‘CARETAKER’ CONVENTIONS AND OTHER PRE-ELECTION PRACTICES

2011 GENERAL STATE ELECTION

Successive Commonwealth and State Governments have accepted over the years that special arrangements apply in the period immediately before an election. In particular, in the period following the dissolution of the lower house of Parliament, the Government assumes a ‘caretaker’ role.

For the 2011 election, the caretaker period will commence on 4 March 2011.

The conventions regarding this caretaker period recognise that, following the dissolution of the lower house, the Executive Government cannot be held accountable to the Parliament in the normal manner. The conventions also recognise that every general election carries with it the possibility of a change of government and, therefore, that significant decisions that would bind an incoming Government and limit its freedom of action should be avoided.

In addition to the formal caretaker conventions, there are other established practices that apply in the lead up to the election. Many of these are directed toward protecting the political neutrality of the public service and ensuring that public resources are not misused for party political purposes.

Some of these practices apply from particular dates (for example, the quarantine period for government advertising commences two months before the election). For most, however, there is no precisely defined time at which observance is required. It would be prudent to assume that all pre-election practices should generally be observed in the months leading up to the election, after the last sitting day of the Legislative Assembly before the election (scheduled to be 3 December 2010). This period is referred to in this paper as the pre-election period.

This guidance note is set out in the following sections:

1. THE CARETAKER CONVENTIONS
   1.1 The Caretaker Period
   1.2 The Caretaker Conventions
   1.3 Compliance with the Caretaker Conventions
   1.4 Preparation for the Caretaker Period
   1.5 Application of the Caretaker Conventions to other entities

2. THE ROLE OF THE PUBLIC SERVICE IN THE PRE-ELECTION PERIOD
   2.1 The Pre-election Period
   2.2 Operation of agencies
2.3  Correspondence  
2.4  Consultation with non-Government Members of Parliament  
2.5  Requests to visit premises and facilities  
2.6  Hospitality  
2.7  Non-participation in political activities

3.  GOVERNMENT INFORMATION  
3.1  Government Advertising  
3.2  Internet and electronic communications  
3.3  Access to Government information

4.  CABINET, LEGISLATION AND THE EXECUTIVE COUNCIL  
4.1  Cabinet  
4.2  Cabinet documents  
4.3  Legislation  
4.4  Executive Council

5.  THE CHARTER OF BUDGET HONESTY  
5.1  Election Promises Costings  
5.2  Budget impact statements  
5.3  Other advice from agencies

6.  AGENCY PREPARATIONS FOR AFTER THE ELECTION  
6.1  Policy development  
6.2  Incoming Ministers Folders  
6.3  Election commitment schedules

7.  FURTHER INFORMATION
1. THE CARETAKER CONVENTIONS

1.1 The Caretaker Period

The caretaker period begins at the time the Legislative Assembly is dissolved. For the 2011 general election, the Legislative Assembly is due to expire on Friday 4 March 2011.

The caretaker period continues until either the election result is clear (if the current Government is returned) or the new Premier is commissioned to form a Government (if there is a change of Government).

1.2 The Caretaker Conventions

During the caretaker period, the routine business of government should continue. The general rule, however, is that no significant new decisions, appointments or contractual commitments should be made.

**Significant new decisions**

The convention is that the Government does not make significant policy decisions during the caretaker period that are likely to commit an incoming Government. This does not, of course, restrict the ability of the party in government to announce new policies that it proposes to implement if returned to government.

**Significant appointments**

The convention is that, wherever possible, the Government avoids making significant appointments during the caretaker period.

When considering whether an appointment qualifies as ‘significant’, consideration should be given to such matters as the seniority, importance and profile of the position, the duration of the appointment, the manner in which the appointment is to be made (for example, whether the appointment is made by the Minister or the Governor), and also whether the proposed appointment is likely to be controversial.

Where possible, significant appointments should be deferred until after the caretaker period. In circumstances where an appointment must be made, consideration should be given to making an acting appointment or a short-term appointment that would expire shortly after the end of the caretaker period.

