



VICTORIAN LOCAL GOVERNANCE ASSOCIATION
SUITE G06, 60 LEICESTER ST CARLTON 3053
TELEPHONE: 03 9349-7999 FAX: 03 9347-9933
EMAIL: vlga@vlga.org.au WEB: www.vlga.org.au

Elections Working Group

Issues Paper

Local Government Caretaker Period

1. Background

The Local Government (Democratic Reform) Act 2003 (the Reform Act), which amended the Local Government Act 1989 (the Act), introduced pre-election caretaker arrangements for Victorian Local Governments.

The caretaker provisions of the Local Government Act are intended to operate for Local Governments, similarly to the caretaker conventions at a State and Federal level, to assure the community that Governments do not:

1. use public resources for political advantage in election campaigns, or
2. make inappropriate decisions that may bind future Governments.

The Federal and State Government Caretaker Conventions are long standing and generally understood by people involved in the political and administrative processes of government however, they are sparsely documented, lack statutory enforcement and are not well understood by the broader community. There is little in the way of statutory backing for caretaker conventions at a State and Federal level. Any breaches of the caretaker conventions are subject to political argument and media commentary rather than legal sanction, based on the view that the voters will hold the government accountable through the polls.

In his Second Reading Speech, the then Minister for Environment, John Thwaites MP, stated that the caretaker arrangements in the Reform Act, "place limitations on councils during the period between the close of the rolls and the election day" and that the "provisions reflect the concerns for public probity that have led to the practice of adopting caretaker conventions at State and Federal levels of Government." What isn't reflected in the Second Reading Speech, is that whilst the issues are purportedly the same as those experienced at the State and Federal level, the actual caretaker provisions go far beyond the conventions adopted, and have far greater implications, and ramifications for Local Government, than they do at a Federal and State level.

A comparison of the relevant provisions of the Local Government Act, and the Victorian and Federal Caretaker Guidelines, is provided at **Appendix 1**.

The statutory Local Government caretaker provisions are far more restrictive than the conventions applicable to other levels of government, in particular due to the lack of a formal executive government at the local level and legislative constraints. In the State and Federal spheres, the executive by convention operates separately from Parliament with the authority of a majority of the Parliament (the governing party). However in the Local Government sphere, executive decisions can only be made by Councillors sitting as Council or a Committee, or under delegation.

In practice, Federal and State Government remain the executive government, even after parliament has risen - Ministers continue to make decisions, limited only by convention. In contrast, all executive decisions, whether by the Council or its delegated officers are constrained by the stringent conditions

imposed under the Act which prevents the Council from functioning fully as a legitimate and distinct sphere of government.

2. The Legislative Framework

The four main caretaker requirements of the Act are currently:

- the definition of 'election period' (section 3(1) of the Act);
- a restriction on Councils publishing or distributing electoral matter during the election period (section 55D of the Act);
- a prohibition on making certain specific major policy decisions during the election period (section 93A of the Act); and
- a requirement that Councils adopt procedures to ensure council resources are not used inappropriately during the election (section 76C of the Act).

These four requirements are discussed in detail and recommendations made in the next Section.

2a Election Period

The caretaker provisions of the Act apply during the entire Local Government 'election period'. Section 3(1) of the Act defines 'election period' as starting at entitlement date and ending at 6pm on election day.

The Reform Act changed the definition of 'entitlement date' so that the election period commences 57 days before the election day and for the 2008 General Elections on 29 November 2008, the election period will therefore commence on Friday 3 October 2008.

In comparison, the date of the 2007 Federal Election was officially announced by the then Prime Minister just 41 days prior to election day.

The caretaker period, which at the Federal level, commences on the day the House of Representatives was dissolved, was therefore just 38 days, one third shorter than that which is imposed on Local Governments in Victoria. A more common period for Federal and State elections is only about four weeks or 30 days or less.

If, as indicated in the Second Reading Speech to parliament, the caretaker provisions are intended to address public probity issues which lead to the adoption of the caretaker conventions at the State and Federal level, it follows that the caretaker period need be no longer for Local Government elections, than that which is in place in other spheres.

Local Governments have been recognised at State and Federal level as a legitimate and distinct sphere of Government. Despite this legitimacy, Victorian Local Governments currently are constrained by a system which is

much more restrictive than other levels of government with adverse impacts for good Local Government.

Recommendation 1

The caretaker period for Local Government should be between 25 and 33 days, in line with the State and Federal Governments.

