the writs. Controversy arose, however, when outgoing National Party Prime Minister, Sir Robert Muldoon, refused to act on advice from the New Zealand Reserve Bank that the dollar should be devalued because of a run on the nation's foreign currency reserves.⁵ The situation was exacerbated by the market's expectation that Labour would devalue the currency by between 15 and 20 per cent. After the election, as a currency crisis loomed, the defeated Muldoon refused to meet with officials over the weekend despite their concerns that opening of the foreign exchange markets would trigger a financial crisis. The incoming Prime Minister, David

Lange, supported devaluation and suggested that 'Muldoon should either implement the incoming Government's instructions or resign and let another member of the National Cabinet take over as caretaker Prime Minister for a week until Labour took office' (Gustafson 2000, p. 392). After much wrangling, Muldoon relented under pressure from his Cabinet colleagues,⁶ but the situation raised questions about the authority and responsibilities of a defeated government during the period leading up to its formal replacement by an incoming administration.

The experience was a catalyst for more explicit guidance about the actions of outgoing governments during the caretaker period. Recommendations of a 1986 Officials Committee on Constitutional Reform were accepted by both parties. Boston et al. (1998, p. 636) note that 'the wording adopted by the Officials Committee corresponded closely to that employed at the time of the 1984 crisis by the outgoing Attorney-General, Jim McLay, in a press statement'. Although formalised by its subsequent incorporation into the *Cabinet Office Manual*, the convention had been operative in that it was accepted by both the Labour and National parties from the time of McLay's statement.

The initially hung parliament that followed the 1993 general election

In contrast to the situation in 1984, the outcome of the 1993 election was initially unclear. To address uncertainty over the conduct of business in the period until the new government could be determined, the Cabinet Office issued a circular outlining criteria for Cabinet and ministerial decision-making. It suggested that caretaker governments should refrain from significant decisions and outlined interim procedures to be followed in the event that urgent decisions were required—specifically, that these should be taken only after consultation with Opposition party leaders. As matters transpired, within a fortnight the National Party had achieved a clear (if slim) majority, leaving the proposed arrangements untested, notwithstanding their having bipartisan support. The criteria were subsequently incorporated into the *Cabinet Office Manual* in 1996 (Boston et al. 1998, p. 637).

The adoption of a mixed member proportional (MMP) electoral system from 1996

The adoption of a mixed member proportional (MMP) electoral system has had a profound impact on New Zealand's caretaker arrangements. Boston et al. (1998, p. 637) note this development 'supplied the necessary political incentive for a more careful formulation of the conventions governing caretaker administrations'. The period between 1993 and 1996 was a time of transition during which the constitutional implications of greater political uncertainty and longer caretaker periods were widely canvassed. The 1996 election, the first held under the new

system, produced no clear result. The government remained in caretaker mode throughout the nine weeks it took to broker a coalition. Boston et al. (1998, pp. 68-73) describe the challenges created for the ongoing business of government in New Zealand by the unexpectedly lengthy caretaker period.

As a consequence of these experiences, the New Zealand guidance, detailed in the *Cabinet Office Manual*, identifies two additional sets of circumstances (aside from election campaigns) in which governments are bound by caretaker conventions:

- **after a general election:** the convention applies until a new administration is sworn in or it becomes clear that the incumbent government continues to have the support of the House necessary to govern; and
- **if the Government has clearly lost the confidence of the House:** the convention guides the government's actions until either it is confirmed in office or a new administration takes its place.

The guidance explains that there are 'two arms' of the convention, each of which has its own constitutional principles. These are, first, when it is clear who will form government, but they have not yet taken office and, second, where it is not clear who will form the next government.

The complexities and uncertainties of New Zealand's electoral processes have necessitated development of highly prescribed caretaker arrangements and practices. The *Cabinet Office Manual* has been periodically updated to incorporate the new understandings that have evolved through practice. Constitutional expert Elizabeth McLeay (1999, p. 12) notes:

The treatment of caretaker government in successive editions nicely demonstrates how conventions evolve: through practical experience (good and bad); from observation of practices elsewhere; and through constitutional advice from the Crown Law Office, constitutional commentators, Prime Ministers and, of course, the Cabinet Office itself. Thus, many factors have influenced, and are continuing to influence, the formulation of rules on how caretaker governments should behave.

ENDNOTES

¹ This is usually a matter of a few days in two-party majoritarian systems like Australia, but can take weeks or months if no party enjoys a clear majority. In New Zealand under MMP the process of forming minority governments can take longer than the election period.

² It should be noted that the obligation on public servants to observe and demonstrate impartiality is not specific to the caretaker period and is relevant at any time. However, in the caretaker period when political sensitivities are heightened, the risk of *perceived* partiality may be greater. Public servants might reasonably be expected to promote government policy in normal times. In a caretaker period, however, this might be seen as promoting the Government rather than the policy.

³ This process was not uncontroversial with debate about the necessity, membership, authority and the impact on the nature of conventions on the 'recognise and declare' model. See Sampford (1987) for a detailed examination of this process of codification.

⁴ The allegations of misconduct by a councillor are detailed in the CMC report: *Independence, Influence and Integrity in Local Government: A CMC Inquiry into the 2004 Gold Coast Election* (CMC 2006).

⁵ In his biography of Muldoon, Barry Gustafson (2000, pp. 384-396) explains Muldoon's rationale for rejecting this advice. He had been in dispute with the Secretary to the Treasury and the Reserve Bank Governor over the matter for several months. Muldoon suspected they were using the opportunity provided by the pre-election run on the NZ currency to re-prosecute advice he had previously rejected.

⁶ Who were prepared to advise the Governor-General that Muldoon no longer enjoyed their confidence and should hand over to his Deputy.

Chapter 4. When do the conventions apply?

The caretaker period begins at the time the lower house (House of Representatives or Legislative Assembly) is dissolved and continues until the election result is clear or, if there is a change of government, until the new government takes office. For the Commonwealth, Queensland, South Australian, Western Australian and Northern Territory governments the caretaker period commences with the issuing of the writs for a general election. This may be some days after a political leader indicates that an election will be called on a given date. The Queensland guidance notes that care should be exercised during the period between the announcement of the election and the dissolution of the Legislative Assembly, this being a particularly sensitive time requiring judgement and common sense.

The New South Wales guidance—mindful of the fixed parliamentary terms in that State—specifies that caretaker conventions commence when the term of the Legislative Assembly expires. In Victoria and Tasmania, the period commences at the time the Legislative Assembly expires or is dissolved. In the ACT—also with fixed four year terms—the conventions apply from the beginning of the election period, which is 37 days before the polling day (ACT 2004, pp. 3-4).

Commencement of the conventions: Australian Commonwealth

Under the Australian Constitution, the House of Representatives continues for three years from the first meeting of the House and no longer, but may be dissolved earlier by the Governor-General (s. 28). The term of the current Parliament ends when the three-year term of the House of Representatives expires or is dissolved by the Governor-General on the advice of the Government. There are two constitutional mechanisms by which this can occur:

- the dissolution of the House of Representatives (s. 5); or
- the simultaneous dissolution of both Houses – a double dissolution (s. 57);

A general election follows either the dissolution of the House or the expiration of its three year term. The 'Governor-General in Council' (that is, acting on the advice of the Federal Executive Council) then issues a writ directing the Electoral Commissioner to conduct an election in accordance with prescribed procedures. The writ specifies the date on which the election will be held and the date for the return of the writ. It is deemed to have been issued at 6 pm on the date of issue.

Exhibit 1 – Key dates in commencement of caretaker conventions: Australian Commonwealth¹

| Stage | Timeframe | Relevant Actor | Authority | Process |
|--|---|---|--|--|
| Prorogation of the Parliament/Dissolution of the House of Representatives. | | Governor-General on advice of Executive Council | Constitution ss. 5, 28. | Proclamation of prorogation and dissolution read by Official Secretary. Direction to Electoral Commissioner to conduct an election. These actions relate to the House of Representatives and periodical or general election of Senators. |
| Issue of writs (deemed to be 6pm). | Within 10 days of dissolution. | Governor-General. | Constitution ss. 32; Cwith Electoral Act ss. 151, 152. | Caretaker conventions officially commence. |
| Close of electoral rolls. | From 2007, 3 working days from date writ is issued. For new enrolments and re-enrolments from 8pm on date of writ. (Formerly 7 days after issue of writ.) | Electoral Commissioner | Commonwealth Electoral Act ss. 102(4), 155. | |
| Nominations close (at 12 noon). | Not less than 10 days nor more than 27 days after date of writ. | | Commonwealth Electoral Act, ss. 156, 175. | |
| Date of polling (a Saturday). | Not less than 23 days nor more than 31 days from date of nomination. | | Commonwealth Electoral Act ss. 157, 158. | |
| | If election result is clear, caretaker conventions end. If not, continue until new government is sworn in. | | | |
| Return of writs. | Not more than 100 days after issue. | | Commonwealth Electoral Act s. 159. | Electoral Commissioner certifies name of successful candidate in each division, returns writ to Governor-General. Forwarded by Official Secretary to Clerk of the House of Representatives. |

Importantly, ministers sitting in the Senate, as members of the Government, are bound by caretaker conventions for the period of the election until the outcome is known. This applies whether or not any Senate elections (periodical, general or territorial) are being held simultaneously with a general election for the House of Representatives.

The process that follows is outlined in Exhibit 1.

Until 1925, the Australian Parliament was prorogued before the dissolution of the House of Representatives; this practice was discontinued between 1928 and 1993, but later reinstated on advice from legal experts (*Odgers' Australian Senate Practice* 2004, Ch. 19). Accordingly, in 1993 and 1996, Governors-General first prorogued Parliament by proclamation, issuing another proclamation the same day to dissolve the Parliament. Since 1998, prorogation and dissolution have been combined in one proclamation.

An Executive Council meeting is usually held between the calling of the election and the issuing of the writs. This is a 'tidy-up' meeting that deals with last minute issues—such as the making of regulations under recently enacted legislation. This is seen as a legitimate house-keeping activity, but can be used cynically by governments—for example, as an opportunity to make last-minute appointments. Until 1996, the Executive Council meeting was preceded by a Cabinet meeting, but to date, the Howard government has avoided this practice.

As noted, the timetable between the announcement of an election and the issuing of writs (i.e. the period when caretaker conventions formally commence) can vary. Since 1940, the average gap has been 19 days (Hughes and Costar 2006, p. 47). It has been argued this reflected a 'convention' that some time should elapse between the announcement of the election and the issuing of the writs since the latter coincides with closure of the electoral rolls (Sawer 2006). Malcolm Fraser controversially altered this practice in 1983, when the writs were issued and the electoral rolls closed at 6 pm the same day (4 February) as his surprise announcement of a double dissolution election for 5 March. Fraser was accused of excluding many thousands of citizens from exercising their right to vote and an action was mounted in the High Court, albeit unsuccessfully. The Joint Select Committee on Electoral Reform (JSCER), established by the Hawke Labor Government in 1983, considered the issue as part of a wide-ranging review of Australia's electoral system. It recommended a proclamation by the Governor-General to announce the election date a minimum of seven days before writs are issued. Subsequent amendments to the *Commonwealth Electoral Act 1918* in 1983 inserted a stipulation that writs must be issued within 10 days of the dissolution (s.151(2)). The JSCER recommendation was incorporated as a separate provision (s.155). This provision remained unchanged until passage of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* (Cwlth) in 2006.² Section 151(2) was unchanged by recent amendments.

Since the late 1980s, the time that has elapsed between announcement of an election and issue of the writs has declined markedly. For elections held between 1990 and 2004, the average time elapsed was around three days. However, the perception that a 'gap' exists between calling of the election and commencement of caretaker conventions remains strong.³ The bitterly fought 2001 election, held in the wake of the September 11 terrorist attacks, may have done much to fuel concerns about government actions in this period (see, for example, Marr and Wilkinson 2003).

Prime Minister John Howard visited the Governor-General on Friday 5 October 2001 asking him to dissolve the House of Representatives for the November 10 election, but writs were not issued until midday on Monday 8 October. During this intervening period, the United States launched air-strikes on Afghanistan in retaliation for the terrorist attacks on New York and Washington.⁴

At issue was whether the Prime Minister was obliged to consult then Leader of the Opposition, Kim Beazley, about a decision to commit 1,000 Australian troops to the so-called 'War on Terror'. John Howard argued that he would 'observe the conventions', but that while he would inform Mr Beazley about developments, he would not make joint decisions. The Prime Minister noted:

I'm quite ready to talk to Mr Beazley ... but of course the decision-making still rests with me because I am still Prime Minister. You continue, of course, to govern and you certainly continue to take decisions within any existing established policy (quoted in Gosch 2001).

The Government was also criticised for entering into an arrangement to process asylum-seekers offshore in Papua New Guinea and Nauru (a policy that became known as the 'Pacific Solution'), just half an hour before caretaker conventions were due to commence at midday (Marr and Wilkinson 2003, pp. 178-79). This became the subject of contention during subsequent Senate estimates hearings, with government officials maintaining caretaker conventions had not been breached as (they argued) the agreements reached related to existing aid policy, and in any event were concluded before the conventions formally commenced (*F&PA Committee Hansard*, 28 May 2002, pp. 192-197). Asked her advice on this matter, the senior DPM&C expert on caretaker conventions noted that the situation was urgent (the fate of the asylum seekers could not await the election outcome), but that in the circumstances the Opposition should be advised of the decision and of the fact that any such decisions would bind any incoming government.

In 2004, controversy arose when a Senate Select Committee conducted a one-day hearing during the caretaker period. The Committee had been established on 30 August 2004 to examine matters arising from public statements by a former ministerial staffer, Mike Scafton, about conversations with the Prime Minister

during the so-called ‘Children Overboard’ affair (which, perhaps ironically, had occurred during the 2001 election campaign). The Prime Minister had announced the election date on Sunday 29 August, but the House was not dissolved, nor the writs issued, until Tuesday 31 August. The Committee held a public hearing one day later, on 1 September. Questions were raised about the appropriateness of this action given the politically contentious nature of the issues under consideration, and whether the prorogation of the Parliament meant the Senate should not be meeting. The issue of whether the Senate has a right to meet or exercise its powers after a dissolution is highly contested, but practice has been that the Senate has not met between prorogation and before opening of the new Parliament, but it has frequently authorised its committees to continue to do so.⁵

New Zealand

In New Zealand, with its unicameral parliament, the conventions apply from the dissolution of the House of Representatives. In the period immediately before a general election, although not bound by caretaker conventions, successive governments have chosen to restrict their actions to some extent at this time in recognition of the fact that an election and, therefore, a potential change of government, is imminent. In practice, restraints have tended to be applied from approximately three months before the general election is due or (if the period between the announcement of the election and polling day is less than three months) from the announcement of the election (NZDPM&C 2001, p. 53). The conclusion of the caretaker period can be difficult to predict in New Zealand. The MMP voting system means that there is a possibility of a lengthy period before the formation of a new government—as happened in 1996, for example, when the caretaker period lasted for nine weeks. The New Zealand caretaker conventions have a lengthy section on guidance for when it is not clear who will form the next government to assist with decision-making during that interregnum.

Local government

Local government caretaker periods are specified in legislation. In each State this period varies according to the State legislation. For instance, in Victoria, the period is 57 days — ‘the period from entitlement day, when voters’ rolls close until the election day’.

In Queensland the election period is defined in the *Local Government Act 1993* (Qld) (s. 301(1)) as ‘the period starting on the day when public notice of the holding of the election is given and ending on the close of the poll in the election’. For the Brisbane City Council this period is as defined in s. 3 of the *Electoral Act 1992* (Qld) as the period beginning on the day after an election writ is issued and ending at 6 pm on the polling day for the election.

Caretaker conventions after an election

The caretaker period concludes when the election result is known with either the confirmation of the continuation of the incumbent government or the commissioning of a new government. Although this has mostly proved straightforward enough, the operation of caretaker conventions in the period after elections emerged as an issue in the late 1990s following close-run election results in NSW, Queensland and Victoria.

The 1995 election in Queensland brought an unexpectedly close result. The Labor Government under Wayne Goss was eventually returned with a one-seat majority in the Legislative Assembly about 17 days after polling day. The Opposition then challenged the result in one seat, Mundingburra, in the Court of Disputed Returns. The judge ordered that a by-election be held in the seat on 3 February 1996. The by-election was won by the Liberal Party candidate and with the support of independent Liz Cunningham, the Coalition under Rob Borbidge secured the confidence of the Legislative Assembly and, hence, the ability to form government. Although the Government had not been in caretaker mode because the House was not dissolved for a by-election, once the result was clear, and Cunningham had indicated her intention to support the Coalition, Opposition Leader, Rob Borbidge, called on Premier Goss to 'observe the appropriate convention', and noted 'the Goss Government should consider itself in a caretaker role only' (Reuters 1996).

In Victoria in 1999, the election result was unclear for almost a month after the polls closed. It took several weeks and a by-election following the death of a candidate on polling day for a minority government to be formed. The ALP under Steve Bracks secured the support of three independents to oust incumbent premier, Jeff Kennett.

The situation posed a challenge for the Victorian Public Service, requiring it to understand and administer post-election caretaker arrangements until the new government could be sworn in (Davis et al. 2001, p. 18). As both parties courted the independents, political manoeuvring complicated the task, prompting the Department of the Premier and Cabinet to establish a reference group, supported by a secretariat, to support decision-making essential to keep the business of government running. Particularly problematic was the role of political advisers—both of incumbent and shadow ministers—who sought to act on behalf of their principals, creating difficulties for public service impartiality and neutrality. Several controversies arose during the extended caretaker period, including over the appointment of a new Auditor-General, and whether it was appropriate for a minister to sign a contract for health services that was in the final stages of negotiation, and would incur financial penalties if not resolved.

The Victorian experience suggested a need for clear guidance on caretaker arrangements in the post-election period. Davis et al. (2001, pp. 25-26) propose

some principles for the conduct of public administration in such circumstances, but these have gone largely untested. Since the ambiguous results of the late 1990s, State and Federal elections have tended to deliver clear parliamentary majorities, mostly favouring incumbents. Former Secretary of the Department of the Prime Minister and Cabinet, Michael Keating (2002, p. 20), urges public servants to avoid such situations, since unlike ministers and shadow ministers, political staff operate outside authority and accountability structures.

Four year fixed terms

In Australia, introduction of fixed four year terms for most States, Territories and local councils has resulted in an orderly approach to the organisation of government business in the run-up to an election. For example, major contracts can be finalised and key appointments made without danger of falling through because of the unexpected calling of an election. Parliamentary business can be completed and legislation presented for assent without the threat of bills lapsing as the Parliament is dissolved. At present, only the Queensland and Commonwealth parliaments still adhere to three year non-fixed terms. It can be said that both jurisdictions suffer from the heightened uncertainty that this brings and both have experienced controversies about the application of the caretaker conventions in recent years.

Introduction of four year fixed terms in most jurisdictions in Australia and New Zealand has taken the heat out many of the controversies which had attended their sudden application as an election was called. Bureaucracies are better prepared to enter the uncertainty of an election period and can be confident the mechanisms are in place to carry them through to the establishment of the next government. This development has led to a more mature approach to managing the continuity of government business during an election period.

Conclusion

The issue of *when* caretaker conventions apply has been something of a concern in recent Commonwealth elections. Closer examination of arrangements governing commencement of the conventions suggests that the time period elapsed between the announcement of the election and the issuing of the writs to dissolve the House of Representatives has actually decreased in recent years. Our more adversarial politics and the emergence of the 'permanent campaign' mode of contemporary politics may account for persistent uncertainty over what governments might do and when. Four year fixed terms have addressed some of the 'gamesmanship' in which governments might engage immediately prior to the calling of an election. For jurisdictions like New Zealand, where election results can take some time to resolve, the issue of caretaker conventions in the post-election period has been more of an issue. Guidance documents have evolved to address the specific concerns of individual jurisdictions.

ENDNOTES

¹ Adapted from *House of Representatives Practice*, Chapter 3.

² Among other things, the *Act* amended s 155, reducing the seven day period for closure of the electoral rolls to a period of three working days. For people who have not voted before, electoral rolls will close at 8 pm the day the writs are issued. This has been a controversial change, aimed ostensibly at limiting the potential for fraudulent enrolments, but which may have the practical effect of excluding many young, first-time voters. For detailed analysis see Hughes and Costar (2006).

³ See, for example, Peter Charlton 2001, 'Caretaker's Conundrum' *The Courier Mail*, 9 October, 2001.

⁴ Prime Minister Howard was advised of the US air-strikes in a telephone call from Vice-President, Dick Cheney, early in the morning of 8 October, 2001.

⁵ Extensive discussion of this issue and references to expert opinions can be found in *Odgers' Australian Senate Practice* (2004, Chapter 7).

Chapter 5. Caretaker conventions: an overview of Australian jurisdictions

Each Australian jurisdiction has developed its own guidance to support ministerial and departmental decision-making during the caretaker period. Guidance on the observance of caretaker conventions tends to be couched as general principles rather than strict, highly specific rules (Boston et al. 1998 p. 646), although, when a well publicised breach has occurred, the tendency has been to increase the detail in prescribing behaviour. Malone (2007, p. 5) notes ‘the proper operation [of caretaker conventions] is dependent on the public servants who will make judgements on precisely what they mean and how they apply’. That is true, but they also depend to a significant extent on the attitude of the first minister and their receptiveness to advice.

In broad terms, caretaker conventions aim to ensure incoming governments are not bound by last minute decisions or actions of their predecessors, that the neutrality of the public service is preserved, and that the substantial—and arguably increasing—advantages of incumbency are moderated. However, the Government remains the government and the ordinary business of public administration continues.

Within this accepted set of principles, each Australian jurisdiction has developed guidance on the practice of the conventions locally. These guidance documents all acknowledge the overarching principles and contain details about local application.

In this chapter we draw on these guidance documents to present a detailed overview of caretaker arrangements. We look at the practices that have developed around specific issues and government activities. We use cases and examples to illustrate the complex and contested nature of caretaker conventions and highlight areas of similarity and difference of practice.

Avoiding major policy decisions

All jurisdictions cite the taking of major policy decisions as a key area which falls under caretaker conventions. The adherence to three caretaker principles is involved in any decision concerning a major policy matter. They are: (1) not taking a decision for which the Government (or minister) cannot formally be called to account in Parliament; (2) not binding an incoming government to a course of action; and (3) avoiding a decision which is a matter of contention between the Government and the Opposition.

Nevertheless, the emphasis on what *constitutes* a policy decision is not consistent across all jurisdictions. A number of jurisdictions focus on the *taking of a policy*

decision and others focus on the *implementation of a new policy*. For example, the Commonwealth, Tasmanian, Western Australian, ACT and Northern Territory governments are concerned to ensure that *major or significant* policy decisions are not made during the caretaker period. 'Major or significant' is not specifically defined, but a decision must be assessed for its policy and financial significance and the likelihood that it would be politically contentious.

The Queensland, Victorian and South Australian governments' guidance documents state that the bureaucracy should avoid implementing major policy decisions during the caretaker period. It is a fine distinction that has important implications. The jurisdictions that are concerned about implementation of major policy decisions distinguish between prior and future policy intent. The implementation of major policy decisions does not infringe the conventions where decisions are 'made or implemented before the expiry of dissolution of the Assembly' and are announced during the caretaker period (Vic DPC 2006: 2). Future policies are also exempt with the majority of jurisdictions acknowledging that the 'conventions do not apply to promises on future policies that the party in government announces as part of its election campaign' (DPMC 2004, p. 3).

The sections of the guidance documents on the taking or implementing of major policy decisions acknowledge the reality of political incumbency in that the Government will be maximising its term in office by making decisions right up to issuing of the writs for the election. Both sides will be making major policy commitments throughout the campaign and these commitments will be the centre of extensive media analysis and debate. The claim that a decision was taken prior to the election is hard for an Opposition to challenge because of the confidentiality of Cabinet decisions. But this has not deterred Oppositions from making such claims in the heat of an election campaign.

Two examples illustrate this difficulty:

Signing Medicare funding agreements 1993

In 1993, the Keating Labor Government announced that it had signed a five-year Medicare hospitals funding agreement with the Victorian and New South Wales governments just minutes before the Official Secretary read the proclamation to dissolve the House of Representatives for the general election. Its actions in doing so were criticised by the Opposition and media because it would bind an incoming government to provide additional funding for those jurisdictions for a period of five years. The then Prime Minister was unrepentant in his defence of the decisions, arguing that the States' decisions to sign the agreement 'at one minute to midnight' showed they wanted the protection of Labor's health policy even if Dr Hewson were elected (quoted in Kitney and Maley 1993). State ministers explained the decision in terms of their need for funding certainty,

since the Medicare agreement had been due to expire at the end of June 1993. In the event, the Coalition lost the election, and the Keating Labor Government provided \$300 million in additional funding for public hospitals over the life of the agreement.

Deploying Defence personnel to Iraq in 2004

In September 2004, more than two weeks into the caretaker period, the Howard Government announced that it had dispatched officers of the Special Air Service (SAS) to rescue two Australians feared kidnapped by insurgents in Iraq. The Opposition Labor Party claimed the Government had breached the caretaker conventions by not consulting then Leader, Mark Latham, about the deployment. Then Defence Minister, Robert Hill, argued the decision was not binding on a future government and, moreover, that it had been 'taken in accordance with the contingency plan that had earlier been agreed by Cabinet' (AAP 2004). The Prime Minister, John Howard, told reporters the decision to establish a hostage crisis team was taken by the National Security Committee of Cabinet before the election campaign. He said: 'the caretaker doctrine does not require a government to consult the Opposition in relation to the implementation of a decision taken before the caretaker mode commenced' (quoted in Seccombe and Allard 2004).

As these examples suggest, the environment for making judgements about the taking and implementation of policy decisions during the caretaker period is highly political and subject to intense public scrutiny through the news media.

This has obvious implications for public sector officials and how they should act and manage the complexities which ensue. Managing the interpretation of what constitutes a major policy announcement is a matter for judgement. Such judgements are not required in most matters of ongoing administration, which does and should continue during the caretaker period. The need for judgement arises when issues are contested between the opposing political parties and the matter is controversial. Public sector officials need to be aware of the requirement to act cautiously when there is no possibility of parliamentary oversight of executive decision-making (Wilson 1995). Judgement cannot be acquired at the calling of an election but is built over time and through experience. This is why only the most senior officials should be responsible for caretaker conventions, and why they often consult central agency experts when weighing their decisions.

As an election approaches, senior departmental officers often take stock of factors relevant to the programs and decisions that they have been dealing with. They should be familiar with, for example, the level of bipartisan support for particular policies, whether there is significant community or stakeholder opposition and the potential for significant media attention. The closer the election, the more pressure there is for public sector officials to get things right, particularly if, for

example, a recently announced Government policy is unpopular with the Opposition. In all cases it is imperative the bureaucracy behaves responsibly and dependably – rather than trying to second-guess who will win the election.

Moratorium on significant appointments

All jurisdictional guidance documents contain a section on avoiding significant appointments during the caretaker period and there is a degree of unanimity on handling the issue between the different jurisdictions. The majority of jurisdictions state that the ‘significance’ of an appointment can be assessed through two considerations – the importance of the position and the likelihood that the appointment would be controversial. Many have codified the level of appointment with precision.

Tasmania, Western Australia and Queensland all offer a classification of what constitutes a ‘significant appointment’. For Tasmania, it is the ‘head or deputy head of an agency, head of a division or branch whose activities are deemed sensitive, members of statutory bodies and statutory office holders’ (Tas DPC 2006, p. 4). Queensland defines appointments to Senior Executive Service and Senior Officer positions as ‘significant’ and prescribes that these should not be processed. Queensland guidances also advise that care should be taken in appointment to AO8 and AO7 levels (Beattie 2006). Western Australia recommends no action be undertaken on senior officer positions classified PSA Level 8 and above (WADPC 2005, p. 2).

Significant appointments should not be controversial because of the range of options available to manage the situation. The options are:

- appoint on a short term or acting basis (to be confirmed at a later date);
- defer appointment until after the election; and
- consult the Opposition (although the Opposition may not accede).

Both Western Australia and Queensland also advise that if a contract is due to expire during the caretaker period it is acceptable to issue a short term contract for up to three months.

Jurisdictions have accepted that they should exercise constraint in making senior appointments during the caretaker period but, technically, caretaker conventions were developed to guide ministerial behaviour, not the behaviour of public servants. The limitation on appointments has evolved as a self-imposed constraint. The New South Wales and Commonwealth guidances mention only that ministers should avoid making significant appointments. They are silent on senior appointments within the public service.¹ Their concern is restricted to appointments of members to statutory bodies and statutory office-holders. Other jurisdictions have expanded what would initially have been a concern about

stacking boards in the dying days of a government to encompass all senior government appointments.

A level of prescription contained in a guidance document is usually an indication that it has been an area of controversy in the past. In Victoria in 1999 an appointment became an issue because, as noted in Chapter 3, the results of the election were not clear for nearly a month after polling day. The appointment of a new Auditor-General had been approved and announced before the election. Because the appointee was relocating from New Zealand, the formality of approval by the Governor-in-Council did not happen until he had taken up his position. The appointee had already signed a legally binding contract for the position. The Labor Opposition indicated that if it were to form government it would support the appointment, but the Opposition did not support the signing of the instrument during the caretaker period (Davis et al. 2001, p. 18).

The prescriptive detail included in the Queensland guidance was driven by controversy about the signing of employment contracts with department heads in the lead-up to an election. In 1989 incoming Premier, Wayne Goss, announced that his Labor Government would take a 'close look' at decisions, appointments or contracts entered into by the outgoing National Party Government during the caretaker period. Of particular concern to the incoming Government was the outgoing Premier Russell Cooper's decision to renew the contract of a senior Treasury official the day before the election was held (Roberts 1989). In 1996 the minority government of Wayne Goss was criticised for signing a five-year contract with an agency head one day before the Mundingburra by-election, which Labor lost. Unable to secure the support of independents, Goss was forced to resign his commission as Premier. The incoming Coalition Government sacked the CEO, and was forced to pay out the balance of his contract.

Avoiding signing major contracts, undertakings and agreements

All guidance documents contain a section addressing the need for governments to avoid entering into major contracts or undertakings. The guidances reflect commercial realities by recognising the need for much of the work of government to continue during the caretaker period. As such, consideration is given to the definition of the word 'major' with the most common definitions revolving around the monetary value of the contract and whether proceeding with it would entrench a 'policy, program or administrative structure' (Commonwealth, Tas, Vic, NT). The Victorian guidance contains some additional material about allowing the entering into of contracts which are subsidiary to an existing 'head contract' during the caretaker period.

Most guidance documents acknowledge the difficulty of deferring contractual commitments for legal or commercial reasons and suggest options if this is the case. These include:

- consultation with the Opposition;
- consultation with the contractor to see if the contract could be renegotiated; and
- the development of contracts which include a clause providing for termination in case an incoming government did not wish to proceed.

