6. Caretaker Conventions: An Overview of New Zealand and Local Government Arrangements

The previous chapter presented 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 recent local government approaches.

New Zealand

In Chapter 3, 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 nine weeks, as the first MMP election demonstrated. These longer periods of transition from one government to the next have 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, and again in 2008. In New Zealand, this trend was in response to a changed electoral system, while in Australia, greater prescription has largely been 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 convention 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, in the pre-election period, the ‘incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office’ (NZDPM&C 2008, pp. 77–8). The key difference between the conventions of the Australian jurisdictions and New Zealand is the much greater focus on transitions and government formation after the election, and much less emphasis on detailed guidance on the management of issues during the actual election campaign. The Cabinet

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1 The Cabinet Manual advises the need to plan ahead to try to ensure all significant matters are dealt with ahead of the election. Departments are warned that those who do not prepare for a protracted caretaker period are likely to experience problems.
Office and the State Services Commission issue guidance before each election to advise agencies on the principles applying during the pre- and post-election periods (New Zealand State Services Commission 2011).

The pre-election period

In New Zealand, the caretaker convention does not apply in the pre-election period (that is, the period of three months before polling day, or the period between election announcement and polling day if less than three months) unless the government has lost the confidence of the House. Successive governments have, however, chosen to restrict their actions in recognition that an election and potential change of government are imminent. During that time, restraint has been exercised in making significant appointments, and in relation to some government advertising (NZDPM&C 2008, p. 77). State officials are advised to work with Ministers at an early stage to agree to timeframes on progressing issues to Cabinet and finalising appointments (New Zealand Cabinet Office 2011).

The caretaker period

After the election, the caretaker convention applies. 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 a 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 the caretaker convention 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 State Services Commission guidance offers advice on advertising and publicity campaigns, use of agency resources and contact with Members of Parliament. There is also detailed guidance on providing information during an election period and the need to meet the requirements of the Official Information Act. The guidance reminds public officials that requests for information made by political parties should be treated in the same way as any request for official information (NZSSC 2011, p. 12). This guidance was based on concerns raised by the Office of the Ombudsman after the 1990 election, where the Ombudsman was critical of state servants who had assessed the political consequences of releasing material rather than making the decision in a politically neutral
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manner (NZSSC 2011, p. 12). The Ombudsman found that the primary priority during an election campaign should be the speedy release of material and the ‘extreme importance of a well-informed electorate’ (NZSSC 2011, p. 23).

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 State Services, and hence its ability to serve successive governments’ (SSC 2011, p. 19).

Transitional arrangements

Experience in New Zealand has led to detailed clarification of the principles involved in managing the interregnum after the election before a new government is formed. There are ‘two arms’ to the convention:

- 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 (NZDPM&C 2008, p. 78).

When it is clear who will form the next government, the incumbent but outgoing government should avoid undertaking any new policy initiatives and 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 3, this formulation is a direct response to the crisis of 1984.

The second ‘arm’ of advice, concerning 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 (NZDPM&C 2008, p. 78).

However, it is recommended that a range of decisions around significant issues that might bind an incoming government should be deferred, be handled
by temporary arrangements or be 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 2008, p. 79), and a range of considerations will need to be taken into account before a decision is made.

**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 where the confidence of the House lies, based on the parties’ public statements, so that a government can be appointed. 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 New Zealand State Services Commission (2008). 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 about 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 apply both ‘judgement and discretion’ (NZSSC 2011, p. 3).

The material provided on caretaker conventions in New Zealand is detailed and promulgated in advance of each election. This has arisen because of the electoral uncertainty that now exists under the MMP system, and the potential for an extended caretaker period for government formation following polling day.

This flurry of documentation from 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 after elections. That advice has been refined after the past couple of
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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 in Australia

In recent times, the majority of jurisdictions in Australia have enacted caretaker provisions within their Local Government Acts, first introduced by Victoria in 2003 and Queensland in 2007. 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 Crime and Misconduct Commission (CMC 2006) report into the conduct of candidates at the 2004 Gold Coast City Council elections. Like the state and Commonwealth conventions, the 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. Making the provisions legally binding has a number of implications, which are explored below.

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. Individual councils are required to develop a caretaker policy to govern the conduct of both staff and councillors before an election. The various Local Government Acts specify a range of decisions that council may not take during an election period. In general, 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 (New South Wales and Victoria) or $150,000 (Queensland and South Australia) or valued at more than 1 per cent of the council’s revenue from rates (whichever is the greater)
- determining a controversial development application
- the use of council resources for publications that advantage a candidate or group of candidates.
State 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. Because most of the legislation is recent, the implications for breaches are as yet untested, as is the potential for ministerial involvement in making judgements about alleged breaches. The introduction of four-year terms for most local councils allows for an orderly management of council business in the run-up to an election. Combined with the community-based rather than partisan alignment of most local government candidates, this has meant major breaches have not been a feature of recent council elections.

Legislating caretaker conventions in local government – unintended consequences?

The recent adoption by state jurisdictions of legislated caretaker arrangements have had a number of consequences. The state *Local Government Acts* are based on the same formula and bring local government into line with state and Commonwealth practices. The legislation of caretaker arrangements for councils is still in its early days, 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 fewer constraints 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 sanctions 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 with the more detailed guidance documents of the other levels of Australian and New Zealand governments, the legislation is short on detail and nuances. 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 nuances of changing practice. A self-managed process retains the capacity for regular updating to respond to local circumstances and issues as they arise.

**Conclusion**

This chapter completes the detailed analysis of the different approaches to caretaker conventions in all Australian jurisdictions, including local government and New Zealand. 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 are improving their internal support for managing their caretaker provisions as the legislated implications of real or perceived breaches increase the onus on them to support their officials during this time.