5. Caretaker Conventions: An Overview of Australian Jurisdictions

Each Australian jurisdiction has developed its own guidelines to support ministerial and departmental decision-making during the caretaker period. Guidances on the observance of caretaker conventions tend to be couched as general principles rather than strict, highly specific rules (Boston et al. 1998, p. 646) — although, when a well-publicised breach has occurred, the tendency has been to increase the detail in prescribing behaviour. Malone (2007, p. 5) notes 'the proper operation [of caretaker conventions] is dependent on the public servants who will make judgements on precisely what they mean and how they apply'. That is true, but they also depend to a significant extent on the attitude of the first minister and their receptiveness to advice.

In broad terms, caretaker conventions aim to ensure incoming governments are not bound by the last-minute decisions or actions of their predecessors, that the neutrality of the public service is preserved and that the substantial — and arguably increasing — advantages of incumbency are moderated. However, the government remains the government, and the ordinary business of public administration continues.

Within this accepted set of principles, each Australian jurisdiction has developed a guidance on the practice of the conventions locally. These guidance documents all acknowledge the over-arching principles and contain details about local application.

In this chapter, we draw on these guidance documents to present a detailed overview of caretaker arrangements. We look at the practices that have developed around specific issues and government activities. We use cases and examples to illustrate the complex and contested nature of caretaker conventions, and highlight areas of similarity and difference in practice.

Avoiding major policy decisions

All jurisdictions cite the taking of major policy decisions as a key area that falls under caretaker conventions. The adherence to three caretaker principles is involved in any decision concerning a major policy matter. These are: (1) not taking a decision for which the government (or minister) cannot formally

be called to account in Parliament; (2) not binding an incoming government to a particular course of action; and (3) avoiding a decision that is a matter of contention between the government and the Opposition.

Nevertheless, the emphasis on what constitutes a policy decision is not consistent across all jurisdictions. A number of jurisdictions focus on the *taking of a policy decision* and others focus on the *implementation of a new policy*. For example, the Commonwealth, Tasmanian, Western Australian, New South Wales, ACT, South Australia and Northern Territory governments are concerned to ensure that major or significant policy decisions are not made during the caretaker period. 'Major or significant' is not specifically defined and remains a matter for judgement, though relevant considerations include assessing for policy and financial significance, and the likelihood the decision would be politically contentious.

The Queensland and Victorian governments' guidance documents state that the bureaucracy should avoid implementing major policy decisions during the caretaker period. This is a fine distinction that has important implications. The jurisdictions that are concerned about implementation of major policy decisions distinguish between prior and future policy intent. The implementation of major policy decisions does not infringe the conventions where decisions 'implemented before the expiry or dissolution of the Assembly are announced during the caretaker period' (Vic DPC 2010, p. 7). Most jurisdictions now distinguish between the 'making' of the policy commitment and its announcement. It is recognised that the conventions aren't contravened when commitments made before an election is called are then announced during the campaign.

Future policies are also exempt, with the majority of jurisdictions acknowledging that the 'conventions do not apply to promises on future policies that the party in government announces as part of its election campaign' (DPM&C 2013, p. 2) – although a number of jurisdictions warn that policies agreed to but not made public before the campaign should be announced ahead of the caretaker period if they are likely to be controversial (Tas DPC 2014, p. 3).

The sections of the guidance documents on the taking or implementing of major policy decisions acknowledge the reality of political incumbency, in that the government will be maximising its term in office by making decisions right up to the issuing of the writs for the election. Both sides will be making major policy commitments throughout the campaign, and these commitments will be the subject of extensive media analysis and debate. The claim that a decision was taken prior to the election is hard for an Opposition to challenge because of the confidentiality of Cabinet decisions. But this has not deterred Oppositions from making such claims in the heat of an election campaign.

Two examples illustrate this difficulty:

Signing Medicare funding agreements 1993

In 1993, the Keating Labor government announced that it had signed a five-year Medicare hospitals funding agreement with the Victorian and New South Wales governments just minutes before the Official Secretary read the proclamation to dissolve the House of Representatives for the general election. This action was criticised by the Opposition and the media because it would bind an incoming government to provide additional funding for those jurisdictions for a period of five years. The then Prime Minister was unrepentant in his defence of the decisions, arguing that the states' decisions to sign the agreement 'at one minute to midnight' showed they wanted the protection of Labor's health policy, even if Dr Hewson were elected (quoted in Kitney and Maley 1993). State ministers explained the decision in terms of their need for funding certainty: the Medicare agreement had been due to expire at the end of June 1993. In the event, the Coalition lost the election and the Keating Labor government provided $300 million in additional funding for public hospitals over the life of the agreement.

Deploying defence personnel to Iraq in 2004

In September 2004, more than two weeks into the caretaker period, the Howard government announced that it had despatched officers of the Special Air Service (SAS) to rescue two Australians feared kidnapped by insurgents in Iraq. The Opposition Labor Party claimed the government had breached the caretaker conventions by not consulting then Opposition Leader Mark Latham about the deployment. Then Defence Minister Robert Hill argued the decision was not binding on a future government and, moreover, that it had been 'taken in accordance with the contingency plan that had earlier been agreed by Cabinet' (AAP 2004). Prime Minister John Howard told reporters the decision to establish a hostage crisis team was taken by the National Security Committee of Cabinet before the election campaign. He said: 'the caretaker doctrine does not require a government to consult the Opposition in relation to the implementation of a decision taken before the caretaker mode commenced' (quoted in Seccombe and Allard 2004).

As these examples suggest, the environment for making judgements about the taking and implementation of policy decisions during the caretaker period is highly political, and subject to intense public scrutiny through the news media.

This has obvious implications for public sector officials and how they should act and manage the complexities which ensue. Managing the interpretation of what constitutes a major policy announcement is a matter for judgement.

