



Express law

fast track information for clients

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Election 2013: caretaker conventions

A general election is expected in the second half of 2013, with the last possible date for that general election being 30 November 2013. The Prime Minister will advise the Governor-General to dissolve the House of Representatives and to issue writs for a general election.

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 (see the [Guidance on the Caretaker Conventions](#) issued by the Department of the Prime Minister and Cabinet, updated in June 2013), 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.

Other bodies that are not government departments or agencies, such as Commonwealth statutory authorities and companies, are also 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 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. Decisions may still be announced 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 before the dissolution. Departments and agencies should take care 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 it is impracticable to defer the appointment until after the caretaker period, the relevant minister may consider:

- making an acting appointment where permissible
- making a short-term appointment that terminates shortly after the end of the caretaker period
- 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, relevant factors are:

- 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. The agency can arrange to include clauses 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.

Australian Public Service involvement in election activities

Established practices have been developed between ministers and their departments to protect the apolitical nature of the Australian Public Service (APS) 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 Department of Finance and Deregulation and the Department of the Prime Minister and Cabinet will review all advertising campaigns and recommend whether they should be continued or 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.

It is also important that agencies are aware of the impact of the *Commonwealth Electoral Act 1918* and the *Broadcasting Services Act 1992* on advertising and information campaigns. Generally speaking, the Electoral Act requires that any electoral advertisement identifies the name and address of the person authorising it and, if it is printed, the name and place of business of the printer. The Department of Finance and Deregulation has published [Electoral Law Authorisation Guidelines](#) on the authorisation requirements in the Electoral Act that provide guidance for agencies on campaign and other government advertising.

The Broadcasting Services Act contains additional obligations on broadcasters that apply during the 'election period'. The 'election period', for these purposes, only applies once a formal announcement is made. In addition, the Broadcasting Services Act provides for an election advertising blackout period that applies from midnight on the Wednesday before polling day. These Acts operate separately from the caretaker conventions.

Internet and electronic communications

Agencies may have to review the way they manage both the agency's website and a ministerial website. AGIMO has given [technical guidance on the separation of ministerial and agency websites](#).

In most cases, agency websites may retain material placed on the websites before the commencement of the caretaker period, but agencies should check to make sure that there are no recent statements that may affect the election – for example, statements that criticise the opposition in strong terms. Agencies should also check icons and links to ensure that they cannot be interpreted as promoting a government policy. During the caretaker period, agencies should only add the following materials to the agency website:

- portfolio-related announcements
- purely factual material, including costings

- information on existing policies and programs, so long as it does not include political material.

In relation to ministerial websites during the caretaker period, the agency should only place material on the website where it relates to existing policy or purely factual material.

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 or funded websites where there is administrative or operational information of high public interest or time-sensitive matters such as health warnings and travel advisories.

When dealing with social media, agencies should observe the same practices that apply to ministerial websites. AGIMO has provided [guidance on the operation and maintenance of agency engagement tools](#) such as blogs, message boards and chat rooms, as well as use of social media websites such as Facebook, Twitter and YouTube, during the caretaker period. In particular, agencies should consider ceasing engagement with such online tools during the caretaker period, disabling comments sections where possible, closely monitoring public contributions and posting a notice that the agency is operating in caretaker period and cannot respond to any political content.

Requests from ministers' offices for information

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

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 – Policy Costing Guidelines](#)). The Act and Policy Costing Guidelines provide for the secretaries to prepare costings of publicly announced government and opposition election commitments during the caretaker period. They do not apply to costings by other agencies or costing of minor parties' and independents' commitments during the caretaker period. However, ministers can request costing information from any agency in accordance with longstanding practice.

The Parliamentary Budget Office (PBO) was established on 15 February 2012. During the caretaker period, the PBO may prepare policy costings of parliamentary parties that are not covered by the Charter of Budget Honesty (that is, minor parties and independents). The requests and costings must be publicly released. To prevent duplicate costings being undertaken, a party member cannot request the PBO to prepare a policy costing for a policy that Treasury and Finance have already prepared costings for and vice versa.

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 be familiar with.

Briefing of the opposition may take place in accordance with the guidelines provision for pre-election consultation with the opposition. Although these guidelines are separate from the caretaker conventions, they are reproduced in the [Guidance on Caretaker Conventions](#) (see Part 7.5). The guidelines on pre-election consultation with the opposition start to apply from the earlier of the date when the election is 'announced' or three months before the expiry of the House of Representatives. Because the House will expire on 27 September 2013, the pre-election consultation period guidelines commenced operation on 27 June 2013.

Under the guidelines on pre-election consultation with the opposition the shadow ministers may receive briefings. The opposition may initiate the request 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.

Conclusion and contacts

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](#).

If further guidance is required in relation to matters arising during the caretaker period, officials could contact Government Division in the Department of the Prime Minister and Cabinet (T 02 6271 5399).

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