



ACT
Government

AUSTRALIAN CAPITAL TERRITORY

2012 GENERAL ELECTION

GUIDANCE ON CARETAKER CONVENTIONS

Updated * – September 2012

* Updated at Section 4(c) to reflect passage of the *Election Commitments Costing Act 2012*, and 4(k) to correct a typographical error.

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1. Introduction

It is the accepted practice of State, Territory and Commonwealth Governments in Australia that special operating arrangements apply in the caretaker period immediately before and after an election.

During the caretaker period, the ongoing business of government service delivery and administration continues. However, successive Australian Capital Territory (ACT) Governments have followed a series of accepted practices, known as the “caretaker conventions”, which aim to ensure that their actions do not bind an incoming government and limit its freedom of action. In summary, the conventions are that the government avoids:

- making major policy decisions that are likely to commit an incoming government;
- making significant appointments; and
- entering major contracts or undertakings.

The caretaker conventions also prescribe arrangements that reinforce the apolitical nature of the ACT Public Service by avoiding the use of Territory resources in a manner that advantages a particular party. In so doing, they also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign.

These guidelines apply to ministers, ACT Public Service Directorates, and all other ACT Government agencies and entities. All ministers and public employees are expected to uphold the caretaker conventions as set out in these guidelines, which have been endorsed by the Chief Minister.

2. The Caretaker Period

In accordance with the provisions of Section 100(1) of the *Electoral Act 1992* (the Electoral Act), the ACT is scheduled to hold a general election for the Legislative Assembly on Saturday, 20 October 2012.

In other jurisdictions it is accepted practice that the caretaker period commences with the dissolution of the Parliament. This reflects that, after dissolution, there is no parliamentary chamber to which a government may be held accountable. However, in the ACT, where the Legislative Assembly is not dissolved until the day of a general election, the caretaker period must be defined differently.

The ACT’s caretaker conventions apply from the beginning of the “election period” as defined by the Dictionary of the Electoral Act:

election period, in relation to an election, means the period -

- (a) beginning on the first day of the pre-election period; and
- (b) ending when the result of the election is declared under section 189.

The “pre-election period” is defined as:

the period of 37 days ending on the end of polling day for an election.

In these guidelines, the term caretaker period is used to describe the time between the commencement of the pre-election period and the first sitting of the new Assembly.

The *Australian Capital Territory (Self-Government) Act 1988 (Cwlth)* requires the Legislative Assembly to elect one of its members as Chief Minister on the first sitting day following a general election. The Chief Minister then appoints Ministers to form the Government.

In 2012, the caretaker period begins on 14 September and ends with the election of the Chief Minister on the first sitting day of the Legislative Assembly following the election.

3. Operations of the Government

The ordinary business of government service delivery and administration continues during the caretaker period. However, the caretaker conventions impact on a number of areas of government administration.

3(a) Policy Decisions

The Cabinet does not normally meet during the caretaker period.

The Government should avoid taking major policy decisions likely to commit an incoming government. What constitutes a major decision is a matter of judgement, but relevant considerations include not only the significance of the decision in terms of policy and resources, but also whether the decision is a matter of contention in the election campaign.

This restriction does not affect the implementation of policy decisions taken before the caretaker arrangements came into effect, nor does it affect ongoing service delivery effort. In particular, given the timing of the expected passage of the 2012-13 Budget by the Legislative Assembly in August 2012, it is entirely appropriate that work continue on the implementation of initiatives announced and funded in that Budget.

Where possible, however, it is desirable that decisions be announced before the start of the caretaker period.

If circumstances require the Government to make a major policy decision during the caretaker period that would potentially commit an incoming government, this should be done in consultation with the relevant opposition and cross bench spokesperson.

The Government may, of course, announce during the caretaker period new policy initiatives that it proposes to implement after the election, should the Government be returned.

3(b) Appointments

The Government should generally avoid making appointments (e.g. to a statutory office or a board or committee) during the caretaker period.