Jurisdictions with fixed parliamentary terms may find managing contractual arrangements less complex, since the regular election date is known in advance.

The management of contracts is routine administration for many departments, and often involves long lead-times. The guidance documents suggest that caution should be exercised in cases which fall under the definition of ‘major’, or that require ministerial approval.

Controversy arises when contracts are seen to breach caretaker conventions by giving electoral advantage to the incumbent government, or when they are interpreted as seeking to entrench a controversial policy. Such contention was avoided in Victoria in 1999, when the Minister for Health—who had been defeated at the election but who remained minister pending the swearing in of the new government—delegated to the Secretary of his Department responsibility for finalising a contract that, if not executed within a specified time-frame, would attract significant penalties. This action was taken on the grounds that the Minister believed it was inappropriate to deal with it himself. The matter was resolved by officials in consultation with the Premier, the Leader of the Opposition, the Shadow Health Minister, political advisers and bureaucrats (Davis et al. 2001, pp. 18-19). The long delay in forming a new government in Victoria after the 1999 election was problematic for other types of contracts. Davis et al. (2001, p. 19) report that new procedures were required to allow urgent contracts to be finalised in the post-election caretaker period.

Negotiations with other governments and official visits

Official visits of dignitaries are not covered by guidance documents in all jurisdictions. New South Wales, Western Australia and the Australian Capital Territory are silent on this issue. The other jurisdictions have a high level of unanimity in how visits from dignitaries should be handled. The common advice is to defer the visit if possible, with either the Prime Minister or relevant premier taking the decision. Dignitaries who have scheduled a visit should be advised of the calling of the election and the reduced availability of ministers to meet them. The Victorian guidance points out that fixed four year terms should allow agencies planning visits to avoid the period in and around the caretaker period (VDPC 2006, p. 4).

The focus of jurisdictional advice on negotiations centres on attendance at ministerial councils and forums, where it could be expected (by other governments) that someone from the relevant jurisdiction would be involved. Tasmania is the one jurisdiction silent on such negotiations but other jurisdictions are in close agreement that, if possible, the government should seek to defer negotiations. If the interests of the State need to be represented at a ministerial council, it is accepted practice for a senior official to attend with observer status and with a limited role of supplying factual information on past positions. It is quite clear that no commitment or agreement should be entered into that would commit an incoming government.

The option of seeking Opposition agreement to a negotiating position is also canvassed by both the Commonwealth and Victorian guidance documents. The lead time for major Commonwealth–State negotiations is quite considerable and with the majority of jurisdictions on fixed terms, this is an area which has not been open to major breaches. In March 2007, the Commonwealth Government ceased negotiations of the new five year Medicare Agreements with the States until after the Federal election due in late 2007. The long lead times around negotiated agreements and the annual nature of most ministerial council meetings has left this area relatively free of controversy.

Dealing with requests from ministerial offices

Requests from ministerial offices during an election campaign can be a source of conflict and uncertainty between the government and the bureaucracy. It is often an area where the government tries to push the advantages of incumbency and exert pressure on what had been a responsive bureaucracy. The elements of advice from the guidance documents are consistent in how to deal with requests from ministerial offices. During the caretaker period, departments are restricted to giving factual advice—not policy advice—to ministerial offices. It is acknowledged that ministers can determine the use to which the material can be put, with both Tasmania and the ACT stating that factual material can be incorporated into speeches or political publications. The majority of jurisdictions have a caveat on the supply of information based on the Commonwealth guidance which suggests it is appropriate to decline a request if it requires ‘the use of significant resources and was clearly for use in an election campaign’ (DPMC 2004, p. 8).

The majority of guidances remind officers to avoid any perception of partisanship in their dealings with ministerial offices and the sensitivity of this interaction is acknowledged by advising that any concerns should be referred to the department’s CEO or to the CEO of the central agency. It is accepted that the level of judgement required with regard to some requests should not be the responsibility of a junior officer. The South Australian Government, for example, recommends establishing special arrangements for communication with the

ministerial office to be put in place through the office of the CEO (SA Cabinet Office 2005, p. 6). This would enable agencies to operate at arm's-length from political activity while the ongoing business of government continues. The NSW memorandum is written to provide guidance for ministers rather than the bureaucracy and asks ministers to 'take particular care to ensure that they do not compromise the neutrality of the public service' (Premier of NSW 2006).

Once again it is stressed that the day-to-day business of government continues. The Commonwealth, Victorian and Tasmanian guidances all acknowledge that given the potential for urgent domestic or international issues to arise, advice should be provided to protect Australia's or the State's interests. This is particularly relevant in the areas of Federal responsibility for defence and national security where international crises and circumstances mean Australia could be in a position of needing to agree on a new policy during a caretaker period.

Restrictions on advertising and information campaigns

The handling of government advertising and information campaigns sees divergent practice amongst Australian jurisdictions. All agree on the need to be able to continue to disseminate material in the public interest and to stop communications that represent a political interest. Campaigns cited as addressing the public interest include defence recruitment, health promotion, road safety or material of an operational nature. There is general agreement that material can be classified as political if it highlights government achievements and policies, features the minister or is a matter of contention between parties. Decisions on advertising and information campaigns need urgent attention at the beginning of an election campaign.

Jurisdictions have developed different mechanisms to handle decision-making on the continuation of advertising and marketing campaigns. The Commonwealth, Queensland and Western Australian governments all identify the head of a communications or purchasing unit as the responsible officer to make the decision on behalf of the Government on what campaigns should be discontinued. South Australia and Tasmania leave the decision at the political level with the Premier deciding on which campaigns to curtail. The ACT has no central mechanism and leaves it to the discretion of each department. Victoria has a mixed model where campaigns that promote government policies are sent to ministers for review but, if an agency has concerns, it is recommended it consult the Strategic Communications Unit in the Department of the Premier and Cabinet.

This mixture of approaches demonstrates the dual nature of caretaker conventions. Is it a guide for ministerial behaviour or a guide for departments to manage within the intense atmosphere of an election campaign? The divide is explicit in the handling of advertising campaigns where some departments take back the decision-making as a check on the power of incumbency while

others leave the management of the decision to the head of the government, the Premier. The Commonwealth guidance makes explicit that bipartisan agreement should be sought for campaigns that are to continue.

Government advertising has proved highly contentious in recent years. It has been described as 'the single most significant benefit of incumbency' (Young 2005). In her submission to the Joint Standing Committee on Electoral Matters inquiry into the conduct of the 2004 election, Melbourne University academic, Sally Young, identified a number of instances where the government's use of advertising might have been questionable. These included what Young (2005, p. 3) describes as an extensive 'warm up' period in the lead-up to the election campaign, during which there was a very large increase in government spending on advertising. Although she notes it is not unusual to see 'spikes' in government advertising expenditure immediately prior to an election, 'what was unusual in 2004 was the extent of pre-election spending and the sheer variety of government ads that were run. The Federal Government spent somewhere between \$32 and \$40 million between May and June alone'.

'Even more startling', according to Young (2005, p. 3), 'was the government's reluctance to forgo government advertising even during the election campaign'. The 'Help Protect Australia against Terrorism' campaign ran extensively on TV, radio and in newspapers during the election period. Under caretaker conventions, this campaign had to be approved by Labor. Media reports suggest that the Government 'had Labor over a barrel' with the anti-terrorism campaign. If it refused it could be 'accused of preventing the community from being warned about the dangers of terrorism' (*Canberra Times*, 24 October 2004). Labor agreed to the ads continuing on terms negotiated with the Government, including the stipulation that the ads specify they were authorised by the Australian Federal Police (AFP).

In supplementary remarks to the Committee's report, Australian Democrat Senator Andrew Murray recommended that, given the potential for incumbents to exploit government advertising for political benefit:

The blackout provisions in the caretaker period for all non-essential government advertising should be extended to cover the time from the July 1 date preceding the earliest likely Federal Election date that can occur for both the House of Representatives, and the half-Senate election (JSCEM 2005, p. 410).

But it seems the Government is unpersuaded of the need for reform. In its response to the Committee's report, the Special Minister of State, Gary Nairn, stated:

The Government notes the supplementary remarks issued by Senator Murray which address the issues of political governance, constitutional

reform, government advertising, funding and disclosure and other matters. These issues have been raised by Senator Murray on a number of previous occasions. The Government makes no further comment on the supplementary remarks (Government response to JSCEM, 30 August 2006, p. 24).

The management of government advertising during an election campaign is further complicated by being covered by electoral legislation. The basis of the Commonwealth and State Acts revolves around the need for authorisation of any material which may affect voting patterns with the concern of attracting a penalty if the legislation is breached.

There is less concern about managing printed material during a campaign. The guidelines around printed material generally leave the decision to the discretion of the department based on the previous criteria—does the material promote the policies of the Government, contain photos of ministers or focus on government achievements? The key word in the guidance documents is to avoid *active* distribution of material which could be seen to promote party political content. The passive distribution of material through responding to requests or making it available in public places is considered acceptable.

Use of internet and electronic communications

Concern about misuse of the internet and electronic communications is a fairly recent addition to many guidance documents. When it *is* included, fairly detailed instructions are given. The Commonwealth, Victorian, Tasmanian, Western Australian and ACT documents contain similar instructions. The starting point is that agencies are responsible for ensuring that government resources are not used to support any political party. For these jurisdictions, agencies play the role in determining if any material needs to be removed from agency websites and ministerial websites supported and maintained by that agency. Ministerial statements that criticise the Opposition are cited as an example of material which should be removed.

The guidances make a distinction between what can be added to *agency* websites and *ministerial* websites during the campaign. For example, it is generally agreed that agencies should only add portfolio related announcements, factual material and material on existing policies and programs. For ministerial websites, maintained by departments, it is agreed that only purely factual material should be added and no material about future policies, how-to-vote material, political speeches and media releases that criticise the Opposition. The wisdom of adding exit or entry messages, particularly to ministerial websites which link to party political sites, is canvassed. The use of these messages draws a line between what is a funded government website and what is a link outside of the government domain. The Commonwealth's *Guidance on Caretaker Conventions* is supplemented

in this area by the Australian Government Information Management Office (AGIMO) *Guidance on Departmental and Ministerial Websites*.

The use of government websites provoked controversy during the 2004 Federal election campaign. In September 2004, Opposition Finance spokesman, Bob McMullan, wrote to then Secretary of Defence, Ric Smith, alleging that then Minister, Robert Hill, had breached the caretaker conventions by posting four election-related announcements on a website maintained by the Department of Defence after the campaign had commenced (Kerin 2004). Of particular concern to Labor was the announcement of a new Defence headquarters at Bungendore, in the Coalition-held marginal seat of Eden-Monaro. McMullan argued that since they related to future policies and election commitments, the announcements should have been posted on the Liberal Party website.

In his letter of response to the shadow minister, the Secretary explained that Defence had closely followed the guidance document issued by the Department of the Prime Minister and Cabinet. He noted the website in question was not a departmental website, but one defined in the conventions as an agency-maintained 'ministerial website'. In accordance with the conventions, Defence put a notice on the website stating that no political or election-related material would be available on the website. The same notice appeared as a 'pop-up message' to advise visitors when they were leaving the website. Smith's letter also noted that the conventions are not infringed when decisions taken prior to the commencement of the caretaker period are announced during an election campaign. He reiterated his appreciation of the sensitivity of matters raised by the Opposition, but stated his belief that Defence was and had been discharging its duties diligently and professionally. However, he advised the shadow minister that, in order to 'minimise the risk of controversy', henceforth 'all of the media materials generated by our ministers and parliamentary secretary since 31 August [commencement of the caretaker period], and all future media materials, will now be posted by ministerial staff to the website of the Liberal Party of Australia' (Defence Media Release, 8 September 2004).

This example underscores the sensitivity of issues raised during the caretaker period, and the need for careful judgement when weighing questions of whether an incumbent government is advantaged through the support services available to ministers in the normal course of administration. It also demonstrates the contested interpretation of the conventions, particularly in areas of new and emerging practice. Notwithstanding the Secretary's confidence that Defence had adhered to the conventions, he initiated a change in the procedure followed—a concession perhaps, that the principle of avoiding APS involvement in election activities should be the dominant consideration in this instance. As expected, more detailed advice on websites and electronic communications is included in the DPMC caretaker conventions guidance, issued in August 2007. It states that

‘as a general rule during the caretaker period, ministerial media releases and alerts should be placed on the website of the relevant political party’ (DPMC 2007, pp. 4-5). New advice about interactive and funded websites (DPMC 2007, p. 5) illustrates the impact of emerging issues and technologies on the evolution of caretaker practices.

As well as detailed guidance about the management of agency and ministerial websites, the majority of jurisdictions caution that departmental email and bulletin boards should not be used to publish political material.

Both the New South Wales and Queensland guidance documents are silent on the management of the internet and electronic communications during an election campaign. However, in Queensland, advice on the management of ministerial websites is provided in a letter from the Director-General of the Department of the Premier and Cabinet to each department head when caretaker conventions commence. It mirrors the advice provided in other jurisdictions. South Australia puts the obligation on ministers to ensure that political material is not present on publicly funded websites. Like New South Wales and Queensland, South Australia acknowledges that agencies should continue to maintain ministerial websites but should only add material relating to existing policy or that is purely factual.

The Northern Territory takes a slightly different approach, consistent with the approach to advertising material. They recommend all agency websites carry an authorisation identifying the senior officer who is responsible for comment on the website. They also recommend the use of entry and exit statements so the user is clear when they are no longer within a government site.

The need for detailed guidance on the use of electronic communications during an election campaign is a useful illustration of the dynamic nature of caretaker conventions, and their flexibility in adapting to changing imperatives—in this case, rapid developments in technology.

Using the public service for policy costings

There is no set approach across jurisdictions to the issue of policy costings. The majority of Australian jurisdictions—New South Wales, Queensland, South Australia, Tasmania and the Northern Territory—are silent on the issue. The Commonwealth has the most detailed guidance on policy costings. The guidance is given statutory sanction in the *Charter of Budget Honesty Act 1998* (Cwlth). This Act outlines the process for the costing of election commitments by both the Government and the Opposition. The Act states the Prime Minister may request the secretaries of the Departments of Treasury and/or Finance to prepare costings of publicly announced government policies. Requests from the Leader of the Opposition are given to the Prime Minister who may agree to refer it to

the responsible secretaries. The onus is then on the responsible secretary to release the policy costings before the polling day.

Victoria allows the Department of the Treasury and Finance, in conjunction with the relevant agency, to cost government and non-government policies as long as the assumptions for the costings are identified and agencies are not required to undertake extensive policy research. In Western Australia, the *Financial Responsibility Act 2000* (WA) ensures the Treasurer releases a financial projections statement within 10 days of the dissolution of the Legislative Assembly. The ACT allows for the factual analysis of Opposition policies, including costings, but requests should be forwarded to the Chief Executive of the Chief Minister's Department.

John Howard proposed a 'Charter of Budget Honesty' in his first *Headland Speech* in 1995 (Howard 1995). The National Commission of Audit, appointed by the Coalition shortly after it took office in 1996, canvassed the proposal in greater detail, and the legislation was finally adopted in 1998.² Among Commonwealth bureaucrats, the general view seems to be that a clear prescription of the rules surrounding budget costings has made life easier for most departments. But the requirement that election promises and commitments by both Government and Opposition parties would be costed by officials has proved contentious. There have been allegations that the process favours the Government, including complaints from former Labor Shadow Minister for Finance, Bob McMullan (quoted in Wanna 2006, p. 8), that the charter 'is deliberately and demonstrably unfair'. Wanna (2006, p. 12) agrees that the Charter's main impact has been 'to award significant political advantage to the incumbents'. It does not allow opposition parties to approach the departments of Treasury and Finance and Administration on a confidential basis in the period prior to the calling of an election, creating an asymmetrical position in which its policies must be costed in the last two to three weeks of a campaign, and in a situation where its credibility is being 'intensively assessed'. Wanna (2006, p. 12) argues that if opposition parties 'were able to benefit from technical advice in advance of the election period, they would approach the election campaign more on an equal footing to the Government'.

Use of agency premises

The majority of jurisdictions accept the 'appropriate' use of government premises for media conferences and functions during an election campaign. The formula for determining 'appropriateness' is that if agency resources are involved, it is appropriate for the Opposition spokesperson, member or candidate also to be invited. This general approach is used by the Commonwealth, Victorian, South Australian, and ACT governments. All agree it is not appropriate for public servants to provide logistical support for political functions.

This approach is less developed than some other areas of concern within caretaker conventions. For example, no guidance is given on who is to arbitrate on this issue: it appears to be left to the discretion of local managers. In Western Australia, if Members of Parliament or candidates wish to visit a government facility, the CEO must be notified and they are to be accompanied by a representative during the visit. This is an issue which can have local application in a way that many of the other conventions do not, as local officers are required to take decisions about political figures with whom they have an ongoing working relationship.

Queensland, New South Wales and the Northern Territory are silent on the issue within their guidance documents but may, during an election campaign, continue to use protocols that already exist to manage visits to government facilities.

Pre-election consultation with the Opposition

Most jurisdictions have quite detailed and prescriptive advice on how the public sector should handle consultations with the Opposition. The focus of the advice is on the government restraining and limiting the bureaucracy in its dealing with non-government parties. This differs from the general focus of the guidance documents which is based on giving the bureaucracy support and advice in constraining the behaviour of the incumbent party.

A very similar process is outlined in each guidance document, with the exception of Tasmania which is silent on the issue. The accepted procedure is for the Opposition spokesperson to make application to the minister, who then forwards it either to the Prime Minister or Premier for consideration. In the Commonwealth ministers decide whether to agree or not, and then advise the Prime Minister of the request and the decision. Guidance documents stress that the approach must come from the non-government parties, not officials. The scope of the meeting is limited to machinery of government and technical issues: it is stressed that officials are not authorised to discuss government policy or give opinions. The discussions are confidential but ministers are entitled to enquire whether the meeting kept within the agreed purposes. It is worth noting that the Commonwealth, Victoria and Queensland governments apply a different commencement time to the process of consultation with the Opposition than the application of the more general caretaker conventions. Consultation can commence in the pre-election period which occurs either three months prior to the expiry of the House of Representatives (Commonwealth) or the date the election is announced—whichever date comes first.

There are some differences between jurisdictions. For example, in Queensland an official from the Department of the Premier and Cabinet sits in on the meeting with the departmental CEO. Queensland is also quite specific that no special material should be prepared and that only existing material such as annual

reports or program statements should be made available. Western Australia has slightly reversed the process in that the Opposition approaches the minister who then refers it to the CEO. The CEO is then responsible for advising the minister when discussions have taken place: the minister then advises the Premier.

The Commonwealth guidance notes that consultation guidelines are different from caretaker conventions. As noted, the guidelines were first tabled in the House of Representatives in December 1976. These initial guidelines allowed direct approaches to departments by Opposition spokespeople. They were subsequently amended. The new guidelines were presented to the Senate on 5 June 1987. Consultation with the Opposition remains a contentious issue, with some senior public servants concerned that shadow ministers may see briefings as opportunities to score points on their opponents through their portfolio agencies.

Non-finalised legislation

Guidance on what happens with non-finalised legislation appears rather vague and variable. The formulation used by the Commonwealth, New South Wales and Victoria is that if Bills have passed through both Houses they should be assented to by the Governor-General or Governor before the dissolution of the lower House. In respect of Bills passed by both Houses, but still awaiting Royal Assent after the dissolution, the Commonwealth Office of Parliamentary Counsel (OPC) has noted, 'it would be improper for such Bills not to receive assent' (Drafting Direction No. 4.10). The Commonwealth guidance acknowledges the constitutional uncertainty on the validity of Acts that receive assent in the period between dissolution and the opening of the new Parliament. To avoid such controversies, the OPC endeavours to ensure that all such Bills are assented to prior to dissolution of the House.

Queensland is quite specific that Bills introduced but not passed lapse as do Bills awaiting Royal Assent. South Australia and Western Australia have a slightly different practice in that all Bills not through both Houses automatically lapse when the lower House is dissolved. South Australia makes provision for legislation passed and assented to before the election to be proclaimed during the caretaker period. In Western Australia there is provision for Bills to be given assent during the caretaker period, notwithstanding the dissolution of the Legislative Assembly. Western Australia allows for Bills to be proclaimed when they come into operation during the caretaker period. The Tasmanian formula is that Bills passed by both Houses should be assented to by the Governor, but may lawfully receive assent later. Tasmania also has provision for legislation to be 'proclaimed' during the caretaker period, but with the caveat that the decision to make the proclamation should not be made once the caretaker period has begun. Proclamations that fall within this period (made from earlier decisions) will still have effect.

The ACT and the Northern Territory approaches are slightly different. The ACT allows for a minister to approve by gazettal the commencement of legislation that has been passed in the Legislative Assembly. In the Northern Territory, Bills which have been introduced to the Legislative Assembly but not passed, automatically lapse, although every effort should be made before prorogation to gain assent from the Administrator to those Bills already passed. There is a capacity, based on the advice of the Clerk of the Legislative Assembly, for a proposed law to be presented to the Administrator for consent during the caretaker period.

There is general agreement amongst all jurisdictions on the handling of subordinate legislation. Where there is no infringement of the caretaker conventions, it is considered acceptable for subordinate legislation to be approved by the Governor-in-Council, or equivalent, during the caretaker period. So, for instance, a Governor may approve minor amendments to traffic regulations if they are forwarded by the Transport Department during the caretaker period.

Meetings of Executive Council

All jurisdictions identify some capacity for Executive Council to meet during the caretaker period but with different levels of advice on whether the meeting should be routine or exceptional. For example, the Commonwealth, Victorian, Queensland, Tasmania and Western Australia all make provision for limited and infrequent meetings to deal with routine business such as regulations and ordinances. Each jurisdiction offers the caveat that the business considered should not infringe the caretaker provisions concerning the taking of major decisions or binding an incoming government.

New South Wales advises that Executive Council will 'meet as usual' during the caretaker period to consider routine matters of government business. In South Australia it is accepted practice for the Executive Council to operate after the dissolution of the House of Assembly. The guidance cites the principle of the separation of powers to support that view. In the Northern Territory the advice suggests that Executive Council should cease, although provision is made to convene in exceptional circumstances. Although there is differing practice across jurisdictions, the general consensus is that there is a need to provide for the management of non-controversial routine business of government.

Meetings of Cabinet

The majority of jurisdictions are either silent on the meeting of Cabinet during the caretaker period, or acknowledge that it would not meet. The exception is South Australia which states that during the caretaker period the normal business of executive government continues because of the separation of powers between the Parliament and the Executive. Cabinet can continue to meet for routine matters, but not major undertakings, initiatives or appointments. This is a

different interpretation from other jurisdictions that base their approach on the convention of responsible government which holds that with the dissolution of the House, the executive cannot be held responsible for its decisions in the normal manner.

A crisis situation might necessitate a Cabinet meeting during the caretaker period. This was the case in 1914 with the outbreak of the First World War during a Commonwealth election (see Weller 2007, pp. 30-32).

Cabinet and other documents

The management of Cabinet documents during an election campaign falls under another set of conventions surrounding the working of Cabinet. The convention is that Cabinet documents and decisions are confidential to the government that created the documents and are not made available to successive governments. All jurisdictions cite this convention and adhere to the same process. Each department is responsible for retrieving and securing their Cabinet documents ready for return to the Cabinet Secretariat in the event of a change of government. The Cabinet Secretary is custodian of Cabinet records for the government and previous governments and, if required, will take over the management of Cabinet documents and issue detailed instructions for their return and lock down.

Correspondence

Correspondence is an area where the need for agency judgement is once again identified. The principle for all jurisdictions is that correspondence should not be allowed to accumulate during the caretaker period. For practical reasons, mainly that ministers are usually busy or travelling for the campaign, there is general agreement they should only sign necessary correspondence. Agencies need to exercise judgement on whether it is to be signed by the minister, CEO or another departmental officer. Most of the guidance documents focus on protecting the public service from any perception of partisanship. Details are given on avoiding the presumption that the government will be returned to office by referring to an 'incoming government'.

Public servants contesting elections

Not all jurisdictions cover this issue within their caretaker conventions—rather it is generally the subject of a separate directive. The Commonwealth, Victoria, Western Australia and the Northern Territory each warn that public officials should not use agency resources to support their personal political aspirations, and provide advice on how public speaking engagements should be managed. New South Wales and the ACT offer no guidance on either issue.

The Queensland guidance states that public servants are entitled to contest State elections. They are not required to resign, but must take leave during the campaign. The details of managing leave provisions are subject to a separate

directive. This process differs from the South Australian process which requires officers to resign before the date of the declaration of the poll. If the candidate is unsuccessful they can be reappointed and the break in service deemed as leave without pay. Tasmanian candidates do not have to resign and are entitled to leave without pay but if they are elected their position is automatically terminated.

The Australian Constitution states that people cannot be chosen if they hold an office of profit under the Crown (s. 44 (iv)). Therefore public servants, amongst others, must resign before nomination. But the *Public Service Act 1999* (Cwlth) (and the earlier 1922 Act) protects their positions if they are not successful (s. 32). This provision also applies when a public servant contests an election for a State parliament.

Other issues

There is a range of advice given on issues which appear in a small number of jurisdictions, which may be a response to local controversies.

Grants

The Tasmanian, ACT and Northern Territory guidance documents all include a section on the management of grants during the caretaker period. All three jurisdictions advise that payment can be made on grants approved prior to the caretaker period but should be forwarded by the department rather than the minister. No commitments should be made on grant applications received during the caretaker period.

Statutory authorities

The Northern Territory is the only jurisdiction that makes mention of the relationship between ministers and statutory authorities and/or government-owned corporations under a separate heading. Both the Commonwealth and Victorian guidance documents mention the relationship with statutory authorities as part of their Introduction. All recommend these bodies should observe caretaker conventions unless to do so would conflict with their legal obligations or commercial requirements.

Travel

Western Australia offers detailed advice on travel for Members of Parliament. It outlines who can travel and under what circumstances at State expense during the caretaker period. It is very prescriptive and even includes the formula for calculating the costs for media representatives travelling on charter flights.

The Commonwealth and Victoria both cite the convention that ministers do not claim travel allowance from the day of the campaign launch to the day after polling day.³ The exception is if ministers have to travel for Cabinet meetings

or in connection with their ministerial duties. The Victorian guidance also outlines the travel entitlements for the Leaders of non-government parties once the election is called.

Tabling and responses to reports

The Commonwealth, Victorian and ACT guidance documents all cover the issue of formal responses to parliamentary reports. The advice is that outstanding reports should be taken up with the incoming government but, in the meantime, agencies can undertake preparatory work and consultation at the agency level so they can provide early advice to the incoming government.

The Commonwealth and Victoria both advise that administrative reports, such as annual reports, can be tabled out of session. The ACT has a detailed framework for annual reporting and makes specific provision for the timetable to present annual reports in an election year.

Conclusion

This detailed comparison of the caretaker provisions in all Australian jurisdictions throws up some interesting observations about management of the caretaker conventions. The tendency has been to add detail and advice as new issues emerge and need to be dealt with. Caretaker conventions were originally designed as a limited guidance for ministers on how to behave during an election campaign. The management of the updating of the guidances has since passed to the public service. Reflecting Australia's 'talent for bureaucracy', this transition has seen an increase in the codification of behaviour and in the complexity of the documents

The documents have also taken on a hybrid nature of providing advice to both ministers and public servants on how to deal with the other during the caretaker period. Both sides seek to constrain the behaviour of each other and this leads to some confusion as the guidances are giving advice for different audiences for particular issues. Despite increased codification, the real challenge in dealing with issues during the caretaker period still relies on judgement at both the political and public sector level. Political judgement is required not to request the public service to undertake work which would compromise its impartiality. The public service must exercise judgement in ensuring it does not undertake work that would give the incumbent party an unfair advantage. The increase in prescriptive advice is an attempt to replace reliance on judgement with clear guidelines against which the behaviour of ministers and public servants can be acquitted. However, each election throws up new and unforeseen challenges and such an approach does not overcome the need for judgement to be exercised by senior staff.

Despite some local variations, the caretaker convention guidelines in all Australian jurisdictions remain clear about the principles behind the documents and the behaviour that derives from those principles. Given the caretaker period lasts for around 33 days every three to four years, the challenge for future versions is to maintain their intent and simplicity.

ENDNOTES

¹ In fact, in the Commonwealth, ministers are explicitly prevented from intervening in public service appointments under Section 19 of the *Public Service Act 1999* (Cwlth).

² For a detailed assessment of the Charter of Budget Honesty's genesis and early performance, see Wanna, Kelly and Forster (2000 pp. 245-258). For more recent, critical appraisals see McMullan (2007) and Wanna (2006).

³ The issue of travel during the caretaker period became controversial during the 1997 'Travel Rorts' affair, when former Keating Government ministers were accused by the new Coalition Government of having 'breached' the convention. For details see Tiernan (2007, pp. 151-170).

Chapter 6. Caretaker conventions: an overview of New Zealand and local government arrangements

The previous chapter undertook a detailed analysis of the elements of the caretaker conventions in all Australian jurisdictions. This chapter will identify and explore the elements of the New Zealand and emerging local government approaches.

New Zealand

In Chapter 2 we looked at the historical factors that drove the documentation of the New Zealand caretaker conventions. Adoption of the mixed-member proportional electoral system (MMP) led to increased uncertainty and delay in the formation of new governments. The MMP system brought with it the potential for extended caretaker periods as the process of government formation could now be as lengthy as the nine weeks taken after the first MMP election demonstrated. These longer periods of transition from one government to the next highlighted the need for greater prescription and codification. To respond to these changed circumstances, there was a consolidation and addition of advice to *The Cabinet Manual* after the 1996 election.¹ In New Zealand this trend was in response to a changed electoral system while, in Australia, greater prescription has been largely driven by a desire for rules and certainty about public service behaviour.

As in other Westminster-style systems, the principle behind the constraint imposed by the New Zealand caretaker conventions is based on the sovereignty of Parliament and the recognition that, during the election period, the executive cannot be held accountable to the Parliament. The New Zealand convention is nevertheless quite clear that the 'incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office' (NZDPM&C 2001, p. 54). The key difference between the conventions of the Australian jurisdictions and New Zealand is the much greater focus on transitions and government formation and much less emphasis on detailed guidance on the management of issues during the actual election campaign. *The Cabinet Manual* is silent on many procedural issues such as how to handle appointments, correspondence, use of government facilities, advertising campaigns and management of the internet which are now a feature of the Australian guidance documents.

Transitional arrangements

Experience in New Zealand has led to detailed clarification of the principles in managing the interregnum before a new government is formed. The conventions describe the ‘two arms’ of the convention:

- where it is clear who will form the next government, but they have not yet taken office; and
- where it is not clear who will form the next government. (NZDPM&C 2001, p. 54).