Such judgements are not required in most matters of ongoing administration, which does and should continue during the caretaker period. The need for judgement arises when issues are contested between the opposing political parties and the matter is controversial. Public sector officials need to be aware of the requirement to act cautiously when there is no possibility of parliamentary oversight of executive decision-making (Wilson 1995). Judgement cannot be acquired at the calling of an election, but is built up over time and through experience. This is why only the most senior officials should be responsible for caretaker conventions, and why they often consult central agency experts when weighing up their decisions.

As an election approaches, senior departmental officers often take stock of factors relevant to the programs and decisions with which they have been dealing. They should be familiar with, for example, the level of bipartisan support for particular policies, whether there is significant community or stakeholder opposition and the potential for significant media attention. The closer the election, the more pressure there is for public sector officials to get things right — particularly if, for example, a recently announced government policy is unpopular with the Opposition. In all cases, it is imperative the bureaucracy behaves responsibly and dependably, rather than trying to second-guess who will win the election.

Moratorium on significant appointments

All jurisdictional guidance documents contain a section on avoiding significant appointments during the caretaker period, and there is a degree of unanimity on handling the issue between the different jurisdictions. The majority of jurisdictions state that the 'significance' of an appointment can be assessed through two considerations: the importance of the position and the likelihood that the appointment would be controversial. Many have codified the level of appointment with precision.

Tasmania and Western Australia offer a classification of what constitutes a 'significant appointment'. For Tasmania, it is the 'head or deputy head of an agency, head of a division or branch whose activities are deemed sensitive, members of statutory bodies and statutory office holders' (Tas DPC 2014, p. 4). Western Australia recommends no action be undertaken on senior officer positions classified PSA Level 8 and above (WADPC 2013, p. 6). New South Wales is not as prescriptive but identifies the elements that would qualify an appointment as 'significant'. They are 'seniority, importance and profile of the position, the duration of the appointment, the manner in which the appointment is to be made … and also whether the proposed appointment is likely to be controversial' (NSWDPC 2011, p. 3).

Significant appointments should not be controversial because of the range of options available to manage the situation. The options are:

- appoint on a short-term or acting basis (to be confirmed at a later date)
- defer appointment until after the election
- consult the Opposition (although the Opposition may not accede).

Both Western Australia and Queensland also advise that if an employment contract is due to expire during the caretaker period, it is acceptable to issue a short-term contract for up to three months. Other options include an acting appointment or consulting with the Opposition (Vic DPC 2010, p. 7).

Jurisdictions have accepted that they should exercise constraint in making senior appointments during the caretaker period but, technically, caretaker conventions were developed to guide ministerial behaviour, not the behaviour of public servants. The limitation on appointments has evolved as a self-imposed constraint. The Commonwealth guidance mentions only that ministers should avoid making significant appointments and is silent on senior appointments within the public service.[1] The Commonwealth's concern is directed to appointment of members to statutory bodies and statutory office-holders. Other jurisdictions have expanded what would initially have been a concern about stacking boards in the dying days of a government to encompass all senior government appointments.

A level of prescription contained in a guidance document is usually an indication that it has been an area of controversy in the past. In Victoria in 1999, an appointment became an issue because, as noted in Chapter 3, the results of the election were not clear for nearly a month after polling day. The appointment of a new Auditor-General had been approved and announced before the election, but because the appointee was relocating from New Zealand, the formality of approval by the Governor-in-Council did not happen until he had taken up his position. The appointee had already signed a legally binding contract for the position. The Labor Opposition indicated that if it were to form government, it would support the appointment, but the Opposition did not support the signing of the instrument during the caretaker period (Davis et al. 2001, p. 18).

The 2013 federal election saw a controversy about an appointment of ABC journalist Barrie Cassidy to the Advisory Council for the Museum of Australian Democracy. The Opposition criticised the appointment during the election campaign because of the timing of the appointment and the perception Cassidy, who had served as press secretary to Prime Minister Bob Hawke, was a 'friend'

1 In fact, in the Commonwealth, ministers are explicitly prevented from intervening in public service appointments under section 19 of the Public Service Act 1999 (Cth).

of Labor (Packham 2013). The Advisory Council is an unpaid, honorary position so does not qualify as 'significant' in the usual sense; however, it did become controversial because the appointment was finalised on the day the writs were issued, although the then minister, Tony Burke, said the 'appointment had been in train for months and was approved by Cabinet' (Burke, quoted in Packham 2013). After meeting with new Attorney-General George Brandis after the election, Cassidy offered his resignation because he accepted the minister's view that he did not think it appropriate for those currently involved in the political process to sit on the board (ABC News 2013). In his own statement, Brandis blamed 'the questionable process of the former government' as his key concern (Brandis 2013).

This appointment demonstrates the arbitrary nature of what can become controversial during an election campaign. In itself, the appointment was not significant, but the high profile of the appointee made it controversial, as did the perceived timing of the appointment. However, Cassidy might have been an unknown victim of a flawed process, with the appointment having been in train for months and the lack of an earlier announcement explained by the then minister with the words, 'I thought it would have been announced by the department' (Burke, quoted in Kenny 2013).

Avoiding signing major contracts, undertakings and agreements

All guidance documents contain a section addressing the need for governments to avoid entering into major contracts or undertakings. The guidances reflect commercial realities by recognising the need for much of the work of government to continue during the caretaker period. Consideration is therefore given to the definition of the word 'major', with the most common definitions revolving around the monetary value of the contract, whether proceeding with it would entrench a 'policy, program or administrative structure', and whether the contract requires ministerial approval (Commonwealth, Tasmania, Victoria, Northern Territory). The Victorian guidance contains some additional material about allowing the entering into of contracts that are subsidiary to an existing 'head contract' during the caretaker period.

Most guidance documents acknowledge the difficulty of deferring contractual commitments for legal or commercial reasons, and suggest options if this is the case. These include:

- consultation with the Opposition
- consultation with the contractor to see whether the contract could be renegotiated

- the development of contracts that include a clause providing for termination in case an incoming government does not wish to proceed.

Jurisdictions with fixed parliamentary terms may find managing contractual arrangements less complex, since the regular election date is known in advance.

