



Express law *fast track information for clients*

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Election 2010: caretaker conventions

The Prime Minister is expected to announce a general election in the near future. Following the announcement of the election, Parliament will be prorogued and the House of Representatives will be dissolved.

Upon the dissolution of the House of Representatives, the Government will assume a caretaker position and caretaker conventions will apply. If the Government is returned, the caretaker period will end when the election result is clear. If there is a change of government, it will end when a new Prime Minister and other ministers are appointed.

The caretaker conventions have significant implications for the activities of the Government during the caretaker period. Some of the more important aspects of the operation of the caretaker conventions and associated practices that apply during the caretaker period are outlined below.

Overview of the operation of the caretaker conventions

During the period preceding an election for the House of Representatives, the Government, as a matter of convention, assumes a caretaker position. In accordance with the caretaker conventions, the Government should avoid making important decisions that would be likely to commit an incoming government and limit its freedom of action.

However, the day-to-day business of government continues during the caretaker period.

It should be noted that the caretaker conventions do not impose legal obligations on ministers, departments or other Commonwealth agencies or bodies. Therefore, failure to comply with them would not affect the legal efficacy of a particular action taken during the caretaker period.

The caretaker conventions are not 'hard and fast' rules, but they represent good administrative practice. Ultimately, the appropriateness of a proposed government action is a matter for the Government to decide. When taking such an action, the Government may take into account whether it could lead to controversy during the election campaign.

Not only departments and agencies but also other bodies, such as Commonwealth statutory authorities and companies, are expected to observe the caretaker conventions where that is consistent with law and there are not compelling organisational requirements to the contrary.

Important aspects of the operation of the caretaker conventions and associated practices

The caretaker conventions and associated practices do not affect the day-to-day business of government. However, they have significant implications for the activities of the Government during the caretaker period. Most importantly, the caretaker conventions suggest that a government should avoid:

- making major policy decisions
- making significant appointments
- entering into major contracts or undertakings.

Major policy decisions

Determining what constitutes a ‘major’ policy decision involves matters of judgment. Relevant considerations include:

- whether it is significant in terms of policy and resources
- whether it is a matter of contention in the election campaign.

The caretaker conventions apply to the making of decisions, *not* to their announcement. The announcement of decisions may still occur during the caretaker period. However, if the announcement of a decision is likely to cause controversy and distract from substantive issues in the election campaign, then, if possible, it should be made prior to the dissolution. Care should be taken to ensure that Commonwealth resources are not used to make announcements that involve partisan activities.

It is still possible for the Government to make a major policy decision during the caretaker period if necessary. In those circumstances, the relevant minister would usually consult the Opposition spokesperson before making the decision.

Significant appointments

In determining what constitutes a ‘significant’ appointment, regard would be had to:

- the importance of the position
- the degree to which it may be a matter of contention between the major parties.

If the deferral of appointment until after the caretaker period is impracticable, the relevant minister may be able to consider the following options:

- making an acting appointment where permissible
- making a short-term appointment that terminates shortly after the end of the caretaker period or
- if those options are not practicable, consulting the relevant Opposition spokesperson regarding a full-term appointment.

There have been instances in past caretaker periods where appointments were made following such consultation.

Major contracts or undertakings

In determining what a ‘major’ contract or undertaking might be, regard would be had to:

- the dollar value involved

- whether it relates to a matter of routine administration or implements or entrenches a program or an administrative structure or policy that is contentious
- whether ministerial approval is required.

If it is not possible to defer the commitment, it may be possible to consider the following options:

- consultation may occur between a minister and a relevant Opposition spokesperson regarding the commitment. There have been instances of such consultation during past caretaker periods
- agencies may explain to contractors that there is a possibility of a change of government and an incoming government may not wish to proceed, and arrange to have clauses included providing for termination in that event.

A similar approach could be taken to potential tenderers so that they are aware of the possibility that a tender might not be completed.

Ordinarily, the Government should also avoid entering into major commitments in the context of international negotiations or it may seek to adopt an observer status until the end of the caretaker period. If the Government needs to participate, it could seek the Opposition's agreement.