Ministers should:

- (i) if possible, defer the appointment until after the caretaker period;
- (ii) if an appointment needs to be made for reasons of continuity, appoint for a short term only to carry through until after the caretaker period; or
- (iii) if a short-term appointment is not practicable, appoint for the full term, following consultation with the relevant opposition and cross bench spokesperson.

3(c) Contracts and Undertakings

The Government should avoid entering into major contracts or other undertakings during the caretaker period. When considering whether a contract or undertaking qualifies as major, relevant considerations include the dollar value of the commitment, and whether the commitment involves a routine matter of administration or rather implements or entrenches a policy or program that is politically contentious. A further consideration is whether the commitment requires ministerial approval.

If a major contract or undertaking cannot be deferred until after the caretaker period, the Government should seek the agreement of the relevant opposition and cross bench spokesperson before entering into the contract or undertaking. Alternatively, directorates and agencies could also explain the implications of the election to the contractor and ensure that contracts include clauses providing for termination in the event of an incoming government not wishing to proceed. Similarly, in the case of tenders, agencies should warn potential tenderers about the implications of the election and the possibility that the tender process might not be completed.

3(d) Ministerial Attendance at Intergovernmental Meetings

Ministers do not generally represent the ACT in intergovernmental meetings scheduled during the caretaker period. Where possible, postponement of such meetings should be requested until after the election. If postponement is not possible, senior officials should attend the meeting in an observer capacity to ensure that the incoming government is fully informed of progress. It is appropriate for officials to brief ministers on the matters discussed and outcomes reached at such meetings during the caretaker period.

The usual practice is for the Head of Service to write to jurisdictional counterparts advising them of the timing of the election and seeking their cooperation with intergovernmental arrangements during this period.

3(e) Requests by Ministers of Directorates and Agencies

Ministers may seek factual information from officials during the caretaker period, some of which may be incorporated into ministerial speeches or political publications. It is inappropriate for officials to be involved in the incorporation of this material into information of a party political nature. It is also inappropriate for officials to speculate as to the purpose to which factual information provided might be put in assessing whether or not it should be provided.

To avoid controversy in the caretaker period about claimed breaches of the apolitical and impartial values of the ACTPS, it may be appropriate to decline a request for assistance if it requires the use of significant resources.

Directorates and agencies need to exercise the utmost care not to become involved in critiquing or otherwise providing advice on matters of policy during this period.

3(f) Commencement of Legislation

During the caretaker period, a minister may, by notified commencement notice, and with the approval of the Chief Minister, approve the commencement of legislation that has been passed in the Legislative Assembly.

4. Operations of Directorates and Agencies

During the caretaker period, the ongoing obligation on directorates and agencies to act in an apolitical manner in keeping with the *Public Sector Management Act (1994)* (the PSM Act) takes on added significance.

4(a) Ministerial Correspondence

Ministers would usually sign only the necessary minimum of correspondence. Any correspondence beyond this necessary minimum should be prepared for signature by directors-general or heads of agencies or their delegates (in consultation with the minister's office), rather than allowing the correspondence to accumulate for an incoming minister.

In preparing correspondence, directorates and agencies should avoid using language that might be construed as implying any particular outcome of the election. References to post-election action should be expressed in terms of "the incoming Government".

4(b) Cabinet Documents

Before the date of the election, the directors-general and heads of agencies must ensure that all Cabinet documents are accounted for and securely stored so that, if there is a change of government, the documents can be returned promptly to the Cabinet Office for destruction in accordance with the provisions of the *Cabinet Handbook*. Alternatively, documents may be destroyed by Cabinet Liaison Officers according to the guidelines given in the *Cabinet Handbook*, which can be found at <http://www.cmd.act.gov.au/functions/publications>.