When it is clear who will form the next government, the incumbent but outgoing government is constrained on undertaking any new policy initiatives but should act on the advice of the incoming government on any matters of significance, even if the outgoing government disagrees with the course of action. As we saw in Chapter 2, this formulation is a direct response to the crisis of 1984.

The second ‘arm’ of advice, on how to manage when it is not clear who will form the next government, is more detailed, a consequence of the length of time before a government could be formed after the 1996 election. Confusion around what the outgoing Government could and could not do led to development of two principles which are:

- decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker Government; and
- in general terms, the normal business of government and the day to day administration of departments and agencies in the wider state sector may continue during the caretaker period.

However, it is recommended that a range of decisions around significant issues which might bind an incoming government should either be deferred, handled by temporary arrangements or subject to consultation with other parties. *The Cabinet Manual* stresses the need for careful judgement by ministers, public servants and Crown entities and does acknowledge there are no ‘hard and fast rules’ (NZDPM&C 2001, p. 55) and a range of considerations will need to be taken into account before a decision is made.

Decision-making during the caretaker period

This section of *The Cabinet Manual* outlines the different roles of departments, Crown entities and ministers during the caretaker period. It reconfirms the advice that the day-to-day administration of departments continues and all issues with caretaker convention implications should be referred to the minister for decision. A section reminds Crown entities and State-owned enterprises of their obligation to apply the principles of the caretaker period, taking into account their legal responsibilities and other statutory duties.

Responsibility for final decisions about the application of caretaker conventions rests with the Prime Minister, although preliminary assistance is available from the Secretary of the Cabinet. As well, the Prime Minister must be consulted on all issues that may require consultation with other political parties. The New Zealand guidance does not contain detailed guidance on the management of particular issues that has become the norm for the Australian jurisdictions. For example, there is no advice on how to handle international negotiations, visiting dignitaries or significant appointments. Here Cabinet Circulars and guidance provided by the State Services Commission (see below) provide the necessary detail.²

Significantly, and in contrast to Australian experience, New Zealand governments assert a mandate to govern for a three year period. As such, according to *Cabinet Office Circular CO (05) 2*, 'they are not bound by the caretaker convention during the pre-election period (unless the election has been caused by the government losing the confidence of the House mid-term). This means that the Government has full power to make decisions in the pre-election period'. However, successive governments have chosen to restrict their actions in the period immediately prior to a general election, recognising the potential for a change of government. Restraint has, for example, been exercised in making significant appointments, and in relation to some government advertising (CO (05) 2, 4). The period of restraint is usually about three months before the latest date that an election can be held.

Government formation

A large proportion of *The Cabinet Manual* guidance concerns the process for the formation of a new government. It is the Governor General's role to ascertain whether parties have the support to form a government. As part of that process, negotiating parties may seek advice from the public service, and departmental officials may provide that advice if authorised to do so by the Prime Minister. Detailed advice for public sector officials on how to manage those negotiations is published by the NZ State Services Commission in *Negotiations Between Political Parties to Form a Government: Guidelines on Support from the State Sector* (www.ssc.govt.nz). This guidance sets out the arrangements under which parties negotiating to form a government are able to access information and analysis from government departments. The State Services Commissioner is the contact point for receiving and responding to these requests.

These instructions are detailed and set out the different responsibilities for critical public sector employees such as the Chief Executive of the Department of the Prime Minister and Cabinet, the Cabinet Secretary and the Secretary to the Treasury. The Clerk of the Executive Council is responsible for providing impartial support to the Governor-General while the State Services Commissioner keeps the Prime Minister informed on what assistance is being given to different

political parties. There is extreme sensitivity about the provision of information and analysis to political parties and this is reflected in the requirement that only a small number of senior officials be involved to exert the 'careful judgement and discretion' required (NZSSC 2005, p. 4).

State Servants, Political Parties and Elections

As well as the material contained in *The Cabinet Manual* and the specific guidance on negotiations during government formation, a third document is also relevant to implementing the New Zealand caretaker conventions. For each election, the State Services Commission publishes a current version of *State Servants, Political Parties and Elections: Guidance for the 2005 Election Period* (SSC 2005). This document more closely resembles the guidance documents of Australian jurisdictions and is focussed on providing information to the public sector. It covers communication campaigns, use of agency resources, costing of policies and arrangements for public sector officials standing for election. This document is supplemented by an 'Election Fact Sheet', framed specifically to address questions state sector employees may have about their conduct during the election campaign (www.ssc.govt.nz/election-guidance-factsheet).

Detailed work has been undertaken on the procedures for the costing of both Government and Opposition policies. The bureaucracy must receive a written request from the Minister of Finance or the department's minister before any work can be undertaken. All work including sources and procedures must be documented in full and no additional commentary or subjective assumptions are allowed. The costing guidelines confirm that ministers 'will not require or use information on costings in a way that might damage the neutrality of the public service, and hence its ability to serve successive governments' (SSC 2005, p. 11).

The material provided on caretaker conventions in New Zealand is detailed and regularly updated. This has arisen because of the electoral uncertainty which now exists under the MMP system and the potential for an extended caretaker period for government formation following polling day. Detailed advice is provided by both the Secretary to the Cabinet and the State Services Commission. This flurry of documentation in the 1990s reflected the transition from a long period of single party majority governments to majority and minority coalition governments (Boston et al. 1998, p. 648). The introduction of MMP saw a rapid increase in detail on how to manage issues in a time of increased uncertainty, particularly post election. That advice has been refined after the past couple of elections and now offers a detailed guide for the incumbent party, the incoming government (in the event of a change) and the public service on how to handle itself in unsettled times.

Local Government Requirements

Two jurisdictions in Australia have enacted caretaker provisions within their local government Acts—Victoria in 2003 and Queensland in 2007. Making the provisions legally binding has a number of implications, some of which are explored in Chapter 7. Queensland’s provisions are based on those of Victoria. The focus is on ensuring public confidence in local government electoral practices and preventing sitting councillors deriving advantage from incumbency.

The main focus of local government caretaker requirements is to prevent inappropriate decision-making by councils during an election period and to ensure council resources are not being used to support the activities of existing councillors, with a particular emphasis on the publication of electoral matter. Both the Victorian *Local Government (Democratic Reform) Act 2003* (Vic) and the Queensland *Local Government and Other Legislation Amendment Act 2007* (Qld) specify a range of decisions that council may *not* take during an election period. Individual councils are responsible for developing ‘codes of conduct’ which include these caretaker provisions. The provisions prevent:

- appointing or terminating a CEO or changing the remuneration of a CEO (this clause also has implications for other senior executives);
- entering into contracts valued at more than \$100,000 (Victoria) or \$150,000 (Queensland) or valued at more than one percent of the council’s revenue from rates (whichever is the greater);
- the publication of electoral matter during a campaign.

Both jurisdictions provide an option for ministerial appeal in exceptional circumstances. If the local council believes a major policy decision is required in the public interest, it can apply to the minister for approval to make the decision. If such an approval is not received, the contracts and decisions are invalid.

Victorian legislation requires individual councils to adopt the provisions from the Act in their own codes of conduct. In Queensland this is not a mandatory requirement, but is left to the discretion of the chief executive of the Department of Local Government, Planning and Sport. Because the legislation has only recently been enacted the implications for breaches are as yet untested, as is the potential for ministerial involvement in making judgements about alleged breaches.

Conclusion

This chapter completes the detailed analysis of the different approaches to caretaker conventions in all Australian jurisdictions, New Zealand and local government in Victoria and Queensland. The likelihood of a publicised breach or confused response during the heat of an election campaign drives the

continued updating of prescriptive guidance documents. Constitutional crises in New Zealand have now led to multiple sources of advice for the executive government, the Governor-General, minority parties and the public sector. Support for the observance of caretaker conventions for local governments is less institutionalised, presumably because it is a comparatively recent development. Local councils may seek to improve their internal support for managing their caretaker provisions as the implications of real or perceived breaches becomes obvious in future elections.

ENDNOTES

¹ *The Cabinet Manual* advises the need to plan ahead to try to ensure all significant matters are dealt with in advance of the election. Departments are warned that those who do not prepare for a protracted caretaker period are likely to experience problems.

² On government decisions and actions in the pre-election period, see <http://www.dPMC.govt.nz/cabinet/circulars/co05/2.html>

Chapter 7. Forces influencing the observance of caretaker conventions

The cases and controversies highlighted in earlier chapters of this monograph have much to tell us about the pressures on the interpretation of caretaker conventions, and the sensitive issues that public officials must navigate when upholding caretaker principles during an election campaign and until the swearing in of a new government. This chapter highlights some of the dilemmas posed by the need to be responsive to government while remaining apolitical and upholding public service obligations to be professional, impartial and to comply with the law. It addresses some of the forces impinging on public service impartiality.

Adversarialism and partisan contest

Arguably, some of the anxiety surrounding caretaker conventions relates to the competitive and intensely partisan environment of contemporary politics. Although we live in the era of the ‘permanent campaign’, the period leading up to polling day is especially fraught—ministers and their staff are under intense pressure; Opposition spokespeople are looking to exploit opportunities to secure political advantage; journalists are looking to break controversial stories and to ‘get behind’ tightly stage-managed ‘run of the mill’ announcements.

As guidance documents make clear, decisions about whether caretaker conventions have been breached are ultimately matters for prime ministers and premiers. They make political calculations about the benefits and risks of particular courses of action. Although it is relatively common for someone to claim that caretaker conventions have been breached, such claims are rarely substantiated. Usually the public debate moves on, or investigations reveal that the decision taken in the matter was a question of judgement. Caretaker guidance documents are guidances only, not hard and fast rules. But, as will be seen in subsequent chapters, recent developments in the adjudication of alleged breaches is challenging traditional understandings of conventions as shared norms of behaviour.

Pressures on public service responsiveness

The public service is expected to be responsive to the government it serves. This obligation does not disappear during the caretaker period. This is mainly an issue with ministerial offices which are accustomed to a different relationship with the bureaucracy, and can be dealt with by establishment of agreed protocols at the commencement of the caretaker period.

Ministerial Staff

Ministerial staff play important roles in exacting responsiveness from the public service (Tiernan 2007). The growth in their numbers and reach has created new challenges for public servants during the caretaker period. The potential for staff to make inappropriate or unreasonable requests of departments is occasionally highlighted in articles about the caretaker period (Malone 2007) and was clearly evident in the 'Children Overboard' case, which unfolded in the partisan glare of the 2001 Federal election (Tiernan 2007; Weller 2002).

In the Victorian case, Davis et al. (2001, p. 19) noted the tensions public servants face as they seek to remain politically impartial while dealing with ministerial advisers 'whose main objectives were overtly political'. They note the conventions are 'silent on the role of political advisers during the caretaker period' (Davis et al. 2001, p. 20). Former Deputy Prime Minister, Brian Howe (2001, p. 28), observes that 'advisers have become essential when ministers/shadow ministers need to understand points of difference in technical detail likely to arise during an extended caretaker period', but he concedes their unelected and unaccountable status raises issues when they represent their principals in negotiations. Keating (2002, p. 120) agrees there is a problem with ministerial staffs' lack of accountability. He stresses the need for public servants to be confident that political staff accurately represent the views of their minister and are acting on his/her authority when claiming to do so.

Public Servants

Given the potential for ministerial staff to conduct themselves in ways that are not strictly in accordance with the spirit of the caretaker conventions, Keating (2002, p. 120) suggests that public servants should insist on directly briefing the minister or shadow minister during the caretaker period and ensure that their personal agreement is obtained for any unavoidable decision taken. This recommendation would essentially place the responsibility for initiating contact with either the Government and/or the Opposition in an election context on public servants—a situation that would pose considerable difficulties for all but the most senior officials.

Recognising the particular sensitivities of the caretaker period for managing the departmental–ministerial office interface, the Australian Public Service Commission (APSC) has developed a number of resources to assist public servants in discharging their obligations using good judgement and common sense. In its most recent publication, *Supporting Ministers: Upholding the Values*, the APSC emphasises:

- The need for the ordinary business of government to continue during the caretaker period—it warns agencies to be careful not to allow the possibility

that an election will be called to constrain the capacity of the elected government to govern;

- The need for officers to be familiar with and follow official guidelines about the operations of caretaker conventions;
- That potential problems and difficulties may be avoided if effective liaison with the minister's office occurs prior to the election. It recommends establishing formal protocols for managing briefing requests and other issues;
- That senior departmental officers have primary responsibility for managing the interface with ministers and the Opposition as alternative government during the caretaker period;
- The desirability of consulting with central agency experts on the caretaker conventions if difficult or sensitive issues arise that are of concern to departmental officers. It is suggested that a single point of contact be established for this purpose.

In many ways the Commonwealth Government practice of ministerial staff decamping from Canberra to campaign offices in Sydney or Melbourne may reduce some of the demands on public servants. In State governments, where ministerial offices are often co-located with departments, the challenge may be greater, but accountability and oversight regimes for ministerial staff are comparatively stronger in Australian State jurisdictions than in the Commonwealth.

Technological change

Technological change, notably the rise of the internet and email, has necessitated development of new practices and guidance to assist public servants to manage within the spirit and intent of the caretaker conventions. The implications of technological change were not canvassed in earlier iterations of the guidance documents and issues of government websites simply did not arise. The 2004 guidance document gave agency heads discretion to determine their own portfolio's approach to websites. This attracted some criticism. Malone (2007, p. 4) has called for stronger prescription and consistency to assist public servants in maintaining their impartiality during the caretaker period. Such developments would further reinforce the tendency to bureaucratise caretaker conventions.

Pace and complexity of decision-making

The increased pace and complexity of government decision-making is much remarked upon by practitioners and scholars. An uncertain international security and threat environment has added to this complexity, creating demands for governments to take decisive action even during election campaigns. Controversy followed the Howard Government's decision to deploy an SAS hostage crisis team to Iraq in 2004, and there were questions about the Government's use of the military in its Pacific Solution policy during the 2001 Federal election. In

2004, the Australian embassy in Jakarta was bombed; the attack occurred during the caretaker period. Because governments need to move quickly in such situations, academic John Uhr (in AAP, 15 September 2004) has argued there may be a need for 'supplementary rules' to guide crisis decision-making.

Power of incumbency

During long periods of incumbency, ministers and their staffs become accustomed to the high levels of support provided by departments. Depending on their level of experience, ministers and members of their staff may find it difficult to adjust to the reduced levels of assistance with advice and briefing from officials. Recent research indicates that the average period of incumbency is 11.6 years for governments federally, and just under 11 years in State jurisdictions (Strangio 2006). In office, governments enjoy substantial advantages in terms of staffing and resources, and the capacity to use advertising and other political 'weapons' in their efforts to retain elected office. The likelihood that a serving government will be returned may create difficulties for public servants in 'standing up' to a minister or his/her staff over a caretaker conventions issue.

Conclusion

A number of forces in modern politics influence the interpretation and management of government business during the caretaker period. This chapter has identified the pressures that greater adversarialism, the growth in power and influence of ministerial staff, rapid technological change, the pace and complexity of decision-making and the power of incumbency are placing on public servants during election campaigns. These influences are driving the trend to codification and bureaucratisation of guidance documents on caretaker conventions, and have been influential in shifting the onus of responsibility to observe the conventions from ministers to bureaucrats.

These forces—particularly the trend from the old style parliamentarianism, where pleasantries could be exchanged across the House, to the professionalism of party machine politics—have led to a more ruthless approach to maximising political advantage. The next chapter explores some of the consequences this transformation could have on caretaker conventions.

Chapter 8. A changing practice?

The understanding that caretaker conventions have no standing in law and, therefore, are not enforceable is gradually being tested. The characteristic of conventions is that they are not legally binding and are based on evolving practice rather than legislation. Regular updating of the guidances has been a response to the emergence of issues in the heat of election campaigns. Jurisdictions have continued to extend and refine the advice given in the light of alleged breaches and controversies. In recent years there has been a trend to a more legalistic approach through the translation of conventions into legislation with the addition of legal penalties for breaches.

This chapter will explore some recent examples of quasi-judicial oversight of caretaker conventions. First, the Queensland Crime and Misconduct Commission's (CMC) report into an alleged breach; and, second, recent Victorian and Queensland Government legislation embodying caretaker conventions in local government statutes. We will also look at the New Zealand model as a best practice guide for council communications

The Tugun Bypass controversy – a case of mistaken oversight?

In February 2004, during the last week of the State election campaign, Queensland Premier Peter Beattie made an announcement on a proposed route of a bypass road, known as the 'Tugun Bypass', at the southern end of the Gold Coast. The new route would involve resumption of 14 houses. Officers from the Department of Main Roads were advised of the announcement the night before and asked by the then Minister for Transport to inform the affected residents of the announcement and the impact it would have on their properties. Limited time was available for departmental officers to draft and distribute a letter to affected residents before the Premier's announcement the next morning. The text of that letter is provided in Exhibit 2.

After the election the CMC received a complaint from the Leader of the Opposition, Mr Lawrence Springborg MP, alleging the announcement of the bypass involved a breach of 'both the spirit and the letter' of the caretaker conventions. He alleged a lack of impartiality by the officers of the Department of Main Roads who were 'acting in a politically partisan manner to implement a major Government decision during an election campaign'.

Exhibit 2 – Tugun Bypass Letter

5 February 2004

Dear Resident

TUGUN BYPASS PROPOSED ROUTE

As you are aware, in late 2003, the New South Wales Government withdrew support for the proposed C4 option, largely on environmental grounds, despite extensive studies being undertaken which had shown that environmental impacts were manageable.

The Queensland Government has maintained its commitment to finding a solution to the congestion in the Tugun and Bilinga area and has been reviewing alternative routes, including those to the east of the airport.

The Premier today announced a proposed route which has the least impact on the broader community. This route will run from Stewart Road Currumbin, on the eastern side of the airport connecting to the Tweed Bypass.

Following the Premier's announcement, I advise that the proposed route will have an impact on your property.

You may wish to discuss this further with us. We invite you to contact (Public Consultation Officer) on (07 5583 8328).

Yours sincerely

A/District Director South Coast Hinterland

The CMC accepted the complaint and investigated. A report, *The Tugun Bypass Investigation*, was issued in July 2004. The CMC found that the letter was in breach of the caretaker conventions because it lacked the impartiality required during an election campaign (CMC 2004, p. 26). However, the CMC did not recommend disciplinary action against the officers involved. Four recommendations were made about additional training for public sector agencies on the content and application of caretaker conventions, including reinforcing the requirement for public servants to avoid any appearance of political partiality during the caretaker period (CMC 2004, p. 32).

The CMC report is one of the few detailed analyses of an alleged breach of a caretaker convention. All of the participants, from the Director-General to those delivering the letter to the residents of Alinda Street, were interviewed and the information presented gives a snapshot of a range of officers at different levels trying to do their job to support multiple stakeholders. The report identified the decisions made over 24 hours and why those decisions were taken. It highlighted the challenges of working in the heated atmosphere of an election

campaign and the shortened timeframes within which decisions and judgements have to be made.

Issues

Jurisdictional Oversight by the CMC

In its report, the CMC had a lengthy section on the statutory basis for the investigation. However, it did not cite any existing precedents for such an oversight body to accept a complaint on an alleged breach of a convention for investigation. As described in Chapter 2, sanctions against breaches are usually moral or political. The CMC report acknowledged this in relation to allegations about the Premier and dismissed any possibility of criminal liability on the part of the Premier by citing the lack of legal standing of the caretaker conventions and concluded 'an alleged breach of the conventions by a member of Parliament ... is not a matter within the investigative or official misconduct jurisdiction of the CMC' (CMC 2004, p. 3).

The CMC, however, believed that a 'different standard applies to public servants' (CMC 2004, p. 4) and a public servant who breached the caretaker conventions could come within section 14 [b][1] of the *Crime and Misconduct Act 2001* (Qld) by acting 'in a way that is not honest or is not impartial'. For that breach to amount to official misconduct, it must constitute a criminal offence or a disciplinary breach so serious as to warrant the person's dismissal (CMC 2004, p. 4). The CMC also identified the possibility of a breach of the *Public Service Act 1996* (Qld) which contained a statement of principles for the conduct of public servants including 'providing sound and impartial advice to the Government' (CMC 2004, p. 4). A contravention of that Act or departmental Codes of Conduct could be grounds for disciplinary action against an officer. Because the Director-General of the Department of the Premier and Cabinet circulated the caretaker conventions to all departments, a breach of these instructions could amount to official misconduct or grounds for disciplinary action under the *Public Service Act 1996* (Qld).

On this formulation, the CMC decided that the non-justiciability of conventions was over-ridden by the provisions for impartiality vested in other Acts governing the conduct of the public service with the possibility of such a breach leading to official misconduct. Its actions can be seen as an example of encroaching legalism, where lawyers seek to make judgements about political norms.

Concerns of the Opposition

The concerns of the Opposition were two-fold: that the actions of the Department of Main Roads officers were an implementation of a policy decision taken during the caretaker period, and that the content of the letter to affected residents was not impartial (CMC 2004, p. 7). The first allegation was made against the Premier

for implementing a policy initiative against the caretaker conventions. As the CMC had decided the conventions were not legally enforceable against a Member of Parliament, the investigation focused on whether departmental officers had implemented a policy initiative during the caretaker period.

Departmental officers interviewed were quite clear the announcement was a new policy promise released during an election campaign and would not have bound an in-coming government (CMC 2004, p. 25). The CMC concluded the allegation could not be substantiated and there was insufficient evidence to support the view that departmental officers were implementing a new policy (CMC 2004, p. 26).

On the second allegation of lack of impartiality, the CMC found that the letter to residents had breached the conventions by displaying partisanship by omitting to mention that the road announcement was contingent on the Beattie Government being re-elected. The CMC then determined whether the breach of the caretaker conventions provided a basis for the recommendation of disciplinary action against any officer (CMC 2004, p. 26). It concluded that the evidence would not support a finding of misconduct against anyone because no officer 'deliberately sought to flout the conventions or to otherwise act with the intention of advancing a political agenda' (CMC 2004, p. 27).

The CMC's test for the breach was whether officers had colluded to achieve a political purpose or that any officer had sought to improperly influence another concerning what the letter should contain (CMC 2004, p. 27). The CMC quite correctly looked beyond the wording of the letter for intent and concluded that the inappropriate wording arose from two causes:

1. an apparently inadequate understanding by those who drafted the letter of the scope and rationale of the conventions; and
2. the pressing timeframe that resulted in more senior officers having insufficient time to properly review the letter and give the relevant issues the consideration that the circumstances requires. (CMC 2004, p. 28)

The CMC concluded that for the letter not to breach caretaker conventions it should have included a qualification that the new route was contingent on the completion of a number of processes and the result of the election (CMC 2004, p. 28).

The View from the Department

The interviews with Department of Main Roads officers highlight the challenges of juggling multiple stakeholders. The Director-General of the department received a phone call at 7.30 pm to inform him the Premier would be making an announcement the next day on the proposed route. The department was requested to inform the affected residents of the impact of the announcement

on their properties. The focus of the department's work was then on informing the residents personally before they heard the announcement through the media. Officers were quite clear that 'out of courtesy, morally and ethically', it was the department's role to tell the residents of the announcement (CMC 2004, p. 18). The shortened timeframe meant that the normal approval and checking of the letter did not take place.

From the department's point of view, officers were fulfilling their responsibility to be both responsive to the government as well as sensitive to stakeholder impact. The extremely truncated timeframe meant the letter was considered 'close enough' (CMC 2004, p. 20) as the department focused on the challenge of getting officers on the ground before the announcement. When interviewed, all departmental officers said they were aware of the provisions of the caretaker conventions and none of them thought, at the time, that they were not being politically impartial. In retrospect it was conceded that, although the department had been concerned to offer a 'compassionate response to those 14 households' (CMC 2004, p. 18), more care should have been taken with the drafting of the letter.

Outcomes and Implications

The Crime and Misconduct Commission made four recommendations about additional guidance and training on the operation of caretaker conventions. The recommendations were:

1. that all public sector agencies have an adequate training mechanism to ensure that staff are fully aware of the caretaker conventions and how they operate during election periods;
2. the CEOs of public sector agencies identify which staff should receive such training, having regard to their duties and how the conventions apply to such duties;
3. the CEOs of public sector agencies ensure that, as soon as the caretaker periods begin, all relevant internal officers receive advice summarising the conventions; and
4. that additional ways be found to reinforce the requirement on all public servants to avoid any appearance of political partiality during caretaker periods.

The CMC's view was that further explanatory material to give guidance to departmental officers was required to prevent their actions—even if well-intentioned—from becoming politically controversial (CMC 2004, p. 32).

Yet, evidence from all of the officers involved showed they understood and were aware of the provisions of the caretaker conventions. The reality of decision-making in such a truncated and pressured timeframe did not allow for the normal consideration and approval processes that would be undertaken for

such a sensitive letter. The focus of the Department of Main Roads was on informing the affected residents in a courteous and sensitive manner before the inevitable media onslaught.

The implications of the CMC report for the Queensland public service are many. The report clearly says that the conventions are not legally binding on politicians but that a different standard applies to public servants because of the principle of impartiality contained in the *Public Service Act 1996* (Qld). This is the first time that an assessment has been made that public sector employees can be held to account for a breach of caretaker conventions in a way that politicians cannot, even if officers are responding to a request from a minister.

The realisation that public servants can bear real consequences for a breach of caretaker conventions has implications for responsiveness during an election campaign. The double standard of accountability means that, in contrast to public servants, ministers have very little to lose in pushing the boundaries. CEOs need to be more alert and responsible for moderating the expectations of ministers and protecting staff from any potential breaches through being overly responsive to the incumbent government.

There is increased responsibility for departmental CEOs to: (a) ensure that all staff are properly trained in the operation of caretaker conventions; and (b) develop an increased understanding of the sanctions for a breach of impartiality. The need for documented approval processes for checking and clearing work becomes important. The CMC oversight of this area also leads to increased pressure and stress on the bureaucracy during the election period and an increased need to exercise high level judgement and caution.

Legislating caretaker conventions in local government – unintended consequences?

Two State governments—Victoria and Queensland—have recently amended local government legislation to specify ‘caretaker arrangements’ which apply during the election period. The Queensland amendments were based on the Victorian and both follow the same formula. In both states the arrangements bring local government into line with the State and Commonwealth practices. The local government arrangements have a twofold aim:

- to avoid the use of public resources in a way that may unduly affect the election result; and,
- minimise the likelihood of council making certain types of decisions that may unduly limit the decision-making ability of the incoming council (www.localgovernment.vic.gov.au).

These new statutory arrangements derived from concerns about official misconduct and the integrity of practices during local council elections. In

Victoria, the change to the legislation was a response to a review of the State constitution in 2003. In Queensland, the legislation was in response to a CMC report into the conduct of candidates at the 2004 Gold Coast City Council elections. Like the State and Commonwealth conventions, these local government arrangements are concerned with curtailing the benefits of incumbency and preventing the present administration from making decisions that would commit an incoming council. The arrangements are based on the caretaker principle that every election brings the possibility of a change of government.

The legislation of caretaker arrangements for councils is still in its infancy but it is possible to conceive of a range of complexities that could arise in the face of such a legalistic approach. Local government representatives in Australia tend to be community representatives rather than organised along party lines. This could lead to a lesser constraint on behaviour as there is often no party machine to exercise discipline and set standards of electoral behaviour. Hence the recent trend to legislate caretaker behaviour could be a response to the lack of political sanction that would normally operate against a political party seen to flaunt the caretaker provisions. A legislated response puts the onus back on individual behaviour instead of the mutually agreed responsibility which is the hallmark of a convention.

The role of the Local Government minister as decision-maker has the potential for conflict, particularly if there are partisan differences between the two jurisdictions. There is the potential for claims of breaches to be tested in the courts particularly around definitions of what is a 'major policy decision' and 'election matter'. The legislation is silent on whether council officers can be prosecuted for breaches and it does not identify whether it is the CEO or the Lord Mayor who is the accountable officer for implementing and managing these arrangements during the caretaker period. The caretaker arrangements focus on limiting the advantages of incumbency but do not formalise the rights of the opposing candidates to access briefings from the administration.

Compared to the more detailed guidance documents of the other levels of Australian and New Zealand governments, the legislation is short on detail and nuance. This lack of information could leave the legislation open to challenge and legal interpretation. Legislation is a blunt tool and by legislating these arrangements local government loses some of the evolutionary capacity and flexibility that a non-legislated convention gives. Legislation is time-consuming and difficult to update and cannot easily reflect the nuance of changing practice. A self-managed process, as adopted by New Zealand (see below), keeps the capacity for regular updating to respond to local circumstances and issues as they arise

New Zealand's 'good practice' approach

In 2004 the New Zealand Controller and Auditor-General published a report on *Good Practice for Managing Public Communications by Local Authorities*. The report addressed the broader issue of all council public communications and addressed the concern that publicly funded communications be used for legitimate purposes. The report stated that the guidance is not binding on councils but recommends that each council adopts a formal communications policy. The report acknowledged this is a contested area where communications should reflect the public interest and not support a partisan point of view, nor be used to promote the profile of individual councillors.

The report included a section on communications in a pre-election period which is concerned with ensuring existing members do not use council resources to promote their re-election prospects. The following principle is identified:

A local authority must not promote, nor be perceived to promote, the re-election prospects of a sitting member. Therefore, the use of Council resources for re-election purposes is unacceptable and possibly unlawful.

The guidance is quite detailed and has been voluntarily adopted by local government in New Zealand. Because of the voluntary process, each council can amend the principles and requirements to meet local needs and update it if local controversies lead to a change of focus.

Conclusion

The trend to transition from convention to legislated practice has a range of implications for those involved with government decision-making. At present, conventions are a moral and mutually reciprocal obligation acknowledged by most political players. Because they have not been subject to legal interpretation conventions have been able to evolve and adapt to changing circumstances and political values. There is concern that those most at risk from legal action are likely to be public sector officials caught in the crossfire of partisan politics.

A desire for formal embodiment of sanctions in legislation could reflect concerns about the efficacy of self-regulation and the willingness of government to adhere to a voluntary restraint not to abuse power. The move towards a more formal restraint on the power of incumbency would see the 'gentlemen's agreement' of mutual obligation changed to one of seeking advantage through legal action.

Chapter 9. Caretaker conventions and the future of responsible government

The scope and application of caretaker conventions will continue to evolve. In previous chapters we have documented the similarities and differences between the jurisdictions under consideration and looked at the implications of changing practice.

Caretaker conventions are among the most challenged and controversial of all conventions. They apply during the most intense time of adversarial politics—when both major parties have the potential to retain or gain government. Minor slips and inexactitudes are exploited by both sides. There is intense pressure on public servants to justify their decisions regarding perceived support or partiality for the incumbent government. As outlined in Chapter 2, conventions are about a shared understanding and mutual responsibility for their upkeep. Perhaps the nature of modern adversarial politics gives the concept of conventions a somewhat antiquated air. The introduction of ministerial codes of conduct and anti-corruption commissions indicates political participants appear less trusting of mutuality and are becoming more interested in enforceable sanctions.