The management of contracts is routine administration for many departments, and often involves long lead-times. The guidance documents suggest that caution should be exercised in cases that fall under the definition of 'major', or that require ministerial approval.

Controversy arises when contracts are seen to breach caretaker conventions by giving electoral advantage to the incumbent government, or when they are interpreted as seeking to entrench a controversial policy. Such contention was avoided in Victoria in 1999, when the Minister for Health — who had been defeated at the election but who remained the minister pending the swearing in of the new government — delegated to the Secretary of his Department responsibility for finalising a contract that, if not executed within a specified time-frame, would attract significant penalties. This action was taken on the grounds that the Minister believed it was inappropriate to deal with it himself. The matter was resolved by officials in consultation with the Premier, the Leader of the Opposition, the Shadow Health Minister, political advisers and bureaucrats (Davis et al. 2001, pp. 18–19). The long delay in forming a new government in Victoria after the 1999 election was problematic for other types of contracts. Davis et al. (2001, p. 19) report that new procedures were required to allow urgent contracts to be finalised in the post-election caretaker period.

The responsibilities of government-owned corporations during the caretaker period are often complex. These entities are at arm's length from the core departments, but report to ministers, and hence are bound by the caretaker conventions. They are wise to exercise caution in the caretaker period, especially when their operations — or even their mere existence is controversial. As well, the corporations' obligations must be balanced against commercial considerations — such as, for example, where a delay would attract contract penalties or significantly disrupt a project that had been approved and already commenced.

During the 2013 federal election, the role of the National Broadband Network Company (NBN Co.) was in the spotlight. The two major political parties held different policy positions about how best to deliver high-speed broadband to Australian homes and businesses. Then Shadow Minister Malcolm Turnbull was highly critical of the company's former chief executive, Mike Quigley, and the NBN Co. board. When Quigley resigned in July 2013, the board commenced an executive search for his replacement. However, in August 2013, the company

confirmed it would follow the caretaker conventions, suspending the search for its new CEO pending the outcome of the September poll. It undertook not to enter into new construction contracts, since that might limit a future government's options with respect to the NBN rollout, but it would continue business-as-usual activities, including construction of the network under existing contracts (Taylor 2013).

Intergovernmental negotiations and official visits

Intergovernmental negotiations

The focus of jurisdictional advice on intergovernmental negotiations centres on attendance at ministerial councils and forums, where it could be expected (by other governments) that someone from the relevant jurisdiction would be involved. The Commonwealth and Tasmania are silent on such negotiations, but other jurisdictions are in close agreement that, if possible, the government should seek to defer negotiations. If the interests of the state need to be represented at the Council of Australian Governments (COAG) or a ministerial council, it is accepted practice for a senior official to attend with observer status and with a limited role of supplying factual information on past positions. It is quite clear that no commitment or agreement should be entered into that would commit an incoming government.

The option of seeking Opposition agreement to a negotiating position is also canvassed by some jurisdictions. The lead time for major Commonwealth–state negotiations is quite considerable, and with the majority of jurisdictions on fixed terms, this is an area that has not been open to major breaches. The frequent number of elections in Australia means that senior officials are well versed in handling these protocols. The long lead times around negotiated agreements and the annual nature of most ministerial council meetings have left this area relatively free of controversy. However, some negotiations can leak into the caretaker period, and we consider these and other pressures on the observance of caretaker conventions in Chapter 7.

Official visits

Official visits of dignitaries are not covered by guidance documents in all jurisdictions. New South Wales, Western Australia and the Australian Capital Territory are silent on this issue. The other jurisdictions have a high level of unanimity regarding how visits from dignitaries should be handled.

The common advice is to defer the visit if possible, with either the Prime Minister or relevant Premier taking the decision. Dignitaries who have scheduled a visit should be advised of the calling of the election and the reduced availability of ministers to meet them. The Commonwealth, with its responsibility for foreign affairs, recommends the government either seeks to defer negotiations or adopt observer status (DPM&C 2013, p. 3).

Dealing with requests from ministerial offices

Requests from ministerial offices during an election campaign can be a source of conflict and uncertainty between the government and the bureaucracy. It is often an area where the government tries to push the advantages of incumbency and exert pressure on what had been a responsive bureaucracy. The elements of advice from the guidance documents are consistent in how to deal with requests from ministerial offices. During the caretaker period, departments are restricted to giving factual advice — not policy advice — to ministerial offices. It is acknowledged that ministers can determine the use to which the material can be put, though it is obviously inappropriate for officials to assist with adding this material to party political material. The majority of jurisdictions have a caveat on the supply of information based on the Commonwealth guidance, which suggests it is appropriate to decline a request if it requires 'the use of significant resources and was clearly for use in an election campaign' (DPM&C 2013, p. 7).

The majority of guidances remind officers to avoid any perception of partisanship in their dealings with ministerial offices, and the sensitivity of this interaction is acknowledged by advising that any concerns should be referred to the department's CEO or to the CEO of the central agency. It is accepted that the level of judgement required with regard to some requests should not be the responsibility of a junior officer. The South Australian guidance, for example, recommends all communication with a ministerial office pass through the CEO's office (SADPC 2013, p. 8). This would enable agencies to operate at arm's length from political activity while the ongoing business of government continues.

Once again, it is stressed that the day-to-day business of government continues. The Commonwealth, Victorian and Tasmanian guidances all acknowledge that, given the potential for urgent domestic or international issues to arise, advice should be provided to protect Australia's or the state's interests. This is particularly relevant in the areas of federal responsibility for defence and national security, where international crises and circumstances mean Australia could be in a position of needing to agree on a new policy during a caretaker period.

Restrictions on advertising and information campaigns

The handling of government advertising and information campaigns reveals divergent practice among Australian jurisdictions, and is an area that has seen tightening up of procedures in recent years. All jurisdictions agree on the need to be able to continue to disseminate material in the public interest and to stop communications that represent a political interest. Campaigns cited as addressing the public interest include defence recruitment, health promotion, road safety or material of an operational nature. There is general agreement that material can be classified as political if it highlights government achievements and policies, features the minister or is a matter of contention between parties. Decisions on advertising and information campaigns need urgent attention at the beginning of an election campaign.