4(c) Pre-Election Budget Update and Policy Costings

The Director-General of the Treasury is required, under Section 20C(1) of the *Financial Management Act 1996*, to prepare a pre-election budget update and provide it to the parliamentary counsel for notification at least 30 days before the polling day of an ordinary election.

The purpose of the pre-election budget update is to give the electorate an accurate picture of the Territory's financial position before the election, and allow the assessment of the Government's financial performance against its financial policy objectives and strategies. The update should include budget estimates for the Territory, General Government Sector and Public Trading Enterprises.

The *Elections Commitments Costings Act 2012* prescribes a process for the costing of publicly announced election commitments of the leader of a registered party with one or more Members of the Legislative Assembly (MLA) or an MLA who is not a member of a registered party (section 5(1)) during a specified period which overlaps the Caretaker Period. That process applies only to formal requests for costings under the Act and does not otherwise affect the operation of the Caretaker Conventions or these Guidelines.

The *Guidelines for Costings of Election Commitments* are available at

<http://www.treasury.act.gov.au/Electioncostings/documents/Guidelines%20FINAL.pdf>.

4(d) Incoming Government Briefs

The Chief Minister and Cabinet Directorate is responsible for coordinating incoming government briefs in the lead-up to an election. One set of briefing papers will be developed for the event of a returned government, and the second for the event of a newly elected government taking office. Separate guidance on this process will be issued by the Head of Service in the lead up to the election.

4(e) Consultation with Public Servants by the Opposition and Recognised Parties in the Legislative Assembly

In order to ensure a smooth transition in the event of a change of government, there may need to be consultation between the Opposition and other recognised parties in the outgoing Legislative Assembly and officials during the caretaker period.

For such consultations to occur, the Leader of the Opposition or of another recognised party in the Assembly should request the relevant minister to grant access to officials. The minister should notify the Chief Minister, and the relevant director-general or head of agency of any such request. Officials are to inform ministers when the discussions are taking place and ministers are entitled only to seek assurances that the discussions are kept within the agreed purposes. The content of the discussion is confidential to the participants.

Directorates will be represented in such discussions by the Director-General and an appropriate officer with relevant expertise from the Chief Minister and Cabinet Directorate.

Queries about approval of particular requests for consultation should be handled between a minister and the Chief Minister. Requests which involve an unreasonable amount of work by directorates or agencies may properly be denied

The subject matter of the discussions between officials and the Opposition or other party should be restricted to matters relating to the machinery of government and government administration, and may include advice on the administrative and technical practicalities and procedures involved in implementing policies already proposed. Officials must not discuss Government policies or provide opinions on alternative policies or other party-political matters. During these consultations, factual information of the nature permitted to be provided to the ministers can be requested by non-government parties and provided on the same basis.

During the caretaker period, the accepted practice of ministerial staff attending discussions between officials and Members of the Legislative Assembly is not appropriate. Directors-general or heads of agencies should inform their minister of when such discussions are to take place, but must not disclose issues canvassed.

4(f) Publications and Advertising Campaigns

During the caretaker period, directorates must continue to adhere to the provisions of the *Government Agencies (Campaign Advertising) Act 2009*. Directorate and agency publications and advertising material should proceed only if they constitute a normal operational requirement of ongoing and uncontroversial service delivery (e.g. public health announcements or road closure notices). In such cases, publications or advertising material should not include photographs and/or statements of a minister.

Directorates and agencies should carefully monitor their media releases during the caretaker period to ensure that the material is of public interest, relates only to the day-to-day business of the directorate or agency, and cannot reasonably be construed as being for political purposes.

There are strict requirements governing the publication of “electoral matter”. In the case of government agency publications, these do not require authorisation as electoral matter if they include as a minimum on the cover and/or title page the agency name and the ACT Government logo or:

- the agency name;
- the City of Canberra Arms (i.e. the Canberra Coat of Arms); and
- the words ‘Australian Capital Territory’, ‘Australian Capital Territory Legislative Assembly’, ‘ACT Legislative Assembly’, ‘Australian Capital Territory Government’ or ‘ACT Government’.

