8. Caretaker Conventions and the Future of Responsible Government

The scope and application of caretaker conventions will continue to evolve. In previous chapters, we documented the similarities and differences between the jurisdictions under consideration, and looked at the implications of changing practice.

Caretaker conventions are among the most challenged and controversial of all conventions. They apply during the most intense time of adversarial politics: when both major parties have the potential to retain or gain government. Minor slips and inexactitudes are exploited by both sides. There is intense pressure on public servants to justify their decisions regarding perceived support or partiality for the incumbent government. As outlined in Chapter 2, conventions are about a shared understanding of and mutual responsibility for their upkeep. Perhaps the nature of modern adversarial politics gives the concept of conventions a somewhat antiquated air. The introduction of ministerial codes of conduct and anti-corruption commissions indicates political participants appear less trusting of mutuality, and they are becoming more interested in enforceable sanctions.

An important corollary of this development is whether the voluntary nature of caretaker conventions can be sustained in contemporary politics? Caretaker conventions were established on the principle of ‘self-policing’, but as accusations intensify about alleged government breaches of conventions, might not future governments consider establishing an independent arbiter? A transition from the status of convention to a set of legally enforceable rules would see a radical recasting of caretaker arrangements.

Prescription and codification

It is difficult to pinpoint precisely when the maintenance of caretaker conventions shifted from being a political responsibility to a primarily bureaucratic one. In his 1951 letter to ministers, Prime Minister Menzies was clear it was their responsibility to exercise judgement in the continuing operation of their departments. As this monograph has demonstrated, a simple letter reminding ministers of their responsibilities has been, since the 1970s, supplanted by increasingly detailed guidance designed to support public servants to make decisions across a broad range of government activities. Jurisdictions now review their guidance documents after each election to respond to recent...
controversies or ambiguities. This has led to a pattern of increasing prescription and specification as jurisdictions try to prevent repetition of claimed breaches and controversies by increasing or adding new suggestions about how to handle a particular situation.

The guidances have evolved into strangely hybrid documents. They acknowledge the responsibility of government politicians to adhere to the conventions — for example, ‘adherence to the conventions is ultimately the responsibility of the Premier and the Government collectively’ (Vic DPC 2010, p. 6). Yet the advice contained is focused on assisting the public sector to put boundaries around and manage the relationship with their political masters. An example of this can be seen in the Victorian guidance document, which describes the established practices around caretaker conventions aimed at ‘protecting the apolitical nature of the VPS and avoiding the use of State resources to advantage a particular political party’ (Vic DPC 2010, p. 6). During the 2013 federal election, the Secretaries of the Departments of the Prime Minister and Cabinet, Treasury and Finance all publicly published material to defend their actions and the impartiality of their respective departments during the campaign.¹

Increasing prescription has the potential to diminish bi-partisan agreement on the caretaker conventions. If conventions are mutually agreed principles that guide political behaviour, that mutuality may be eroded by incumbents adding new levels of detail to the guidance documents. Quite often, the updating is undertaken at a bureaucratic level, as officers try to counteract criticism by adding advice on how to manage, for example, the impact of the internet. To preserve the mutuality of caretaker conventions, amendments should be agreed by both major political parties to ensure the acceptance of bi-partisan responsibility for their maintenance and observance.

Codification and prescription also lead to a focus on interpretation and a loss of flexibility. An emerging concern is that increased prescription will lead to legal sanctions for breaches for the public service. Codification also shifts the responsibility to adhere to the restraints away from politicians and displaces it on to the public service. The public sector’s tendency to document and regulate might, in the longer term, transfer the spotlight from political behaviour to bureaucratic interpretation and application. This is already evident in some of the commentary on caretaker conventions (see, for example, Malone 2007).

¹ PM&C Secretary Ian Watt made public correspondence between himself and Opposition Leader Tony Abbott on the ‘By Boat, No Visa’ campaign and on the signing of the Memorandum of Understanding between Australia and Papua New Guinea on the resettlement of refugees. Secretaries Martin Parkinson and David Tune released a media release denying that either the Treasury or Department of Finance and Deregulation had costed Opposition policies.
The introduction of statutory sets of public service values and codes of conduct means that public servants now have legal obligations for non-partisan behaviour, and these apply during the caretaker period. This was tested by a Queensland Crime and Misconduct Commission Inquiry in 2004, which found – though the conventions were not legally binding on politicians – a different standard applied to public servants who were bound by the principle of impartiality contained in their *Public Service Act 1996* (Qld) (CMC 2004, pp. 26–7). Although it has not been repeated since, the potential remains for public servants to be caught in similar breaches, with the possibility that disciplinary or financial sanctions could be applied. The implication is clear, although little publicised at present. Public servants are exposed in ways that ministers still are not. This changing environment will only accelerate the trend to prescription to be used as a bulwark against ministerial demands for responsiveness during the caretaker period.

**Future prospects**

If a convention reflects shared norms about political behaviour, is it not the prerogative of the government of the day to update or revise its content or application? Over the years, public servants have unobtrusively become the guardians of the detail and the application of the caretaker conventions. The continuing declining trust in politicians could contribute to this trend. Surveys show the perception of the ethical standards and honesty of politicians continues to decline. As the management of conventions is about trust and ethical standards, as trust diminishes in the capacity of politicians to self-police, a greater emphasis is placed on written codes and external regulation bodies to administer its application. This presents a dilemma because public servants understandably want the certainty and clarity that detailed procedures provide. Australia’s ‘talent for bureaucracy’ (Davies 1964) tends to favour addressing problems by the development of detailed guidelines and procedures.

The trend to increased codification could reflect a diminished understanding of, and experience with, the processes of government. In the past, the application of conventions has been the province of the most senior bureaucrats. Their long experience and judgement allowed them to make the fine distinctions often required to navigate the political–public service interface. To do so successfully

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2 The Queensland Crime and Misconduct Commission report The Tugun Bypass Investigation looked into a complaint by the then Leader of the Opposition that officers of the Department of Main Roads were ‘acting in a politically partisan manner to implement a major Government decision during an election campaign’ (CMC 2004, p. 7).

3 The 2013 Roy Morgan Survey of the perceptions of ethical standards of professions shows the standing of both state and federal politicians continues to decline, with only 14 per cent thinking they have high standards (Roy Morgan 2013).
requires a capacity to apply the caretaker principles with the confidence to take and defend such judgements in the contested atmosphere of an election campaign. Arguably, contemporary trends in public sector employment — rapid progression to senior ranks, external appointments to senior positions and greater use of contract appointments — could account for uncertainty and discomfort in applying the caretaker conventions. If that is the case, the trend to codification and prescription is likely to continue so that senior officials can point to written guidance as the basis for their decision-making.

The controversy that surrounds the application of caretaker conventions is unlikely to diminish, but political processes require political solutions. The increase in detail in the application of caretaker conventions cannot continue indefinitely, and eventually responsibility will have to return to ministers and political leaders to manage. With the increased potential for public servants to be disciplined for breaches of the guidelines, there might well be some relief in returning ownership to the political players.