Jurisdictions have developed different mechanisms to handle decision-making on the continuation of advertising and marketing campaigns. The Commonwealth[2] and Western Australian governments identify the head of a department as the responsible officer to make the recommendation on what campaigns should be discontinued. Queensland and Tasmania leave the decision at the political level, with the Premier deciding on which campaigns to curtail. The ACT introduced legislation in 2009 to appoint an independent reviewer, who is not a public servant, to report the Legislative Assembly on proposed campaigns. For South Australia and the Northern Territory, individual agencies review all public information campaigns and decide which to defer. Victoria has a mixed model, in which agencies review all campaigns scheduled to take place during the caretaker period, with any that promote government policies being sent to ministers for review. New South Wales has addressed the concerns about governments ramping up advertising before the caretaker period by introducing a 'quarantine period' for two months prior to the state election. The *Government Advertising Act 2011* (NSW) legislates to prohibit any party political material in government advertising, and has a provision for a governing political party to pay back the costs of any campaign that breaches the legislation (NSW Government 2012, p. 4).

This mixture of approaches demonstrates the dual nature of caretaker conventions. Is it a guide for ministerial behaviour or a guide for departments to manage within the intense atmosphere of an election campaign? The divide is explicit in the handling of advertising campaigns, where some departments take back the decision-making as a check on the power of incumbency while

2 In the Commonwealth, the Departments of Finance and Deregulation and Prime Minister and Cabinet undertake the review.

others leave the management of the decision to the head of the government, the Premier. The Commonwealth guidance makes it explicit that bipartisan agreement should be sought for campaigns that are to continue.

Government advertising has proved highly contentious in recent years, and has been described as 'the single most significant benefit of incumbency' (Young 2005). These issues were canvassed in a Joint Standing Committee on Electoral Matters inquiry into the conduct of the 2004 election. In her submission, Melbourne University academic Sally Young identified a number of instances where the government's use of advertising might have been questionable. These included what Young (2005, p. 3) describes as an extensive 'warm-up' period in the lead-up to the election campaign, during which there was a very large increase in government spending on advertising. Although she notes it is not unusual to see 'spikes' in government advertising expenditure immediately prior to an election, 'what was unusual in 2004 was the extent of pre-election spending and the sheer variety of government ads that were run. The federal government spent somewhere between $32 and $40 million between May and June alone.'

'Even more startling,' according to Young (2005, p. 3), 'was the government's reluctance to forgo government advertising even during the election campaign.' The 'Help Protect Australia against Terrorism' campaign ran extensively on TV, radio and in newspapers during the election period. Under caretaker conventions, this campaign had to be approved by Labor. Media reports suggest that the government 'had Labor over a barrel' with the anti-terrorism campaign. If it refused, it could be 'accused of preventing the community from being warned about the dangers of terrorism' (*Canberra Times* 2004). Labor agreed to the ads continuing on terms negotiated with the government, including the stipulation that the ads must specify they were authorised by the Australian Federal Police (AFP).

By Boat, No Visa campaign

These issues were replayed in the 2013 federal election campaign with the issue of government advertising once again on the front page. The Rudd government decided to continue the $30 million *By Boat, No Visa* campaign during the election. The ads were run in mainstream media, including television, radio and newspapers, and were aimed at deterring asylum seekers from travelling to Australia by boat. In line with the *Guidance on Caretaker Conventions*, all advertising campaigns were reviewed at the beginning of the caretaker period by the Departments of Finance and Deregulation and the Prime Minister and Cabinet. Bipartisan agreement was then sought for campaigns that were to

continue. In the case of the *By Boat, No Visa* campaign, Opposition Leader Tony Abbott wrote to Prime Minister Rudd advising that the Opposition did not support the continuation of these ads in Australia (Abbott 2013a).[3]

When the government decided to continue airing the advertisements, the Opposition Leader then followed up with a letter to the Secretary of the Department of the Prime Minister and Cabinet, Dr Ian Watt, asking him to enforce the convention. The Secretary replied:

> responsibility for observing the conventions ultimately rests with decision makers, be they agency heads or, in the cases where they are involved, with Ministers and/or the Prime minister. Decision makers, including Ministers, are not prevented from making decisions, as the conventions are not legally binding. The Department does not have the power to enforce the observance of the conventions. (Watt 2013c)

In defending this decision, Immigration Minister Tony Burke said the caretaker conventions provided for consultation and that had occurred (Ross 2013). The independent Auditor-General, Ian McPhee, was also involved in the controversy when a complaint about the continuation of the ads was made to him. His response was 'the caretaker conventions give the government latitude when it comes to advertising campaigns, and noted in any case the conventions were not legally binding' (Morozow 2013).

Following the election of the Liberal coalition government, the Secretary of the Department of Finance, David Tune was asked about the continuation of the advertising at the Senate Estimates hearings. He described his involvement:

> The issue was on this occasion we were in the caretaker period and there are conventions around actions by public servants in that period of time, which I take seriously as a secretary and my department takes seriously. There was a contrary view. As a result of that the direction occurred (Senate Estimate Hearing 2014:43).

The Secretary went on to say he could not recall another instance where a senior official was directed by a Minister to continue on an advertising campaign during an election.

This controversy exemplifies the circular arguments that can revolve around caretaker controversies. The department makes a recommendation; the government can choose to ignore the recommendation; and the Opposition tries in vain to find an avenue to have the decision overturned. As Ian Watt pointed

3 In his 6 August 2013 letter to Prime Minister Rudd, Tony Abbott agreed to the continuation of the 'offshore' component of the advertising campaign, but found the 'onshore' component was 'being used for partisan political purposes within Australia' (Abbott 2013b).

out in his letter to Tony Abbott, the respective Secretaries were directed by their ministers to continue the campaign. He said 'both Secretaries have complied with the directions, as they are required to under the *Public Service Act*' (Watt 2013c). Watt's letter makes clear the basis on which the advertising campaign would continue — at the lawful direction of ministers, which by law and convention, officials are bound to follow. His response can be read as an effort to safeguard public service neutrality amidst a bitter and rapidly escalating partisan battle. Both the 2004 and 2013 advertising controversies show that both sides of Parliament will weather the controversy on continuing advertising campaigns because they see the political value of the campaign as outweighing the damage from the objections of the Opposition.