2b Publishing or Distributing Electoral Matter - Section 55D of the Act

This restriction goes beyond the purpose of ensuring governments do not use public resources in election campaigning or make decisions that may bind future governments inappropriately. This restriction, depending on the interpretation, could prevent effective communication by Local Governments with their communities and bring the more serious responsibilities of legitimate democratic governance to a standstill during the caretaker period.

Local Governments are continuously in the process of engaging with their community on many matters that are important to the community's wellbeing.

In practice Councils can be ineffectual from the beginning of the Caretaker period through October and November until after the Christmas/New Year holiday period, say end January and thus unable to operate effectively as a new Council for some 4 months!

There may be a number of matters of importance to a community and substantial deferral of such matters until the next year is neither warranted nor consistent with the intent of the Act.

The full text of Section 55D is set out below:

"A Council must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed, an electoral advertisement, handbill, pamphlet or notice during the election period unless it only contains information about the election process."

The definition of "electoral advertisement, handbill, pamphlet or notice" is:

"an advertisement, handbill, pamphlet or notice that contains electoral matter, but does not include an advertisement in a newspaper announcing the holding of a meeting;"

The definition of "electoral matter" is

matter which is intended or likely to affect voting in an election but does not include any electoral material produced by or on behalf of the returning officer for the purposes of conducting an election.

and the Act also provides that

Without limiting the generality of the definition of "electoral matter", matter is to be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on-

- (a) the election; or*
- (b) a candidate in the election; or*
- (c) an issue submitted to, or otherwise before, the voters in connection with the election.*

The terms of the legislation are extremely broad, and effectively result in any material which identifies a Councillor, or describes the performance, commitments or achievements of Council as matters which will be considered to be "before the voters" at the election.

The reference to "candidates" is in itself problematic, as historically, many candidates do not nominate until the last day of the nomination period, which is 27 days into the 57 day electoral period.

As a consequence of the significantly longer election period as previously discussed, this particular provision has an impact on all publications emanating from Council for the full 57 day period. Essentially, Council is prevented in practice, from drawing any connections between sitting Councillors and any decision, program, promotion or issue, which has the potential to influence the decision by any voter on whom to vote for in the forthcoming election. This provision remains in place regardless of the involvement the Councillor has had in the relevant issue, or the needs of the Council administration in serving the community interest.

For example, consultation on a significant planning issue affecting the community may be unavoidable during the caretaker period. If Council considers the effective prosecution of Council's agenda requires Councillor involvement in order to maintain effective representation of the community, Ministerial approval is required. In the context of some planning decisions, this may leave Council in the invidious position of requiring Ministerial approval to involve Councillors in a matter which is politically at odds with the Government of the day.

On a smaller scale, for a period of 57 days, Council is prevented from reporting to the community on the activities of their Councillors, even in the context of reporting to their individual wards in relation to relevant Council decisions, programs, promotions or issues. This is at odds with the concept of accountable local democracy, insofar as it inhibits the ability of an incumbent Councillor from reporting to his or her constituency on matters of particular significance to their community.

In the absence of an identifiable opposition in the local sphere, the Federal and State conventions cannot be directly translated, though the principles can. Appropriate guidelines or current provisions or conventions should be developed which encourage greater transparency and involvement with the community and potential candidates; ensuring incumbents do not receive

undue political advantage whilst enabling the business of Local Government to continue unhindered.

Recommendation 2

Subject to consultation with Local Governments, the Act should be amended to provide for Regulations to be issued, providing clarity and examples of the practical application of Section 55D.

These Regulations should reflect the caretaker provisions adopted in the State and Federal spheres.

2c Major Policy Decisions - Section 93A of the Act

There are many matters of considerable importance to Local Government and communities which could be affected by the constraints of the Act.

For example, major policy decisions are defined in the act to include the awarding of contracts in excess of \$100,000 or 1% of rates revenue, whichever is greater.

Whilst the award of some contracts over \$100,000 may legitimately be described as a major policy decision, many such contracts relate to routine maintenance issues, such as annual supply contracts for asphalt and road works, or drainage works and construction. The inclusion of an arbitrary dollar limit in the definition therefore, inhibits or unnecessarily delays the ability of Local Governments to effectively prosecute some of their most basic functions.

The definition may additionally inhibit the administration from implementing the outcomes of legitimately made, major policy decisions for example, capital works programs, whereby the administration is unnecessarily fettered by a restriction on entering into contracts to carry out such works.