APS involvement in election activities

The caretaker period is a sensitive time for public servants. Accordingly, the Australian Public Service (APS) adopts certain practices intended to protect its apolitical nature and avoid the use of Commonwealth resources to advantage a specific party during a caretaker period.

Advertising and information campaigns

At the beginning of the caretaker period, the departments of Finance and Deregulation and the Prime Minister and Cabinet will review all advertising campaigns and recommend whether they should be continued or be deferred.

Agencies should avoid active distribution of material during the caretaker period if it promotes government policies or emphasises the achievements of the Government or a minister. However, operational-type campaigns, such as Defence Force recruiting, or public health campaigns, usually continue.

In this context, agencies also need to be aware of the impact of the *Broadcasting Services Act 1992* and the *Commonwealth Electoral Act 1918* on the conduct of information campaigns. Generally, under the Commonwealth Electoral Act, for example, an electoral advertisement would need to identify the name and address of the person authorising it and, for printed material, the name and place of business of the printer.

Other established practices include arrangements relating to the content and maintenance of agency and ministerial websites, electronic bulletin boards and email systems, use of agency premises, and requests from ministers' offices for information.

Internet and electronic communications

Agency websites may retain material placed on the websites before the commencement of the caretaker period in most cases. Agencies should check icons and links to ensure that they cannot be interpreted as promoting a government policy. In relation to ministerial websites, generally during the caretaker period, ministerial media releases and alerts should be placed on the website of the relevant political party. In certain instances it may be appropriate to include a media release in a minister's own name on agency-maintained/funded websites where there is administrative or operational information of high public interest and of a time-sensitive matter such as health warnings and travel advisories.

Requests from ministers' offices for information

In relation to requests from ministers, ministers may continue to ask for factual material from agencies during the caretaker period, and material relating to the day-to-day business of government is supplied to ministers in the usual way. The way this material is used is for ministers to determine. It may be appropriate to decline a request for assistance if it requires the use of significant resources and is clearly for use in the election campaign. If there is doubt, agencies should discuss with the minister or senior staff the purpose for which the material is to be used.

Subject to the need for urgent policy advice on domestic or international issues — for example, to protect Australia's interests — agencies should generally decline requests for policy advice during the caretaker period. Any request for legal advice on issues affecting a minister in his or her capacity as an election candidate should be declined.

Charter of Budget Honesty and other policy costings

In relation to policy costing by departments during the caretaker period, the secretaries of the Treasury and the Department of Finance and Deregulation have issued guidelines under the *Charter of Budget Honesty Act 1998* (see Charter of Budget Honesty: Costing Election Commitments). The guidelines can be accessed at <http://www.finance.gov.au/publications/charter-of-budget-honesty/index.html>. This Act provides for the secretaries to prepare costings of publicly announced government and opposition commitments during the election period. This Act does not apply to costings by other agencies during the caretaker period. Ministers can request costing information from other agencies in accordance with longstanding practice.

Related matters

There are also other related practices – for example, those dealing with consultation between APS officials and the Opposition, the handling of Cabinet documents and dealing with correspondence – that officials should also be familiar with.

Briefing of the Opposition may take place in accordance with the guidelines providing for pre-election consultation with the Opposition. The guidelines are reproduced in the material prepared by the Department of the Prime Minister and Cabinet referred to below. Under the guidelines, shadow ministers may request briefings from senior officials. These briefings are initiated by the shadow minister writing to the minister concerned. Officials are not authorised to discuss government policies or to give opinions on matters of a party political nature. Ministers and ministerial staff are not present at such briefings. However, they can seek general information from officials on whether the discussion kept within the agreed purposes.

This *Express law* draws heavily on material prepared by the Department of the Prime Minister and Cabinet and available on its website. For further information on the caretaker conventions and related materials, see the PM&C website:

http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.rtf

If further guidance is required in relation to matters arising during the caretaker period, officials could contact David Macgill, Assistant Secretary, Parliamentary and Government Branch, Department of the Prime Minister and Cabinet (T 02 6271 5761).

For further information please contact:

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