7. Forces Influencing the Observance of Caretaker Conventions

The cases and controversies highlighted in earlier chapters 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 an 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. The public service sometimes becomes collateral damage in these relentless quests, which may be why public service leaders have seemed more willing in recent times to ‘go public’ to explain the basis of their advice and decisions during the caretaker period. When it is anticipated that a sitting government will be defeated, Opposition parties seem especially keen to remind the public service of its obligations to be impartial — the inference being that a negative consequence might flow for a career official seen as too responsive to the current government, rather than to the new administration likely to be formed after the election.

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 judgment. Caretaker guidance documents are guidances only — not hard and fast rules. But, as cases and examples canvassed in this volume have shown, adversarial partisan politics
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is challenging traditional understandings of conventions as shared norms of behaviour. It creates particular strains on those aspects of the conventions where consultation with the Opposition is required.

Has ‘hyper-partisanship’ become the new normal?

The 2010 federal election delivered a hung parliament for the first time in Australia since 1941. Labor and the Coalition won 72 seats each at the federal poll of August 2013. The incumbent Prime Minister successfully negotiated an agreement with the Australian Greens and three regional Independents to form a minority government. The Coalition’s frustration at having fallen just short of forcing a change of government was palpable. It believed Gillard’s precarious alliance could fracture at any time. Journalist David Marr (2012, p. 64) reported:

The Opposition was led by a man who believed that at any moment death, scandal or defection could make him Prime Minister. He was intent on demolishing the government and wrecking the parliament. But it didn’t happen, despite the scandals laid on by the Labor Party. The parliament functioned. Gillard survived. Complex legislation was passed. And month in, month out, pollsters reported that Australians were loathing it all: minority government, the taxes, the tone of national debate …

Some analysts argue the ‘hyper-partisanship’ that characterised the minority federal government from 2010–13 has become the modus operandi of contemporary politics — in Australian jurisdictions, at least. Jim Chalmers, a former Labor Chief of Staff and now the Member for the federal seat of Rankin, argues that ‘badly misaligned incentives in our political system … tilt the playing field in favour of the new hyper-partisans’, who he defines as ‘extremists on the Left and Right who prioritise combat over problem-solving’. He argues that, ‘The most blatantly partisan political actors are not only found in the parliaments but also in journalism, the public affairs branches of our major peak organisations, lobbying houses and the broader commentariat.’ (Chalmers 2013, pp. 104–5) The heated atmosphere of an election campaign is especially ripe for the often-confected outrage of those less interested in substantive issues and responsibilities than the drive to win and retain power.

Pressures on public service responsiveness

The public service is expected to be responsive to the government it serves. In most jurisdictions, the public service values and codes of conduct are explicit on this point. The obligation to be professional, neutral and impartial, and at the
same time to serve the government of the day, continues during the caretaker period. Tensions about this balance can become an issue with ministerial offices, which are accustomed to a different relationship with the bureaucracy. Often, these can be dealt with by establishing agreed protocols at the commencement of the caretaker period. In preparing for recent federal elections, the Department of the Prime Minister and Cabinet has conducted briefing sessions for chiefs of staff on the caretaker conventions and what it is reasonable for their ministers to expect by way of advice and support during the caretaker period.

Ministerial staff

Ministerial staff play important roles in ensuring public service responsiveness to ministers and to the policy directions of government (Tiernan 2007; Tiernan and Weller 2010). 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; Owens 2012) 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) note the tensions public servants faced as they sought 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) notes 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.

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.
Former PM&C Secretary Terry Moran, who previously served as Secretary of the Victorian Department of the Premier and Cabinet, agrees staffers have become a ‘big problem’:

The reason for that is that the old conventions governing their roles no longer hold true … There is insufficient accountability because there are so many ministerial advisers now with few, in some jurisdictions, who actually possess a grasp of the business of government commensurate with their responsibilities. No one can suggest that they are an expression of the ‘persona’ of the minister any more. Now the minister isn’t accountable for what they do, because now a minister can say, ‘Oh that was one of my advisers, I did not know about this.’ (quoted in Alford 2012)

Others reject this blanket characterisation of ministerial staffers, noting that relationships are more cooperative than frequent criticisms would allow. For example, an experienced senior official argued that during a recent election, chiefs of staff were right to raise concerns about why some departments were not processing grants or contracts that had been determined and approved prior to the commencement of the caretaker period. They were justified in questioning why public servants were not implementing government policy. He attributed public servants’ reticence to the widespread belief that the government would be defeated at the forthcoming elections. Officials seemed especially concerned about matters that were contentious with the Opposition. They didn’t want to be criticised, or be in the situation shortly afterwards of having to extract the Commonwealth from a commitment not supported by an incoming government. Public servants are by nature cautious, he explained; they are anxious to avoid controversy. They want to preserve their capacity to build effective working relationships with an incoming minister and their staff.

This echoes concerns expressed by staffers in Commonwealth and state jurisdictions about a lack of responsiveness from departments when it appears the end of a government is nigh. The principle that the government remains the government until the end of the caretaker period is clear, and officials would do well to remember that partisans can have long memories and that the experience of a lack of responsiveness could affect relationships of trust into the future.

Good practitioners on both sides of the political–administrative divide recognise such difficulties can be avoided by ensuring only the most senior and experienced officials are responsible for managing the interface with ministers and the Opposition as the alternative government during the caretaker period. Recent guidance documents have recommended agencies appoint internal
experts to handle queries. These officers can then be the conduit for advice and support from central agency experts on difficult or sensitive issues that might arise, or are of concern.

In many ways, the Commonwealth Government practice of ministerial staff decamping from Canberra to campaign offices in Sydney or Melbourne may relieve 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**

As noted in previous chapters, technological change — notably the rise of the internet and email, as well as social media — has necessitated the 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 was 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 eleven 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 their 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.