An important corollary of this development is whether the voluntary nature of caretaker conventions can be sustained in contemporary politics? Caretaker conventions were established on the principle of ‘self-policing’ but as accusations intensify about alleged government breaches of conventions, might not future governments consider establishing an independent arbiter? A transition from the status of convention to a set of legally enforceable rules would see a radical recasting of caretaker arrangements.

Prescription and codification

It is difficult to pinpoint precisely when the maintenance of caretaker conventions shifted from being a political responsibility to a primarily bureaucratic one. In his 1951 letter to ministers, Menzies was clear it was their responsibility to exercise judgement in the continuing operation of their departments. As this monograph has demonstrated, a simple letter reminding ministers of their responsibilities has been, since the 1970s, supplanted by increasingly detailed guidance designed to support public servants to make decisions across a broad range of government activities. Most jurisdictions, with the exception of NSW, have a system to review their guidance documents after each election to respond to recent controversies or ambiguities. This has led to a pattern of increasing prescription and specification as jurisdictions try to prevent repetition of claimed

breaches and controversies by increasing or adding new suggestions about how to handle a particular situation.

The guidances have evolved into strangely hybrid documents. They acknowledge the responsibility of government politicians to adhere to the conventions, for example, 'adherence to the conventions is ultimately the responsibility of the Premier and the government collectively' (Vic DPC 2006, p. 2). Yet the advice contained is focussed on assisting the public sector to put boundaries around and manage the relationship with their political masters. An example of this can be seen in the Victorian guidance document, which is described as being 'intended to explain the conventions and practices in more detail and to provide guidance for the handling of business during the caretaker period' (Vic DPC 2006, p2).

Increasing prescription has the potential to diminish bi-partisan agreement on the caretaker conventions. If conventions are mutually agreed principles that guide political behaviour, that mutuality may be eroded by incumbents adding new levels of detail to the guidance documents. Quite often, the updating is undertaken at a bureaucratic level, as officers try to counteract criticism by adding advice on how to manage, for example, the impact of the internet. To preserve the mutuality of caretaker conventions amendments should be agreed by both major political parties to ensure the acceptance of bi-partisan responsibility for their maintenance and observance.

Codification and prescription also leads to a focus on interpretation and a loss of flexibility. An emerging concern is that increased prescription will lead to legal sanctions for breaches for the public service. Codification also shifts the responsibility to adhere to the restraints away from politicians and displaces it to the public service. The public sector's tendency to document and regulate might, in the longer term, transfer the spotlight from political behaviour to bureaucratic interpretation and application. This is already evident in some of the commentary on caretaker conventions (see, for example, Malone 2007).

Introduction of statutory sets of public service values and codes of conduct means that public servants now have legal obligations for non-partisan behaviour and these apply during the caretaker period. This was tested during the Tugun Bypass example cited in Chapter 7. Although it has not been repeated since, the potential remains for public servants to be caught in similar breaches with the possibility that disciplinary or financial sanctions could be applied. The implication is clear although little publicised at present. Public servants are exposed in ways that ministers still are not. This changing environment will only accelerate the trend to prescription which can be used as a bulwark against ministerial demands for responsiveness during the caretaker period.

Future prospects

If a convention reflects shared norms about political behaviour, is it not the prerogative of the government of the day to update or revise its content or application? Over the years, public servants have unobtrusively become the guardians of the detail and the application of the caretaker conventions. This presents a dilemma because public servants understandably want the certainty and clarity that detailed procedures provide. Australia's 'talent for bureaucracy' (Davies 1964) tends to favour addressing problems by the development of detailed guidelines and procedures.

The trend to increased codification could reflect a diminished understanding of, and experience with, the processes of government. The application of conventions has been, in the past, the province of the most senior bureaucrats. Their long experience and judgement allowed them to make the fine distinctions often required to navigate the political/public service interface. To do so successfully requires a capacity to apply the caretaker principles with the confidence to take and defend such judgements in the contested atmosphere of an election campaign. Arguably, contemporary trends in public sector employment—rapid progression to senior ranks, external appointments to senior positions and greater use of contract appointments—could account for uncertainty and discomfort in applying the caretaker conventions. If that is the case, the trend to codification and prescription is likely to continue so that senior officials can point to written guidance as the basis for their decision-making.

The controversy that surrounds the application of caretaker conventions is unlikely to diminish but political processes require political solutions. The increase in detail in the application of caretaker conventions cannot continue indefinitely and, eventually, responsibility will have to return to ministers and political leaders to manage. With the increased potential for public servants to be disciplined for breaches of the guidelines there might well be some relief in returning ownership to the political players.

Glossary

Cabinet

A committee of ministers which forms the apex of executive decision-making.

Commonwealth Charter of Budget Honesty

An Act that provides, among other things, for a pre-election costing of Government and Opposition commitments and policies during the caretaker period. The Charter is the subject of significant controversy.

Constitution

The set of rules by which a country or state is governed. In Australia, the Constitution was written in the 1890s and it sets out the structure of Australian Federal Government. The Constitution can only be explicitly amended by referendum.

Convention

Conventions are non-legal rules that guide political practice in areas on which the Constitution is silent.

Dissolution of the House of Representatives

The House of Representatives is dissolved by the Governor-General under mechanisms specified in the Constitution (s. 5) and (s. 57).

Double Dissolution

Colloquial term for dissolution of both the Senate and the House of Representatives arising when the Senate blocks, fails to pass or amends a bill unacceptably on two occasions with a gap of at least three months.

Executive Council

Executive Council is a formal body of the Governor-General or Governor meeting with members of the Cabinet. Governor-General-in-Council/Governor-in-Council gives legal effect to many of the decisions of Government such as subordinate legislation and appointments.

Mixed Member Proportional (MMP) electoral system

The New Zealand electoral system, introduced in 1996, is based on each elector having two votes—one for a party and one for a local candidate.

Prorogation of Parliament

A discontinuation of a session of Parliament without necessarily dissolving it. The Commonwealth Parliament is sometimes prorogued immediately prior to a dissolution of the House of Representatives.

Royal Assent

The Governor-General or Governor gives assent to laws when they have been passed by Parliament. This is the final step in the legislative process with assent giving legal effect to Bills becoming Acts.

Subordinate legislation

Subordinate legislation is made under the authority of existing Acts. Subordinate legislation includes regulations, by-laws, orders, ordinances, statutory instruments and notices. Subordinate legislation is signed by Governor-General/Governor-in-Council.

Westminster Model

The Westminster model of government is based on practices of the British Government, many of which are adopted by a range of representative democracies. Elements of the Westminster model include: parliamentary sovereignty; a collective and responsible cabinet; ministers accountable to Parliament; a non-partisan and permanent civil service; and an Opposition recognised as an executive-in-waiting.

Writ

A document commanding an electoral officer to hold an election. The writ contains dates for the close of rolls, the close of nominations, election day and the return of the writ.

References

- AAP 2004, 'Hill says Iraq plan not covered by caretaker rule'. *Australian Associated Press*. 16 September.
- ACT 2004, *Guidance on Caretaker Conventions*. Chief Minister's Department.
- APSC 2006, *Supporting Ministers: Upholding the Values*. A Good Practice Guide. Australian Public Service Commission, Canberra.
- Boston, J., S. Levine, E. McLeay, N. Roberts, H. Schmidt, 1998, 'Caretaker government and the evolution of caretaker conventions in New Zealand'. *Victoria University of Wellington Law Review*, Vol 28, No. 4 pp. 629-648.
- Canberra Times* 2004. 'Propaganda Pays Off'. Editorial, 24 October.
- Charlton, P. 2001, 'Caretaker's conundrum' *The Courier Mail*, 9 October.
- Codd, M. 1996, 'National elections: Caretaker conventions and arrangements for transition' Australian Institute of Administrative Law (AIAL) Forum No. 10.
- Controller and Auditor-General 2004, *Good Practice for Managing Public Communication by Local Authorities*. April.
- Cooray, L.J.M. 1979, *Conventions, the Australian Constitution and the Future*, Legal Book, Sydney.
- CMC 2004, *The Tugun Bypass Investigation*. Crime and Misconduct Commission Report, July.
- 2005, *The Local Government Electoral Process: Discussion Paper*. Crime and Misconduct Commission, December.
- 2006, *Independence, Influence and Integrity in Local Government: A CMC Inquiry into the 2004 Gold Coast Election*.
- Davies, A.F. 1964, *Australian Democracy: An Introduction to Political System*. Melbourne, Longmans.
- Davis, Glyn, Alice Ling, Bill Scales and Roger Wilkins 2001 'Rethinking Caretaker Conventions for Australian Governments' in *Australian Journal of Public Administration*, 60 (3), pp. 11-26.
- Department of the Prime Minister and Cabinet (DPMC) 1987, 'Caretaker Conventions and Other Pre-Election Practices' *Annual Report 1986-87*, AGPS, Canberra.
- DLGPSR 2005, *Queensland Council Elections: Ensuring Accountable and Transparent Council Elections*. Discussion Paper. Queensland Department of Local Government, Planning, Sport and Recreation.

- DPMC 2004, *Guidance on Caretaker Conventions*. Department of the Prime Minister and Cabinet.
- Dicey, A.V. 1959, *An Introduction to the Study of the Law of the Constitution* (10th edition) Macmillan and Company Ltd, London.
- F&PA 2005, *Inquiry into the Regional Partnerships and Sustainable Regions Programs*. Senate Finance and Public Administration Committee, October.
- Gosch, E. 2001, 'Thirty-ninth parliament dissolved ahead of November 10 election' *Australian Associated Press*, 9 October.
- Gustafson, B. 2000, *His Way: A Biography of Robert Muldoon*. Auckland, Auckland University Press.
- Hasluck, P. 1979, *The Office of Governor-General*. Melbourne, Melbourne University Press.
- Heard, A. 1991, *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto, Oxford University Press.
- Hood Phillips, O and P. Jackson 1978, *Constitutional and Administrative Law*. Sixth Edition. London, Sweet and Maxwell.
- Howard, J. 1995, *The Role of Government: A Modern Liberal Approach*. Speech to the Menzies Research Centre, Canberra, 6 June.
- Howe, B. 2001, 'Comment on 'Rethinking caretaker conventions for Australian governments''. *Australian Journal of Public Administration*. Vol 60(3), September, pp. 27-28.
- Hughes, Colin A. 1980, 'Conventions: Dicey Revisited' in P. Weller and D. Jaensch (eds) *Responsible Government in Australia*. Melbourne, Drummond Publishing.
- Hughes, C. and B. Costar 2006, *Limiting Democracy: The Erosion of Electoral Rights in Australia*. Sydney, UNSW Press.
- Jaconelli, J. 2005, 'Do constitutional conventions bind?' *Cambridge Law Journal*, 64(1), March, pp. 149-176.
- Jennings, I. 1959, *The Law and the Constitution* (5th edition). London, University of London Press.
- Joint Standing Committee on Electoral Matters (JSCEM) 2004, *Report of the Inquiry into the conduct of the 2004 Federal Election and Matters Relating Thereto*.
- Kane, J. 2006, 'Constitutionalising Local Government', *Public Administration Today*, July-September, pp. 24-26.
- Keating, M. 2002, 'Caretaker conventions post an election'. *Australian Journal of Public Administration*, Vol 61(2), June, pp. 119-120.

- Kerin, J. 2004, 'Direct hit on Hill's use of site'. *The Australian*. 9 September.
- Kitney, G. and K. Maley 1993, 'Keating claims health victory'. *Sydney Morning Herald*, 9 February.
- Laver, K and A. Schepsle 1994, *Cabinet Ministers and Parliamentary Government: The Political Economy of Institutions and Decisions*. Cambridge University Press.
- Lindell, G. J. 1988, 'Executive Actions and Appointments Following a Dissolution of Parliament' *Australian Law Journal* 62, pp. 321-322.
- Ling, Alice 2000. 'Conventions About Caretaker Government in Australia'. Unpublished Masters of Public Administration Thesis, University of Queensland.
- Malone, P. 2007, 'Time to tighten the caretaker conventions'. Democratic Audit of Australia Discussion Paper 3/07.
- Marshall, G. 1984, *Constitutional Conventions: The Rules and Forms of Political Accountability*. Oxford, Clarendon Press.
- 2004, 'The Constitution: its theory and interpretation'. In Bognador, V (ed) *The British Constitution in the Twentieth Century*. Oxford University Press.
- Marshall, G. and G. Moodie 1971, *Some Problems of the Constitution*, 5th ed. London, Hutchinson University Library.
- Marr, D. and M. Wilkinson 2003, *Dark Victory*. Sydney, Allen & Unwin.
- McLeay, E. 1999, 'What is the Constitutional status of the New Zealand Cabinet Office Manual?' *Public Law Review*, Vol 10, March, pp. 11-17.
- McMullan, B. 2007, 'The dangers of complacency: the case for reforming fiscal policy in Australia. In Wanna, J (ed) *A Passion for Policy: Essays in Public Sector Reform*. Canberra, ANU E Press.
- Odgers' Australian Senate Practice* 2004, Eleventh Edition. <http://www.aph.gov.au/senate/pubs/odgers/index.htm>
- Premier of New South Wales 2006, 'Caretaker' Government Conventions and Other Pre-Election Practices' Memorandum No. T2006-18. 18 December.
- Proceedings of the Australian Constitutional Convention* 266-29 April 1983, Vol 1 appendix, p. 319.
- Reid, G.S. 1977, 'Commentaries'. In Evans, G (ed) *Labor and the Constitution: Essays and Commentaries on Constitutional Controversies of the Whitlam Years in Australian Government*. Melbourne, Heinemann.
- Reuters 1996, 'Queensland's Borbidge calls on Goss to go'. *Reuters News Service*, 12 February.

- Rhodes, R. A.W. and P. Weller 2005, 'Westminster transplanted and Westminster implanted: exploring political change'. In H. Patapan, , J. Wanna, and P. Weller (eds) *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific*. Sydney, UNSW Press.
- Roberts, G. 1989, 'Jobs on the line for top public servants'. *Sydney Morning Herald*, 5 December.
- Sampford, C.J.G. 1987, 'Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions'. *Oxford Journal of Legal Studies*, Vol. 7, No. 3, pp. 369-420.
- Sawer, M. 2006, 'Review of Limiting Democracy: The Erosion of Electoral Rights in Australia'. *Democratic Audit of Australia*, Available at: http://arts.anu.edu.au/democraticaudit/papers/20061006_sawer_review_ch_bc.pdf
- Secombe, M. and T. Allard 2004, 'Hostage drama politicised, says ALP'. *Sydney Morning Herald*, 16 September.
- South Australian Cabinet Office 2005, *Caretaker Conventions and Other Pre-Election Practices: A Guide for South Australian Agencies*. August.
- State Services Commission 2005, *State Servants, Political Parties and Elections: Guidance for the 2005 Election Period*.
- Strangio, P. 2006, *Incumbency Dominance: An Unhealthy Trend?* Senate Occasional Lecture, 25 August.
- Tasmanian Department of Premier and Cabinet (Tas DPC) 2006, *State Election Caretaker Conventions*.
- Tiernan, A. 2007, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney, UNSW Press.
- Twomey, A. and R. Wilkins 2007, 'Cabinet Conventions: NSW Practice'.
- Victorian Department of Premier and Cabinet (Vic DPC) 2006, *Caretaker Conventions: Guidance for Handling Government Business During the Election Period*.
- Wanna, J. 2006, 'Between a rock and hard place: the nonsense of Australia's Charter of Budget Honesty Act 1998' Paper presented at Australasian Political Studies Association (APSA) Conference, Newcastle, 25-27 September.
- Wanna, J., J. Kelly and J. Forster 2000, *Managing Public Expenditure in Australia*. Sydney, Allen & Unwin.
- Weller, P. 2002, *Don't Tell the Prime Minister*. Melbourne, Scribe.

- Weller, P., R.A.W. Rhodes and J. Wanna forthcoming publication on Westminster traditions.
- Western Australian Department of Premier and Cabinet (WADPC) 2005, *Caretaker Conventions: Guidelines Applying in Western Australia During the State Election Period*.
- Wilson, J. 1995, 'Constitutional conventions and election campaigns: the status of the caretaker convention in Canada'. *Canadian Parliamentary Review*. Vol 18, No. 4, Winter 1995-96.
- Young, S. 2005, *Submission to Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*. 4 May.

Appendix A. Different approaches – what the jurisdictional guidances say

This appendix collects and publishes for the first time all of the caretaker guidances from across Australia and New Zealand. This appendix collates and provides a brief overview of the similarities and differences of the approaches adopted by different jurisdictions.

In Australia, caretaker conventions were first published by the Commonwealth in 1987, although they had been explicitly articulated by prime ministers since 1951. The Commonwealth guidance is both the oldest and most authoritative—the majority of State provisions are derived from the Commonwealth. Since 1987, the tendency has been to add prescriptive detail and to enumerate the practices behind the conventions. Pressures on the management and interpretation of caretaker conventions discussed in chapter 5 have prompted a transition from the minimalist approach of a letter from Mr Menzies to his ministers, to a highly planned and administered process of updating and disseminating the caretaker conventions before an election, and providing advice on application during the election campaign.

All jurisdictions except New South Wales have engaged in an increased bureaucratisation of the process, with increased detail and advice in response to breaches and controversies. The focus of the New South Wales guidance is on advising ministers of their responsibilities. It directs them on behaviour that should be avoided during an election campaign. The guidance is there to ‘assist ministers’ and, at just over a page, has avoided the tendency of other jurisdictions in adding detailed and more prescriptive instructions with the passage of time.

The focus of the New Zealand caretaker convention guidance, contained in *The Cabinet Manual*, is broader than its Australian counterparts because of that country’s different electoral system. Introduction of the MMP system of voting in 1996 necessitated an increased focus on transitions and the formation of government. It contains detailed advice about procedures when it is not clear who will form the next government and on decision-making during an extended caretaker period. It was noted in Chapter 2 that in 1996 the caretaker period lasted for nine weeks. Although this has not been repeated at subsequent elections, New Zealand departments are encouraged to plan and prepare for the possibility of a protracted caretaker period (*The Cabinet Manual* 2001 DPC, p. 58).

The emphases of caretaker guidance documents have shifted from advising ministers about appropriate conduct during the election period to supporting public sector officials to avoid perceptions of partisanship and prevent governments from exploiting the advantages of incumbency. The majority of

jurisdictions now work with caretaker guidance documents that have dual objectives. Ministers and departmental officers have different roles during an election campaign and they need to be clear about their respective roles. As caretaker guidance documents become more detailed with prescriptive advice for public servants, there may be a need to develop and publish two guidances: the first might be aimed at ministers, outlining their responsibilities within the broader Westminster context and reiterating their relationship with the public service during the caretaker period. The other would provide detailed advice for departments on how best to manage internal arrangements at a time when the fate of the Government is in the hands of the people, examples being the signing of correspondence or decisions about departmentally supported websites.

Table of Contents

| | |
|------------------------------|-----|
| Australian Capital Territory | 87 |
| New South Wales | 97 |
| Northern Territory | 101 |
| Queensland | 113 |
| South Australia | 119 |
| Tasmania | 129 |
| Victoria | 141 |
| Western Australia | 153 |
| New Zealand | 165 |

Australian Capital Territory

2004 General Election Guidance on Caretaker Conventions Issued by Chief Minister's Department, June 2004

Table of Contents

Section/Subject

1. Introduction
2. The Caretaker Period
3. Operations of the Government
 - a. Policy Decisions
 - b. Appointments
 - c. Contracts and Undertakings
 - d. Ministerial Attendance at Intergovernmental Fora during an Election Period
 - e. Requests by Ministers of Departments and Agencies
 - f. Commencement of Legislation
4. Operations of Departments and Agencies
 - a. Provision of Information and Advice to Ministers
 - b. Ministerial Correspondence
 - c. Cabinet Documents
 - d. Pre-Election Budget Update
 - e. Incoming Government Briefs
 - f. Consultation with Public Servants by Non-Government Parties
 - g. Publications and Advertising Campaigns
 - h. Government Use of Electronic Communication
 - i. The Use of Government Agency Premises
 - j. Approval of Grants
 - k. Responses to Parliamentary Committee Reports
 - l. Annual Reports
 - m. Public Sector Ethical Requirements
5. Further Information

1. Introduction

It is accepted practice within governments at both the State/Territory and Commonwealth levels that special arrangements apply with regard to the operation of government in the 'caretaker period' immediately before and after an election.

Each general election brings with it the possibility of a change of government, and so it is appropriate for governments to operate in ways that will not limit the freedom of action of an incoming government.

Successive ACT governments have adopted similar arrangements during the caretaker period. These arrangements have no legal standing and so are known as the ‘caretaker conventions’.

Adherence to the caretaker conventions is ultimately the responsibility of the Chief Minister. The Chief Minister strongly supports adherence to these longstanding conventions, and has approved these guidelines.

The following guidelines apply to all ACT Government Ministers and to all officers of ACT Government departments and agencies.

2. The Caretaker Period

In accordance with the provisions of Section 100(1) of the Electoral (Amendment) Act 1997, the Australian Capital Territory is scheduled to hold a general election for the Legislative Assembly on Saturday, 16 October 2004.

It is accepted practice in the Australian system of government that the period during which the caretaker conventions apply commences from the time of the dissolution of the Parliament. This reflects that, after dissolution, there is no parliamentary chamber to which a government may be held accountable.

However, under the ACT’s system of fixed terms of parliament, where the Legislative Assembly is not dissolved until the day of a general election, the caretaker period must be defined differently.

The ACT’s caretaker conventions apply from the beginning of the ‘election period’ as defined by the Electoral Act 1992. Under section 3 of the Electoral Act:

- ‘the ‘election period’, in relation to an election, means the period —
- (a) beginning on the first day of the pre-election period; and
 - (b) ending when the result of the election is declared under section 189’.

The ‘pre-election period’ is defined in section 3 as:

‘...the period of 37 days ending on the expiration of polling day for an election’.

Thus, in relation to the 2004 ACT general election, the caretaker period begins on 10 September, which is 37 days before polling day on 16 October.

The *Australian Capital Territory (Self-Government) Act 1988* requires the Legislative Assembly to elect one of its number to be Chief Minister on the first sitting day following a general election. The Chief Minister then appoints Ministers to form government. Therefore, in the event of a change of government,

the caretaker conventions will remain in force until the first sitting day of the Legislative Assembly following a general election.

Alternatively, in the event of a returned government, the caretaker conventions will apply until such time as the government is clearly returned (i.e. at the declaration of the result of the election as per Section 189 of the Electoral Act). This would be where the government has a majority of Assembly seats in its own right, or where the government can clearly count upon a majority of Assembly Members for support. At this time the incumbent government regains its mandate to govern without the restrictions of the caretaker period. If, however, the likely outcome of the election of the Chief Minister by the Legislative Assembly remains unclear, the caretaker conventions will remain in force until the first sitting day of the Assembly.

Note: In the event of a Federal election being called for 16 October 2004, the ACT election will be moved to 4 December 2004. In this event the caretaker period would begin on 29 October 2004 and, as outlined above, would end once the election result is clear or a new government is formed. Were it the case that the caretaker period had already begun, (i.e. that the Federal election was called for 16 October after the commencement of the ACT caretaker period on 10 September), the caretaker conventions would cease to apply and would not recommence until the beginning of a new caretaker period on 29 October.

3. Operations of the Government

The business of government continues during the caretaker period. However, the caretaker conventions in effect during this period impact on a number of areas of government administration. These areas are:

3(a) Policy Decisions

The Government should avoid taking major policy decisions likely to commit an incoming government.

This restriction would not apply to the implementation of major policy decisions taken and announced before the caretaker arrangements came into effect. Also, the Government may, of course, announce during the caretaker period new policy initiatives that it proposes to implement after the election, should the Government be returned to office.

If circumstances require the Government to make a major policy decision during the caretaker period that would potentially commit an incoming government, this should be done in consultation with appropriate non-Government party leaders/Members.

3(b) Appointments

The Government should avoid making appointments of any significance during the caretaker period.

Ministers should:

- i. if possible, defer the appointment until after the caretaker period;
- ii. if an appointment needs to be made for reasons of continuity, appoint for a short term only to carry through until after the caretaker period; or
- iii. if a short-term appointment is not practicable, appoint for the full term, following consultation with appropriate non-Government party leaders/Members.

3(c) Contracts and Undertakings

The Government should avoid entering into major contracts or other undertakings during the caretaker period that are likely to commit an incoming government.

This restriction includes commitments that would be politically contentious. If a major contract or undertaking cannot be deferred until after the caretaker period, the Government should seek the agreement of non-Government party leaders/Members before entering into the contract or undertaking.

3(d) Ministerial Attendance at Intergovernmental Fora during an Election Period

Ministers, whilst they retain their office and title during the pre-election period, would not generally represent the ACT in intergovernmental fora unless it is unavoidable. Where possible, Ministers and agencies should seek postponement of such meetings until after the election. If postponement is not possible, a senior departmental officer should attend the meeting in an observer capacity to ensure that the ACT is fully informed of progress, briefing the Minister on return.

The usual practice is for the Chief Executive of the Chief Minister's Department to write to jurisdictional counterparts advising them of the timing of the ACT Election and seeking their cooperation with intergovernmental arrangements during this period.

3(e) Requests by Ministers of Departments and Agencies

Ministers may seek a wide range of factual information during the pre-election period, some of which may be incorporated into Ministerial speeches or political publications. It is appropriate for the public service to provide factual information to Ministers provided that they take no active part in the incorporation of this material into information of a party political nature.

3(f) Commencement of Legislation

During the caretaker period, a Minister may, by gazettal, and with the approval of the Chief Minister, approve the commencement of legislation that has been passed in the Legislative Assembly.

4. Operations of Departments and Agencies

During the caretaker period, the ongoing obligation on departments and agencies to act in an apolitical manner in keeping with ACT public sector requirements, takes on added significance. The caretaker period affects a department's or agency's usual activities in several ways:

4(a) Provision of Information and Advice to Ministers

A department or agency should continue to provide information and advice concerning the day-to-day business of government to Ministers. Accordingly, factual material should be provided if requested by a Minister, even if it might be drawn upon for use in speeches or other material for the election campaign. Provided that the material is strictly factual, the use to which it is put is a matter for the Minister.

Strictly factual analysis of opposition policies in terms of practical implementation, for example costing, can be undertaken, but departments and agencies need to exercise the utmost care not to become involved in critiquing the policy. Having regard to the potential sensitivity of such requests, and consistent with the advice of the ACT Commissioner for Public Administration on this issue, chief executives of departments and agencies should refer such requests to the Chief Executive, Chief Minister's Department for decision.

4(b) Ministerial Correspondence

Ministers would usually sign only the necessary minimum of correspondence. Any correspondence beyond this necessary minimum should be prepared for signature by Chief Executives or their delegates, rather than allowing the correspondence to accumulate for an incoming Minister.

In preparing correspondence, departments and agencies should avoid using language that might be construed as implying any particular outcome of the election. References to post-election action should be expressed in terms of 'the incoming Government'.

4(c) Cabinet Documents

Before the date of the election, the Chief Executives of departments and agencies must ensure that all Cabinet documents are accounted for and securely stored so that, if there is a change of government, the documents can be returned promptly to the Cabinet Office for destruction in accordance with the provisions

of the Cabinet Handbook. Alternatively, documents may be destroyed by Cabinet Liaison Officers according to the guidelines given in the Cabinet Handbook, which can be found at http://www.cmd.act.gov.au/Documents/Cabinet_Handbook.pdf.

4(d) Pre-Election Budget Update

The Financial Management Act 1996 was amended in 2003 to require a pre-election budget update be prepared by the Under Treasurer and provided to the parliamentary counsel for notification at least 30 days before the polling day of an ordinary election. In the case of the 2004 ACT general election this update should be provided on or before Friday 17 September. The Financial Management Act 1996 may be found at <http://www.legislation.act.gov.au/a/1996-22/current/pdf/1996-22.pdf>.

The purpose of the pre-election budget update is to give the electorate an accurate picture of the Territory's financial position before the election, and allow the assessment of the government's performance against its financial policy objectives. The update should include budget estimates for the Territory, General Government Sector and Public Trading Enterprises.

4(e) Incoming Government Briefs

The Chief Minister's Department is responsible for coordinating two sets of incoming government briefs in the lead-up to an election. One set of briefing papers will be developed for the event of a returned government, and the second for the event of a newly elected government taking office.

4(f) Consultation with Public Servants by Non-Government Parties

In order to ensure a smooth transition in the event of a change of government, there may need to be consultation between the leaders of the non-government parties and departmental officers during the caretaker period.

For such consultations to occur, leaders of non-government parties should request the relevant Minister to grant access to departmental and agency officers. The Minister should notify the Chief Minister, and the relevant Chief Executive, of any such request and whether the request was granted.

The subject matter of the discussions between departmental and agency officers and non-government parties should be restricted to matters relating to the machinery of government and government administration, and may include advice on the administrative and technical practicalities and procedures involved in implementing policies already proposed by the parties. Officers are not authorised to discuss Government policies or to provide opinions on alternative policies or other party-political matters.

Officers are to inform Ministers, through their Chief Executive, of when the discussions are to take place.

4(g) Publications and Advertising Campaigns

During the caretaker period, departmental and agency publications and advertising material should proceed only if they constitute a normal operational requirement of the department or agency. In such cases, publications and advertising material should not include photographs and/or statements of a Minister.

Departments and agencies should carefully monitor their media releases during the caretaker period to ensure that the material is of public interest, relates only to the day-to-day business of the department or agency, and cannot reasonably be construed as being for political purposes.

The ACT Electoral Commission advised government agencies through Whole of Government Message No.225 on 27 February 2004 as to the laws applying to the publication of electoral matter. Government agency publications do not require authorisation as electoral matter if they include as a minimum on the cover and/or title page:

- The Canberra coat of arms;
- The agency name; and
- The words 'Australian Capital Territory', 'Australian Capital Territory Legislative Assembly', 'ACT Legislative Assembly', 'Australian Capital Territory Government' or 'ACT Government'.

However, for documents published for the first time from 16 April 2004 until the election, authorisation is required for government agency documents that contain a picture of a Member of the ACT Legislative Assembly.

Further guidance can be obtained from the ACT Electoral Commission's website, at: <http://www.elections.act.gov.au/adobe/FactSheets/FactSheetAuthorisingElectoralMaterial.pdf>.

4(h) Government Use of Electronic Communication

Agency websites may retain material placed on the website before the commencement of the caretaker period in most cases. Agencies should check the wording of any icons and links on their websites to ensure that they cannot be interpreted as promoting a Government policy. Agencies should add only the following material to their websites during the caretaker period:

- agency-related announcements of a routine, apolitical nature;
- purely factual material; and
- information on existing policies and programmes, unless the information includes statements of a partisan political nature.

