4. When Do the Conventions Apply?

The caretaker period begins at the time the Lower House (House of Representatives or Legislative Assembly) is dissolved and continues until the election result is clear or, if there is a change of government, until the new government takes office. The Queensland guidance notes that care should be exercised during the period between the announcement of the election and the dissolution of the Legislative Assembly, this being a particularly sensitive time requiring judgement and common sense. The New South Wales guidance — mindful of the fixed parliamentary terms in that state — specifies that caretaker conventions commence when the term of the Legislative Assembly expires. In Victoria and Tasmania, the period commences when the Legislative Assembly expires or is dissolved. In the Australian Capital Territory — which also has fixed four-year terms — the conventions apply from the beginning of the election period, which is 37 days before the polling day (ACT 2012, pp. 3–4).

Commencement of the conventions

Australian Commonwealth

Under the Australian Constitution, the House of Representatives continues for three years from the first meeting of the House and no longer, but may be dissolved earlier by the Governor-General (s. 28). The term of the current Parliament ends when the three-year term of the House of Representatives expires or is dissolved by the Governor-General on the advice of the government. There are two constitutional mechanisms by which this can occur:

- the dissolution of the House of Representatives (s. 5), or
- the simultaneous dissolution of both Houses — a double dissolution (s. 57).

A general election follows either the dissolution of the House or the expiration of its three-year term. The 'Governor-General in Council' (that is, acting on the advice of the Federal Executive Council) then issues a writ directing the Electoral Commissioner to conduct an election in accordance with prescribed procedures. The writ specifies the date on which the election will be held and the date for the return of the writ. It is deemed to have been issued at 6 p.m. on the date of issue.

Importantly, ministers sitting in the Senate, as members of the government, are bound by caretaker conventions for the period of the election until the outcome is known. This applies whether or not any Senate elections (periodical, general or territorial) are being held simultaneously with a general election for the House of Representatives.

The process that follows is outlined in Table 4.1.

Until 1925, the Australian Parliament was prorogued before the dissolution of the House of Representatives; this practice was discontinued between 1928 and 1993, but later reinstated on advice from legal experts (Odgers 2012, Ch. 19). Accordingly, in 1993 and 1996, Governors-General first prorogued Parliament by proclamation, issuing another proclamation on the same day to dissolve the Parliament. Since 1998, prorogation and dissolution have been combined in one proclamation.

An Executive Council meeting is usually held between the calling of the election and the issuing of the writs. This is a 'tidy-up' meeting that deals with last minute issues — such as the making of regulations under recently enacted legislation. This is seen as a legitimate housekeeping activity, but can be used cynically by governments — for example, as an opportunity to make last-minute appointments.

As noted, the timetable between the announcement of an election and the issuing of writs — that is, the period when caretaker conventions formally commence — can vary. Since 1940, the average gap has been nineteen days (Hughes and Costar 2006, p. 47). It has been argued that this reflected a 'convention' that some time should elapse between the announcement of the election and the issuing of the writs, since the latter coincides with the closure of the electoral rolls (Sawer 2006). Malcolm Fraser controversially altered this practice in 1983, when the writs were issued and the electoral rolls closed at 6 p.m. on the same day (4 February) as his surprise announcement of a double dissolution election for 5 March. Fraser was accused of excluding many thousands of citizens from exercising their right to vote and an action was mounted in the High Court, albeit unsuccessfully.

Table 4.1: Key dates in commencement of caretaker conventions — Australian Commonwealth[1]

Stage	Timeframe	Relevant Actor	Authority	Process
Prorogation of the Parliament/Dissolution of the House of Representatives		Governor-General on advice of Executive Council	Constitution, ss. 5, 28	Proclamation of prorogation and dissolution read by Official Secretary. Direction to Electoral Commissioner to conduct an election. These actions relate to the House of Representatives and periodical or general election of Senators.
Issue of writs (deemed to be 6pm)	Within 10 days of dissolution.	Governor-General.	Constitution s. 32; Commonwealth Electoral Act, ss. 151, 152	Caretaker conventions officially commence.
Close of electoral rolls	From 2007, 3 working days from date writ is issued. For new enrolments and re-enrolments from 8pm on date of writ. (Formerly 7 days after issue of writ.)	Electoral Commissioner	Commonwealth Electoral Act, ss. 102(4), 155	
Nominations close (at 12 noon)	Not less than 10 days nor more than 27 days after date of writ.		Commonwealth Electoral Act, ss. 156, 175	
Date of polling (a Saturday)	Not less than 23 days nor more than 31 days from date of nomination.		Commonwealth Electoral Act, ss. 157, 158	
If election result is clear, caretaker conventions end. If not, continue until new government is sworn in.				
Return of writs	Not more than 100 days after issue.		Commonwealth Electoral Act, s. 159.	Electoral Commissioner certifies name of successful candidate in each division, returns writ to Governor-General. Forwarded by Official Secretary to Clerk of the House of Representatives.