The Department of Prime Minister and Cabinet publication, Guidance On Caretaker Conventions (Updated August 2007) contains the following guidance on "major policy decisions":

"Governments avoid making major policy decisions during the caretaker period that are likely to commit an incoming government. Whether a particular policy decision qualifies as 'major' is a matter for judgment. 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 between the Government and Opposition in the election campaign."

Further advice is provided in the context of major contracts:

"Governments avoid entering major contracts or undertakings during the caretaker period. When considering whether a contract or

undertaking qualifies as 'major', agencies should consider the dollar value of the commitment and also whether the commitment involves a routine matter of administration or rather implements or entrenches a policy, programme or administrative structure which is politically contentious."

This guidance, is mirrored in the guidelines issued by the Department of Premier & Cabinet in Victoria.

Major contracts at the Victorian and Federal level are not defined in terms of dollar value, rather whether the contract represents "a routine matter of administration" or is a contract which in effect "implements or entrenches a policy, programme or administrative structure which is politically contentious" (Federal guidelines).

The provisions of the caretaker conventions in this regard, are far more realistic in terms of the ability of the administration to continue the business of government. The Victorian legislation would benefit from a move away from the current, prescriptive provisions, in favour of legislative guidance on relevant qualitative considerations. This would enable a case by case assessment of whether awarding a contract, above or below the nominal \$100,000 threshold, is an appropriate action during the caretaker period.

Clearly, as with Federal and State practice, the Council would be accountable to the community should they be seen to take inappropriate decisions and the community would no doubt reflect any concerns in their voting. It should also be noted that there is another inbuilt protection in that these would be decisions not of individual Councillors but of the Council supported by a majority of the elected Councillors.

The guidance provided for Federal and Victorian parliaments specifically states the conventions are "neither legally binding nor hard and fast rules" and indicate that application of the conventions requires "judgement and common sense". In the Victorian legislation however, Local Governments are subjected to overly prescriptive provisions and definitions of what constitutes a major policy decision, in addition to provisions which potentially invalidate decisions and/or election results, and create entitlements to compensation.

A move away from prescriptive provisions towards legislative guidance similar to that provided in the Federal guidelines, would enable the realisation of the intent of caretaker conventions / legislation, without imposing unnecessary impediments on the business of Council.

Judgement is applied in the State and Federal spheres to ensure the elected representatives of the day do not take decisions which inappropriately commit the incoming government to a particular policy or program.

Such judgement can equally be exercised at a local level, and legislative guidance on the principle issues to be applied, would provide further assurance to the public and potential candidates on the probity of the process.

Recommendation 3

The definition of a 'major policy decision' should be amended in favour of a definition which is consistent with the State and Federal Caretaker provisions as follows:

“A 'major' policy decision is a matter for judgment and relevant considerations include the significance of the decision in terms of policy and resources, whether the decision is potentially contentious and whether the decision involves a routine matter of administration or implements or entrenches a policy, programme or administrative structure.”

2d Council Resources - Section 76C of the Act

Local Governments must ensure that due propriety is observed in the use of all Council resources, and Council staff are required to exercise appropriate discretion in that regard.

Council resources, including offices, staff, hospitality services, equipment and stationary must be used exclusively for normal Council business during the caretaker period, and not in connection, whether actual or perceived, with the election campaign of any individual.

Councillors are however, entitled to continue using equipment provided to them to facilitate the performance of their normal duties; any incidental use which may relate to personal or electoral activities should be appropriately documented and reimbursed to Council, which can be appropriately managed in accordance with Council policies and the provisions of the Act.

It is important to note that the provisions of the Local Government Act, whilst appropriate, are far more stringent than the conventions which operate in the Federal sphere. The Federal and State provisions in this matter are arguably quite inadequate as they provide very substantial advantages of incumbency.

For example, members of parliament may continue to claim travel expenses during the caretaker period, by convention, up until their respective parties' official campaign launch.

In the recent federal election, this entitled federal members to continue to claim travel expenses for 26 days after the commencement of the caretaker period, resulting in those particular caretaker provisions applying for only 15 days before the election.

There has also been a great deal of publicity about the use of Federal MP's printing allowances during elections periods, pointing once again to much less stringent controls than exist in Local Government.

Recommendation 4

The Act should be amended to provide a minimum standard for all Councils to adopt during the caretaker period with respect to the resourcing of current Councillors, to ensure that Council resources are not inappropriately applied during the election period, and ensure that incumbent councillors are not unreasonably advantaged.