If agency websites contain links to websites outside the act.gov.au domain, agencies should consider the need for clear entry/exit messages.

In order to avoid the need for authorisation as electoral matter, agency websites must conform to the ACT Electoral Commission's guidelines for government publications, as outlined above under 'Publications and Advertising Campaigns'.

Electronic bulletin boards and email systems provided by agencies should not be used to publish or distribute political material. Material from political parties and how-to-vote material, whether produced by a union, a church or any other organisation should not be displayed.

4(i) The Use of Government Agency Premises

There may be occasions where agency premises can appropriately be used during the caretaker period by political parties for public events, such as media conferences, or where they are the obvious place for a function (for example, the opening of a building by a Minister). In the case of official functions involving the use of agency resources, it would generally be appropriate for the Opposition spokesperson, member or candidate to be given the opportunity to be present.

It is not appropriate that the use of agency premises extend to such activities as engaging public servants in political dialogue, or using public servants for logistical support for political functions. Nor should the use of premises unreasonably disrupt the normal operations of the offices concerned.

4(j) Approval of Grants

The payment of grants approved prior to the caretaker period can proceed but should be forwarded by the Department rather than by a Minister or another member of the Government.

During the caretaker period, commitments should not be made in respect of grant applications received during the period or which were lodged before commencement of the period but are awaiting decision.

4(k) Response to Parliamentary Committee Reports

Responses to outstanding parliamentary committee reports should be taken up with the incoming government. Agencies may, however, undertake appropriate preparatory work and consultation at the agency level so that they are in a position to provide early advice to the incoming government.

4(l) Annual Reports

The *Annual Reports (Government Agencies) Act 2004* has revised the framework for annual reporting across the ACT Public Sector, and makes specific provisions for the timetable for presenting annual reports in an election year. The Act requires Ministers to table reports in the Legislative Assembly during the 3

month period following the end of the financial year. However, the last sitting day before the 2004 election is 26 August. Accordingly, the Chief Minister has required that agencies and public authorities provide 17 copies of their annual report to their Minister(s) by 24 September 2004, which must then be provided to the Speaker by 30 September. A further 40 copies must be provided for tabling in the Assembly on the second sitting day following the scheduled 16 October election.

Agencies are advised that definitive guidance is available in the Chief Minister's Annual Reports Directions for 2003/04, to be made available from June 2004 at Public Sector Managements' website: <http://www.psm.act.gov.au/publications.htm> . In addition, agencies may refer to the full text of the Annual Reports (Government Agencies) Act 2004 at <http://www.legislation.act.gov.au/a/2004-8/current/pdf/2004-8.pdf> .

Other administrative reports and publications can be released during the caretaker period. However, where a report or publication contains information that is likely to be controversial, consideration should be given to whether delivery should be deferred until after the caretaker period.

4(m) Public Sector Ethical Requirements

Public sector agencies, public employees and members of Government boards and committees must consider numerous ethical issues during the pre-election period with regard to their operations and conduct. These might relate to real or perceived conflicts of interest, the public perception of impartiality in their operation and conduct, and the participation of individuals in political campaigning.

The Commissioner for Public Administration has issued guidance on these matters for public officials during the pre-election period, entitled Guidance on Public Sector Ethical Requirements during the Pre-Election Period Including the Operation of Boards and Committees. This document is available from PSM's website at http://www.psm.act.gov.au/publications/ethics_election_issues.doc . Further enquiries can be directed to Employment Policy and Workplace Relations.

5. Further Information

Where Ministers require further clarification of these guidelines, they should seek advice from the Chief Minister.

Where Chief Executives require further clarification of these guidelines, they should seek advice from the Chief Executive of the Chief Minister's Department.

General inquiries regarding the caretaker period arrangements and their application can be directed to:

Different approaches – what the jurisdictional guidances say

Manager, Intergovernmental Relations and Executive Projects
Cabinet Office
Chief Minister's Department
Telephone 620 50513
Fax 620 75996

Further guidelines and information on arrangements that apply in the election period may be accessed from:

- Public Sector Management Group
www.psm.act.gov.au
Phone: 620 76207
- ACT Electoral Commission
www.elections.act.gov.au
Phone: 620 50236

Mike Harris
Chief Executive
Chief Minister's Department
June 2004

New South Wales

Premier of New South Wales (Memorandum to all Ministers)

MEMORANDUM No. T2002-6

'CARETAKER' GOVERNMENT CONVENTIONS AND OTHER PRE-ELECTION PRACTICES

This Memorandum relates to 'Caretaker' Government Conventions and other Pre-election Practices and replaces Premier's Memorandum T98-6.

A number of conventions that have evolved in relation to periods of 'caretaker' government should be adhered to in New South Wales. These conventions cover the period leading up to an election. They apply on and from Friday, 28 February 2003, when the Legislative Assembly expires, to the declaration of the election result.

As a general rule, no significant new decisions or initiatives, appointments, or contractual undertakings should be made during this period. Routine government business, however, should proceed as usual.

To assist Ministers the attached outline of the relevant conventions has been prepared. Should any difficulties arise in the application of these conventions in particular circumstances, Ministers should contact the Director-General, Premier's Department, except when the matter relates to Cabinet conventions, in which case the Director-General, The Cabinet Office, should be contacted.

Please ensure that all agencies within your portfolio are advised of these conventions.

Bob Carr
Premier

Issued: Cabinet Secretariat
The Cabinet Office

Contact: Maria Sykes
(02) 9228-4636

Date: December, 2002.

'Caretaker' Government Conventions and Other Pre-Election Practices

Successive Commonwealth and State Governments have accepted over the years that special arrangements should apply in the period immediately before an election. Governments assume a 'caretaker' role during this period to ensure

that decisions are not taken which would bind an incoming Government and limit its freedom of action.

The formal period during which the ‘caretaker’ conventions operate dates from the expiration of the Legislative Assembly until the election result is clear, or, in the event of a change of Government, until the new Government is appointed.

The general rule is that routine government business should continue during this period, but there are some important qualifications to this:

Appointments

Ministers should avoid, wherever possible, making significant appointments during the ‘caretaker’ period. In particular, appointments, which are potentially controversial, should be avoided. When an appointment must be made, there is the option of making an acting or short-term appointment.

Major Contracts and Agreements

During the ‘caretaker’ period, the Government should avoid entering into major contracts or undertakings which have not previously been announced or for which tenders have not been called, especially those commitments which would be politically contentious.

Operation of Agencies

During the ‘caretaker’ period, Ministers should take particular care to ensure that they do not compromise the neutrality of the Public Service. Material concerning the normal day to day business of government is supplied to Ministers in the usual way.

During the election period, Ministers should continue to attend to essential correspondence. Other correspondence may be attended to by agencies.

Consultation by Non-Government MPs with Agency Officers

As is normally the case, requests by non-Government members of Parliament to consult with agency officers must be made through the relevant Minister.

Ministers should draw to the attention of agency officers that they might comment on the practicalities of implementing and administering Opposition or other non-Government member's policies, but should not discuss Government policies. Ministers must be advised of when discussions are to take place and the general nature and scope of those discussions.

Cabinet Documents

As Ministers are aware, Cabinet documents are confidential and are not to be made available to succeeding Governments drawn from different political parties. Accordingly, Ministers should ensure that all Cabinet documents are accounted

for and properly stored ready for return to The Cabinet Office in the event that there is a change of Government.

Legislation

It is the practice for Bills which have passed through Parliament to be assented to by the Governor before the expiration of the Legislative Assembly.

The Executive Council will meet as usual during the 'caretaker' period to consider routine matters of Government business.

Northern Territory

This document is available at http://uluru.nt.gov.au/dcm_external/caretaker

**These guidelines have been prepared by the Cabinet Office,
Department of the Chief Minister.**

Last updated April 2005

Northern Territory of Australia - Guidance on Caretaker Conventions

Index of Contents

1. Introduction
2. What is the Caretaker Period?
3. Notification of Caretaker Period and Conventions
4. Operations of Government
 - 4.1. Cabinet and Executive Council
 - 4.2. Appointments
 - 4.3. Major New Policies
 - 4.4. Major New Contracts or Undertakings
 - 4.5. Intergovernmental Meetings
 - 4.6. Hosting Dignitaries
 - 4.7. Departmental Liaison Officers
 - 4.8. Ministerial Websites
5. Operations of Government Agencies
 - 5.1. General
 - 5.2. Ministerial Correspondence
 - 5.3. Provision of Information or Advice to Ministers
 - 5.4. Legislation and Subordinate Legislation
 - 5.5. Public Information Programs
 - 5.5.1. Advertising
 - 5.5.2. Media Releases
 - 5.5.3. Government Websites
 - 5.5.4. Other Materials
 - 5.6. Public Speaking
 - 5.7. Approval of Grants
 - 5.8. Hospitality by Agencies
 - 5.9. Statutory Authorities and Government Owned Corporations and Companies
6. Important Agency Responsibilities during the Caretaker Period
 - 6.1. Cabinet Documents

- 6.2. Incoming Government Briefings
7. Guidelines for Consultation by the Opposition with Agency Officers
8. Political Participation by NTPS Officers

1. Introduction

It is accepted practice within governments at both State/Territory and Commonwealth levels that special arrangements apply with regard to the operation of government in the ‘caretaker period’ immediately before and after a general election.

During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. However, each general election brings with it the possibility of a change of government, and so it is appropriate for governments to operate in ways that will not limit the freedom of action of an incoming government. These arrangements are not legally binding and so are known as ‘caretaker conventions’. Their application in individual cases requires judgement and common sense.

The basic caretaker conventions require a government to avoid implementing major policy initiatives, making appointments of major significance or entering major contracts or undertakings during the caretaker period.

Other than in exceptional circumstances, Cabinet and Executive Council functions will cease until such time as a new government is formed.

The basic conventions are directed to decision-taking, not to policy announcements. The caretaker conventions do not apply to new policy initiatives which a Government may announce as part of its election campaign.

The following guidelines apply to all Northern Territory Government Ministers and to all officers of Northern Territory Government Agencies and instrumentalities.

2. What is the Caretaker Period?

The caretaker period commences from the prorogation (suspension) of the Legislative Assembly by the Administrator (usually the same day as the announcement of the General Election). The caretaker period continues until:

- a. the election result shows the Government is returned; or
- b. in the event of a change of Government, the new Government is appointed by way of swearing in of the new Ministers by the Administrator.

3. Notification of Caretaker Period and Conventions

When announcing the date for a general election, the Chief Minister will write to Ministers advising them of their role as the caretaker Government and providing them with a copy of these guidelines.

The Chief Executive of the Department of the Chief Minister will write to all Agency Chief Executive Officers advising them of the commencement of the caretaker period and that the caretaker conventions are to apply to all Agency activities.

4. Operations of Government

4.1 Cabinet and Executive Council

The functions of Cabinet and the Executive Council will generally cease during the caretaker period and do not resume until the incoming Government is formed. Should it be necessary for Cabinet to convene, any deliberations and decisions should be made in the context of the caretaker conventions.

In exceptional circumstances, and with the consent of the Administrator, the Executive Council may convene during the caretaker period to handle urgent non-controversial matters.

Cabinet records held in Ministerial Offices should be clearly identified and promptly returned to the Cabinet Office before the expiry of the caretaker period, in accordance with any instructions issued by the Cabinet Office.

4.2 Appointments

The Government should avoid making appointments of significance during the caretaker period. Factors to consider when deciding whether a particular appointment is significant include the inherent importance of the position and the degree to which the appointment may be a matter of disagreement between the major parties contesting the election.

If deferring the appointment is impracticable, usually for reasons associated with the proper functioning of an Agency or Government body, there are several options:

- a. make an acting appointment;
- b. make a substantive, but short term appointment to extend until shortly after the end of the caretaker period; or
- c. if those options are not practicable, the Minister could consult the relevant Parliamentary Opposition spokesperson regarding a full term appointment.

4.3 Major New Policies

Governments avoid making major policy decisions during the caretaker period that are likely to commit or limit the freedom of an incoming government. Whether a particular policy decision qualifies as 'major' is a matter for judgement. Relevant considerations include not only the significance of the decision in terms of policy and resources, but also whether the decision is a matter of contention between the Government and Opposition in the election campaign.

The conventions apply to the making of decisions, not to their announcement. Accordingly, the conventions are not infringed where decisions made before prorogation of the Legislative Assembly are announced during the caretaker period. However, it is preferable that decisions be announced prior to the commencement of the caretaker period, especially if their announcement is likely to cause controversy.

If circumstances require the Government to make a major policy decision during the caretaker period that would potentially bind an incoming government, consultation between the caretaker Government and the Parliamentary Opposition should occur.

The above restrictions do not apply to the implementation of major policy decisions taken and announced before the caretaker arrangements came into effect.

During an election period, Ministers may not request the development of new policy initiatives but may request factual material from Agencies.

4.4 Major New Contracts or Undertakings

The caretaker Government should avoid entering into major contracts or undertakings which could potentially commit an incoming Government to a particular course of action. When considering whether a contract or undertaking qualifies as 'major', agencies should consider the monetary value of the commitment, and also whether the commitment involves a routine matter of administration or rather implements or entrenches a policy, program or administrative structure which is politically contentious.

If a contract or undertaking cannot be deferred until after the caretaker period for commercial or legal reasons, or for essential continuity of government reasons, there are a number of options. The Minister could consult the relevant Parliamentary Opposition spokesperson regarding the commitment. Agencies could, where applicable, explain the implications of the election to the contractor and ensure that contracts include provision for the termination of the contract or undertaking should the incoming Government not wish to proceed. In the case of tenders, it may be appropriate to warn potential tenderers about the implications of the election and the possibility that the tender might not be completed.

4.5 Intergovernmental Meetings

During the caretaker period, Ministers would not normally represent the Northern Territory at intergovernmental meetings. Where it is not convenient to postpone such a meeting, a senior Agency officer should attend as an observer to ensure the Northern Territory is informed of the deliberations, and brief the Minister afterwards as necessary. The Agency officer should make it known

that he/she is constrained by caretaker conventions and is not authorised to commit the incoming Government to proposed actions that may be discussed at the meeting.

The Chief Executive of the Department of the Chief Minister will write to jurisdictional counterparts to advise of the timing of the election and the application of caretaker arrangements.

4.6 Hosting Dignitaries

It is preferable that visits to the Northern Territory by dignitaries be deferred by the Chief Minister until after the caretaker period, particularly where there is an expectation that agreements are to be made or negotiations undertaken.

In those cases where it is agreed that a visit will still proceed during the caretaker period, dignitaries are to be advised of the election announcement and any changes in arrangements for the visit, including the reduced availability of Ministers.

4.7 Departmental Liaison Officers

Where Departmental Liaison Officers (DLOs) have been provided by Agencies to assist Ministers' offices with necessary liaison work with Agencies, the need for that work should be reviewed at the commencement of the caretaker period.

If there is ongoing work of a liaison nature during the caretaker period, DLOs may remain with Ministers' offices. However, DLOs are NT Public Sector staff and therefore are to avoid assisting Ministers in ways that could create a perception that they are being used for party political purposes.

4.8 Ministerial Websites

Ministerial websites can continue to retain information held on them prior to the commencement of the caretaker period. Additional materials should not be added during the caretaker period.

5. Operation of Government Agencies

5.1 General

While the NT Public Sector is required at all times to act in an apolitical manner, the circumstances of the caretaker period require special attention to ensure the impartiality of the Public Sector and its ability to serve whichever Government is elected.

The general rule during the caretaker period is that the normal business of Government continues until the wishes of the incoming Government are known. However, a number of aspects of an Agency's usual activities are affected by the caretaker period as outlined in the following sections.

5.2 Ministerial Correspondence

During the caretaker period, Ministers usually sign only the minimum of correspondence. In some circumstances, correspondence which would otherwise normally be signed by a Minister may be signed by a Chief Executive Officer. In such cases, the correspondence should make it clear that the correspondence is being sent from the Agency due to Government being in caretaker mode. Judgement should be exercised in determining when such action is appropriate.

It is important that Agency correspondence during the caretaker period does not assume or imply that one party or another will form the Government after the election.

Care should be taken to protect the NTPS from perceptions of partisanship. Correspondence that requires an explanation of Government policy should not commit the Government to post-election action, nor should it imply that the policy will continue if the Government is re-elected. References to post-election action are to be expressed in terms of the 'incoming Government'.

5.3 Provision of Information or Advice to Ministers

During the caretaker period, Agencies should continue to provide Ministers with information and advice relating to the general day-to-day operations of the Agency as required. While Ministers cannot request the development of new policy initiatives, they may continue to request factual material from Agencies. The purpose to which such material is used is a matter for the Minister to determine.

5.4 Legislation And Subordinate Legislation

All Bills which have been introduced in the Legislative Assembly but are yet to be passed, automatically lapse when the Assembly is prorogued.

Every effort should be made to ensure that Bills passed by the Assembly are presented to the Administrator for assent prior to prorogation of the Assembly. Advice will be sought by the Clerk of the Legislative Assembly if it is considered necessary to present a proposed law to the Administrator for assent during the caretaker period.

Where a commencement notice for a new Act has been signed by the Administrator, every effort should be made to ensure that publication (gazettal) of the notice occurs prior to prorogation of the Assembly. If a commencement notice has been signed by the

Administrator but not published at the time of prorogation, consideration needs to be given as to the appropriateness of publishing it during the caretaker period. Once the caretaker period has commenced, Ministers should avoid requesting the Administrator to sign commencement documentation for Acts.

It is possible, where there is a genuine need and where there is no infringement of the basic caretaker conventions, for subordinate legislation (e.g. regulations) to be made by the Administrator, acting on the advice of the Executive Council, during the caretaker period (see also section 4.1 on Cabinet and Executive Council).

5.5 Public Information Programs

5.5.1 Advertising

The definition of advertising is broad and includes print, radio, television, cinema, web and all outdoor advertising.

As a general rule, advertising should not be undertaken by Government Agencies during the caretaker period except to fulfil statutory requirements or to provide essential information to the public. Examples of public information may include:

- Advertising of emergency information, such as natural disaster information
- Promotion of essential community health information, such as the outbreak of a disease, mosquito warnings, etc.
- Advertising of road closures or road works.

If it is necessary to advertise at all, Agencies should consider their obligations under the Electoral Act and the Australian Broadcasting Act. In the interests of risk management, it is desirable that all advertising placed by Agencies during the period of the election be officially authorised on behalf of the Government.

In all cases, the person authorising the advertisement will need to be named in the manner described at Appendix A. This person is likely to be the CEO or a senior delegate, as the named individual becomes personally responsible for the advertising material. For this reason, the authorising officer should be satisfied that each advertisement placed during an election period is necessary, factual and free from political inference.

5.5.2 Media Releases

During the caretaker period, Agencies should ensure that any media releases focus on issues of public interest relating to the day-to-day operations of the Agency. The Government's guidelines for advertising may assist in considering whether the content of a media release is appropriate.

5.5.3 Government Websites

All Agency websites must carry authorisations on at least the home page in the form shown at Appendix A. Websites should also warn internet users when they are leaving the website to ensure there is no confusion about the material being authorised. See Appendix A.

5.5.4 Other Materials

During the caretaker period, Agencies should avoid the active distribution of materials such as brochures, newsletters, DVDs and booklets that have an emphasis on the achievements of Government.

5.6 Public Speaking

NT Public Sector officers should generally decline to speak publicly during the caretaker period. If officers wish to speak at a public meeting, they should seek permission beforehand from the Chief Executive Officer of their Agency. NT Public Sector officers should not attempt to explain or promote Government policies during this time.

5.7 Approval of Grants

The payment of grants approved prior to the caretaker period can proceed but should be forwarded by the Agency rather than by a Minister or another member of the Government. During the caretaker period, commitments should not be made in respect of grant applications received during the caretaker period or which were lodged before commencement of that period but are awaiting decision.

5.8 Hospitality by Agencies

Agencies should exercise care in hosting official functions during the caretaker period to avoid any perception that the function is for electioneering or political purposes. Generally speaking, such functions should only proceed where they were scheduled prior to the calling of the election.

If Agency resources are being used to host an official function during the caretaker period where a Minister is present, it is appropriate to give the Parliamentary Opposition spokesperson the opportunity to attend.

5.9 Statutory Authorities and Government Owned Corporations and Companies

The relationship between Ministers and bodies such as statutory authorities and government companies, varies from body to body. However, those bodies should observe the caretaker conventions and practices unless to do so would conflict with their legal obligations or compelling commercial/organisational requirements.

6. Important Agency Responsibilities during the Caretaker Period

6.1 Cabinet Documents

Cabinet documents are treated as confidential to the Government which created them. Accordingly, such documents are not available to succeeding Governments drawn from different political parties. The Cabinet Handbook, which is available on the NT Government intranet site, provides further guidance for Agencies on this topic.

Before the date of the election, Chief Executive Officers of Agencies are to ensure that all Cabinet documents in the Agency's possession are to be accounted for and securely stored. In the event of a change of government, any Cabinet documents not strictly required for retention by the Agency are to be destroyed under the supervision of the Agency Secretariat or the Cabinet Office, with any retained Cabinet documents to be stored subject to the appropriate security arrangements.

6.2 Incoming Government Briefings

During the caretaker period, Agencies are required to prepare two sets of briefing documents. The first set should be prepared on the basis that the current Government will be returned, and the second set on the basis that there is a change in government.

The briefing documents should provide the incoming Minister with a comprehensive statement of the organisation, structure, budget, functions and major current issues facing the Agency.

7. Guidelines for Consultation by the Opposition with Agency Officers

In order to ensure a smooth transition in the event of a change in Government, the following guidelines for pre-election consultation between the Parliamentary Opposition and Agency officers should apply:

- a. Consultations with Agencies are initiated by the Opposition spokesperson making a request to the relevant Minister to meet with Agency personnel. The Minister is to notify the Chief Minister as to the nature of the request and whether it has been granted;
- b. Agencies are to be represented in such discussions by the relevant Chief Executive Officer, accompanied by senior Agency officers if necessary;
- c. The subject matter of the discussions between Agency officers and Opposition spokespersons should relate only to the machinery of Government and its administration. Discussions may also relate to the

- resources generally available in the portfolio area to implement policies of the incoming Government;
- d. Agency officers are not authorised to provide an opinion on the merits of Government or Opposition policy; and
 - e. Queries about approval of particular requests for consultation should be handled between the relevant Minister and the Chief Minister. Requests which involve an unreasonable amount of work by the Agency may properly be denied.

8. Political Participation by NTPS Officers

NT Public Sector officers should not use Agency resources or their position to support particular political purposes.

While it is recognised that NT Public Sector officers have the right to participate in public life, potential conflicts of interest, whether real or perceived, should be brought to the attention of the relevant Chief Executive Officer in accordance with the Northern Territory Public Sector Principles and Code of Conduct made under the Public Sector Employment and Management Act.

NTPS officers should also refer to the document NTPS employees and elections - Guidelines for public sector employee conduct during election periods and Procedures for contesting Federal, State, Territory or Local Government elections (January 2005) published by the Office of the Commissioner for Public Employment, and available at the following website: http://www.nt.gov.au/ocpe/public_sector/Guidelines_employees_elections.pdf

Appendix A - Guidelines for Advertising during the Caretaker Period

Newspapers: Print advertising is controlled under the Electoral Act. All advertisements must comply as follows:

- The word ADVERTISEMENT must appear at the top of each advertisement in a minimum 10pt Helvetica font (or equivalent).
- The advertisement must be authorised by a named person on behalf of the Northern Territory Government. For example:

Authorised by Mike Burgess on behalf of the Northern Territory Government, Department of Business, Industry and Resource Development, The Esplanade, Darwin.

Television: The standard authorisation tags placed on Northern Territory Government television advertisements will need to be expanded to include both the name of the individual authorising the advertisement as well as a voiceover carrying the 'Spoken by J Bloggs and L Smith' (during non-election periods, these words are only written on the end screen).

At the end of each advertisement, a black screen will appear carrying the following words in white text. For example:

Authorised by Robert Griew on behalf of the Northern Territory Government, Department of Health and Community Services, Mitchell Street, Darwin.

Spoken by J Bloggs and L Smith.

At the same time these words appear on screen, they must also be spoken.

Some advertisements have been exempted from using authorisation tags on television and radio advertisements during non-election periods. These exemptions do not apply during election periods.

Radio Advertising: Again, the normal authorisation tags will need to be extended during an election period. At the end of each advertisement, the following words must be spoken, for example:

Authorised by Richard Galton on behalf of the Northern Territory Government, Department of Corporate and Information Services, Cavenagh Street, Darwin.

Spoken by J Bloggs and L Smith.

Again, any exemptions from using the authorisation tag do not apply during an election campaign.

Outdoor Advertising (billboards, buses, taxis, outdoor signage, airport signage, etc): Agencies should urgently review any existing advertising or signage of this nature and authorise it immediately. This signage must be authorised, usually by placing a 'sticker' or some other additional signage on it. The words must be as follows, e.g.:

Authorised by Sarah Butterworth on behalf of the Northern Territory Government, Department of Infrastructure, Planning and Environment, Cavenagh Street, Darwin.

There is no minimum size required for this authorisation.

Internet/Intranet websites: All Agency websites must carry authorisations on at least the home page. Information in the metadata tag is not enough. The authorisation may appear in the footer of the home page. For example:

Responsibility for comment in this website is taken by Paul Tyrrell on behalf of the Northern Territory Government, Department of the Chief Minister, Mitchell Street, Darwin.

To ensure there is no confusion about what the CEO is taking responsibility for, Agencies must make it clear to the user when they are leaving the Agency website. For example, a message should appear when leaving the website carrying

Different approaches – what the jurisdictional guidances say

words such as 'You are now leaving the Northern Territory Government website. No responsibility can be taken for the accuracy of information outside of this site'.

Queensland

9.1 Basic Conventions and Practices

Successive Commonwealth and State Governments have accepted that special arrangements apply in the period immediately before an election, in recognition of the considerations that:

with the dissolution of the Legislative Assembly, there is no popular Chamber to which the Executive Government can be responsible; and every general election brings with it the possibility of a change of government.

By convention, the government assumes a caretaker role from the time that the Legislative Assembly is dissolved, and ensures that decisions are not taken which would bind an incoming government and limit its freedom of action.

The basic caretaker conventions require a government to avoid implementing major policy initiatives, making appointments of significance or entering into major contracts or undertakings during the caretaker period. The basic conventions are directed to the making of decisions, and not to policy announcements. The caretaker conventions do not, of course, apply to new policy promises which a government may announce as part of its election campaign.

There are other established practices, usually regarded as part of the caretaker conventions, which govern activities in the election period. These are mainly directed at ensuring that departments should avoid any partisanship during an election campaign. They address matters such as the nature of requests that Ministers may make of their departments, procedures for consultation by the Opposition with departmental officers, travel by Ministers and their Opposition counterparts and the continuation of government advertising campaigns.

Adherence to the conventions and practices (which have no formal legal standing) is ultimately the responsibility of the Premier. Where Ministers are in doubt about a particular matter, they should raise it with the Premier.

9.2 The Caretaker Period

The caretaker conventions operate from the dissolution of the Legislative Assembly until the election result is clear or, in the event of a change of government, until the new government is appointed. However, it is also accepted that some care should be exercised in the period between the announcement of the election and the dissolution of the Legislative Assembly.

9.3 Notification of the Convention(s)

Shortly after the announcement of an election, the Premier will write to all Ministers, summarising the conventions which will apply from the dissolution of the Legislative Assembly and other matters which relate to the election period. The Director-General of the Department of the Premier and Cabinet will write to all Chief Executive Officers advising them of the caretaker conventions and when they will commence.

The Cabinet Secretariat will also circulate information to all CLLO's advising them of caretaker conventions, as soon as the election is announced.

9.4 Appointments

By convention a caretaker government should avoid, wherever possible, making appointments of significance in the caretaker period. Factors in deciding whether or not a particular appointment is significant include the degree to which it may be a matter of disagreement between the major parties contesting the election, as well as the position's inherent importance.

As a rule, significant appointments dated to commence after polling day would not be made in the caretaker period. Appointments which would normally be made after the date of dissolution are deferred until after the election.

Where it is necessary for a significant appointment to be made during the caretaker period, usually for reasons associated with the proper function of the agency concerned, there are several options available.

One is that provisions for an acting appointment, where available, are used to avoid the need for a substantive appointment. Another is that a short term appointment, normally of up to three months' duration, is made.

9.5 Major New Policy Implementation, Contracts or Undertakings

The broad rule is that governments should avoid implementing new policies, or entering into major contracts or undertakings during the caretaker period. This includes commitments which could bind an incoming government. Major contracts or undertakings should not be considered only in terms of monetary commitment but should also take into account other relevant factors such as the nature of the undertaking and the level of bipartisan support.

Consistent with this requirement, major project approvals within government programs are normally deferred by Ministers.

9.6 Operations of Departments

The general rule during the caretaker period is that the normal business of government continues until the incoming government's wishes are known. Several aspects of a department's usual activities are, however, affected.

While departments are concerned at all times to avoid partisanship, the circumstances of an election campaign require special attention to the need to ensure the impartiality of the Public Service and its ability to serve whatever government is elected.

During the election period, Ministers would usually sign only necessary or routine correspondence. It is desirable that judgement be used in determining whether correspondence of significance should be signed in this period by the Minister or by the Chief Executive Officer. Care is taken when preparing departmental replies not to assume that one party or another will form the government after the election. References to post-election action are in terms of the 'incoming government'.

During an election period, Ministers may not request the development of new policy initiatives but may request factual material from departments. Departmental officers should not use their official position to act in a partisan manner.

Departmental officers who feel there is a difficulty with a particular request from a Minister may raise the matter with the Chief Executive Officer of the Department who may, if necessary, consult with the Director-General of the Department of the Premier and Cabinet.

9.7 Guidelines for Consultation by The Opposition with Departmental Officers

In order to ensure a smooth transition in the event of a change of government, the following guidelines for pre-election consultation between the Parliamentary Opposition and departmental officers should apply.

These guidelines may come into operation before the caretaker period, and apply as soon as the election announcement has been made or two months before the expiry of the term of the Legislative Assembly, whichever date occurs first. Like the practice in all other Australian jurisdictions, consultations during the caretaker period are conducted through informal discussions:

Consultations with departments are initiated by the Opposition spokesperson making a request for access to the relevant Minister, who will notify the Premier as to the nature of the request and as to whether it has been granted.

The subject matter of the discussion between officers and the Opposition spokespersons relates to the machinery of government and administration and the resources generally available in the portfolio area as they would relate to

the implementation of Opposition policy. Officers are not authorised to discuss the merits of policies of either the government or the Opposition.

Officers are to inform Ministers when the discussions are taking place and Ministers are entitled only to seek assurances that the discussions are kept within the agreed purposes. The content of the discussion is confidential to the participants.

Departments will be represented in such discussions by the Chief Executive Officer and an appropriate officer with relevant expertise from the Department of the Premier and Cabinet.