1 Adapted from House of Representatives Practice, Chapter 3.

The Joint Select Committee on Electoral Reform (JSCER), established by the Hawke Labor government in 1983, considered the issue as part of a wide-ranging review of Australia's electoral system. It recommended a proclamation by the Governor-General to announce the election date a minimum of seven days before the issue of writs. Subsequent amendments to the *Commonwealth Electoral Act 1918* in 1983 inserted a stipulation that writs must be issued within ten days of the dissolution (s. 151(2)). The JSCER recommendation was incorporated as a separate provision (s. 155). This provision remained unchanged until the passage of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* (Cth) in 2006.[2] Section 151(2) remains unchanged by recent amendments.

Since the late 1980s, the time that has elapsed between the announcement of an election and the issuing of the writs has declined markedly. For elections held between 1990 and 2013, the average time that elapsed was around three days, with only one day between the 2013 election announcement and the issuing of the writs. However, the perception that a 'gap' exists between calling of the election and commencement of caretaker conventions remains strong (for example, see Charlton 2001). The bitterly fought 2001 election, held in the wake of the September 11 terrorist attacks, may have done much to fuel concerns about government actions in this period (see, for example, Marr and Wilkinson 2003).

Prime Minister John Howard visited the Governor-General on Friday, 5 October 2001, asking him to dissolve the House of Representatives for the 10 November election, but writs were not issued until midday on Monday, 8 October. During this intervening period, the United States launched air-strikes on Afghanistan in retaliation for the terrorist attacks on New York and Washington.[3]

At issue was whether the Prime Minister was obliged to consult the then Leader of the Opposition, Kim Beazley, about a decision to commit 1,000 Australian troops to the so-called 'War on Terror'. John Howard argued that he would 'observe the conventions', but that while he would inform Mr Beazley about developments, he would not make joint decisions. The Prime Minister noted:

> I'm quite ready to talk to Mr Beazley … but of course the decision-making still rests with me because I am still Prime Minister. You continue, of course, to govern and you certainly continue to take decisions within any existing established policy. (quoted in Gosch 2001)

2 Among other things, the Act amended section 155, reducing the seven-day period for closure of the electoral rolls to a period of three working days. For people who have not voted before, electoral rolls close at 8 p.m. the day the writs are issued. This has been a controversial change, aimed ostensibly at limiting the potential for fraudulent enrolments, but it may have the practical effect of excluding many young, first-time voters. For detailed analysis, see Hughes and Costar (2006).

3 Prime Minister Howard was advised of the US air strikes in a telephone call from Vice-President Dick Cheney early on the morning of 8 October 2001.

The government was also criticised for entering into an arrangement to process asylum seekers offshore in Papua New Guinea and Nauru (a policy that became known as the 'Pacific Solution'), just half an hour before caretaker conventions were due to commence at midday (Marr and Wilkinson 2003, pp. 178–9). This became the subject of contention during subsequent Senate estimates hearings, with government officials maintaining caretaker conventions had not been breached as (they argued) the agreements reached related to existing aid policy, and in any event were concluded before the conventions formally commenced (F&PA Committee 2002, pp. 192–7). Asked for advice on this matter, a senior DPM&C official noted that the situation was urgent (the fate of the asylum seekers could not await the election outcome), but that in the circumstances the Opposition should be advised of the decision and of the fact that any such decisions would bind any incoming government.