Further guidance can be obtained from the ACT Electoral Commission’s website, at:

<http://www.elections.act.gov.au/page/view/422/title/elections-act-factsheet-authorising> and
<http://www.elections.act.gov.au/resources/uploads/pdfs/factsheets/factauthorise.pdf>

4(g) Government Use of Electronic Communication

Agency websites may retain material placed on the website before the commencement of the caretaker period in most cases. Agencies should check the wording on their websites to ensure that they cannot be interpreted as promoting a Government policy. Agencies should add only the following material to their websites during the caretaker period:

- announcements of a routine, apolitical nature;
- purely factual material; and
- information on existing policies and programs.

Media releases with overtly partisan content, announcing new policy, or criticising non-government parties should not be posted to government websites during the caretaker period.

If agency websites contain links to websites outside the act.gov.au domain, agencies should consider the need for clear exit messages.

In order to avoid the need for authorisation as electoral matter, agency websites must conform to the requirements in the *Electoral Act 1992* for government publications, as outlined above under “Publications and Advertising Campaigns”.

Electronic bulletin boards and email systems provided by agencies should not be used to publish or distribute political material. Material from political parties and how-to-vote material should not be displayed.

Any interactive functions of websites within the act.gov.au domain such as discussion groups, chat rooms or blogs which allow unmoderated comment or debate should be moderated during the caretaker period. Words along the following lines might be appropriate: “In the period preceding an election for the ACT Legislative Assembly, the ACT Government assumes a caretaker role. It is important during that time that ACT Government resources are not used to communicate political material. As this website is hosted by the [directorate/agency], the site will be moderated from the beginning of the Caretaker Period on 14 September 2012 until after the election to ensure that political material is not placed on the site.”

4(h) The Use of Government Agency Premises

There may be occasions where agency premises can appropriately be used during the caretaker period by political parties for public events, such as media conferences, or where they are the obvious place for a function. In the case of official functions involving the use of directorate agency resources, relevant non-government spokespersons should be given the opportunity to be present.

It is not appropriate that the use of agency premises extend to such activities as engaging public servants in political dialogue, or using public servants for logistical support for political functions. Nor should the use of premises unreasonably disrupt the normal operations of the offices concerned.

ACT Government premises may be used as the backdrop for political advertising or policy material by government and non-government parties (e.g. photography or filming) provided that no official resources are utilised, and the operations of the site are not unreasonably impacted. It is important that the impartiality of ACT public servants is not compromised through their appearance in party political material of this sort. With this in mind it may be more appropriate for actors to be used in place of officials.

4(i) Approval of Grants

The payment of grants approved prior to the caretaker period can proceed but should be forwarded by the directorate or agency rather than by a minister or another member of the Government.

During the caretaker period, commitments should not be made in respect of grant applications received during the period or which were lodged before commencement of the period but are awaiting decision.

4(j) Response to Parliamentary Committee Reports

Responses to outstanding parliamentary committee reports should be taken up with the incoming government. Agencies may, however, undertake appropriate preparatory work and consultation at the agency level so that they are in a position to provide early advice to the incoming government.

4(k) Annual Reports

The *Annual Reports (Government Agencies) Act 2004* contains specific provisions about tabling and presenting annual reports in an election year. In 2012, Annual Reports will be provided to Ministers in the usual three months timeframe from the end of the Financial Year, but will not be tabled until the second sitting day of the new Assembly.

This means that Annual Reports will need to be provided to the relevant Minister by 24 September and to the Speaker by 28 September. Agencies will still be required to publish their reports on 28 September. However, the Office of the Legislative Assembly will keep the tabling copies of each Annual Report until they are tabled after the election.

The Government Solicitor's Office has advised that any extension of time for providing Annual Reports should be sought before the last day of sitting prior to the caretaker period. Accordingly, approval for an extension of time to provide an Annual Report should be sought by the relevant Minister from the Chief Minister by 22 August 2012.