For the purpose of facilitating consultation, the Chief Executive Officer should seek details of the likely topics for discussion so that relevant information can be made available during the deliberations. Information should only be presented in the form in which it exists at the time of the consultation (eg. annual reports, program statements, etc.). Alternatively, information can be communicated orally.

The creation of documents for, or records of, consultations should be avoided. The confidentiality of matters raised during discussions should remain insulated from partisan political debate during an election period. Specific material generated for, or notes taken during, the meeting would form an official record of the proceedings and seriously undermine the requisite confidentiality of the consultation particularly if the records subsequently became public.

Departments will be expected to prepare two sets of briefing documents for the incoming government. One set will be drafted on the basis that the current government is returned, the second set on the basis that a new government is elected. Both sets of briefing documents should aim to provide the incoming Minister with a comprehensive statement of the organisation, structure, budget, functions and major current issues facing the department.

Queries about approval of particular requests for consultation should be handled between a Minister and the Premier. Requests which involve an unreasonable amount of work by the department may properly be denied.

9.8 Cabinet Documents

It is a requirement that Cabinet documents are treated as confidential to the government that created them. Accordingly, such documents are generally not made available to succeeding governments drawn from different political parties, except in specific circumstances related to continuity of administration. Refer to Chapter 4.15.5 'Access to past government's Cabinet documents by the present government'.

At the beginning of the caretaker period and in accordance with instructions issued by the Cabinet Secretary, all Cabinet documents previously circulated

by the Cabinet Secretariat and held in ministerial and departmental offices should be clearly identified and prepared for possible return to the Cabinet Secretariat for disposal purposes. In the event of a change of government, the outgoing Premier will issue instructions through the Cabinet Secretary about the disposal of documents of the outgoing administration.

9.9 Legislation

All Bills that have been introduced in the Legislative Assembly but are yet to be passed, automatically lapse when the Legislative Assembly is dissolved. Likewise, all Bills passed by the Legislative Assembly and awaiting Royal Assent will lapse with the dissolution of the Assembly.

By convention, the Governor should not proclaim the commencement of any Acts during the caretaker period. It is therefore necessary to ensure that all Bills which are awaiting Royal Assent and/or proclamation receive Assent and/or are proclaimed prior to the dissolution of the Legislative Assembly.

It is possible, where there is a need and where there is no infringement of the basic caretaker conventions, for subordinate legislation to be approved by the Governor in Council during the caretaker period.

9.10 Executive Council during the Caretaker Period

Ordinary meetings of the Executive Council are not held during the caretaker period. However, with the consent of the Premier and the Governor, special sittings of Executive Council may be held to consider limited business.

Arrangements for Executive Council will be forwarded to all departments by the Executive Council Secretariat at the commencement of the caretaker period.

9.11 Other Matters

It has become accepted that the Premier considers whether any government advertising campaigns, which would otherwise be conducted during the caretaker period, should be suspended or curtailed.

Campaigns highlighting the role of particular Ministers or addressing issues which are controversial between the major political parties normally would be discontinued. Advertisements promoting rights or entitlements or which are of an operational nature usually continue.

If necessary, the Premier also considers whether visits to Queensland by foreign dignitaries, involving government hospitality, should proceed. In any case, the dignitaries are advised of the election announcement and any changes in arrangements, including the reduced availability of Ministers.

The Council of Australian Governments or the Ministerial Councils may meet during a caretaker period. If such a meeting is to be held during this time,

Ministers should generally refrain from attending and adopting or announcing policy positions. Where the interests of the State need to be represented, it may be prudent for the Chief Executive Officer or another senior official of the relevant agency to attend in an observer role. If a major agreement is scheduled for discussion or ratification, the Chief Executive Officer should seek deferral of the item of rescheduling of the meeting until after the conclusion of the caretaker period.

South Australia

Caretaker Conventions and Other Pre-Election Practices A Guide for South Australian Government Agencies

Cabinet Office

August 2005

Caretaker conventions in Australia go back at least as far as the administration of Sir Robert Menzies. By 1961, it had become established practice for the Prime Minister to remind Ministers of the special need to avoid 'major policy decisions or important appointments' in the caretaker period.

The following principles are therefore based in part on the conventions established by the Commonwealth Department of the Prime Minister and Cabinet, and formally adopted by most other states: including South Australia in all recent elections.

Timing of Next Election

Section 28 of the South Australian Constitution Act 1934 provides for fixed four-year terms so that the next state election will be held on 18 March 2006.

By convention, the caretaker period starts when the writs for the election are issued. The caretaker period will run from the date of issue of the writ until the outcome of the election is clear.

Despite the move to fixed four year terms, no amendment was made to the provisions of the Electoral Act that govern the issue of the writs.¹

This provides the incumbent Government with flexibility in determining the length of the official election campaign.

The current situation is that the Premier may call an election (have a writ issued by the Governor) on any day between Monday 23 January 2006 (for an election period of 55 days) and Tuesday 21 February 2006 (for a short election period of 25 days).

Basic Conventions and Practices

Successive Commonwealth and State Governments have accepted that special arrangements apply in the period immediately before an election, in recognition of the considerations that:

- with the dissolution of the House of Assembly, there is no popular chamber to which the Executive Government can be responsible;

- every general election brings with it the possibility of a change of government.

By convention the Government assumes a caretaker role from the announcement of an election by the Premier and ensures that decisions are not taken which would bind an incoming government and limit its freedom of action.

The basic caretaker conventions require a government to avoid implementing major policy initiatives, making appointments of significance or entering into major contracts or undertakings during the caretaker period.

The basic conventions are directed to the taking of decisions, and not to policy announcements. The caretaker conventions do not, of course, apply to new policy promises which a government may announce as part of its election campaign.

There are other established practices, usually regarded as being part of the caretaker conventions, which govern activities in the election period. These are mainly directed at ensuring that agencies should avoid any partisanship during an election campaign. They address matters such as the nature of requests that Ministers may make of their agencies, procedures for consultation by the Opposition with agency officers, travel by Ministers and their Opposition counterparts and the continuation of Government advertising campaigns.

Adherence to these conventions and practices (which have no formal legal standing) is ultimately the responsibility of the Premier. Where Ministers are in doubt about a particular matter, they should raise it with the Premier.

The Caretaker Period

The caretaker conventions operate from the announcement of an election by the Premier until the election result is clear or, in the event of a change of government, until the result is clear leading to the appointment of a new government.

Notification of the Conventions

Immediately after the announcement of an election, the Premier will write to all Ministers, summarising the conventions which will apply and other matters which relate to the election period. The Chief Executive of the Department of the Premier and Cabinet will write to all Chief Executives advising them of the caretaker conventions.

Executive Government

When an election is announced, the Premier will have asked the Governor to dissolve the House of Assembly and authorise an election (Section 47, Electoral Act). It is accepted practice that Ministers of the Crown continue in office. It is

also accepted practice that the Executive Council continues to operate after the dissolution of Parliament as logically does the Cabinet. This is a reflection of the basic principle of the Westminster system of the separation of powers between the Parliament, the Executive and the Judiciary.

Thus, during the caretaker period, the normal business of Executive Government continues with the exception that by convention it is not considered appropriate for the Executive Government to undertake significant business (which might not be in accordance with the wishes of an incoming government and which would not have the scrutiny of a House of Assembly). Thus, Cabinet may continue to meet for routine matters which could not be classified as ‘major’ undertakings, initiatives or appointments. (See the discussion which follows.) It is also possible, where there is a need and where there is no infringement of the basic caretaker convention, for subordinate legislation and certain other matters to be approved by the Governor in Executive Council during the caretaker period. The agenda of Cabinet would also reflect this situation.

Significant Appointments

During a caretaker period, the making of all significant appointments should be avoided wherever possible.

The judgment as to whether or not a particular appointment is significant would include:

- the position’s inherent importance;
- the degree to which it may be a matter of disagreement between the two major parties.

The rule has been that significant appointments which would commence after polling day are not made in the caretaker period. Appointments which would normally be made after the date of dissolution are generally deferred until after the election.

When it is necessary for a significant appointment to be made during the caretaker period for reasons of operational functioning of the agency, either an acting appointment or a short term appointment for up to three months may be made.

However, if a short term appointment is not practicable, an appointment may be made following consultation with the relevant Opposition spokesperson.

Boards and Committees

Vacancies may occur on government boards and committees during the caretaker period. As mentioned above, the caretaker conventions prohibit appointments of ‘significance’ during the caretaker period. If a board or committee experiencing a vacancy is able to operate legally and effectively with a quorum during the

period, they should be encouraged to do so without the need for any new appointment.

If a ‘non-significant’ appointment is necessary, then short term appointments should be considered. A practical consideration is the fact that meetings of Cabinet and Executive Council will be infrequent during the election period.

Major New Policy Implementation, Contracts or Undertakings

The broad rule is that governments should avoid implementing new policies, or entering into major contracts or undertakings during the caretaker period. This includes commitments which could bind an incoming government.

Consistent with this requirement, major project approvals and major new contracts within Government programs are normally deferred by Ministers. However, where the Government has previously announced its commitment to enter into the contract, and the substance of the terms have been agreed before the election is called, or the contract is in the nature of a collateral agreement into which the Government is obliged to enter, then the execution of that contract is viewed as an administrative act and is not caught by the caretaker convention. Similarly, where the Government is obliged to enter into a contract (e.g. because of a collateral contract) the convention does not prevent this occurring. However where there are still significant policy matters to be determined in respect of a contract and the contract is of real significance (either because of its subject matter, complexity, amount involved or political sensitivity) then it should not be executed during the election period.

Departmental Operations

During the caretaker period, Ministers would usually sign only necessary or routine correspondence. It is desirable that judgment be used in determining whether correspondence of significance should be signed in this period by the Minister or by the Chief Executive. Care is taken when preparing departmental replies not to assume that one party or another will form the Government after the election. References to post election action are in terms of the ‘incoming Government’.

Judgment is required with regard to the development of new policy initiatives. Departmental officers who feel there is a difficulty with a particular request from a Minister may raise the matter with their Chief Executive, who may consult with the Chief Executive of the Department of the Premier and Cabinet.

Cabinet Documents and Agency Files

Successive governments have also accepted the convention that Ministers should not seek access to documents recording the deliberations of Ministers in previous

governments. Cabinet documents, in particular, are considered confidential to the government that created them. In this context, all Cabinet documents, including files, submissions and related documents should be returned to the custody of Chief Executives for storage until the result of the election is known. Each Chief Executive should advise the Executive Director, Cabinet Office when they have accounted for all documents and ensured they are securely stored.

Legislation

All Bills which have been introduced in the Parliament but are yet to be passed, automatically lapse when Parliament is dissolved.

It is the practice for Bills which have been passed through Parliament to be assented to by the Governor and, if necessary, proclaimed before the election is announced. At the same time subordinate legislation, including instruments made under Acts just assented to, may be approved by the Governor in Council. Legislation that has already been assented to may be proclaimed during the caretaker period.

It is also possible, where there is a need and where there is no infringement of the basic caretaker conventions, for subordinate legislation and certain other matters to be approved by the Governor in Council during the caretaker period.

Ministerial Councils

When a Ministerial Council meeting is scheduled to take place during the caretaker period, the Minister concerned should be mindful of the caretaker conventions when considering participation in the meeting. Ministers should ensure that any statements of policy position are made subject to the qualification that the Government is in a caretaker position and policy may be open to change.

Subject to the concurrence of the Ministerial Council, the Government may elect to send an official observer to the meeting (generally a senior public official).

Advertising Campaigns

It is accepted that during the caretaker period the Premier will consider all advertising campaigns, with particular regard to campaigns that may be regarded as being party political in nature. In these cases, campaigns must be suspended.

Advertising or promotional campaigns that do not overtly favour the party in government, such as community based information campaigns or advertisements of an operational nature, may continue during this caretaker period.

Telephone Answering Messages

During an election campaign the Government's promotional material is subjected to greater scrutiny than normal. This includes the telephone answering messages

attached to agency numbers. Depending on the matters raised during the election campaign, some of these messages may be considered as electoral advertisements ('calculated to affect the outcome of the election') within the meaning of the Electoral Act 1985. They should therefore cease during the election period. It is not appropriate that electoral advertising material be funded from agency budgets.

Agency and Ministerial Websites

Ministers have an obligation to ensure that political material is not contained on publicly funded websites.

Agencies may continue to maintain and fund the maintenance of ministerial websites during the caretaker period and material placed on the minister's website before the caretaker period may be retained, as may links between the Minister's and agency's websites. However, agencies should add to ministerial websites only material relating to matters of existing policy or purely factual material.

Material concerning future policies, election commitments, how-to-vote material or media releases and speeches that criticise opponents, promote the Government or pursue election issues should not be displayed on a government website.

Credit Cards

Access to credit cards charged to agency budgets should be strictly monitored during the caretaker period and their use strictly controlled. Special care should be taken with entertainment expenses.

Relationship Between Agencies and Ministerial Offices

By agreement with ministers, special arrangements for communication with their offices should be considered during the caretaker period. The aim is to ensure that agencies can continue to operate at 'arms length' from political activity while ensuring that the ongoing business of government continues to be addressed.

It may be appropriate, for example, to request that all communications with agencies pass through Chief Executive's offices or through some delegated senior staff.

Use of Government Premises

While there should be no difficulty with the responsible use by all parties campaigning in an election of agency premises that are normally open to public use, it is most important during an election campaign that public servants not engage in party political activity. For that reason, it is not appropriate that premises be used as logistical support for political functions.

Public Servants in Ministers' Offices

Generally, public servants must not be seen to be supporting particular issues or parties during the election campaign. Proper lines of supervision and support for public servants working in Ministers' offices are essential to avoid potential conflicts of interest. For this reason it is entirely proper if the normal reporting relationships of public servants to Ministers and Ministerial staff is changed by Chief Executives during the caretaker period, following consultation with Ministers.

Non-essential public servants may be recalled from offices for the period but common sense would require that continuity of government and the usual services of the office need to continue, especially if there is any change of ministerial responsibilities following an election.

Access to Public Servants by Members of Parliament

Access to public servants by Members of Parliament should normally proceed through application to the relevant Minister. (*PSM Act Determination 9 – Ethical Conduct – Access by Members of Parliament to Public Servants.*)

Public Servants may not discuss the affairs of Government with a Shadow Minister unless agreed by the Minister after consultation with the Premier. The procedure will be initiated by the relevant Opposition spokesperson making a request of the Minister concerned, who will notify the Premier of the request and whether it has been agreed. Officials will inform their Ministers when any approved discussions are taking place.

Party Leaders may have other Members of Parliament or their staff members present.

Officials will not be authorised to discuss Government policies or to give opinions on matters of a party political nature. 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 Opposition parties.

Should the Opposition representatives raise matters which, in the judgment of the officials, seek information on Government policies or seek expressions of opinion on alternative policies, the officials would suggest that the matters be raised with the Minister.

Protocol

Official Visits

Dignitaries need to be informed of the election announcement. It would be normal for any official visits already scheduled and now falling within the caretaker period to be postponed. However, where a visit that is non-political

is scheduled, it could proceed and advice must be provided to the Premier regarding these circumstances and the desirability and practicability of the visit continuing or being postponed.

Appointments for dignitaries to meet with the Premier, Ministers and the Leader of the Opposition are generally cancelled. An appointment with the relevant Chief Executive could be arranged as an alternative.

No inter-governmental agreements should be signed and no formal letters of invitation to overseas dignitaries should be issued during the caretaker period.

Hospitality

Generally official functions of a formal nature, i.e. luncheons, dinners and receptions, scheduled to be hosted by the Premier or Ministers are postponed or cancelled but in the circumstances referred to under 'Official Visits' they may continue.

There may be circumstances where the Governor could be asked to host a function during the caretaker period.

Titles

Any Ministers who lose their seats during the election and have served a term of three or more years in Cabinet can, through the Premier, seek permission of the Governor to retain the title 'Honourable'.

Advice on all official ministerial functions may be obtained from the Manager, Protocol on telephone 8226 3627.

Public Servants Contesting an Election

PSM Act Determination 2 – Recruitment and Employment of Non-executive Employees – Employees Contesting Elections provides information on the employment options for public servants contesting an election.

The Constitution Act precludes any officer or employee of the Crown from being elected to the South Australian Parliament. The Act states that the resignation of a public servant must be effective before the date of declaration of the poll. However, if they are the only candidate for a seat, they will be declared as elected without a poll, on the day of nomination. Public servants intending to contest an election should therefore ensure that their resignation is effective before the date of declaration of the poll and may also wish to seek permission to lodge a provisional resignation, effective on the day nominations close, which takes effect only if they are the sole candidate.

For the purposes of contesting an election a public servant may choose to resign at an earlier date, apply for leave or electioneer in their own time. However, employees should note that if they do not resign from the public service while

electioneering they are potentially in a position of conflict of interest, and the provisions of Section 56 of the Public Sector Management Act may apply. Departmental property and time must not be used for campaigning purposes.

Where an employee has chosen to resign in order to contest an election and is not successful, the Public Sector Management Act requires that the employee be reappointed (Section 54) and the break in service will be deemed to be leave without pay.

ENDNOTES

¹ Subsection 48(2) of the Electoral Act provides that a writ must fix:

- the date and time for the close of the rolls (which must be a date falling not less than seven days nor more than 10 days after the date of the issue of the writ);
- the date for nominations (which must be a date falling not less than three days nor more than 14 days after the date fixed for the close of the rolls);
- the date for the polling (which is now fixed under section 28(1) of the Constitution Act)
- the date for the return of the writ.

Tasmania

State Election Caretaker Conventions

Department of Premier and Cabinet 2006

Caretaker Conventions Table of Contents

1. Introduction
2. Major Policy Commitments
3. Significant Appointments
4. Major Legal or Intergovernmental Commitments
 - 4.1. Contracts or Undertakings
 - 4.2. Intergovernmental Negotiations
5. Ongoing Work of the State Service
 - 5.1. Requests From Ministerial Offices For Information
 - 5.2. Legislation
 - 5.3. Correspondence
 - 5.4. Grants
 - 5.5. Tabling of and Responses To Reports
6. Avoiding Inappropriate Involvement in Election Activities
 - 6.1. Advertising and Information Campaigns
 - 6.2. Internet and Electronic Communications
 - 6.3. Use of Agency Premises
 - 6.4. Political Participation by State Servants
7. Other Matters
 - 7.1. Financial Entitlements
 - 7.2. Government Funded Vehicles
 - 7.3. State Visits
 - 7.4. Agency Briefings
 - 7.5. Post Election - Cabinet Documents

1 Introduction

1.1 By convention, during the period preceding an election for the House of Assembly, the government assumes a 'caretaker role'. This practice recognises that, with the dissolution of the House, the Executive cannot be held accountable for its decisions in the normal manner, and that every State election carries the possibility of a change of government.

1.2 The caretaker period begins at the time the House of Assembly is dissolved and continues until the election result is clear or, if there is a change of government, until the new government is appointed.

1.3 During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. The role of government agencies remains unchanged, the provision of all normal services should continue and statutory responsibilities are not affected.

1.4 However, successive governments have followed a set of practices, known as the ‘caretaker conventions’, which aim to ensure that their actions do not inappropriately bind an incoming government and limit its freedom of action.

1.5 While business continues, as it applies to ordinary matters of administration, the caretaker conventions do affect some aspects of executive government. In summary, the conventions are that the government avoids:

- making major policy decisions that are likely to commit an incoming government;
- making significant appointments; and
- entering major contracts or undertakings.

1.6 There are also established conventions and practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the state service, preventing controversies about the role and work of the State Service during an election campaign, and avoiding the use of State Government resources in a manner to advantage a particular party.

1.7 The conventions and practices have developed primarily in the context of the relationship between Ministers and their portfolio departments. The relationship between Ministers and other bodies, such as statutory authorities, government business enterprises and State-owned companies, varies from body to body. However, those bodies should also observe caretaker conventions and practices unless to do so would conflict with their legal obligations or compelling organisational requirements.

1.8 The following notes are intended to explain the conventions and practices in more detail and to provide guidance for the handling of business during the caretaker period. The conventions are neither legally binding nor hard and fast rules. Their application in individual cases requires judgement and common sense. The Secretary, Department of Premier and Cabinet is able to provide information and advice to agencies, but responsibility for observing the conventions ultimately rests with heads of agency and, in matters where they are involved, with the relevant Ministers.

2 Major Policy Commitments

2.1 Governments avoid making major policy decisions during the caretaker period that are likely to commit an incoming government. Whether a particular policy decision qualifies as ‘major’ is a matter for judgement. Relevant considerations include not only the significance of the commitment in terms of

policy and resources, but also whether the decision is a matter of contention between the Government and opposition parties in the election campaign.

2.2 The conventions apply to the making of commitments, not to their announcement. Accordingly, the conventions are not necessarily contravened where commitments made before the calling of an election are announced during the caretaker period. However, where possible, commitments about policies that have been agreed but not made public should be announced ahead of the caretaker period if their announcement is likely to cause controversy during the election campaign.

2.3 The conventions do not apply to promises on future policies that the party in government announces as part of its election campaign.

2.4 If circumstances require the Government to make a major policy commitment during the caretaker period that would bind an incoming government, the relevant Minister, after agreement with the Premier, would usually consult the Opposition spokesperson beforehand.

Operational Note

- a. Consultation by non-government parties or Members of Parliament with departmental officers must only occur with the express authorisation of the Premier. If a non-government party or Member makes direct contact with an agency they should be referred to the Head of the Premier's Office.

3 Significant Appointments

3.1 Governments defer making significant appointments during the caretaker period. As a rule, any significant appointments to commence after election day would not be offered in the caretaker period. Appointments, to be made after the date of dissolution, are deferred until after the elections. Finalisation of selection processes that have started but not completed should also be deferred until after the caretaker period.

3.2 In considering whether an appointment qualifies as 'significant', the agency should consider not only the importance of the position, but also whether the proposed appointment would be likely to be controversial. However significant appointments will include those for head or deputy head of agency, the head of a division or branch whose activities are deemed sensitive, membership of statutory bodies and statutory office holders.

3.3 If deferring an appointment is impracticable, usually for continuity purposes or reasons associated with the proper functioning of an agency, there are several options:

- An acting appointment can be made where permissible;

- Make a short term appointment until shortly after the end of the caretaker period; or
- If those options are not practicable, the relevant Minister, after agreement with the Premier, could consult the relevant Opposition spokesperson regarding a full term appointment.

4 Major Legal or Intergovernmental Commitments

4.1. Contracts or Undertakings

4.1.1 Governments avoid entering into major contracts or undertakings during the caretaker period. When considering whether a contract or undertaking qualifies as ‘major’, agencies should consider the monetary value of the commitment and also whether the commitment involves a routine matter of administration or rather implements or entrenches a policy, program or administrative structure which is politically contentious. A further consideration is whether the commitment requires ministerial approval.

4.1.2 If it is not possible to defer the commitment until after the caretaker period, for legal, commercial or other reasons, there are a number of options. The Minister, after agreement with the Premier, could consult the relevant Opposition spokesperson regarding the commitment. Agencies could also ensure that new contracts entered into during the caretaker period include clauses providing for termination in the event of an incoming government not wishing to proceed.

4.1.3 Similarly, in the case of outstanding tender processes, agencies should warn potential tenderers about the implications of the election and the possibility that the tender might not be completed. If possible, new tender processes should not commence during the caretaker period.

4.2 Intergovernmental Negotiations

4.2.1 The convention that the Government avoids entering into major commitments during the caretaker period gives rise to particular issues in the context of intergovernmental negotiations and agreements. The Government ordinarily seeks to defer such negotiations or adopts observer status until the end of the caretaker period.

4.2.2 If deferring involvement or adopting observer status is not feasible, the Government should if possible limit its role to providing information on its past position, without committing the incoming government to that position.

4.2.3 If it is necessary for the Government to participate fully in the negotiations, it should advise the other parties to the negotiations that any outcomes will need to be authorised by the incoming government, or it could seek Opposition parties’ agreement to negotiating positions.

5 Ongoing Work of The State Service

5.1 Requests from Ministerial Offices for Information

5.1.1 During the caretaker period, executive government continues to operate and Ministers remain in authority. The Minister's statutory responsibilities, especially those with time limits, are not affected except to the extent that any decision that is within the discretion of the Minister must be considered in the context of the caretaker conventions.

5.1.2 Material relating to the day to day business of government is supplied to Ministers in the usual way. Ministers are entitled to request, and should continue to be provided with factual or other material, including information to be incorporated in speeches, and to be briefed on issues. The purpose to which such material is put is for Ministers to determine. However, to avoid controversy in the election period about claimed breaches of the apolitical and impartial values of the State Service, it may be appropriate for an agency to decline a request for unusual information if it requires the use of significant resources and is clearly for use as part of the election campaign. If in doubt, the head of agency should discuss with the Minister or his/her senior staff the purpose for which the material is to be used.

5.1.3 In most instances, agencies should decline requests for policy advice during the caretaker period. There might, however, be urgent issues on which policy advice should clearly be provided to Ministers to allow responsible ongoing administration or to protect the State's interests. Requests for legal advice on issues affecting the Minister in his or her capacity as a candidate should be declined.

5.1.4 Agencies can proceed with policy development work during the caretaker period so that they are in a position to provide advice to the incoming government, provided that contact with Ministers' offices is not required.

5.1.5 Otherwise the normal work of the State Service including operational and other activities, continues without interruption. The caretaker conventions apply in respect of any decisions and special care should be taken with public consultation.

5.2 Legislation

5.2.1 Bills that have passed both Houses of Parliament should, if practicable, be assented to by the Governor before the dissolution of the House of Assembly, but may lawfully be assented to subsequently.

5.2.2 Legislation can be proclaimed during the caretaker period but, other than in exceptional circumstances, proclamations that have a commencement date after the date of the election are not made.

5.2.3 Where there is a need and where there is no breach of the caretaker conventions, the Executive Council may approve regulations and other statutory rules during the caretaker period. However, meetings are infrequent during the caretaker period and are held, with the Premier's approval, only when required by the amount of business.

5.3 Correspondence

5.3.1 Judgement is necessary in determining whether significant correspondence should be signed by the Minister or head of agency. Whatever the decision, the caretaker conventions apply.

Operational Notes

- a. Although Ministers continue to sign correspondence, the time they have available for this during the election campaign will be limited. In any event, Ministers would usually sign only essential correspondence.
- b. The general principle is that correspondence should be answered rather than left to accumulate. In cases where no issue of policy arises, for example in relation to the preparation of replies to routine incoming correspondence, departmental replies for signature by the head of agency should be prepared.
- c. Replies should not assume that the Government will or will not be returned to office. Any reference to post election action should be in terms of the 'incoming government'. It may be appropriate in some cases to include a sentence along the lines —
- d. 'The matter you raised is one which will be taken up with the incoming government.'
- e. Letters requiring explanation of current policy should, if possible, be answered without committing a government to post election action or implying that the policy will continue if the Government is re-elected.
- f. To avoid confusion, and as a matter of courtesy, members of the House of Assembly who are standing for re-election should continue to be addressed as 'MHA' until it is known whether they have been re-elected. Newly elected members should be addressed as 'MHA' as soon as it is known that they are elected. Members who are not standing for re-election should not be addressed as 'MHA' following the dissolution of the House of Assembly.

5.4 Grants

5.4.1 The payment of grants which were approved prior to the caretaker period can proceed but should be forwarded by the Department rather than by a Minister or another member of the Government.

5.4.2 During the caretaker period, commitments should not be made in respect of grant applications received during the period or which were lodged before commencement of the period but are awaiting decision.

5.5 Tabling of and Responses to Reports

5.5.1 Responses to outstanding parliamentary committee reports should be taken up with the incoming government. Agencies may, however, undertake appropriate preparatory work and consultation at the agency level so that they are in a position to provide early advice to the incoming government.

5.5.2 Reports of an administrative nature, such as annual reports, can be delivered during the caretaker period. However, where a report contains information that is likely to be controversial, consideration should be given to whether delivery should be deferred until after the caretaker period.

6 Avoiding Inappropriate Involvement in Election Activities

6.1 Advertising and Information Campaigns

6.1.1 The Premier may decide to curtail some government advertising campaigns, depending on their nature. As a general rule campaigns which promote the Government or highlight the role of particular Ministers or which address issues that are controversial between the major political parties would normally be discontinued. Campaigns that are non-contentious such as road safety or public health campaigns, usually continue.

6.1.2 At the beginning of the caretaker period, individual agencies should review arrangements for the distribution of printed material, including newsletters. Agencies should avoid active distribution of material during the caretaker period if it promotes Government policies or emphasises the achievements of the Government or a Minister.

6.2 Internet and Electronic Communications

6.2.1 During the caretaker period, agencies need to ensure that agency resources are not used to support any particular political party. Agencies should review their websites at the beginning of the caretaker period accordingly.

6.2.2 Agency websites may retain material placed on the website before the commencement of the caretaker period in most cases. Exceptions might be recent ministerial statements that criticise non-government parties or members in strong terms. Agencies should check the wording of any icons and links on their websites to ensure that they cannot be interpreted as promoting a new government policy. Agencies should add only the following material to their websites during the caretaker period:

- Portfolio-related announcements, if that is the usual practice (the definition of portfolio-related will require judgement within each agency, but, as examples, election promises should not be placed on an agency website, but a ministerial press release relating to a public health warning might appropriately be added);

- Purely factual material; and
- Information on existing policies and program, unless the information includes attacks on non-government parties or members or other political material.

6.2.3 If agency websites contain links to websites outside the tas.gov.au domain, agencies should consider the need for entry/exit messages. (See 6.2.5 below.)

6.2.4 In the case of ministerial websites, agencies may continue to maintain or fund the maintenance of the website during the caretaker period if that was the practice prior to the caretaker period. Material placed on the Minister's website before the caretaker period may be retained, as may links between the Minister's and agency's websites. In relation to the addition of material:

- Agency staff should add to ministerial websites only material relating to matters of existing policy or purely factual material. They should not add material concerning future policies, election commitments, how-to-vote material or media releases and speeches that criticise opponents, promote the Government or pursue election issues; and
- Agencies may also wish to place a notice on the ministerial website noting that election-related material is not available on the website. The notice could refer visitors to the government party's website, or include a link to that website.

6.2.5 If an agency-maintained/funded ministerial website contains links to websites outside the tas.gov.au domain, such as political party websites, agencies should give particular attention to the need to include appropriate entry/exit messages. Such messages could be along the lines of 'you are now leaving the website of [X]. The website you are entering is not maintained or funded by the Government of Tasmania'.

Operational Notes

- a. If a Minister's website is personal and not maintained by the agency, the Minister might consider placing a disclaimer on the website to the effect that no State Government resources are being used to communicate political material.
- b. State Servants should not use government email, faxes etc to distribute political material. This action would be a breach of the State Service Code of Conduct (see section 6.4).