The management of government advertising during an election campaign is further complicated by being covered by electoral legislation. The basis of the Commonwealth and state Acts revolves around the need for authorisation of any material that may affect voting patterns, with the concern of attracting a penalty if the legislation is breached.

There is less concern about managing printed material during a campaign. The guidelines around printed material generally leave the decision to the discretion of the department, based on the previous criteria — does the material promote the policies of the government, contain photos of ministers or focus on government achievements? The key point in the guidance documents is to avoid active distribution of material that could be seen to promote party political content. The passive distribution of material through responding to requests or making it available in public places is considered acceptable.

Use of internet and electronic communications

Concern about misuse of the internet and electronic communications is a fairly recent addition to many guidance documents, and the instructions given have become increasingly detailed. For the majority of jurisdictions, the starting point is that agencies are responsible for ensuring that government resources are not used to support any political party. To do this, the majority of guidances recommend agencies review their websites at the beginning of the caretaker period. They can then determine whether any material needs to be removed from agency websites, as well as any ministerial websites supported and maintained by that agency. Ministerial statements that criticise the Opposition are cited as an example of material that should be removed. The advent of social media and increased interactivity of government websites has meant the addition of new directions to manage these functions. Most jurisdictions recommend

agencies moderate previously unmoderated discussion forums and blogs, as well as posting a message explaining the restrictions of the caretaker period and advising that political material posted will be removed.

The guidances make a distinction between what can be added to *agency* websites and *ministerial* websites during the campaign. For example, it is generally agreed that agencies should only add portfolio-related announcements, factual material and material on existing policies and programs. For ministerial websites maintained by departments, it is agreed that only purely factual material should be added, and no material about future policies, how-to-vote material, political speeches and media releases that criticise the Opposition. The wisdom of adding exit or entry messages, particularly to ministerial websites that link to party political sites, is canvassed. The use of these messages draws a line between what is a funded government website and what is a link outside of the government domain. The Commonwealth's *Guidance on Caretaker Conventions* is supplemented in this area by the Australian Government Information Management Office Guidance on Departmental and Ministerial Websites (AGIMO 2013).

Government websites

The use of government websites provoked controversy during the 2004 federal election campaign. In September 2004, Opposition Finance Spokesman Bob McMullan wrote to then Secretary of Defence Ric Smith, alleging that then Minister Robert Hill had breached the caretaker conventions by posting four election-related announcements on a website maintained by the Department of Defence after the campaign had commenced (Kerin 2004). Of particular concern to Labor was the announcement of a new Defence headquarters at Bungendore, in the Coalition-held marginal seat of Eden-Monaro. McMullan argued that since it related to future policies and election commitments, the announcement should have been posted on the Liberal Party website.

In his letter of response to the shadow minister, the Secretary explained that Defence had closely followed the guidance document issued by the Department of the Prime Minister and Cabinet. He noted the website in question was not a departmental website, but one defined in the conventions as an agency-maintained 'ministerial website'. In accordance with the conventions, Defence put a notice on the website stating that no political or election-related material would be available on the website. The same notice appeared as a 'pop-up message' to advise visitors when they were leaving the website. Smith's letter also noted that the conventions are not infringed when decisions taken prior to the commencement of the caretaker period are announced during an election campaign. He reiterated his appreciation of the sensitivity of matters

raised by the Opposition, but stated his belief that Defence was and had been discharging its duties diligently and professionally. However, he advised the shadow minister that, in order to 'minimise the risk of controversy', henceforth 'all of the media materials generated by our ministers and parliamentary secretary since 31 August [commencement of the caretaker period], and all future media materials, will now be posted by ministerial staff to the website of the Liberal Party of Australia' (Department of Defence 2004).

This example underscores the sensitivity of issues raised during the caretaker period, and the need for careful judgement when weighing questions of whether an incumbent government is advantaged through the support services available to ministers in the normal course of administration. It also demonstrates the contested interpretation of the conventions, particularly in areas of new and emerging practice. Notwithstanding the Secretary's confidence that Defence had adhered to the conventions, he initiated a change in the procedure followed — a concession, perhaps, that the principle of avoiding APS involvement in election activities should be the dominant consideration in this instance. As expected, more detailed advice on websites and electronic communications is included in the DPM&C caretaker conventions guidance issued in August 2007. The 2013 Guidance states that 'as a general rule during the caretaker period, ministerial media releases and alerts should be placed on the website of the relevant political party' (DPM&C 2013, p. 5). New advice about interactive and funded websites (DPM&C 2013, p. 5) illustrates the impact of emerging issues and technologies on the evolution of caretaker practices.

As well as detailed guidance about the management of agency and ministerial websites, the majority of jurisdictions caution that departmental email and bulletin boards should not be used to publish political material.

The Queensland guidance document is silent on the management of the internet and electronic communications during an election campaign. However, in Queensland, advice on the management of ministerial websites is provided in a letter from the Director-General of the Department of the Premier and Cabinet to each department head when caretaker conventions commence. It mirrors the advice provided in other jurisdictions. South Australia puts the obligation on ministers to ensure that political material is not present on publicly funded websites.

The Northern Territory takes a slightly different approach, consistent with the approach to advertising material. It recommends that all agency websites carry an authorisation identifying the senior officer who is responsible for comment on the website. It also recommends the use of entry and exit statements so users are clear about when they are no longer within a government site (NTDCM 2012, p. 16).