**Major contracts and agreements**

The convention is that the Government avoids entering major contracts or agreements during the caretaker period.

When considering whether a contract or agreement qualifies as ‘major’, relevant considerations include such matters as the dollar value of the commitment, the content and extent of other financial and non-financial obligations, and the duration of any
commitments. Contracts which are likely to be politically contentious should particularly be avoided.

The entry into contracts that merely involve or continue routine matters of administration are not prohibited in the caretaker period.

The caretaker convention also does not prevent the Government taking action that it has already committed to and announced prior to the caretaker period commencing (for example, where tenders for a specified contract had already been called for prior to the commencement of the caretaker period).

The convention that the Government avoids entering major agreements during the caretaker period extends to intergovernmental agreements. If any intergovernmental meetings or negotiations are held during the caretaker period, the Government will ordinarily adopt observer status.

1.3 Compliance with the Caretaker Conventions

The caretaker conventions are not black-letter law, and their application to individual cases requires judgment and common sense. The Department of Premier and Cabinet (DPC) is available to provide advice and assistance to agencies and Ministers should any difficulties arise in the application of the conventions to particular circumstances.

It is acknowledged that, in rare cases, it may be necessary for legal or practical reasons to make a significant decision or appointment or to enter into a major contract during the caretaker period.

This may be more likely if the caretaker period continues for a significant time after an election, for example because the election result remains unclear or there is a hung Parliament.

In those circumstances, and if short-term interim arrangements are not feasible or appropriate, consideration may need to be given to the Minister consulting with the Opposition before any action is taken that would bind a future government.

1.4 Preparation for the Caretaker Period

Given the fixed-term nature of New South Wales’ Parliaments, Ministers and agencies will usually know in advance when the caretaker period will commence.

Accordingly, apart from unforeseen matters arising, it should be possible in most cases to take steps to avoid situations during the caretaker period that would require the making of any significant decisions or appointments, or the entry into major contracts or agreements.

That said – and although the conventions only apply during the caretaker period – it is accepted that care should also be taken throughout the pre-election period and particularly after the Legislative Assembly has ceased sitting. In particular, the Government should generally be circumspect at any time in the lead-up to the election before making any
significant decision that may be politically contentious and would bind a future Government.

1.5 Application of the Caretaker Conventions to other entities

The caretaker conventions developed primarily in the context of the relationship between Ministers and their departments. The relationship between Ministers and other bodies, such as State-owned corporations and statutory authorities, varies. Nevertheless, all agencies should generally observe the conventions and the other pre-election practices, unless, for example, to do so would conflict with their other obligations.

2. THE ROLE OF THE PUBLIC SERVICE IN THE PRE-ELECTION PERIOD

2.1 The Pre-Election Period

In addition to the formal caretaker conventions described above, there are other established practices that apply in the lead up to the election.

Many of these are directed toward protecting the political neutrality of the public service and ensuring that public resources are not misused for party political purposes.

Some of these practices apply from particular dates (for example, the quarantine period for government advertising commences two months before the election).

For most, however, there is no precisely defined time at which observance is required. It would, however, be prudent to assume that all of the pre-election practices should generally be observed in the months leading up to the election, and particularly once the Legislative Assembly has ceased sitting for the last time before the election.

In this paper, this period from the last sitting day of the Legislative Assembly (scheduled to be 3 December 2010) is referred to as the pre-election period.

2.2 Operation of agencies

Agencies continue to operate during the caretaker period, dealing with the ordinary business of government.

Whilst agencies are concerned at all times to avoid partisanship, the circumstances of an election campaign require special attention to the need to ensure the impartiality and apolitical nature of the public service, and its continuing ability to serve whatever government is elected.