The Act should provide for the preparation of Ministerial Regulations, which reflect the caretaker provisions adopted in the State and Federal spheres, and provide guidance in the practical application of the prescribed minimum standards.

Appendix 1

COMPARISON OF CARETAKER PROVISIONS / CONVENTIONS

Victorian Local Government	Victorian State Government	Federal Government
<p><u>Local Government Act Section 3, Election Period</u></p> <p>The Election period is defined as the period that starts on the entitlement date; and ends at 6 pm on election day.</p> <p>The Entitlement date is defined as the day that is 57 days before the election day.</p>	<p><u>Source: Caretaker Conventions - Guidance for Handling Government Business during the Election Period, Department of Premier and Cabinet, 2006</u></p> <p>The caretaker period begins at the time the Legislative Assembly expires or is dissolved and continues until the election result is clear or, if there is a change of government, until the new government is appointed.</p> <p><u>Source: Electoral Act and Constitution Act</u></p> <p>Generally, the Assembly expires on the Tuesday, 25 days before the last Saturday in November (Election Day) nearest to the fourth anniversary of the previous general election.</p>	<p>When the Prime Minister announces the intention to hold an election, the Governor General will dissolve parliament and issue writs for the election.</p> <p><u>Source: Guidance on Caretaker Conventions, Department of Prime Minister and Cabinet, Updated August 2007</u></p> <p>The caretaker period begins at the time the House of Representatives is dissolved and continues until the election result is clear or, if there is a change of government, until the new government is appointed.</p> <p><u>Source: Commonwealth Electoral Act</u></p> <p>According to the provisions of the Commonwealth Electoral Act the minimum period between the issue of issue of writs and polling day, is 33 days.</p>
<p><u>Legal Status of Caretaker Provisions</u></p> <p>A major policy decision made in contravention of Section 93A is invalid and any person who suffers any loss or damage as a result of acting in good faith on a decision made in contravention of this section is entitled to compensation.</p>	<p><u>Source: Caretaker Conventions - Guidance for Handling Government Business during the Election Period, Department of Premier and Cabinet, 2006</u></p> <p>The Caretaker guidelines state conventions are neither legally binding nor hard and fast rules</p>	<p><u>Source: Guidance on Caretaker Conventions, Department of Prime Minister and Cabinet, Updated August 2007</u></p> <p>The Caretaker guidelines state conventions are neither legally binding nor hard and fast rules</p>
<p><u>Local Government Act Section 55D, Prohibition on Council</u></p> <p>A Council must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed, an electoral advertisement, handbill, pamphlet or notice during the election period unless it only contains information about the election process.</p> <p>"Electoral advertisement, handbill, pamphlet or notice" means an advertisement, handbill, pamphlet or notice that contains electoral matter, but does not</p>	<p><u>Source: Caretaker Conventions - Guidance for Handling Government Business during the Election Period, Department of Premier and Cabinet, 2006</u></p> <p>Agencies must review advertising campaigns and any appearance of party political content or purpose must be avoided. Advertising campaigns which promote Government policies and/or Ministers may be particularly sensitive.</p> <p>Departmental campaigns which convey necessary public information (e.g. public health or safety) or of an operational nature (eg employment</p>	<p><u>Source: Guidance on Caretaker Conventions, Department of Prime Minister and Cabinet, Updated August 2007</u></p> <p>Advertising campaigns will be reviewed and a recommendation made as to whether campaigns should continue, for which bipartisan agreement will be sought.</p> <p>Operational campaigns usually continue, and campaigns highlighting the role of particular Ministers or address issues that are a matter of contention between the parties are normally</p>