Social media

The growth of digital communications, and the use of social media tools such as Facebook, LinkedIn and Twitter to deliver public information and services, have necessitated new advice and guidance about how these activities should be managed during the caretaker period. The Commonwealth guidance recommends that agencies adopt approaches similar to those that apply to ministerial websites. It notes that AGIMO issues additional technical guidance about the use of interactive online engagement tools for federal employees. In 2013, the Australian Government Chief Technology Officer used his blog to issue advice about the application of caretaker conventions to government websites and via social media (Sheridan 2013). He emphasised the need to moderate comments or communications that could be viewed as contentious, or as conferring advantage on the incumbent government; and to carefully monitor online promotional or awareness-raising activities. He referred officials seeking further information to related guidance from the Australian Public Service Commission (APSC 2012).

The need for detailed guidance on the use of electronic communications during an election campaign is a useful illustration of the dynamic nature of caretaker conventions, and their flexibility in adapting to changing imperatives — in this case, rapid developments in technology.

Using the public service for policy costings

There is no set approach across jurisdictions to the issue of costing election policy commitments. Queensland, South Australia and the Northern Territory are silent on the issue. The Commonwealth has the most detailed guidance on policy costings. The guidance is given statutory sanction in the *Charter of Budget Honesty Act 1998* (Cth).[4] This Act outlines the process for the costing of election commitments by both the government and the Opposition. The Act states the Prime Minister may request the secretaries of the Departments of Treasury and/or Finance to prepare costings of publicly announced government policies. Requests from the Leader of the Opposition are given to the Prime Minister, who may agree to refer them to the responsible Secretaries. The onus is then on the responsible Secretary to release the policy costings before polling day.

To further complicate this process, the federal Parliament established the Parliamentary Budget Office (PBO) in 2012. It was established as an independent body to provide to the Parliament an independent analysis of forward estimates

4 For a detailed assessment of the Charter of Budget Honesty's genesis and early performance, see Wanna et al. (2000, pp. 245–58). For more recent, critical appraisals, see McMullan (2007) and Wanna (2006).

and the financial implications of policy proposals. Within the caretaker period, it can prepare election policy costings for either a parliamentary party or an Independent (DFD 2012).

Both New South Wales and Tasmania have legislated a Charter of Budget Honesty which allows for both the Premier and the Leader of the Opposition to request costings of publicly announced policies. Victoria allows the Department of the Treasury and Finance, in conjunction with the relevant agency, to cost government and non-government policies as long as the assumptions for the costings are identified and agencies are not required to undertake extensive policy research. Requests are made through the Premier, and a political party may only request costings of its own policies. In Western Australia, the *Financial Responsibility Act 2000* (WA) ensures the Treasurer releases a financial projections statement within ten days of the dissolution of the Legislative Assembly. Major political parties can then request costings of election commitments directly from the Under Treasurer — a different approach from other jurisdictions, which maintain a political control over requests through the Premier. Like Western Australia, the Australian Capital Territory allows for costings to be directed to the Treasury Directorate, and to be released publicly by the Director-General prior to the polling day.

Use of agency premises

The majority of jurisdictions accept the 'appropriate' use of government premises for media conferences and functions during an election campaign. The formula for determining 'appropriateness' is that if agency resources are involved, it is appropriate for the Opposition spokesperson, member or candidate to also be invited. Public servants should be even-handed in giving assistance to both government and Opposition. This general approach is used by the Commonwealth, Victorian, South Australian, Northern Territory, Tasmanian and ACT governments. All agree it is not appropriate for public servants to provide logistical support for political functions.

This use of agency premises is less developed than some other areas of concern within caretaker conventions. For example, no guidance is given on who is to arbitrate on this issue — it appears to be left to the discretion of local managers. In Western Australia, if Members of Parliament or candidates wish to visit a government facility, the CEO must be notified and they are to be accompanied by a representative during the visit. The New South Wales guidance states Members of Parliament wanting to visit agency premises have to seek the permission of the minister, except when the premises are in their own electorate.

Queensland is silent on the issue within its guidance documents, but expects that, during an election campaign, agencies will continue to use protocols that already exist to manage visits to government facilities.

This is an issue which can have local application in a way that many of the other conventions do not, as local officers are required to take decisions about political figures with whom they have an ongoing working relationship. Visiting departmental premises also became politicised. During the last federal election the Queensland Education Minister, John-Paul Langbroek, banned federal Education Minister Peter Garrett from visiting two state schools. The Queensland minister said 'schools are being used as political stages' and 'we don't think this is good for either students or staff' (Bourke 2013).

Pre-election consultation with the Opposition

Most jurisdictions have quite detailed and prescriptive advice on how the public sector should handle consultations with the Opposition. The focus of the advice is on the government restraining and limiting the bureaucracy in its dealing with non-government parties. This differs from the general focus of the guidance documents, which is based on giving the bureaucracy support and advice in constraining the behaviour of the incumbent party.

A very similar process is outlined in each guidance document. The accepted procedure is for the Opposition spokesperson to make application to the minister, who then forwards it either to the Prime Minister or Premier for consideration. In the Commonwealth, ministers decide whether to agree or not, and then advise the Prime Minister of the request and the decision. Guidance documents stress that the approach must come from the non-government parties, not officials. The scope of the meeting is limited to machinery of government, administrative and technical issues: it is stressed that officials are not authorised to discuss government policy or give opinions. The discussions are confidential, but ministers are entitled to inquire whether the meeting stayed within the agreed purposes. It is worth noting that the Commonwealth, Victorian and Queensland governments apply a different commencement time to the process of consultation with the Opposition than the application of the more general caretaker conventions. Consultation can commence, in the case of the Commonwealth and Victoria, three months prior to the expiry of the House of Representatives (Commonwealth) and two months in Queensland, or the date the election is announced — whichever comes first.

There are some differences between jurisdictions. For example, in Queensland an official from the Department of the Premier and Cabinet sits in on the meeting with the departmental CEO. Queensland is also quite specific that no special

material should be prepared, and that only existing material such as annual reports or program statements should be made available. Western Australia has slightly reversed the process, in that the Opposition approaches the minister, who then refers the matter to the CEO, who is responsible for advising the minister when discussions have taken place: the minister then advises the Premier.