In 2004, controversy arose when a Senate Select Committee conducted a one-day hearing during the caretaker period. The committee had been established on 30 August 2004 to examine matters arising from public statements by a former ministerial staffer, Mike Scrafton, about conversations with the Prime Minister regarding the so-called 'Children Overboard' affair (which, perhaps ironically, had occurred during the 2001 election campaign). The Prime Minister had announced the election date on Sunday, 29 August, but the House was not dissolved, and the writs were not issued, until Tuesday, 31 August. The committee held a public hearing one day later, on 1 September. Questions were raised about the appropriateness of this action, given the politically contentious nature of the issues under consideration, and whether the prorogation of the Parliament meant the Senate should not be meeting. The issue of whether the Senate has a right to meet or exercise its powers after dissolution is highly contested, but the practice has been for the Senate not to meet between prorogation and before the opening of the new Parliament — although it has frequently authorised its committees to continue to do so.

Australian local government

Local government caretaker periods are specified in legislation. This period varies according to the particular state legislation, but normally the caretaker period begins on the day the nomination for candidates closes. For instance, in Victoria, the period is 32 days — the period from the last day of nominations until election day.

In Queensland, the election period is defined in section 25 (1) of the *Local Government Electoral Act 2011* (Qld): it 'starts on the day when public notice of the holding of the election is given' and 'ends at the conclusion of the election'.

For the Brisbane City Council, this period is as defined in section 3 of the *Electoral Act 1992* (Qld) as the period beginning on the day after an election writ is issued and ending at 6 p.m. on the polling day for the election.

New Zealand

New Zealand, with its unicameral parliament, has three-year fixed terms. The conventions apply from the dissolution of the House of Representatives. In the period immediately before a general election, although not bound by caretaker conventions, successive governments have chosen to restrict their actions to some extent at this time in recognition of the fact that an election — and therefore a potential change of government — is imminent. In practice, restraints have tended to be applied from approximately three months before the general election is due or, if the period between the announcement of the election and polling day is less than three months, from the announcement of the election (NZDPM&C 2008, pp. 76–7). The conclusion of the caretaker period can be difficult to predict in New Zealand. The MMP voting system means that there is a possibility of a lengthy period before the formation of a new government — as happened in 1996, for example, when the caretaker period lasted for nine weeks. The New Zealand caretaker conventions have a substantial section on guidance when it is not clear who will form the next government, in order to assist with decision-making during that interregnum.

Caretaker conventions after an election

The caretaker period concludes when the election result is known with either the confirmation of the continuation of the incumbent government, or the commissioning of a new government. Although this has mostly proved straightforward, the operation of caretaker conventions in the period after elections emerged as an issue in the late 1990s following close-run election results in New South Wales, Queensland and Victoria.

The 1995 election in Queensland brought an unexpectedly close result. The Labor Government under Wayne Goss was eventually returned with a one-seat majority in the Legislative Assembly about seventeen days after polling day. The Opposition then challenged the result in one seat, Mundingburra, in the Court of Disputed Returns. The judge ordered that a by-election be held in the seat on 3 February 1996. The by-election was won by the Liberal Party candidate and, with the support of independent Liz Cunningham, the Coalition under Rob Borbidge secured the confidence of the Legislative Assembly, and hence the ability to form government. Although the government had not been in caretaker mode because the House was not dissolved for a by-election,

once the result was clear, and Cunningham had indicated her intention to support the Coalition, Opposition Leader Rob Borbidge, called on Premier Goss to 'observe the appropriate convention', and noted that 'the Goss Government should consider itself in a caretaker role only' (Reuters 1996).

In Victoria in 1999, the election result was unclear for almost a month after the polls closed. It took several weeks and a by-election following the death of a candidate on polling day for a minority government to be formed. The ALP under Steve Bracks secured the support of three independents to oust incumbent Premier Jeff Kennett. The situation posed a challenge for the Victorian public service, requiring it to understand and administer post-election caretaker arrangements until the new government could be sworn in (Davis et al. 2001, p. 18). As both parties courted the independents, political manoeuvring complicated the task, prompting the Department of the Premier and Cabinet to establish a reference group, supported by a secretariat, to support decision-making essential to keep the business of government running. Particularly problematic was the role of political advisers — both of incumbent and shadow ministers — who sought to act on behalf of their principals, creating difficulties for public service impartiality and neutrality.

The Victorian experience suggested a need for clear guidance on caretaker arrangements in the post-election period. Davis et al. (2001, pp. 25–6) propose some principles for the conduct of public administration in such circumstances, but these have gone largely untested.