Ministers should take particular care to ensure that they do not compromise the neutrality of the public service in the lead up to an election. Ministers may continue to request factual material from agencies, including during the caretaker period, and the purpose to which such material is to be put is a matter for the Minister to determine. Material concerning the normal day-to-day business of government should also continue to be supplied to Ministers in the usual way.
Agencies should, however, generally not be asked to provide policy advice during the caretaker period. There might, however, be circumstances where issues arise that clearly require advice to be given to Ministers in order to enable the Government to respond appropriately in the public interest.

2.3 Correspondence

During the pre-election period, Ministers should continue to attend to essential correspondence. Once the caretaker period commences, Ministers will usually avoid signing any correspondence other than that which it is necessary for them personally to sign in that period.

Otherwise, correspondence may be attended to by agencies in the usual way. Some correspondence that would ordinarily be signed by Ministers may need to be prepared for signature by agency officials, rather than be left to accumulate.

When preparing replies, care should be taken to protect the public service from any perception of partisanship. Replies should not assume that the Government will or will not be returned to office. References to any post-election matters should refer in neutral terms to the “incoming Government”.

2.4 Consultation with non-Government Members of Parliament

It is accepted custom and practice in New South Wales that Members of Parliament and/or their staff are to contact the appropriate Minister or Minister's staff whenever seeking information on particular issues. Alternatively, a written request is made to the head of the agency concerned.

In the pre-election period, the following particular practices also apply:

- Any consultation that non-Government members wish to undertake with agency officials is to be initiated through the relevant Minister's office. The relevant Minister is to notify the Premier of any request and whether it has been granted. Agency officials should not initiate any consultation.

- The subject matter of discussions should generally be about the machinery of government and administration. Agency officials may comment on the practicalities of implementing and administering the policies that have been proposed by the relevant member. Agency officials are not to discuss Government policies or offer opinions on matters of a party political nature.

- The detailed substance of the discussion is to be kept confidential between the agency officials and the member(s) with whom they meet. Ministers are, however, entitled to be informed that the discussions have taken place and to seek assurances that the discussions were kept within the agreed purposes.
2.5 Requests to visit premises and facilities

In accordance with usual practice, requests by Members of Parliament to undertake visits of Government premises or facilities, such as gaols and schools, should be initiated formally through the relevant Minister’s office.

These requirements do not, however, apply to a Member of Parliament in respect of his/her electorate. In those circumstances Members may communicate directly with branches of agencies located within their electorate and arrange visits by direct contact with the local agency official in charge.

Where Members or candidates (other than the Premier or Ministers) seek to visit premises or facilities, agencies should as far as possible be even-handed in their responses and assistance. Any such visits or inspections must not be allowed to unreasonably disrupt the normal operations of the agency concerned.

2.6 Hospitality

Agencies should exercise care in hosting official functions during the pre-election period, and particularly during the caretaker period, to avoid any perception that the function is for electioneering or party political purposes.

In the case of official functions held during the caretaker period involving the use of agency resources at which a Minister will be present, it may be appropriate for the Opposition spokesperson to also be given the opportunity to be present to avoid perceptions of partisanship.

2.7 Non-participation in political activities

In accordance with usual practice, senior agency officials who are required to comment publicly on official matters should confine their responses to factual information. The expression of opinions on policies, decisions or proposals should be avoided. This applies at all times, but especially in the pre-election period.

Public sector employees (other than Ministerial Office staff) must never engage in activities of a party political nature whilst on duty.

Employees should have regard to their agency’s code of conduct in relation to any political activities undertaken when not on duty. The general rule is that employees must ensure that any participation in party political activities in their private time does not conflict with their primary duty as a public employee – of serving the government of the day in a politically neutral manner. They must also ensure that when speaking on political matters whilst not on duty, they are not identified in any way as acting or speaking in their capacity as a public sector employee.

Employees wishing to contest the State election should read Premier’s Memorandum M2010-22 (Contesting elections).
3. GOVERNMENT INFORMATION

3.1 Government Advertising

The NSW Government Advertising Guidelines are available on the Department of Services, Technology & Administration’s website (www.services.nsw.gov.au/advertising).