The Commonwealth guidance notes that consultation guidelines are different from caretaker conventions. As noted, the guidelines were first tabled in the House of Representatives in December 1976. These initial guidelines allowed direct approaches to departments by Opposition spokespeople. They were subsequently amended. The new guidelines were presented to the Senate on 5 June 1987. Consultation with the Opposition remains a contentious issue, with some senior public servants concerned that shadow ministers may see briefings as opportunities to score points on their opponents through their portfolio agencies.

Post-election consultation

The caretaker period ends when the election result is clear, or if there is a change of government, until the new government is appointed. Most elections deliver clear results, but occasionally – as in New South Wales in 1991, Queensland in 1998, Victoria in 1999, the Commonwealth and Tasmania in 2010, and South Australia in 2014, it took some time for the final result to be determined and for political parties to negotiate the support necessary to form government.

Some argue there is an increasing trend to minority governments (see, for example, Reece 2012), and that this will necessitate greater attention to caretaker conventions in the post-election period, as is routine in jurisdictions like New Zealand (see Chapter 6). For the public service, uncertainty in the aftermath of an election creates a range of practical problems. Who is eligible to receive advice and briefing from departments? How should agencies manage the preparation of incoming government briefs when the composition of the government and the timing of the swearing in of a new government are unclear?

Non-finalised legislation

Guidance on what happens with non-finalised legislation appears rather vague and variable. The formulation used by the Commonwealth, New South Wales and Victoria is that if Bills have passed through both Houses, they should be assented to by the Governor-General or Governor before the dissolution of the

Lower House. In respect of Bills passed by both Houses, but still awaiting Royal Assent after the dissolution, the Commonwealth Office of Parliamentary Counsel (OPC) notes that 'it would be improper for such Bills not to receive assent' (OPC). The Commonwealth guidance acknowledges the constitutional uncertainty about the validity of Acts that receive assent in the period between dissolution and the opening of the new Parliament. To avoid such controversies, the OPC endeavours to ensure that all such Bills are assented to prior to dissolution of the House.

Queensland is quite specific that Bills introduced but not passed lapse, as do Bills awaiting Royal Assent. South Australia and Western Australia have a slightly different practice in that all Bills that have not passed through both Houses automatically lapse when the Lower House is dissolved. South Australia makes provision for legislation passed and assented to before the election to be proclaimed during the caretaker period. In Western Australia, there is provision for Bills to be given assent during the caretaker period, notwithstanding the dissolution of the Legislative Assembly. Western Australia allows for Bills to be proclaimed when they come into operation during the caretaker period. The Tasmanian formula is that Bills passed by both Houses should be assented to by the Governor, but may lawfully receive assent later. Tasmania also has provision for legislation to be 'proclaimed' during the caretaker period, but with the caveat that the decision to make the proclamation should not be made once the caretaker period has begun. Proclamations that fall within this period (made from earlier decisions) will still have effect.

The approaches of the Australian Capital Territory and the Northern Territory are slightly different. The ACT allows for a minister to approve by gazettal the commencement of legislation that has been passed in the Legislative Assembly. In the Northern Territory, Bills that have been introduced to the Legislative Assembly but not passed automatically lapse, although every effort should be made before prorogation to gain assent from the Administrator to those Bills already passed. There is a capacity, based on the advice of the Clerk of the Legislative Assembly, for a proposed law to be presented to the Administrator for consent during the caretaker period.

There is general agreement among all jurisdictions on the handling of subordinate legislation. Where there is no infringement of the caretaker conventions, it is considered acceptable for subordinate legislation to be approved by the Governor-in-Council, or equivalent, during the caretaker period. So, for instance, a Governor may approve minor amendments to traffic regulations if they are forwarded by the Transport Department during the caretaker period.

Meetings of Executive Council

All jurisdictions identify some capacity for the Executive Council to meet during the caretaker period, but with different levels of advice on whether the meeting should be routine or exceptional. For example, the Commonwealth, Victoria, New South Wales, Tasmania and Western Australia all make provision for limited and infrequent meetings to deal with routine business such as regulations and ordinances. Queensland does not hold ordinary meetings of the Executive Council during the caretaker period, but a special sitting can be held with the consent of the Governor and the Premier. Each jurisdiction offers the caveat that the business considered should not infringe the caretaker provisions concerning the taking of major decisions or binding an incoming government. To decrease the necessity for the Executive Council to meet during the caretaker period, most jurisdictions make provision for a 'tidy-up' meeting before commencement to approve new regulations.

In South Australia, it is accepted practice for the Executive Council to operate after the dissolution of the House of Assembly. The guidance cites the principle of the separation of powers to support that view. In the Northern Territory, the advice suggests that the Executive Council should cease, although provision is made to convene in exceptional circumstances. Although there is differing practice across jurisdictions, the general consensus is that there is a need to provide for the management of non-controversial routine business of government.

Meetings of Cabinet

The majority of jurisdictions are either silent on the meeting of Cabinet during the caretaker period, or acknowledge that it would not meet. If Cabinet did need to meet, items considered would be consistent with the caretaker conventions. The exception is South Australia, which states that during the caretaker period the normal business of executive government continues because of the separation of powers between the Parliament and the Executive. Cabinet can continue to meet for routine matters, but not major undertakings, initiatives or appointments. This is a different interpretation from other jurisdictions, which base their approach on the convention of responsible government holding that, with the dissolution of the House, the executive cannot be held responsible for its decisions in the normal manner.

A crisis situation might necessitate a Cabinet meeting during the caretaker period. This was the case in 1914 with the outbreak of the First World War during a Commonwealth election campaign (see Weller 2007, pp. 30–2).

Cabinet and other documents

The management of Cabinet documents during an election campaign falls under another set of conventions guiding the working of Cabinet. The convention is that Cabinet documents and decisions are confidential to the government that created the documents, and are not made available to successive governments. All jurisdictions cite this convention and adhere to the same process. Each department is responsible for retrieving and securing its Cabinet documents ready for return to the Cabinet Secretariat in the event of a change of government. The Cabinet Secretary is custodian of Cabinet records for the government and previous governments; if required, Cabinet Secretariat will take over the management of Cabinet documents and issue detailed instructions for their return and lockdown.