The 2010 federal election saw, for the first time, the challenges of a long transition within the Commonwealth government. The media focus was firmly on the implications of a hung parliament and which party the independent cross-benchers would support to form government. To manage these unusual circumstances, the DPM&C quickly developed and distributed *Guidelines for Post-election Consultations with Independent Members* (DPM&C 2010). These guidelines advised that senior officials could hold discussions with independent members after agreement from the Prime Minister and after giving notice of the meeting to the Leader of the Opposition. This restricted public service advice to:

- matters relating to machinery of government and administration, including the administrative and technical practicalities and procedures involved in implementation of policies proposed by the government and Opposition parties
- information on the international, economic and budget outlook, including the costs of government and Opposition policies and their net impact on the Pre-Election Economic and Fiscal Outlook aggregate budget estimates, and

- factual information of the kind that an official might provide to a parliamentary committee.

During the seventeen days after the poll, the cross-bench MPs received briefings from eleven Departmental Secretaries (Reece 2012, p. 7). The post-election guidelines were not incorporated into the guidance for the 2013 election, prompting some to question whether the 2010 guidelines had been too narrowly framed, and thus represented a 'missed opportunity' for what over time proved not to be the aberration some regarded the 2010 result to be; rather, it was indicative of a more pluralistic and fragmented politics.

Four-year fixed terms

In Australia, introduction of fixed four-year terms for most states, territories and local councils has resulted in an orderly approach to the organisation of government business in the run-up to elections. For example, major contracts can be finalised and key appointments made without danger of these falling through because of the unexpected calling of an election. Parliamentary business can be completed and legislation presented for assent without the threat of Bills lapsing as the Parliament is dissolved. At present, only the Queensland and Commonwealth parliaments still adhere to three-year, non-fixed terms. It can be said that both jurisdictions suffer from the heightened uncertainty that this brings, and both have experienced controversies about the application of the caretaker conventions in recent years.

In Queensland, Premier Anna Bligh announced on 25 January 2012 than the election would be held on 24 March, and that she would seek the dissolution of Parliament on 19 February. Premier Bligh took the unusual step of announcing the election date early to allow some certainty for business and the electorate regarding the timetable. Though this situation is quite normal for jurisdictions with fixed terms, this announcement was portrayed in Queensland as a breach of the caretaker conventions. This view was echoed by Scott Prasser in an opinion piece in *The Australian* as being 'unprecedented in Australian politics' and having the air of 'political trickery' (Prasser 2012: 12). Yet it is quite clear that caretaker conventions take effect when the writs are issued and the Parliament is dissolved. After Anna Bligh's announcement, the Parliament continued to sit and the Labor government continued to be accountable to it.

The same controversy arose when Prime Minister Julia Gillard announced in January 2013 that the date for the next election was to be 14 September 2013. Critics forgot the connection between caretaker conventions and the sitting of Parliament. The conventions operate from the dissolution of the House of Representatives until the election result is clear, and are designed to

begin when the executive government loses its accountability to Parliament. The majority of Australian jurisdictions now have fixed parliamentary terms, and are used to managing the months before the official beginning of the election period in a systematic manner. When the decision about when to call an election remains the political prerogative of the leader, as in Queensland and the Commonwealth, the pre-caretaker period tends to become involved as a weapon in political positioning.

The introduction of four-year fixed terms in most jurisdictions in Australia and New Zealand has taken the heat out many of the controversies that previously had attended their sudden application as an election was called. Bureaucracies are better prepared to enter the uncertainty of an election period, and can be confident the mechanisms are in place to carry them through to the establishment of the next government. This development has led to a more mature approach to managing the continuity of government business during election periods.

Conclusion

The issue of when caretaker conventions apply has been something of a concern in recent Commonwealth elections. Closer examination of arrangements governing commencement of the conventions suggests that the time period elapsing between the announcement of the election and the issuing of the writs to dissolve the House of Representatives has actually decreased in recent years. Our more adversarial politics and the emergence of the 'permanent campaign' mode of contemporary politics may account for persistent uncertainty over what governments might do, and when. Four-year fixed terms have addressed some of the 'gamesmanship' in which governments might engage immediately prior to the calling of an election. For jurisdictions like New Zealand, where election results can take some time to resolve, the issue of caretaker conventions in the post-election period has been more of an issue. Guidance documents have evolved to address the specific concerns of individual jurisdictions.

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