Victorian Local Government	Victorian State Government	Federal Government
<p>include an advertisement in a newspaper announcing the holding of a meeting;</p> <p>"Electoral matter" means matter which is intended or likely to affect voting in an election and matter is to be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on the election, a candidate, or an issue submitted to, or otherwise before, the voters in connection with the election.</p>	<p>advertisements) may be continued as long as they do not feature Ministers or promote Government policies.</p> <p>Agencies should review the distribution of printed material, including newsletters and avoid active distribution of material if the material can be seen as promoting party political content, Government policies or emphasises the achievements of the Government or a Minister. Passive distribution of material, such as continued placement in the Agency's offices or distribution in response to requests is acceptable.</p> <p>Agencies' websites may retain material placed on the website before the commencement of the caretaker period in most cases. Exceptions might be recent ministerial statements that criticise the Opposition or other non government parties or members in strong terms.</p> <p>Agencies should add only portfolio-related announcements, purely factual material and information on existing policies and programmes (unless it includes criticism of the Opposition or other political material), to their websites during the caretaker period</p>	<p>discontinued.</p> <p>Agencies should review the distribution of printed material, including newsletters and avoid active distribution of material if it promotes Government policies or emphasises the achievements of the Government or a Minister. Passive distribution of material, such as continued placement in the agency's offices or distribution in response to requests is acceptable.</p> <p>Agency websites may, in most cases, retain material placed on the website before the commencement of the caretaker period. Exceptions might be recent ministerial statements that criticise the Opposition in strong terms. Agencies should add only portfolio-related announcements, purely factual material, information on existing policies and programmes, to their websites during the caretaker period:</p> <p>Ministerial media releases and alerts should be placed on the website of the relevant political party, except where there is a need to issue media releases of high public interest and of a time-sensitive nature. (eg health warnings, travel advisories, or counter terrorism alerts.)</p> <p>Electronic bulletin boards and e-mail systems should not be used to publish political material. Material from political parties and how-to-vote material should not be displayed.</p>

Victorian Local Government	Victorian State Government	Federal Government
<p data-bbox="49 181 739 245"><u>Local Government Act Section 93A, Conduct of Council during election period</u></p> <p data-bbox="49 268 739 437">A Council, a special Committee or a person acting under a delegation must not make a major policy decision during the election period for a general election, except in extraordinary circumstances where the Minister has granted an exemption.</p> <p data-bbox="49 459 739 590">A major policy decision means a decision relating to the employment, remuneration or termination of a CEO (other than appointing an acting CEO), or entering into a contract valued at over \$100 000.</p> <p data-bbox="49 612 739 778">A major policy decision made in contravention of this section is invalid and any person who suffers any loss or damage as a result of acting in good faith on a decision made in contravention of this section is entitled to compensation.</p>	<p data-bbox="763 181 1464 280"><u>Source: Caretaker Conventions - Guidance for Handling Government Business during the Election Period, Department of Premier and Cabinet, 2006</u></p> <p data-bbox="763 303 1464 434">Governments should avoid making major policy decisions, making significant appointments and entering major contracts or undertakings during the caretaker period.</p> <p data-bbox="763 456 1464 625">A ‘major’ policy decision is a matter for judgment and relevant considerations include the significance of the decision in terms of policy and resources, whether the decision is a matter of contention between the Government and Opposition in the election campaign.</p> <p data-bbox="763 647 1464 778">When considering a ‘significant’ appointment, relevant considerations are the importance of the position and whether the proposed appointment would be likely to be controversial.</p> <p data-bbox="763 801 1464 1034">Relevant considerations when considering ‘major’ contracts are the dollar value of the commitment, whether the commitment involves a routine matter of administration or implements or entrenches a policy, programme or administrative structure which is politically contentious, and whether the commitment requires ministerial approval.</p> <p data-bbox="763 1056 1464 1257">If circumstances require the Government to make a major policy decision, make a significant appointment, or enter a major contract or undertaking during the caretaker period that would bind an incoming government, the Minister would usually consult the Opposition spokesperson beforehand.</p>	<p data-bbox="1496 181 2175 280"><u>Source: Guidance on Caretaker Conventions, Department of Prime Minister and Cabinet, Updated August 2007</u></p> <p data-bbox="1496 303 2175 434">Governments should avoid making major policy decisions, making significant appointments and entering major contracts or undertakings during the caretaker period.</p> <p data-bbox="1496 456 2175 657">A ‘major’ policy decision is a matter for judgment and relevant considerations include the significance of the decision in terms of policy and resources, whether the decision is a matter of contention between the Government and Opposition in the election campaign.</p> <p data-bbox="1496 679 2175 810">When considering a ‘significant’ appointment, relevant considerations are the importance of the position and whether the proposed appointment would be likely to be controversial.</p> <p data-bbox="1496 833 2175 1066">Relevant considerations when considering ‘major’ contracts are the dollar value of the commitment, whether the commitment involves a routine matter of administration or implements or entrenches a policy, programme or administrative structure which is politically contentious, and whether the commitment requires ministerial approval.</p> <p data-bbox="1496 1088 2175 1321">If circumstances require the Government to make a major policy decision, make a significant appointment, or enter a major contract or undertaking during the caretaker period that would bind an incoming government, the Minister would usually consult the Opposition spokesperson beforehand.</p>