6.3 Use of Agency Premises

6.3.1 There may be occasions where agency premises can appropriately be used during the caretaker period by political parties for public events, such as media conferences, or where they are the obvious place for a function. In the case of official functions involving the use of agency resources, it would generally be

appropriate for the Opposition spokesperson, and other non-government Members or candidates to be given the opportunity to be present.

6.3.2 While there should be no difficulty with the responsible use, by all parties campaigning in an election, of agency premises that are normally open to the public, it is most important during an election campaign that public servants not become caught up with party political activity. For that reason, it is not appropriate that use of premises extend to such activities as engaging public servants in political dialogue, or using public servants for logistical support for political functions. Nor, of course, should use of premises unreasonably disrupt the normal operations of the offices concerned.

6.3.3 Ministerial visits to agencies for consultations would, of course, be in order for the conduct of routine government business, in accordance with the caretaker conventions.

6.4 Political Participation by State Servants

6.4.1 State servants must not use agency resources or their positions to support particular issues or parties during the election campaign. Material from political parties and how-to-vote material, whether produced by a political party or any other organisation must not be displayed within the precincts of government buildings, or on other Crown property or vehicles. Web pages and e-mail systems provided by agencies should not be used to publish or transmit political material.

6.4.2 State servants need to exercise judgement if they are scheduled to speak at public functions during the caretaker period. In the case of controversial issues, officials should decline invitations to speak. In the case of non-controversial issues, state servants may speak, but should explain that the Government is in caretaker mode and that they will limit their statements to factual issues and matters of administration. State servants should avoid publicly explaining or promoting policies during the caretaker period.

Operational Notes

- i. The State Service Principles articulated in the State Service Act 2000 assert that the 'State Service is apolitical, performing its functions in an impartial ethical and professional manner'. The State Service Code of Conduct requires state servants:
 - When acting in the course of their State Service employment, to behave in a way that upholds the State Service principles;
 - To behave in a way that does not adversely affect the integrity and good reputation of the State Service;
 - To disclose and take reasonable steps to avoid conflicts of interests in connection with State Service employment; and
 - To use Tasmanian Government resources in a proper manner.

ii. State Servants Standing for Election

- An officer of the State Service who is a candidate for election to either House of State Parliament must vacate the office on becoming a candidate, ie when nominations have closed, and the person is formally recognised as a candidate.
- An employee of the State Service who is a candidate for election to either House of State Parliament does not have to resign prior to contesting a seat.
- An employee who is a candidate is entitled to leave without pay for a period of up to two months for the purpose of contesting an election - Section 2(2)(b) of the Constitution (State Employees) Act 1944.
- An employee who is a candidate retains normal entitlements to other classes of leave which may be taken as part of, instead of, or in addition to the above leave in any desired combination, and in broken periods, and subject to normal conditions. Annual recreation leave for electioneering before nominations have closed may also be granted. Whilst on leave without pay to contest an election, care should be taken by the employee to ensure compliance with the Code of Conduct provisions as outlined in Section 9 of the State Service Act 2000.
- If elected, the Constitution (State Employees) Act 1944 provides that service as an employee of the State Service is automatically terminated.

7 Other Matters

7.1 Financial Entitlements

7.1.1 During the caretaker period, agency provision of entitlements for Ministers and their staff should be assessed on a case-by-case basis. Agencies should not cover claims relating to the election campaign or a political event, as these costs are to be borne by the respective political party. Examples of claims that would not be covered include requests for additional laptop computers or mobile telephones for Ministers or their staff unless there was a demonstrable official purpose.

7.1.2 Claims relating to the management of essential government business can be covered in the normal way; for example, to support Ministers attending Cabinet meetings or primarily in connection with their ministerial duties.

7.1.3 In the case of claims that cover a combination of government and political business, partial reimbursement can be granted to cover government activities.

7.2 Government Funded Vehicles

7.2.1 Use of ministerial car and driver, or other government vehicles by Ministers or other members of the Parliament remain available during the caretaker period for official purposes but not for private use.

7.3 State Visits

7.3.1 The Premier will, if necessary, determine whether visits by foreign dignitaries involving government hospitality should proceed during the caretaker period. In any case, dignitaries whose visits are scheduled for the caretaker period or shortly afterwards should be advised of the election announcement and any changes in arrangements, including the reduced availability of Ministers and the possibility of a change of government. Details of any requests for Official Visits should be directed to the State Protocol Officer, Department of Premier and Cabinet.

7.4 Agency Briefings

7.4.1 It is usual during the caretaker period for agencies to prepare briefing material for an incoming Premier on their composition, administration and major current issues. The Director, Policy Division, Department of Premier and Cabinet coordinates these briefings. Agencies should also prepare portfolio specific briefing packages for their new Minister.

7.5 Post Election - Cabinet Documents

7.5.1 Successive governments have accepted the convention that Ministers do not seek access to documents recording the deliberations of Ministers in previous governments. Cabinet documents, in particular, are considered confidential to the government that created them. In this context, if there is a change of government at an election, all Cabinet documents, including Agendas, Minutes and Decisions should be returned to the custody of the Cabinet Office.

7.5.2 The Manager, Cabinet Office issues further procedural guidelines on the handling of Cabinet documents once the result of the election is known.

Victoria

Caretaker Conventions – Guidance for Handling Government Business during the Election Period

Department of Premier and Cabinet

1. Introduction

1.1 Successive Governments have accepted that, during the period preceding an election for the Legislative Assembly, the Government assumes a ‘caretaker role’. This practice recognises that, with the expiry or dissolution of the Legislative Assembly, the Executive cannot be held accountable for its decisions in the normal manner, and that every general election carries the possibility of a change of Government.

1.2 The caretaker period begins at the time the Legislative Assembly expires or is dissolved and continues until the election result is clear or, if there is a change of Government, until the new Government is appointed.

1.3 During the caretaker period, the business of Government continues and ordinary matters of administration still need to be addressed. However, the circumstances of an election campaign require special attention to ensure the impartiality of the Public Service is maintained.

1.4 Public funds are not to be used for electoral purposes, which is unacceptable at any time, not just during the election period. In addition, successive Governments have followed a series of practices, known as the ‘caretaker conventions’, which aim to ensure that their actions do not bind an incoming Government and limit its freedom of action. In summary, the conventions are that the Government avoids:

- implementing major policy decisions that are likely to commit an incoming Government;
- making significant appointments; and
- entering major contracts or undertakings.

1.5 There are also established practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the public service and avoiding the use of State resources in a manner to advantage a particular party. The conventions and practices also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign.

1.6 The conventions and practices have developed primarily in the context of the relationship between Ministers¹ and their Departments. The relationship

between Ministers and other public sector bodies, such as statutory authorities and Government companies, varies from body to body. However, those bodies should observe the conventions and practices unless to do so would conflict with their legal obligations or compelling organisational requirements. For convenience, Agency is used in this document as a descriptor of Departments and public sector bodies.

1.7 The following notes are intended to explain the conventions and practices in more detail and to provide guidance for the handling of business during the caretaker period. The conventions are neither legally binding nor hard and fast rules. Adherence to the conventions is ultimately the responsibility of the Premier and the Government collectively. Their application in individual cases requires judgement and common sense. Department Heads have responsibility to ensure that the business of Government proceeds at the direction of Ministers and in a manner which is consistent with the conventions.

1.8 It should be recalled that since the passage of the Constitution (Parliamentary Reform) Act 2003, Victoria has a fixed parliamentary period of four years. This allows a degree of certainty as to when the caretaker period will take place. From 2006 elections will be held, other than in extraordinary circumstances, every four years on the last Saturday in November and the Legislative Assembly will expire in early November or late October 25 days earlier. In view of these arrangements, Ministers and Agencies should consider these conventions when making plans for the future and should avoid planning activities for this period if those activities may be inconsistent with the conventions.

2. Major Policy Decisions

2.1 Governments avoid implementing major policy decisions during the caretaker period that are likely to commit an incoming Government. Whether a particular policy decision qualifies as ‘major’ is a matter for judgement. Relevant considerations include not only the significance of the decision in terms of policy and resources, but also whether the decision is a matter of contention between the Government and Opposition in the election campaign.

2.2 The conventions apply to the implementation of decisions, not to their making or announcement. It is only actions taken during the caretaker period which commit the State to a course of action that can be contrary to the conventions. Accordingly, the conventions are not infringed where decisions, made or implemented before the expiry or dissolution of the Assembly, are announced during the caretaker period. Similarly, the conventions do not apply to promises on future policies that the party in Government announces as part of its election campaign.

2.3 If circumstances require the Government to implement a major policy decision during the caretaker period that would bind an incoming Government, the Minister would usually consult the Opposition spokesperson beforehand.

3. Significant Appointments

3.1 Governments defer making significant appointments during the caretaker period. When considering the advice it would give on whether an appointment qualifies as 'significant', the Agency should consider not only the importance of the position, but also whether the proposed appointment would be likely to be controversial.

3.2 If deferring the appointment is impracticable, usually for reasons associated with the proper functioning of an Agency, there are several options:

- an acting appointment where permissible;
- a short term appointment until shortly after the end of the caretaker period;
or
- if those options are not practicable, a full term appointment, but this is usually preceded by consultation with the relevant Opposition spokesperson.

4. Major Contracts or Undertakings

4.1 Governments avoid entering major contracts or undertakings during the caretaker period. Where contracts have been entered into prior to the caretaker period, further agreements can be entered into during that period if these are subsidiary to that 'head contract', relating to matters already proceeding; penalties may in fact be incurred for breach, if further agreements are not entered into. When considering whether a contract or undertaking qualifies as 'major', Agencies should consider the dollar value of the commitment and also whether the commitment involves a routine matter of administration or rather implements or entrenches a policy, programme or administrative structure which may be politically contentious. A further consideration is whether the commitment requires ministerial approval.

4.2 If it is not possible to defer the commitment until after the caretaker period, for legal, commercial or other reasons, there are a number of options. The Minister could consult the relevant Opposition spokesperson regarding the commitment. Agencies could also explain the implications of the election to the contractor and ensure that contracts include clauses providing for termination in the event of an incoming Government not wishing to proceed. Similarly, in the case of tenders, Agencies should warn potential tenderers about the implications of the election and the possibility that the tender might not be completed.

5. Negotiations and Visits

5.1 The convention that the Government avoids entering major commitments during the caretaker period gives rise to particular issues in the context of contractual and intergovernmental negotiations and visits (e.g. interstate/overseas dignitaries). The Government ordinarily seeks to defer such negotiations or adopts observer status until the end of the caretaker period. The other parties to the negotiations, however, may not be familiar with the concept of caretaker conventions and the Government may need to explain the constraints they impose.

5.2 If deferring involvement or adopting observer status is not feasible, the Government could limit its role to providing information on its past position, without committing the incoming Government to that position. If it is necessary for the Government to participate fully in the negotiations, it should advise the other parties to the negotiations that any outcomes will need to be authorised by the incoming Government, or it could seek the Opposition's agreement to negotiating positions.

5.3 The Premier will, if necessary, determine whether visits by dignitaries involving Government hospitality should proceed during the caretaker period. In any case, dignitaries whose visits are scheduled for the caretaker period or shortly afterwards should be advised of the election announcement and any changes in arrangements, including the reduced availability of Ministers and the possibility of a change of Government. The four year fixed term should allow Agencies, when planning visits for dignitaries, to avoid the period in and around the caretaker period.

6. Avoiding VPS Involvement in Election Activities

6.1 Advertising and Information Campaigns

6.1.1 Agencies are to review their advertising campaigns which may be scheduled to take place during the caretaker period. Any appearance of party political content or purpose must be avoided and particular campaigns with content that could be so perceived are to be deferred. It may be necessary to withdraw advertising that has already been booked. Advertising campaigns which promote Government policies and/or Ministers may be particularly sensitive and should be referred to Ministers for review. Departmental campaigns which convey necessary public information (e.g. to promote public health or safety) or are of an operational nature (such as employment advertisements) may be continued as long as they do not feature Ministers or promote Government policies. If an Agency has concerns or requires clarification, the Strategic Communications Unit in the DPC should be consulted.

6.1.2 At the beginning of the caretaker period, individual Agencies should review arrangements for the distribution of printed material, including newsletters. Agencies should avoid active distribution of material during the caretaker period if the material can be seen as promoting party political content, Government policies or emphasises the achievements of the Government or a Minister. Passive distribution of material, such as continued placement in the Agency's offices or distribution in response to requests, is acceptable.

6.2 Internet and Electronic Communications

6.2.1 During the caretaker period, Agencies need to take steps, which are outlined below, to ensure that Agency resources are not used to support any particular political party. Agencies should review their websites at the beginning of the caretaker period accordingly.

6.2.2 Agency websites may retain material placed on the website before the commencement of the caretaker period in most cases. Exceptions might be recent ministerial statements that criticise the Opposition or other non government parties or members in strong terms. Agencies should check the wording of any icons and links on their websites to ensure that they cannot be interpreted as promoting a Government policy. Agencies should add only the following material to their websites during the caretaker period:

- portfolio-related announcements, if that is the usual practice (the definition of portfolio-related will require judgement within each Agency, but, as examples, election promises should not be placed on an Agency website, but a ministerial press release relating to a public health warning might appropriately be added);
- purely factual material; and
- information on existing policies and programmes, unless the information includes criticism of the Opposition or other political material.

6.2.3 If Agency websites contain links to websites outside the vic.gov.au domain, Agencies should consider the need for entry/exit messages. (See 6.2.7 below)

6.2.4 In the case of Ministerial websites, Agencies may continue to maintain or fund the maintenance of the website during the caretaker period if that was the practice prior to the caretaker period. Material placed on the Minister's website before the caretaker period may be retained, as may links between the Minister's and Agency's websites. In relation to the addition of material:

- Agencies should add to ministerial websites only material relating to matters of existing policy or purely factual material. Agencies should not add material concerning future policies, election commitments, how-to-vote material or media releases and speeches that criticise opponents, promote the Government or pursue election issues;

- Agencies may also wish to place a notice on the ministerial website noting that election-related material is not available on the website. The notice could refer visitors to the Government party's website, or include a link to that website;
- if the maintenance of the website has become the responsibility of the Minister rather than the Agency, ministerial staff may add any material to the website as long as there is no cost to the State and a notice is added to the effect that since the commencement of the caretaker period the website is neither the responsibility of nor a cost to the Agency.

6.2.5 If the Minister's website is personal and not maintained by the Agency, the Minister might consider placing a disclaimer on the website to the effect that no State resources are being used to communicate political material.

6.2.6 If an Agency-maintained/funded ministerial website contains links to websites outside the vic.gov.au domain, such as political party websites, Agencies should give particular attention to the need to include appropriate entry/exit messages. Such messages could be along the lines of 'you are now leaving the website of [X]. The website you are entering is not maintained or funded by the State of Victoria'.

6.2.7 Electronic bulletin boards and e-mail systems provided by Agencies should not be used to publish political material. Material from political parties and how-to-vote material produced by any organisation should not be displayed.

6.3 Use of Agency Premises

6.3.1 There may be occasions where Agency premises can appropriately be used during the caretaker period by political parties for public events, such as media conferences, or where they are the obvious place for a function (for example, the opening of a building by a Minister). In the case of official functions involving the use of Agency resources, it would generally be appropriate for the Opposition spokesperson, member or candidate to be given the opportunity to be present.

6.3.2 While there should be no difficulty with the responsible use, by all parties campaigning in an election, of Agency premises that are normally open to the public, it is most important during an election campaign that public servants not become caught up with party political activity. For that reason, it is not appropriate that use of premises extend to such activities as engaging public servants in political dialogue, or using public servants for logistical support for political functions. Nor should use of premises unreasonably disrupt the normal operations of the offices concerned.

6.3.3 Ministerial visits to Agencies for consultations would be in order for the conduct of routine Government business, in accordance with the caretaker conventions.

6.4 Correspondence

6.4.1 Ministers usually sign only the necessary minimum of correspondence and it is desirable that some correspondence normally signed by Ministers be prepared for signature by departmental officers, rather than left to accumulate.

6.4.2 When preparing replies, care should be taken to protect the public service from perceptions of partisanship. Replies should not assume that the Government will or will not be returned to office. References to post-election action are in terms of the 'incoming Government'. Correspondence that requires an explanation of Government policy should not commit the Government to post-election action or imply that the policy will continue if the Government is re-elected. Including a reply that a matter is one for the incoming Government may help avoid any implication of continuing policy.

6.5 Political Participation by Officers

6.5.1 The public sector values in the Public Administration Act 2004 state that the public sector performs its functions in an impartial manner. Conflicts of interests (real or apparent) must be avoided. Therefore officials should not use Agency resources or their positions to support particular issues or parties during the election campaign. The wearing or displaying of political material in official premises is not permissible.

6.5.2 Officials need to exercise judgement if they are scheduled to speak at public functions during the caretaker period. In the case of controversial issues, officials should decline invitations to speak. In the case of non-controversial issues, officials may speak, but should explain that the Government is in caretaker mode and that they will limit their statements to factual issues and matters of administration. Officials should avoid publicly explaining or promoting policies during the caretaker period.

6.6 Requests from Ministers' Offices for Information or Assistance

6.6.1 Ministers may continue to request factual material from Agencies during the caretaker period in the usual way. The purpose for which such material is used is for the Minister to determine.

6.6.2 Ministers may not, however, request Agencies to develop new policy initiatives. There might however, be urgent domestic or international issues on which policy advice should clearly be provided to Ministers to allow responsible ongoing administration or to protect Victoria's interests.

6.6.3 Agencies can proceed with policy development work during the caretaker period so that they are in a position to provide advice to the incoming Government, provided that contact with Ministers' offices is not required.

6.6.4 Ministers may not require administrative assistance or material if the predominant purpose for the assistance clearly relates to the election rather than the ongoing business of Government. It is proper practice for such requirements to be declined and for the Minister to be advised as to the reason. If the Minister confirms that he or she requires that assistance, the Agency should promptly consult with DPC.

6.7 Policy Costings

6.7.1 The Department of Treasury and Finance, in conjunction with relevant Departments, may be asked by Ministers to cost Government and Opposition policy proposals. The costings will be undertaken provided any assumptions necessary for the costings are identified for the Departments, or do not require extensive policy research by Departments.

6.8 Departmental Liaison Officers

6.8.1 Particular issues also arise in relation to Departmental Liaison Officers (DLOs). DLOs are provided by Departments to assist Ministers' offices with necessary liaison work with Agencies. The need for that work should be reviewed at the commencement of the caretaker period. If there is ongoing work of a liaison nature during the caretaker period, DLOs may remain with Ministers' offices. However, DLOs are public servants. They are not ministerial advisers. They should therefore avoid assisting Ministers in ways that could create a perception that they are being used for party political purposes.

6.9 Hospitality

6.9.1 Agencies must exercise care in hosting official functions during the election period. Such functions are not to be capable of representation as being for electioneering purposes. Consideration is to be given to deferring official visits by dignitaries from outside Victoria, particularly where there is an expectation that agreements will be signed or negotiations concluded.

6.9.2 Ministers may choose not to attend intergovernmental meetings, meetings of Ministerial councils and the like. Officials, when attending such meetings are to identify that they are constrained by caretaker conventions and confine themselves to seeking and providing information without making any policy commitments which might constrain whichever Government takes office after the election.

7. Related Matters

7.1 Tabling of and Responses to Reports

7.1.1 Responses to outstanding parliamentary committee reports should be taken up with the incoming Government. Agencies may, however, undertake

appropriate preparatory work and consultation at the Agency level so that they are in a position to provide early advice to the incoming Government.

7.2 Financial Entitlements

7.2.1 It has been a longstanding convention that Ministers do not claim travelling allowance from the day of the Premier's campaign launch to the day after polling day. The only exceptions are where Ministers travel for Cabinet meetings or primarily in connection with their ministerial duties/ portfolio responsibilities.

7.2.2 An additional vehicle for the Leaders of the non-government parties will be provided once the election is called. They may also charter aircraft for themselves during the election period. Such charters need to be approved by the Premier on a case by case basis and the relevant Leader is to be notified of approval or non approval in each case. Forty-eight hours notice of the intended date of use of aircraft is required. Media representatives on any charter flights are to make payments for an evenly shared portion of the charge.

7.3 Legislation, Executive Council and Cabinet

7.3.1 Bills that have passed both Houses of Parliament should be assented to by the Governor before the expiry or dissolution of the Legislative Assembly. Practice has been not to provide Royal Assent after expiry or dissolution.

7.3.2 Legislation is also not proclaimed during the caretaker period other than in exceptional circumstances.

7.3.3 The Executive Council usually meets immediately before the dissolution to approve regulations and Orders in Council, including those made under Acts just assented to. The Executive Council meets during the caretaker period but only as required. Its functions during this period are limited to approving regulations, appointments and Orders in Council which do not infringe the caretaker conventions. However, meetings are infrequent during the caretaker period and are held only when required by the amount of business. Further, the relevant Departmental Secretary will need to justify each item which is proposed to be considered by Executive Council before the Council will consider it.

7.3.4 Cabinet rarely meets during the caretaker period — and will normally only do so if the items to be considered can be put into effect consistently with the caretaker conventions. Cabinet will not normally meet until after the election and when the caretaker period is over.

7.4 Cabinet and Other Documents

7.4.1 Cabinet documents are the property of the State and must be dealt with properly as public records. Successive Governments have accepted the convention that Ministers do not seek access to documents recording the deliberations of Ministers in previous Governments. Cabinet documents, in particular, are

considered confidential to the Government that created them. In this context, all Cabinet documents, including files, Submissions, Memoranda, Agenda and Minutes (decisions) should be returned to the custody of the Cabinet Secretariat, for storage until the result of the election is known. If such documents are required in the day to day administration of an Agency, they may with the agreement of the Cabinet Secretariat, be kept in secure conditions with the Agency; however, they must be returned on the day preceding election day.

7.4.2 The Cabinet Secretariat may issue further procedural guidelines on the handling of Cabinet documents before or at the commencement of the caretaker period. The Cabinet Secretariat is the appropriate contact for further advice on such matters. Advice on the security and handling of Cabinet documents is also contained in the Cabinet Handbook.

7.4.3 In relation to other documents, should a Government not be returned, the official (as distinct from party and personal) documents are also public records and are to be kept in accordance with the requirements of the Public Records Act 1973 and cannot be destroyed.

7.5 Consultation Between Officials and Non-Governmental Parties

7.5.1 The Guidelines for consultation by officials with non-government parties are as follows:

- i. The Guidelines for consultation apply from a date three months prior to the expiry of the Legislative Assembly or, if the Assembly is being dissolved, the date of the announcement of the election, whichever date comes first.
- ii. Leaders of non-government parties may make a request for consultation with officers through the Premier. Similarly, Shadow Ministers may also request access to officers through the relevant Minister so long as the Premier is informed of the request and whether it has been agreed. Approval may be given to have discussions with appropriate officials of Government Agencies.
- iii. Shadow Ministers may have other Members of Parliament or their staff members present at such meetings. A Departmental Secretary may have other officials present. It is not appropriate for Ministers' Private Office staff to be present.
- iv. The request procedure and discussions will be at the initiative of the non-Government parties, not officials. Officials will inform their Ministers when the discussions are taking place. Departmental heads are to ensure that officers authorised to conduct or attend briefings have a proper understanding of the matters likely to be raised at such briefings.

- v. Officials will not be authorised to discuss Government policies or to give opinions on matters of a party political nature. The subject matter of the discussions should 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. If the non-government representatives raise matters which, in the judgement of the officials, seek information on Government policies or sought expressions of opinion on alternative policies, the officials are to suggest that the matter be raised with the Minister.
- vi. The detailed substance of the discussions will be confidential but Ministers will be entitled to seek from officials general information on whether the discussions kept within agreed purposes and the Guidelines for consultation.

8. Forms of Address

8.1 Addressing Members during the Caretaker Period

8.1.1 To avoid confusion, and as a matter of courtesy, members of the Legislative Assembly and Council who are standing for re-election should continue to be addressed as 'MP' or 'MLC' respectively until it is known whether they have been re-elected. Newly elected members should be addressed as 'MP' or 'MLC' respectively as soon as it is known that they are elected. Members who are not standing for re-election (including Ministers) are not to be so addressed following the expiry or dissolution of the Legislative Assembly/ proroguing of the Council.

8.1.2 However, a Minister who is retiring from Parliament continues to hold his or her position as Minister (as distinct from MP or MLC) pending the swearing in of the incoming Government.

9. Conclusion

9.1 Agency heads are responsible for appropriate action to ensure that Agencies and associated Agencies observe the conventions during the caretaker period.

9.2 Agency heads need to be familiar with the caretaker conventions. However, any queries they may have as to the operation of the conventions in any particular case are to be referred to the Secretary of Department of Premier and Cabinet or any staff members nominated by the Secretary.

9.3 To ensure the consistent application of caretaker conventions within Agencies and to minimise the number of requests for advice to the DPC, Agencies should appoint one or two senior officers to be the initial contact for caretaker enquiries. If further advice is required in relation to particular issues that arise during the caretaker period, Agencies should contact Mr Ian Killey PSM, General Counsel in the DPC on (03) 9651 5644.

Different approaches – what the jurisdictional guidances say

ENDNOTES

¹ All references to Ministers should be read as including Parliamentary Secretaries.

Western Australia

Premier's Circular

Number: 2005/01, Issue Date: 23/01/2005, Review Date: 31/03/2005

Guidelines Applying in Western Australia during the State General Election Period (Caretaker Conventions)

Policy

The Government assumes a 'caretaker' role in the period immediately before a State General Election. This role commences from the date of the dissolution of the Legislative Assembly and continues until the election result is clear, or in the event of a change of government, until the new government is formally sworn in.

Background

It is recognised that every general election carries the possibility of a change of government. In the caretaker period, efforts are made to ensure that decisions are not taken that would bind an incoming government and/or limit its freedom of action.

The practices associated with the caretaker role are directed at protecting the apolitical nature of the Public Sector, and avoiding the use of State Government resources in a manner to advantage a particular party. The arrangements also aim to prevent controversies about the role of the Public Sector during an election campaign.

Attached is a copy of the Guidelines that will apply to the forthcoming election period.

A copy of the document has been made available to the Leader of the Opposition, minor parliamentary parties, independent Members, and secretaries of the parliamentary parties. It is also available on the Department of the Premier and Cabinet website at www.dpc.wa.gov.au

DR GEOFF GALLOP MLA

PREMIER

For enquiries contact: Lynsey Warbey 9222 9401
Principal Policy Officer, Office of the Director General
Department of the Premier and Cabinet
Other relevant Circulars: 2001/2 (expired)
Circular/s replaced by this Circular:

Guidelines Applying in Western Australia during the State General Election Period Caretaker Conventions 2005

Department of The Premier and Cabinet

Table of Contents

1. Introduction
2. Significant Appointments and Contracts of Employment
3. Major Contracts, Undertakings and Policy Decisions
4. Advertising, Publications and Information Campaigns
5. Internet and Electronic Communications
6. Travel
7. Operations of Public Sector Agencies and Relationships with Ministers
8. Legislation
9. Executive Council
10. Cabinet
11. Consultations by Members of Parliament and Political Candidates with Public Sector Officers
12. Visits by Members of Parliament and Political Candidates to Government Facilities
13. Political Participation by Public Sector Officers
14. Hospitality
15. Public Records
16. Coat of Arms and Common Badge
17. Inquiries

1. Introduction

1.1 By convention, the Government assumes a ‘caretaker’ role in the period immediately before a State General Election as it is recognised that every general election carries the possibility of a change of government. This role commences from the date of the dissolution of the Legislative Assembly and continues until the election result is clear, or in the event of a change of government, until the new government is formally sworn-in.

1.2 In the caretaker period, efforts are made to ensure that decisions are not taken that would bind an incoming government and/or limit its freedom of action. The practices associated with the caretaker role are directed at protecting the apolitical nature of the Public Sector and avoiding the use of State Government resources in a manner to advantage a particular party. The arrangements also aim to prevent controversies about the role of the Public Sector during an election campaign.

1.3 These guidelines are intended to explain the conventions and practices in more detail and to provide guidance for the handling of business during the caretaker period. The conventions are neither legally binding nor inflexible rules. Their application in individual cases requires judgement and common sense. While the Department of the Premier and Cabinet is able to provide information and advice to agencies, responsibility for observing the conventions ultimately rests with Chief Executive Officers or, in cases where they are involved, with the Premier and Ministers.

1.4 Generally, the arrangements are intended, wherever possible, to ensure that:

1.4.1 significant appointments are not made;

1.4.2 major policy decisions are not taken which would be likely to commit an incoming government (including the implementation of new policies or approval of major projects within government agencies);

1.4.3 no commitments are made to major contracts or undertakings;

1.4.4 electioneering is not undertaken through government advertising, publications or electronic communications;

1.4.5 Members of Parliament do not undertake air travel at public expense for electioneering purposes; and

1.4.6 Public Sector officers are not involved in party political activities.

1.5 While the conventions and practices have developed primarily in the context of the relationship between Ministers and their agencies, other bodies, such as government trading enterprises, should observe them unless to do so would conflict with their legal obligations or compelling organisational requirements.

1.6 It is important to note that the conventions are directed to the taking of decisions and not their announcement. Accordingly, they do not apply to new policy promises that a government or opposition may announce as part of its election campaign.

1.7 To ensure the consistent application of these guidelines, agencies should appoint one or two senior officers to be the initial contact for inquiries.

2. Significant Appointments and Contracts of Employment

2.1 Significant appointments and reappointments should be deferred during the caretaker period. When determining whether an appointment or reappointment is 'significant', consideration should be given to the importance of the position and whether the proposed appointment is likely to be controversial.

2.2 Where the proper function of a Public Sector agency requires a significant position to be filled, acting arrangements or a short-term appointment should be used.

2.3 No action should be taken in relation to contracts of employment for senior officer positions (generally, no appointments or reappointments should occur for positions classified at PSA Level 8 and above (or equivalent)). Where a decision needs to be made in relation to a reappointment, and reappointment is proposed, the contract should be for a period ending no more than three months from the date of the election.

3. Major Contracts, Undertakings and Policy Decisions

3.1 The broad rule is for the Government to avoid entering into major contracts or undertakings or making major policy decisions, during the caretaker period, including commitments that would be politically contentious or likely to commit an incoming government. Major project approvals or policy decisions should be deferred unless there is appropriate consultation with the Opposition parties.

3.2 Whether a particular decision qualifies as ‘major’ is a matter for judgement. Relevant considerations include not only the significance of the decision in terms of policy and resources but also whether the issue is a matter of contention between the Government and Opposition parties in the election campaign.

3.3 If it is not possible to defer the commitment until after the caretaker period for legal, commercial or other reasons, further advice should be sought from the Director General, Department of the Premier and Cabinet.