Guidance will be available in the Chief Minister's Annual Reports Directions for 2011-2012 which are currently being prepared. They will be available on the Legislation Register at <http://www.legislation.act.gov.au/a/2004-8/li.asp> .

4(l) Public Sector Ethical Requirements

The general obligations of public employees are prescribed in section 9 of the *Public Sector Management Act 1994* (PSM Act). During the caretaker period, the usual obligations on officials continue to apply, but the levels of scrutiny are likely to be higher.

Public sector agencies, public employees and members of Government boards and committees must consider numerous ethical issues during the caretaker period with regard to their operations and conduct. These issues might relate to real or perceived conflicts of interest, the public perception of impartiality in their operations and conduct, and the participation of individuals in political campaigning.

Appendix 1 provides advice on appropriate standards of conduct for officials seeking to actively participate in the political process.

5. Further Information

Where ministers require further clarification of these guidelines, they should seek advice from the Chief Minister.

Where Directors-General require further clarification of these guidelines, they should seek advice from the Head of Service or Commissioner for Public Administration.

General inquiries regarding the caretaker period arrangements and their application can be directed to:

Director, Public Sector Management
Workforce Capability and Governance Division
Chief Minister and Cabinet Directorate
Telephone 620 50296
email: psm@act.gov.au

Andrew Cappie-Wood
Head of Service

Andrew Kefford
Commissioner for Public Administration

June 2012

Appendix 1 - GUIDELINES FOR THE BEHAVIOUR OF PUBLIC EMPLOYEES WISHING TO PARTICIPATE ACTIVELY IN THE POLITICAL PROCESS

Introduction

1. These guidelines provide advice on appropriate standards of behaviour by Territory employees in relation to their active participation in the political process. They apply to all staff and executives in the ACT Public Service (ACTPS) as well as those of other ACT public sector agencies and entities.
2. These Guidelines supplement the general advice on the operation of the Government set out in the *Guidance on Caretaker Conventions*. They are, however, applicable on an ongoing basis, and not just during the caretaker period.
3. Officials, as members of the community, have a right to political expression and participation. At the same time, they are servants of the community and the government-of-the-day with a duty to maintain parliamentary and public confidence in the integrity, impartiality and political neutrality of the ACTPS.
4. These guidelines are intended to assist individuals navigate the tension between these rights and responsibilities. As is the case in relation to management of conflict of interest generally, officials should seek to resolve any conflicts in the public interest.
5. Officials are encouraged to discuss any active participation in the political process with their supervisor before it is undertaken. Advice can be sought if necessary from Directors-General and/or the Commissioner for Public Administration.

Candidates

6. Officials are entitled to stand as a candidate for election to the Legislative Assembly. However, sections 103 and 104 of the *Electoral Act 1992* provide that a person is not qualified to take a seat if they hold a public office or employment.
7. The Electoral Commissioner suggests that candidates seek their own advice on whether resignation is necessary in their particular case and if so, the appropriate time to resign. Public sector employees seeking to contest elections other than those for the ACT Legislative Assembly should investigate whether similar restrictions exist in the relevant jurisdiction. For further information, see the Electoral Commission Candidates Information Handbook available at:

http://www.elections.act.gov.au/resources/uploads/pdfs/election_12/Candidates_information_handbook_2012.pdf

8. Officials employed under the *Public Sector Management Act 1994* (PSM Act) who resign to contest an election, and are not elected, may be re-employed or re-appointed under sections 111 or 118. To be re-employed or re-appointed, the former public employee must have resigned no earlier than six months before nominations for the election closed, been an unsuccessful candidate and applied for re-employment or re-appointment no later than two months after the election result is declared.

Approved Leave

9. A Director-General may grant leave without pay for executives under Public Sector Management Standards (2006) section 766A and for non-executive employees under the relevant industrial agreement. The maximum period of leave that may be granted for this purpose is three months. The period of leave does not count as service for any purpose.