In accordance with those guidelines, agencies should cease all major advertising activities for a period of two months prior to the State election (the ‘quarantine period’). The only advertising to be exempt during the quarantine period will be advertising that relates to community health and safety issues, appropriate public information and services that have clear commercial considerations (for example transport providers and tourism promotion).

3.2 Internet and electronic communications

Particularly during the caretaker period, agencies should ensure that their websites do not contain material that could be seen to compromise the neutrality of the public service or would involve agency resources being used for electioneering or partisan political purposes. Agencies may need to review their websites at the beginning of the caretaker period.

Agencies should generally not add new material to their websites during the caretaker period, except where it is clearly in the public interest to do so and there is no risk that the material could be interpreted as promoting a particular party or its policies.

Where an agency maintains an interactive function on its website (for example, public discussion groups), and the function needs to continue in operation during the caretaker period, it would be appropriate to include a statement indicating that the site will be moderated during the caretaker period to ensure that political material is not placed on the site and, if any such material is posted, that it will be promptly removed.

The Department of Premier and Cabinet (Ministerial and Parliamentary Services) will continue to provide IT (including email services) to Ministers throughout the election period. Ministerial websites will also continue to be maintained.

As a general rule, during the caretaker period, Ministers should not seek to publish media releases or other material on agency or agency-maintained Ministerial websites. This does not prevent releases or notices being published on matters of administration or operational information that is time-sensitive and in the public interest (for example, public health warnings).

A statement may be included on Ministerial websites indicating that election-related material is not available from that site, and a statement or a link may be included that refers those who are seeking such material to the Government party’s website.
3.3 Access to Government information

Agencies can continue to receive and deal with applications from members of the public, including journalists and Members of Parliament, for access to information under the Government Information (Public Access) Act 2009 during the caretaker period.

The Act expressly provides that an agency is not subject to the direction and control of any Minister in dealing with a particular access application. During the caretaker period, agencies should therefore continue to deal with access applications in accordance with their obligations under the Act.

4. CABINET, LEGISLATION AND THE EXECUTIVE COUNCIL

4.1 Cabinet

Meetings of Cabinet and Cabinet committees are generally not scheduled during the caretaker period, although this is ultimately a matter for the Premier. If Cabinet does meet, any deliberations will be subject to the caretaker conventions (see section 1.2).

4.2 Cabinet documents

All Cabinet documents belong to the State and not to the Ministers of particular governments. Cabinet documents are, however, confidential to the Government that created them. By convention, Cabinet documents are not made available to succeeding Governments drawn from different political parties.

In the event that there is a change of government, all Cabinet documents of the former Government must be returned to Cabinet Secretariat in the Department of Premier and Cabinet. Accordingly, at the commencement of the caretaker period any Cabinet documents that are still held by Ministers’ officers should be returned to the custody of Cabinet Secretariat which will hold them until the result of the election is known.

Further advice will be issued regarding the return and handling of Cabinet documents shortly before the commencement of the caretaker period.

General information on the conventions regarding Cabinet, including the convention of Cabinet confidentiality, are set out further in Cabinet Conventions: NSW Practice, which has been published under Premier’s Memorandum M2006-08 (Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions).

4.3 Legislation

Bills that have passed through Parliament will be assented to by the Governor before the caretaker period commences.

Legislation which commences on proclamation may be proclaimed to commence before or during the caretaker period. Proclamations to commence legislation on a date falling after the election will ordinarily be deferred until after the caretaker period has ended.
4.4 Executive Council

It is the practice for the Executive Council to meet immediately before the commencement of the caretaker period to approve any proposed regulations. The Executive Council may otherwise meet as required, including if necessary during the caretaker period, to consider routine matters of Government business.

5. THE CHARTER OF BUDGET HONESTY

5.1 Election Promises Costings

The Charter of Budget Honesty (Election Promises Costing) Act 2006 provides for the Premier or the Leader of the Opposition to request Treasury to prepare costings of their party’s publicly announced or proposed policies. Costings may be requested at any time during the period of 60 days before the election.

