1. Introduction

Despite the regular cycle of elections in Australia and New Zealand, the application of the caretaker conventions remains a continuing source of conflict and media attention. In 2013, the federal election provided a rich source of controversy, as have recent state and territory elections. During the course of these 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 where 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 be entered into and no significant appointments 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 September 7, 2013 was a bitter contest between the minority Labor government, led by the recently reinstalled Prime Minister Kevin Rudd, and the Coalition parties under the leadership of Tony Abbott. The election date was initially settled by Prime Minister Julia Gillard in January 2013, when she announced the date of September 14. This raised some controversy about when the caretaker period would start, despite the conventions only applying after the dissolution of the House of Representatives. The reappointment of Kevin Rudd as Prime Minister saw him reclaim his prerogative to announce the timing of the federal election at his own choosing.

The extended unofficial campaign, as well as the five-week official campaign, led to a number of Opposition complaints, with claims that caretaker conventions had been breached by the following:

- **Signing international agreements.** The handling of asylum seekers during the election campaign was hotly contested by both sides. Opposition Leader Tony Abbott initially complained about the signing of a Memorandum of Understanding (MOU) between Australia and Papua New Guinea on 5 August 2013 on the transfer and resettlement of asylum seekers. Because the agreement was signed the day before the dissolution of the Parliament — though a day after the announcement of the election — the Secretary of the Department of the Prime
Minister and Cabinet (DPM&C) advised the Opposition Leader that ‘the Department considers the validity of the MOU is not affected by the commencement of the caretaker period’ (Watt 2013a).

- **Government advertising campaigns** — notably saturation television, radio and print advertising for the ‘No Boat, No Visa’ campaign. This campaign was controversial before the commencement of the caretaker period, and the Opposition Leader refused to agree to the onshore component of this advertising campaign continuing because he believed it ‘was being used purely for partisan political purposes’ (Abbott 2013a). The withdrawal of the Opposition’s consent to continue to run the advertisements meant the government was in contravention of the caretaker guidelines, which state ‘bipartisan agreement is sought for campaigns that are to continue’ and campaigns which ‘are a matter of contention between the parties are normally discontinued’ (DPM&C 2013). The government counteracted by claiming the government was only required to ‘consult’ with the Opposition, and such consultation had occurred (*The Drum*, 20 August 2013). For a case study on this controversy, see Chapter 5.

- **Departmental costings of Opposition commitments.** Two weeks before the election, Prime Minister Kevin Rudd made a statement that the government had found a $10 billion hole in the savings claimed by the Coalition. Rudd said the costings hole was based on figures from the Commonwealth Treasury, the Department of Finance and Deregulation and the Parliamentary Budget Office. That day, the Secretaries of Treasury and Finance issued a joint statement denying they had undertaken costings of Opposition policies. This highly unusual intervention by senior officials was forced upon them to protect the impartiality of the Commonwealth public service, and to prevent the perception these departments were modelling Opposition policies on behalf of the government during an election campaign.

These controversies highlight the many challenges facing the public service during election campaigns. Public officials can apply the caretaker guidelines, but their recommendations do not have to be adopted by the government. They do not have the power to enforce the observance of the conventions. This responsibility sits with ministers, the Prime Minister or the Premier. Public servants are also under pressure to maintain impartiality and, just as importantly, the perception of impartiality. Oppositions are constantly alert in looking to identify any advantage they believe the incumbent government could be receiving during the caretaker period.
Allegations can flow both ways, with ministers complaining that shadow ministers have 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.

Complaints of breaches of caretaker conventions during elections are not new. What has arguably changed is a more adversarial political context which 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.

Recent examples of alleged breaches 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 have for the interpretation and adjudication of the actions of key actors during the caretaker period
- the future of caretaker conventions, given pressures on their adjudication and interpretation.

These questions are explored in the second edition of *Caretaker Conventions in Australasia*. This edition builds on the observations of the 2007 edition as it explores the difficulties faced by public servants in both updating and applying caretaker conventions. The monograph is based on a detailed exploration of the most recently published caretaker conventions and includes insights from interviews with senior government officials experienced in managing during the caretaker period. This analysis 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 restraint 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: 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 commentator has observed that caretaker conventions are a good example of A.F. Davies’ claim that Australians have a particular ‘talent for bureaucracy’ (quoted in Colebatch 2005). Instead of ministers being required to act responsively during an election campaign, the onus is now on how the bureaucracy deals with ministerial requests, as well as 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 based on local controversies.

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. In particular, 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, every 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, and explores some of the judgements that public sector employees might be required to make, in order to provide 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 monograph collates and consolidates 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 government jurisdictions, and in 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 management during the caretaker period. It aims to demystify and critically assess many of the practices that have evolved over time.
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