3. Origins of Caretaker Conventions

The source of a convention is frequently difficult to trace because of the lack of either an authoritative text or 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; Rhodes et al. 2009, pp. 5–9).

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 where, for example, 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. 291–2). 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 more 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 sub-set 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.

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\(^1\) This is usually a matter of a few days in two-party majoritarian systems like Australia, but can take longer if no party enjoys a clear majority. In New Zealand under MMP the process of government formation following recent elections has taken approximately two weeks, with nine weeks (after the first MMP election in 1996) being the longest so far.
Broadly, caretaker conventions specify the following 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.
- Governments should not include public servants in election activities.

Like the 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 have 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 simultaneously both simple and complex. 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.
- Every general election brings with it the possibility of a change of government. (DPM&C 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 in order to clarify and remove existing ambiguities. The intention is not to change the ‘rules’ but rather 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 is required to ‘self-police’ the rules (Jaconelli 2005, p. 176). Self-policing is not always the preferred option for an Opposition that suspects 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 it is challenging arbitrating on complaints about its own behaviour. Because the conventions are not legally binding, a disgruntled complainant has only two types of sanctions upon which to call — 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 it 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 its moral deficiency and inability to be trusted with handling the delicate niceties 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 and an area in which both the media and voters find it hard to discern the credibility of the complaints. It remains difficult to resolve these allegations because decisions are based on fine judgements about the applicability of the conventions in each 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).

One area that 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. Public servants are bound by their relevant Codes of Conduct, which include
the need to act ‘impartially’. This is reinforced by the penalties in *Public Service Acts* that allow for termination and other sanctions if the Code of Conduct is breached. This means if a public servant is found to have acted partially during an election campaign — even if they did so under the direction of the minister — it amounts to misconduct and is grounds for disciplinary action. The stakes for public servants to maintain the caretaker conventions during an election period are higher than for their political masters.

This has led to increased documentation, the development of guidance documents for governments and especially greater involvement of the public service to explain and assist with decision-making during this time. The next section identifies and explores the elements that make up the caretaker conventions of the Commonwealth and New Zealand governments, the Australian states, territories and local government jurisdictions.

**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 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 for the Prime Minister to write to all ministers advising them explicitly of the need to avoid ‘major policy decisions or important appointments’ in the relevant period (DPM&C 1987). The ball was firmly in the ministers’ court, it being their responsibility to behave accordingly.

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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. Origins of Caretaker Conventions

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 guiding 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 states:

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 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 Australian example related to the

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³ This process was not uncontroversial, with debate about the necessity, membership, authority and impact on the nature of conventions on the ‘recognise and declare’ model. See Sampford (1987) for a detailed examination of this process of codification.
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 means 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 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 into the Cabinet Handbook.
At less than two pages, it is far less detailed than the DPM&C guidance document (which now runs to twelve 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 2013). Passage of the Public Service Act 1999 (Cth), 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 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 the Commonwealth’s lead in formalising, publishing and updating caretaker conventions. But different electoral timetables, local specificities and individual experience have meant the codified conventions are not consistent across all jurisdictions. The comparative analysis of different jurisdictional arrangements in Chapter 5 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, New South Wales and Victoria, they are issued as guidance documents by the respective Departments of Premier and Cabinet. In Western Australia, they are contained in a government memorandum to ministers issued by the Premier following the announcement of a general election. In the Australian Capital Territory and the Northern Territory, guidance documents are issued by the Chief Minister’s Department.

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 effect for the first time in elections for 25 Victorian local councils held in November 2004.

Since then, other jurisdictions have progressively amended their Local Government Acts to include the requirement for local councils to prepare and adopt a caretaker policy that governs the conduct of both councillors and staff in the period before the council election. The intent of the arrangements mirrors that of other jurisdictions, in that they are designed 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.

The introduction of fixed four-year terms for the majority of councils in Australia allows for an orderly management of decision-making leading up to the council election, and reduces the potential for major decisions needing to be made during an election period. As with all caretaker conventions, it is expected the regular business of council will continue. Restrictions are placed upon entering into major contracts, or appointing or terminating the chief executive officer during this time. The major focus is on not allowing the use of council resources for the advantage of candidates, particularly publications or public events which give a candidate a platform.

With the onus on individual councils developing their own caretaker policies, there has developed variability in caretaker requirements between councils. This can lead to neighbouring councils operating under different requirements. For example, the maximum amount of a contract that can be entered into during an election can vary from council to council. Councils are only directed to adopt ‘minimum requirements’ of prohibited activities during an election, so there remains scope to adjust their policies depending on local issues.

Significantly, caretaker arrangements for local government are legislated, and they have become matters of law, adjudicated by 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, but if a council enters into a contract considered ‘invalid’ during an election period, the relevant Local Government Minister can void the contract and the council can be sued for compensation. The implication of the legislation of caretaker requirements for local government may indeed not yet be fully appreciated, but this represents a significant departure from practice in other Westminster-style political systems.
New Zealand

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

- the 1984 constitutional crisis
- the ‘hung parliament’ following the 1993 general election
- 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 ten 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. 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. 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, 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’.

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4 In his biography of Muldoon, Barry Gustafson (2000, pp. 384–96) 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 that they were using the opportunity provided by the pre-election run on the New Zealand currency to re-prosecute advice he had previously rejected.

5 Who were prepared to advise the Governor-General that Muldoon no longer enjoyed their confidence and should hand over to his deputy.
Although formalised by its subsequent incorporation into *The Cabinet 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 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 that 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, and the expectation that longer transition times would become the norm in forming government in New Zealand, a new formulation was developed to give guidance to the period after the election but before the swearing in of the new government. The caretaker convention identifies ‘two arms’ of the convention, each of which has its own constitutional principles. The first arm applies when it is not clear who will form the next government, and the second applies when it is clear who will form government, but they have not yet taken office.
The caretaker convention also applies if the Government has clearly lost the confidence of the House. In that case, the convention guides the government’s actions until a new administration takes office, following either negotiations between parties represented in the current Parliament, or a general election.

In New Zealand, the public and media attention falls on the transition period after the election, rather than the focus being on the conduct of politicians during the campaign, which characterises Australian elections. The complexities and uncertainties of New Zealand’s electoral processes have necessitated development of highly prescribed caretaker arrangements and practices. *The Cabinet Manual* has been updated periodically in the 20 years since the introduction of MMP 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.
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