5.2 Budget impact statements

Under the Charter of Budget Honesty (Election Promises Costing) Act 2006, the Secretary of Treasury is also required to prepare a budget impact statement for all Treasury-costed Government and Opposition policies. The budget impact statements are required to be publicly released on the fifth last day before the election.

5.3 Other advice from agencies

In accordance with usual practice, Ministers can generally seek factual advice from agencies at any time, including about the likely cost of implementing alternative policies. Any such advice, even if obtained from Treasury, does not constitute a costing for the purposes of the Charter of Budget Honesty.

6. AGENCY PREPARATIONS FOR AFTER THE ELECTION

6.1 Policy development

Agencies can, during the pre-election period (including the caretaker period), continue to work internally on proposals and policy development that could, if approved by the post-election government, be implemented after the election.

Particularly where a proposal is not controversial and is likely to proceed irrespective of the election outcome (for example, statutory reviews), agencies should take the necessary steps to ensure that they will be in a position to advise the post-election government on the proposal and, if approval is given to do so, to proceed to implement the proposal after the election.

Agencies can also begin to prepare contingency briefing papers and plans for the publicly announced policies of the Government and the Opposition, to present to incoming Ministers after the election.
6.2 Incoming Ministers Folders

In the lead-up to the election, the Director General of the Department of Premier and Cabinet will issue a memorandum requesting all Departmental Directors General to prepare and collect together incoming Ministers’ folders for agencies within their clusters. Two sets of folders are usually prepared – the first for the Government, should it be returned, and the second for the Opposition, should it be invited to form Government.

These folders are prepared for submission to Cabinet. Both sets of folders should be lodged with the Cabinet Secretariat before the election, for submission to Cabinet after the election. Depending on the outcome of the election, either the Government or Opposition folders will be submitted to the post-election Cabinet. By convention, the other folder is not made available to the incoming Government.

6.3 Election commitment schedules

Agencies will also be asked to prepare election commitment schedules, again for both the Government and the Opposition. Depending on the election outcome, the relevant schedule will become a key tool for identifying and managing the agency’s priorities post-election.

7. Further Information

The conventions and practices described in this note have developed as a matter of custom over time. They are not legally binding and do not constitute hard-and-fast rules. Their application to particular circumstances will often require the exercise of judgment.

Any questions concerning the application of the conventions and practices to particular circumstances should be directed to the Director General of the Department of Premier and Cabinet.
## APPENDIX – TIMELINE

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Conventions / Practices</th>
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<tbody>
<tr>
<td>3 December 2010</td>
<td>Last scheduled sitting day before the election</td>
<td>Commencement of the pre-election period.</td>
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<tr>
<td>(Friday)</td>
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<tr>
<td>25 January 2011</td>
<td>60 days before the election</td>
<td>Requests may be made for election promises to be costed under the Charter of Budget Honesty (Election Promises Costing) Act 2006.</td>
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<tr>
<td>(Tuesday)</td>
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<tr>
<td>26 January 2011</td>
<td>Two months before the election</td>
<td>Commencement of quarantine period on Government advertising.</td>
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<tr>
<td>(Wednesday)</td>
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<tr>
<td>4 March 2011</td>
<td>Dissolution of the Legislative Assembly</td>
<td>Commencement of the caretaker period.</td>
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<tr>
<td>(Friday)</td>
<td></td>
<td>Government avoids:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- significant decisions</td>
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<td>- significant appointments</td>
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<td></td>
<td></td>
<td>- major contracts and agreements.</td>
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<tr>
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<td></td>
<td>Routine business of government continues.</td>
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<tr>
<td>21 March 2011</td>
<td>Fifth last day before the election</td>
<td>Budget impact statements published.</td>
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<td>(Monday)</td>
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<tr>
<td>26 March 2011</td>
<td>Election day</td>
<td></td>
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<tr>
<td>(Saturday)</td>
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<tr>
<td></td>
<td>Government is returned or incoming Government is commissioned.</td>
<td>Caretaker period ceases.</td>
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