4. Advertising, Publications and Information Campaigns

4.1 In general, government advertising, information campaigns and publications, except work commissioned by the Western Australian Electoral Commission, are to be deferred during the caretaker period. However, exemption from this requirement may be sought from the Chief Executive Officer, State Supply Commission in respect of the following instances:

- advertisements relating to public inquiries;
- advertising of commercial services provided by agencies; and
- community service announcements.

4.2 In addition, Chief Executive Officers are authorised to approve the advertising/publication of information in the areas listed hereunder:

- changes to statutes and delegated legislation;
- vacant positions which are of a minor professional, administrative or technical nature;
- calling of tenders for minor works; and
- notices required pursuant to any statute.

4.3 No government agency should publish pamphlets, brochures, leaflets or reports that advocate or criticise the election policies of any political party.

Publications should not promote any politician or political candidate, including Ministers.

4.4 Agencies should avoid active distribution of material during the caretaker period if it promotes the Government's policies or emphasises the achievements of the Government or a Minister.

4.5 Should there be any doubt about any advertising or publication issues, the matter should be referred to the Chief Executive Officer, State Supply Commission.

5. Internet and Electronic Communications

5.1 During the caretaker period, agencies need to take additional steps to ensure that electronic resources are not used to support any particular political party. Agencies should therefore review their websites at the beginning of the caretaker period.

5.2 Agency websites may retain material placed on the website before the commencement of the caretaker period. Exceptions might be recent Ministerial statements that criticise the Opposition or other parties in strong terms. Agencies should review the content of any icons and links on their websites to ensure that they cannot be interpreted as promoting a particular government policy.

5.3 Agencies should not add material to their websites during the caretaker period unless it can be demonstrated that there is a clear public interest in doing so. Additional material may include:

5.3.1 necessary portfolio-related announcements, if that is the usual practice. The definition of 'portfolio-related' will require judgement in each agency. By way of example, election promises should not be placed on an agency website but a media release relating to a public health warning might be appropriate;

5.3.2 purely factual material; and

5.3.3 essential updates on existing policies and outputs, unless the information includes electioneering material or attacks on political opponents.

5.4 Agencies should not publish material on their websites that advocates or criticises the election policies of any political party or candidate or which promotes any politician or political candidate, including Ministers.

5.5 In the case of Ministerial websites (including the Leader of the Opposition website), the Department of the Premier and Cabinet will continue to maintain and fund the maintenance of the website during the caretaker period. Material placed on a Minister's website before the caretaker period may be retained, as may links between the Minister's and his/her agencies' websites.

5.6 In relation to the addition of new material to Ministerial websites:

5.6.1 Only necessary material relating to matters of existing policy or purely factual material can be added to websites. Material concerning future policies, election commitments or media releases and speeches that criticise opponents, promote the Government or pursue contentious issues, cannot be added.

5.6.2 The Department of the Premier and Cabinet will place a notice on the Ministerial website indicating that election-related material is not available on the website. The notice may refer visitors to the Government's party website or include a link to that website.

5.6.3 If an agency or Ministerial website contains links to websites outside the wa.gov.au domain, such as political party websites, appropriate entry/exit messages should be added. Such messages should be along the lines of 'You are now leaving the website of X' or 'The website you are now entering is not maintained or funded by the Government of Western Australia'.

5.7 Websites for Members of Parliament maintained using public funds must not be used for electioneering purposes. Notices referring visitors to the party's website or links to that website are permissible.

5.8 Electronic bulletin boards and e-mail systems provided by agencies should not be used for electioneering purposes. Information from political parties and election material, whether produced by an individual or organisation, should not be published or distributed using agency systems.

6. Travel

6.1 During that portion of the caretaker period from the date of the dissolution of the Legislative Assembly until the close of polling on election day, no Member of Parliament shall travel by air at the expense of the State, except:

- the Premier;
- the Deputy Premier;
- the Leader of the Opposition in the Legislative Assembly;
- Members of Parliament nominated by the Premier or the Deputy Premier to attend official functions;
- Members of Parliament nominated by the Leader of the Opposition in the Legislative Assembly to attend official functions;
- a Minister traveling to respond to an emergency or disaster where the presence of the Minister is necessary or desirable;
- any Minister or Member of Parliament in the course of a journey to or from a destination outside the State;
- any Member of Parliament, so entitled, traveling between the Member's electorate and Perth, or within that Member's electorate;
- any Member of Parliament utilising an entitlement determined by the Salaries and Allowances Tribunal.

6.2 The Premier, Deputy Premier, Leader of the Opposition in the Legislative Assembly, or a Member of Parliament nominated to represent them at an official function, may be accompanied by their spouse.

6.3 The Premier, Deputy Premier, Leader of the Opposition in the Legislative Assembly, or a Member of Parliament nominated to represent them at an official function, may be accompanied by members of their staff, if necessary, to assist them in the performance of their duties.

6.4 Travel under this provision shall be by regular passenger transport airline services, unless there is no scheduled service operating at a reasonably convenient time. In such cases, a charter may be used.

6.5 If it is considered appropriate by the Premier, Deputy Premier, or Leader of the Opposition in the Legislative Assembly, Members of Parliament may accompany them, or a nominated Member, on a charter flight at no cost provided vacant seats are available and such travel does not increase charter costs.

6.6 If it is considered appropriate by the Premier, Deputy Premier, or Leader of the Opposition in the Legislative Assembly, media representatives and candidates who are not Members of Parliament may accompany them or a nominated Member on a charter flight provided vacant seats are available and such travel does not increase charter costs. Where media representatives or candidates who are not Members of Parliament travel on charter flights, they shall be charged for the cost of their travel on the following basis:

Cost of Travel = Hourly Charter Rate x No of Hours Passenger on the Charter
Seat Capacity of Charter Aircraft

6.7 The Imprest System for Members of Parliament Travel is suspended for the period between the issue of the writs for a general or conjoint election and the day fixed by those writs for taking of the poll.

7. Operations of Public Sector Agencies and Relationships with Ministers

7.1 The normal business of government should continue but Public Sector agencies should avoid partisanship and ensure the impartiality of the Public Sector. Communication arrangements between Ministerial offices and agency employees should continue to be in accordance with section 74 of the Public Sector Management Act 1994.

7.2 Material concerning the day-to-day business of Public Sector agencies should be supplied to Ministers in the usual way.

7.3 Ministers should sign only the necessary minimum of correspondence during the caretaker period. Departmental officers or Ministerial staff can respond to some correspondence normally signed by Ministers.

7.4 Ministers may choose not to attend intergovernmental meetings, meetings of Ministerial councils and the like. Public Sector officers, when attending such meetings, should make it known that they are constrained by the caretaker conventions and confine themselves to seeking and providing information without making any policy commitments that might constrain an incoming government.

7.5 Ministers may ask relevant Public Sector agencies to cost government and non-government party policy proposals.

7.6 Under the Government Financial Responsibility Act 2000, the Treasurer is to release a Pre-Election Financial Projections Statement within 10 days after the Legislative Assembly is dissolved.

8. Legislation

8.1 Bills introduced into the Legislative Assembly but not passed will lapse when the Legislative Assembly is dissolved.

8.2 Bills that have completed their passage through Parliament may be presented for Royal Assent if essential, notwithstanding the dissolution of the Legislative Assembly and the prorogation of the Legislative Council. As a general rule however, Bills will not be presented for Royal Assent during the caretaker period.

8.3 Bills assented to may be proclaimed where they come into operation during the caretaker period.

9. Executive Council

9.1 The Executive Council will continue to meet during the caretaker period but will only consider necessary and routine matters of government administration.

10. Cabinet

10.1 Cabinet will not normally meet during the caretaker period. Any deliberations and decisions by Cabinet during this period must be made in the context of the caretaker conventions.

10.2 Successive governments have accepted the convention that Ministers do not seek access to documents recording the deliberations of previous governments. Agencies should ensure that all Cabinet documents are adequately secured throughout the caretaker period and after any change of government.

11. Consultation by Members of Parliament and Political Candidates with Public Sector Officers

11.1 Members of Parliament and political candidates may wish to seek consultations with appropriate Public Sector officers. In this respect, the following practices and guidelines come into operation as soon as the election announcement has been made:

11.1.1 The procedure must be initiated by an approach by the relevant Member of Parliament or political candidate through the appropriate Minister. The Minister shall refer the request to the relevant Chief Executive Officer. Public Sector officers should not instigate discussions.

11.1.2 The Chief Executive Officer should notify the Minister, in writing, of the details of when the discussions will take place. The Minister should then advise the Premier of the discussions.

11.1.3 Public Sector officers are not authorised to discuss government policies or to give opinions on matters of a party political nature. The subject matter of the discussions must be restricted to the machinery of government and administration. The discussions may include the administrative and technical practicalities and procedures involved in the implementation of policies proposed by the non-government parties.

11.1.4 Public Sector agencies will be represented in such discussions by the Chief Executive Officer or his/her nominated representative and appropriate officers with relevant expertise.

11.1.5 The detailed substance of the discussions will be confidential but Ministers will be entitled to seek general information on whether the discussions kept within the agreed purposes.

11.1.6 Any requests for consultation that involve an unreasonable amount of work by a Public Sector agency may properly be denied.

11.2 As part of the process of preparing the way for any incoming government, Public Sector agencies may prepare general briefing papers on the implications of major stated policies, to present to incoming Ministers subsequent to the election.

12. Visits by Members of Parliament and Political Candidates to Government Facilities

12.1 Where Members of Parliament or political candidates wish to visit government facilities for campaigning purposes, the Chief Executive Officer must be notified and that officer, or a nominated representative, will accompany the Members or political candidates during the visit.

13. Political Participation by Public Sector Officers

13.1 Subject to 13.3, Public Sector officers should not use agency resources or their positions to support particular political parties during the election campaign. The provisions of the Public Sector Management Act 1994 and the Western Australian Public Sector Code of Ethics should act as a guide to officers in performing their functions during the caretaker period.

13.2 Whilst a Public Sector officer's right to be involved in public life is acknowledged, including participation in political parties, the underlying principle is that such participation should not interfere with the performance of the officer's functions and government resources should not be used to this end.

13.3 It is recognised that Ministerial officers appointed under the Public Sector Management Act 1994 to assist political office holders, may become involved in activities of a party political nature when undertaking functions specified by the political office holder.

13.4 Public Sector officers need to exercise judgement if they are scheduled to speak at public functions during the caretaker period. In the case of controversial issues, officials should decline invitations to speak. In the case of non-controversial issues, officials may speak but should explain that the Government is in caretaker mode and that they will limit their statements to factual issues and matters of administration. Officials should avoid publicly explaining or promoting policies during the caretaker period.

14. Hospitality

14.1 Agencies should exercise care in hosting official functions during the election period to avoid any perception that the function is for electioneering or party political purposes.

14.2 In the case of official functions involving the use of agency resources, it may be appropriate for the Opposition parties' spokesperson/s, Members of Parliament or political candidates to be given the opportunity to be present.

14.3 Consideration should be given to deferring official visits by dignitaries from outside Western Australia, particularly where there is an expectation that agreements will be signed or negotiations concluded.

15. Public Records

15.1 All official documents are to be maintained in accordance with the provisions of the State Records Act 2000. The provisions of the Department of the Premier and Cabinet Records Keeping Plan 2004 also apply to the handling of Ministerial office records.

16. Coat of Arms and Common Badge

16.1 The Coat of Arms of the State of Western Australia (Coat of Arms) may be used by the Government and the Opposition for purposes associated with their official functions, including correspondence sent pursuant to 7.3.

16.2 Except for advertisements/publications provided for in 4.2, the Common Badge or the Coat of Arms (Seal Form) should NOT be used on any government

advertisements published during the caretaker period without the approval of the Director General, Department of the Premier and Cabinet.

16.3 The Common Badge or the Coat of Arms (Seal Form) may be used on correspondence sent in accordance with 7.3 of these Guidelines.

17. Inquiries

17.1 All inquiries concerning these arrangements should be referred in the first instance to the Director General, Department of the Premier and Cabinet.

ATTACHMENT

REQUEST FOR APPROVAL TO ADVERTISE OR PUBLISH DURING STATE GENERAL ELECTION PERIOD 2005/06

Mr Phil Turner
Acting Chief Executive Officer
State Supply Commission
Level 5, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Department/Agency: _____

Contact Person: _____

Telephone: _____ Fax: _____

Email: _____

Subject: _____

Advertising Commences: ___/___/___ ends ___/___/___ (dates inclusive)

Where advertising through an advertising agency is proposed, the following information is required:

Advertising Agency: _____

Advertising Media: _____

Please explain why an exemption should be granted:

Please note: A copy of the advertising/publication for which exemption is requested must accompany all applications. Videos, CDs and DVDs are also acceptable.

Declaration:

I certify that the advertising material/publication that is the subject of this application does not advocate or criticise the election policies of any political party nor does it personally promote any Member of Parliament (including a Minister) or political candidate.

Chief Executive Officer: _____ Date: ___/___/___

This form may be faxed to the State Supply Commission on 9222 5760

This form is also available on the State Supply Commission website

SSC use only:

Request No:.....

New Zealand

CABINET MANUAL 2001

Cabinet Office, Department of the Prime Minister and Cabinet

Wellington, New Zealand

Transitions Between Administrations Elections

4.3 The term of Parliament is three years from the date fixed for the return of the writs issued for the previous general election (section 17 of the Constitution Act 1986). Parliament may, however, be dissolved before the three year term finishes, under section 18 of the Constitution Act. When the term of Parliament has ended, or Parliament has been dissolved, a general election is held to determine the composition of the next Parliament and the next government.

4.4 The Governor-General has the formal power to dissolve, prorogue (that is, discontinue without dissolving) and summon Parliament, under section 18 of the Constitution Act. By convention, the Governor-General exercises this power on the advice of the Prime Minister (so long as that Prime Minister has the support of a majority of the House of Representatives).

4.5 Elections are held in accordance with the Electoral Act 1993. New Zealand's proportional representation electoral system lessens the likelihood that one party will win enough seats to be sworn in as a single party majority government. The election may well result in a minority single party government, or a majority coalition government, or a minority coalition government.

4.6 The formation of a government following a general election is the usual process by which executive power is transferred from one government administration to another. (For information on mid-term changes of government, see paragraphs 4.12 - 4.13.)

4.7 Following an election, the Governor-General will appoint a Prime Minister and a government in accordance with the principles and processes set out in paragraphs 4.32 - 4.43.

Mid-Term Transitions

4.8 Some transitions between administrations may occur during the electoral term. There may be a transition to a new Prime Minister, or to a new governing party or coalition. In these situations, established constitutional principles and processes apply (see paragraphs 4.9 - 4.13).

Mid-term Change of Prime Minister with no Change of Government

4.9 A change of Prime Minister may occur because the incumbent Prime Minister loses the support of his or her party and resigns, or as a result of the retirement, incapacity or death of the incumbent Prime Minister.

4.10 Constitutional convention requires the Governor-General to appoint as the new Prime Minister the person who has, or appears to have, the support of a majority of members of the House. The Governor-General will therefore accept the decision of the party or group of parties that has the support of the House, as to which individual will lead the government as Prime Minister. That decision is likely to be reached in accordance with internal party processes (that is, political party rules) and, in a coalition or minority government context, clear expressions of support for the new leader by parties representing a majority in the House.

4.11 In some cases (for example, in the event of the sudden death or incapacity of a Prime Minister), until the leadership of the government is determined, another Minister may act as Prime Minister in a temporary capacity.

Mid-term Change of Government

4.12 A basic principle of New Zealand's system of responsible government is that the government must have the confidence of the House of Representatives to stay in office. A government may lose the confidence of the House during its parliamentary term. Where loss of support is clear (for example, where the government has lost a vote of confidence in the House), the Prime Minister will, in accordance with convention, advise that his or her administration will resign. In this situation, either an alternative administration may be appointed from the existing Parliament (if an alternative administration that has the support of the House is available - see the information about government formation at paragraphs 4.32 - 4.43) or an election may be called. The Governor-General may act in this case under the reserve powers (see paragraph 1.10). Until a new administration is appointed, the incumbent government continues in office, governing in accordance with the caretaker convention (see paragraphs 4.16 - 4.31).

4.13 In some cases, however, the support of the House may become unclear (for example, in the case of a change in coalition arrangements). The Governor-General has previously indicated that, in that situation, the incumbent government will need to clarify, within a fairly short timeframe (allowing a reasonable period for negotiation and reorganisation), where the confidence of the House lies. The caretaker convention applies in the mid-term context only when it becomes clear that the government has lost the support of the House.

The Pre-Election Period

4.14 In the period immediately before a general election, the government is not bound by the caretaker convention (see paragraphs 4.16 - 4.31) unless the election has resulted from the government losing the support of the House. But successive governments have chosen to restrict their actions to some extent at this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent. For example, significant appointments have been deferred, and some government advertising has been thought to be inappropriate during the election campaign (that is, where it might create a perception that public funds are being used to finance publicity for party political purposes — see the Guidelines for Government Advertising at appendix 2 for general guidance). In practice, restraints have tended to be applied from approximately three months before the general election is due, or (if the period between the announcement of the election and polling day is less than three months) from the announcement of the election.

4.15 The Secretary of the Cabinet is available to provide advice on decision making during the pre-election period.

Caretaker Convention

4.16 On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or (after an election) when it is unclear whether it has retained the confidence of the House. During such periods the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. However, governments in this situation have traditionally constrained their actions until the political situation is resolved, in accordance with what is known as the convention on caretaker government.

4.17 There are two circumstances in which the government would see itself bound by the caretaker convention:

After a general election: The convention applies until a new administration is sworn in or it becomes clear that the incumbent government continues to have the support of the House necessary to govern.

If the government has clearly lost the confidence of the House: The convention guides the government's actions until either it is confirmed in office or a new administration takes office. This confirmation or change of government may arise either as a result of negotiations between the parties represented in the current Parliament or as a result of a new general election.

4.18 In both situations the government is likely to state explicitly that it is to operate as a caretaker government until the political situation is resolved.

Main Principles of the Caretaker Convention

4.19 There are two arms to the convention, each of which has its own set of constitutional principles:

- where it is clear who will form the next government, but they have not yet taken office;
- where it is not clear who will form the next government.

Where it is clear who will form the next government, but they have not yet taken office

4.20 In this situation the outgoing government:

- should undertake no new policy initiatives; and
- should act on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office - even if the outgoing government disagrees with the course of action proposed.

4.21 Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed.

Where it is not Clear who will form the Next Government

4.22 This situation could arise after a general election, or if a government has clearly lost the confidence of the House part way through the term of Parliament. The following principles apply to government business (at every level) in these circumstances:

- Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government.
- In general terms, the normal business of government and the day to day administration of departments and agencies in the wider state sector may continue during the caretaker period.

However, where matters arise that would usually require decisions, concerning:

- significant issues;
- issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as signing a major contract or making a significant appointment);
- new policy initiatives; or
- changes to existing policy;
- decisions relating to those matters should:
- be deferred, if possible, until the political situation is resolved; or

- if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (that is, by extending a board appointment or rolling over a contract); or
- if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties.

(Note: consultation would be required to establish whether the proposed action had the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency and confidentiality of the issue.)

4.23 The convention colours the whole conduct of government, and requires careful judgement by Ministers, public servants, Crown entities and other Crown agencies as to whether particular decisions are affected.

4.24 No hard and fast rules are possible. In the end, Ministers may need to take into account various considerations (including political considerations), both on whether it is appropriate or necessary to proceed on a matter and on how it should be handled. Decisions will also be considered against the background that the incumbent caretaker government has lawful executive authority, until replaced or confirmed in office.

Decision Making Process during Periods of Caretaker Government

4.25 It is important for Ministers and departmental officials to be clear about their respective roles in the decision making process during a caretaker period:

Decisions Within Departments, Crown Entities and Other Crown Agencies

General: The day to day administration of departments and agencies in the wider state sector will (in general terms) continue during the caretaker period. However, departmental officials and board members or employees of Crown entities, state-owned enterprises and other Crown agencies should always take into account the fact that they are operating in a caretaker environment and exercise special care when making decisions during this time.

Departments: As a rule, all issues arising within departments that have caretaker convention implications should be referred to the Minister, who will decide (in consultation, if appropriate, with ministerial colleagues and/or the Prime Minister) how the convention applies and how the decision should be handled. This should not involve any departure from usual practice, because most decisions to which the convention applies (that is, those relating to significant issues, issues with long-term implications, new policy initiatives or changes to existing policy) would, in the usual course of events, be referred to the Minister.

Where an issue is referred to a Minister, the department should be ready to provide advice (if required) as to the application of the caretaker convention, and the options for handling the decision in terms of the convention (note: the Secretary of the Cabinet is available for guidance — see paragraph 4.26).

On rare occasions, caretaker convention issues may arise in relation to matters that, under statute, fall solely within the decision making authority of a chief executive or statutory officer. Where appropriate, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraph 4.22) when making those decisions. In such cases, it may be helpful or prudent to contact the Secretary of the Cabinet for guidance.

Crown entities, state-owned enterprises and other Crown agencies: The statutory provisions governing decision making within Crown entities, state-owned enterprises and other Crown agencies impose different obligations from those applicable to decision making within departments. Cabinet expects, however, that agencies in the wider state sector will apply the principles of the caretaker convention (see paragraph 4.22) to decision making during the caretaker period, as far as is possible (taking into account their legal obligations and statutory functions and duties). Cabinet also expects that agencies in the wider state sector will discuss with their Responsible Ministers any issues that have caretaker convention implications. For general guidance on the application of the caretaker convention, the heads of Crown entities or other Crown agencies may wish to contact relevant departmental chief executives or the Secretary of the Cabinet.

Ministerial Decisions

As a general rule, Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted (see paragraphs 3.13 - 3.14). Ministers may well wish to discuss with their Cabinet colleagues whether the caretaker convention applies to a particular decision and how it should be handled. If Ministers are in any doubt about whether the caretaker convention applies to a particular matter, they should err on the side of caution and raise the matter with the Prime Minister or at Cabinet. If a Minister considers that a matter requires consultation with other political parties, the proposed consultation must be approved in advance by either Cabinet or the Prime Minister (see subparagraph (c) below).

Coordination and the Prime Minister's Role

In cases where any doubt arises as to the application of the caretaker convention, Ministers should consult the Prime Minister. Final decisions concerning the caretaker convention rest with the Prime Minister.

All approaches to other political parties must be cleared in advance with the Prime Minister or Cabinet. Ministers should ensure that they notify the office

of the Prime Minister as early as possible of all matters that may require consultation and action during periods of caretaker government.

4.26 For guidance about the application of the caretaker convention and the decision making process during the caretaker period, Ministers, departments and Crown agencies may contact the Secretary of the Cabinet for assistance in the first instance.

Guidance on Decisions Concerning Expenditure and the Official Information Act

4.27 During a caretaker period, particular attention should be paid to the following types of decisions:

- Decisions on expenditure: The government must have authority from Parliament to spend money. Departments must always check that adequate authority exists before expenditure is incurred. This means that departments should check that proposed spending has been authorised either by an Appropriation (Main or Supplementary Estimates) Act or a Cabinet minute authorising expenses to be met from Imprest Supply pending passage of an Appropriation Act.
- Decisions under the Official Information Act 1982: The Official Information Act continues to operate during the caretaker period. In general, responding to requests for information should be seen as part of the day to day business of government, and should be dealt with in the ordinary way. On rare occasions, however, requests may raise issues that are likely to be of long-term significance for the operation of government and that require ministerial involvement. In this situation, it may be necessary to consider extending the time limit in order to consult with the incoming Minister. Any such extension must comply with section 15A of the Official Information Act.

Planning Ahead

4.28 In practical terms, a general election creates the potential for a significant period during which it is difficult for Ministers to take decisions, for several reasons:

A general election always results in a period of reduced decision making capacity at the ministerial and Cabinet level, while Ministers are occupied with the election campaign.

Immediately after the election, the caretaker convention is likely to apply, and Ministers may be involved in coalition negotiations.

4.29 It is difficult to predict how long the caretaker period may last after an election. In 1996, for example, the caretaker period lasted for approximately nine weeks, while in 1999 it was much shorter. Departments and agencies that

plan and prepare for a protracted caretaker period of weeks or even months are likely to experience few real problems. The importance of planning cannot be overstated.

4.30 An additional practical consideration is the need to take significant decisions in time for them to be taken account of in the pre-election economic and fiscal update, which the Treasury is required to prepare under the Fiscal Responsibility Act 1994. This update is published four to six weeks before the election. It must include information on all government decisions and circumstances that may have a material effect on the fiscal and economic outlook.

4.31 It is therefore important for Ministers, departments, Crown entities and other Crown agencies to ensure that all significant matters that will require ministerial attention in the course of the election year are dealt with well in advance of a general election. In particular, departments and agencies in the wider state sector should consider the effect of a general election on the timing of any regular or annual processes that require ministerial decision or parliamentary action, on processes with statutory deadlines and on the passage of legislation. Throughout the election year, the state sector as a whole should strive to ensure that matters are brought to the attention of Ministers in a timely fashion.

Government Formation

Contexts in Which Governments may be Formed

4.32 The government formation process will usually occur after elections, as is reflected in the following paragraphs. However, there may be a mid-term change of government (see paragraphs 4.12 - 4.13), in which case the general principles and processes set out below will also apply.

Single Party Majority Outcome

4.33 Where an election results in a clear majority for a single party, no government formation negotiations will be necessary. If the incumbent government has been confirmed in office, it can simply resume normal government business, perhaps appointing some new Ministers (if required).

4.34 If the election results in a change to a new single party majority administration, the outgoing government continues in office, governing under the first arm of the caretaker convention (see paragraphs 4.20 - 4.21), until the incoming government can be appointed. Under the Constitution Act 1986, this transition can occur swiftly.

Minority or Coalition Outcome

4.35 Under a proportional representation electoral system, it is likely that two or more parties will negotiate so that a government can be formed (whether a

majority coalition government, a minority single party government, or a minority coalition government). This process is political, and the decision to form a government must be arrived at by politicians.

4.36 Any agreement reached by the parties during their negotiations may need to be confirmed subsequently by the political parties involved, each following its own internal procedures.

4.37 Once the political parties have reached an adequate accommodation, and a government is able to be formed or confirmed, it is expected that they will make that clear by appropriate public announcements of their intentions. Where parties have agreed to form a coalition government, they may sign a written coalition document setting out the political arrangements for the formation and maintenance of the government.

4.38 By convention the task of the Governor-General in the government formation process is to ascertain where the support of the House lies (or appears to lie), so that a government can be appointed or confirmed in office. It is not the Governor-General's role to form the government or to participate in any negotiations (although it is possible that the Governor-General might wish to talk to party leaders if there were no clear outcome from the talks).

4.39 Accordingly, the Governor-General will, by convention, abide by the outcome of the government formation process in appointing a new ministry or accepting the right of the incumbent government to remain in office for a further term. The Governor-General will also accept the decision of the party or group of parties as to which individual will lead the government as Prime Minister.

4.40 If, at the end of the government formation process, the incumbent government is confirmed in office, it will continue to govern and the caretaker period will end.

4.41 If a new administration is to assume office, the incumbent government will continue in office, operating in accordance with the first arm of the caretaker convention (see paragraphs 4.20 - 4.21), until the new government takes office. The formal procedures for appointing a new government are set out in chapter 1.

4.42 If the situation is still unclear by the time that Parliament has been summoned to meet, the address in reply debate may resolve matters because there is an early opportunity for a confidence vote. In the unlikely event that the confidence vote fails to resolve the situation, another election may be required.

4.43 During the government formation process, the Clerk of the Executive Council provides official, impartial support to the Governor-General, including liaising with party leaders as required on behalf of the Governor-General. The Clerk facilitates the transition between administrations (in particular, assisting the

outgoing and incoming Prime Ministers if there is a change of government). See paragraphs 1.22 - 1.26 for further information about the Clerk of the Executive Council's role.

Provision Of Information by the Public Service to Negotiating Parties

4.44 Inter-party negotiations to form a government are the business of politicians, but negotiating parties may seek access to the public service or agencies in the wider state sector for information and analysis on issues that might form part of a coalition agreement.

4.45 Departmental officials may provide information to political parties for the purposes of government formation negotiations only when authorised by the Prime Minister to do so, and must follow the relevant guidance (as approved by Cabinet and issued by the State Services Commission — see the Commission website at www.ssc.govt.nz). Agencies in the wider state sector are also expected to observe the State Services Commission guidance.

Briefing an Incoming Government

4.46 During the government formation period, the incoming government (or the party or group of parties that seems likely to be the incoming government) may seek official advice on specific issues, pending appointment to office.

4.47 If portfolio allocations have not yet been announced, chief executives may provide advice to the incoming government, through the Prime Minister-designate, only after the express consent of the incumbent Prime Minister has been obtained and a process has been agreed with the State Services Commissioner.

4.48 If portfolios have been allocated but the incoming Ministers have not yet been formally appointed, chief executives may, with the knowledge of the incumbent Minister and the State Services Commissioner, offer to brief new Ministers on their portfolio responsibilities. Further guidance on briefing incoming Ministers can be found at paragraphs 2.155 - 2.157, and on the State Services Commission website — see *Public Servants, Political Parties and Elections* at www.ssc.govt.nz.

Incoming Ministers

4.49 Section 6(2)(a) of the Constitution Act 1986 enables a swift transition between administrations. It provides that any candidate at a general election can be appointed as a Minister, before being confirmed as elected, so long as that Minister is confirmed as a Member of Parliament within 40 days of being appointed to the executive.

4.50 Further information on the appointment of Executive Councillors and Ministers can be found at paragraphs 1.15 - 1.17, and paragraphs 2.14 - 2.17.

4.51 Section 6(2)(a) does not apply to Parliamentary Under-Secretaries, who cannot be sworn in until their election as Members of Parliament has been confirmed.

4.52 Incoming Ministers have access (subject to certain conditions and to the rights and duties set out in the Official Information Act 1982) to the Cabinet records of previous administrations, for continuity of government purposes. (See paragraphs 6.64 - 6.69 for further information.)

Outgoing Ministers

4.53 Where a general election results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is ready to be sworn in, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of his or her entire ministry.

4.54 Section 6(2)(b) of the Constitution Act 1986 may require some Ministers in the caretaker government to resign before the government formation process has concluded. Section 6(2)(b) requires any Minister who has not been re-elected to Parliament to resign from the executive within 28 days of ceasing to be a Member of Parliament. In this event, the Prime Minister may ask another Minister in the caretaker government to be acting Minister in the relevant portfolio(s), or may appoint a new Minister to the portfolio(s) (albeit in a caretaker capacity).

4.55 Ministerial Services provides practical assistance to outgoing Ministers in relation to staff, office and other practical arrangements. The Cabinet Office and Archives New Zealand provide guidance on the storage and disposal of Ministers' official papers (see paragraphs 6.70 - 6.91 for further information). The Cabinet Office also seeks information from outgoing Ministers concerning gifts they have received while in office, in accordance with the Guidelines on Ministers' Interests (see also paragraphs 2.68 - 2.70).