Political participation of Public Employees

10. Officials have the same rights as other members of the community to engage in the political process, except where these activities impact adversely on their ability to perform their official duties to the standard required in the PSM Act and/or place them in conflict with the general obligations of public employees set out in section 9. It is unlikely, for example, that membership of a political party would of itself create a conflict of interest, but engaging in public debate on political issues relevant to official duties, or holding an office or executive position within a political party would likely do so.
11. Where a Director-General is concerned that there may be, or may appear to be, a conflict between an official's duties and their involvement in political activities, the issue should be discussed with the employee. Individual circumstances including the level of the employee within the ACTPS; their capacity to influence government decision-making; the extent to which they deal directly with ministers and Members of the Legislative Assembly; and the extent to which they represent the government in public will be relevant considerations in the settling of an appropriate course of action.
12. Other matters for discussion will include:
 - a. the extent to which the intended behaviour impairs the public employee's ability to exercise impartial decision making or maintain public confidence the integrity, impartiality and neutrality of the ACTPS;
 - b. the extent to which the intended behaviour might involve use of information obtained through official duties or amount to unauthorised public comment; and

- c. the use of any official facilities, including the employee's time during work hours.

Executives and full-time holders of public office

13. In general terms, the higher an individual is in the ACTPS, the greater the restriction on their ability to actively participate in the political process without raising questions of conflict as their duty to uphold the impartiality of the ACTPS is arguably greater. Senior officials hold special positions in government employment and in the community in general and have a significant capacity to influence government decision-making.

Public Comment and Disclosure of Official Information

14. Public employees may participate in a private capacity in public discussions and debates about community issues. However, public employees should consider whether personal comments and statements could be mistaken for an official comment or endorsement that may undermine public confidence in the employee's ability, or that of their agency, to carry out official functions fairly and impartially. Public comment may include, but is not limited to, letters to the editor, use of social media and comments made in public discussions.

15. Section 9 of the PSM Act prescribes that a public employee may not disclose, without lawful authority, information obtained during the course of their duties.

Fundraising and Canvassing

16. Where a public employee chooses to become involved in campaigning for candidates for political office (e.g. by handing out how-to-vote information, participating in fundraising activities, or canvassing for votes) then they should avoid giving any impression that such activities are undertaken other than in a private capacity. They should not, for example, wear an ACT Public Service uniform or display work related material.

Wearing of Party Political Badges or other Display of Political Material

17. It is generally not appropriate to display political badges or other political material at work.
18. Where a public employee's duties involve public contact, the displaying of political material at work is particularly inappropriate as this may create the impression of official endorsement of the political material or create doubt about the neutrality of the ACTPS.

Use of Official Facilities and Equipment

19. Public employees must not use official facilities to promote any political party. The use of official facilities includes use of meeting rooms, the use of government telephones, facsimile machines, e-mail, computers and photocopiers.

Government boards and Committees

Conflict of interest

20. In relation to caretaker periods, members of boards and committees are reminded that they should provide an undertaking that they are not subject to a conflict between their personal or financial interests and those of the board or committee. Political activity by a board member may create a conflict of interest. In such circumstances it would generally be expected that the member consider either resigning or standing down for the duration of the election campaign.

Candidates

21. Sections 103 and 104 of the Electoral Act 1992 provide that a person is not qualified to take a seat in the Assembly if he or she holds a remunerated statutory office or appointment or is otherwise employed by a Government or a Government body. Individuals must seek their own advice about whether their appointment falls within this provision.

Where Directors-General require further clarification of these guidelines, they should seek advice from the Head of Service or Commissioner for Public Administration.

General inquiries regarding the caretaker period arrangements and their application can be directed to:

Director, Public Sector Management
Workforce Capability and Governance Division
Chief Minister and Cabinet Directorate
Telephone 620 50296
email: psm@act.gov.au