Correspondence

Correspondence is an area where the need for agency judgement is once again identified. The principle for all jurisdictions is that correspondence should not be allowed to accumulate during the caretaker period. For practical reasons — mainly that ministers are usually busy or travelling for the campaign — there is general agreement they should only sign necessary correspondence. Agencies need to exercise judgement about whether correspondence is to be signed by the minister, CEO or another departmental officer. Most of the guidance documents focus on protecting the public service from any perception of partisanship. Details are given on avoiding the presumption that the government will be returned to office by referring to an 'incoming government'.

Public servants contesting elections

Not all jurisdictions cover this issue within their caretaker conventions; rather, it is generally the subject of a separate directive. Public servants have the same rights as other citizens to engage in the political process, though a range of considerations around impartiality and conflict of interest come into play if they do stand for office. The Commonwealth, Victoria, New South Wales, the Australian Capital Territory, Western Australia and the Northern Territory all warn that public officials should not use agency resources to support their personal political aspirations, and provide advice on how public speaking engagements should be managed.

The Queensland guidance states that public servants are entitled to contest state elections. They are not required to resign, but must take leave during the campaign. The details of managing leave provisions are subject to a separate directive. This process differs from the South Australian process, which requires officers to resign before the date of the declaration of the poll. If the candidate is unsuccessful, they can be reappointed and the break in service is deemed as leave without pay. Tasmanian candidates do not have to resign, and are entitled to leave without pay; however, if they are elected, their position is automatically terminated.

The Australian Constitution states that people cannot be chosen if they hold an office of profit under the Crown (s. 44 (iv)). Therefore, public servants — among others — must resign before nomination. But the *Public Service Act 1999* (Cth) (and the earlier 1922 Act) protects their positions if they are not successful (s. 32). This provision also applies when a public servant contests an election for a state parliament.

Other issues

A range of advice is given on issues that appear in a small number of jurisdictions, which may be a response to local controversies.

Grants

The Tasmanian, ACT and Northern Territory guidance documents all include a section on the management of grants during the caretaker period. All three jurisdictions advise that payment can be made on grants approved prior to the caretaker period, but should be forwarded by the department rather than the minister. No commitments should be made on grant applications received during the caretaker period.

Senior officials from several jurisdictions report that contracts and grants are especially sensitive when it seems likely the sitting government will be defeated and there is contention between the political parties about the agency or programs involved. Government-owned corporations, which are at arm's length from the core departments, but report to ministers and hence are bound by the caretaker conventions, are wise to exercise caution in the caretaker period, especially when their operations — or their mere existence — court controversy. Their obligations must be balanced against commercial considerations — such as, for example, where a delay would attract contract penalties or significantly disrupt a project that had been approved and already commenced.

Statutory authorities

The Northern Territory is the only jurisdiction that makes mention of the relationship between ministers and statutory authorities and/or government-owned corporations under a separate heading. The Commonwealth guidance mentions the relationship with statutory authorities as part of its Introduction. Both advise that the relationship between ministers and statutory authorities will vary depending on the body, but they recommend these bodies should observe caretaker conventions unless to do so would conflict with their legal obligations or commercial requirements.

Travel

Western Australia offers detailed advice on travel for Members of Parliament. It outlines who can travel, and under what circumstances, at state expense during the caretaker period. It is very prescriptive and even includes a formula for calculating the costs for media representatives travelling on charter flights. The Commonwealth and Victoria both cite the convention that ministers do not claim travel allowance from the day of the campaign launch to the day after polling day. The exception is if ministers have to travel for Cabinet meetings or in connection with their ministerial duties. The Victorian guidance also outlines the travel entitlements for the leaders of non-government parties once the election is called.

Tabling and responses to reports

The Commonwealth, Victorian, Tasmania and ACT guidance documents all cover the issue of formal responses to parliamentary reports. The advice is that outstanding reports should be taken up with the incoming government; however, in the meantime, agencies can undertake preparatory work and consultation at the agency level so they can provide early advice to the incoming government.

The Commonwealth and Victoria both advise that administrative reports, such as annual reports, can be tabled out of session. The Australian Capital Territory has a detailed framework for annual reporting, and makes specific provision for the timetable to present annual reports in an election year.

Conclusion

This detailed comparison of the caretaker provisions in all Australian jurisdictions exposes some interesting observations about management of the caretaker conventions. The tendency has been to add detail and advice as new

issues emerge and need to be dealt with. Caretaker conventions were originally designed as a limited guidance for ministers on how to behave during an election campaign. The management of the updating of the guidances has since passed to the public service. Reflecting Australia's 'talent for bureaucracy', this transition has seen an increase in both the codification of behaviour and the complexity of the documents

The documents have also taken on a hybrid nature of providing advice to both ministers and public servants on how each should deal with the other during the caretaker period. Both sides seek to constrain the behaviour of each other, and this leads to some confusion as the guidances are giving advice for different audiences for particular issues. Despite increased codification, the real challenge in dealing with issues during the caretaker period still relies on judgement at both the political and public sector levels. Political judgement is required so as not to request the public service to undertake work that would compromise its impartiality. The public service must exercise judgement in ensuring it does not undertake work that would give the incumbent party an unfair advantage. The increase in prescriptive advice is an attempt to replace reliance on judgement with clear guidelines against which the behaviour of ministers and public servants can be acquitted. However, each election throws up new and unforseen challenges, and such an approach does not overcome the need for judgement to be exercised by senior staff.

Despite some local variations, the caretaker convention guidelines in all Australian jurisdictions remain clear about the principles behind the documents and the behaviour that derives from those principles. Given the caretaker period lasts for around 33 days every three to four years, the challenge for future versions is to maintain their intent and simplicity.

This text taken from *Caretaker Conventions in Australasia: Minding the shop for government*, 2nd edition, by Jennifer Menzies and Anne Tiernan, published 2014 by ANU Press, The Australian National University, Canberra, Australia.