



GUIDANCE NOTE 6

Dispute resolution during caretaker period

1. This guidance note is to be read in conjunction with the Department of the Prime Minister and Cabinet Guidance on Caretaker Conventions 2016.

Background

2. The 'caretaker period' refers to the period between the dissolution of the House of Representatives preceding a Federal election, and continues until the election result is clear or, if there is a change of government, until the new government is appointed.

The caretaker conventions

3. During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. However, successive governments have followed a series of 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. The conventions are not legally binding, and their application requires judgement and common sense.
4. In summary, the conventions are that the government avoids:
 - a. making major policy decisions that are likely to commit an incoming government,
 - b. making significant appointments, and
 - c. entering major contracts or undertakings.
5. The caretaker conventions may affect the way alternative dispute resolution (ADR) and litigation involving the Commonwealth should be handled. However, they do not displace the Commonwealth's obligation to the courts or tribunals, or the obligations set out in the *Legal Services Directions 2017* to protect the interests of the Commonwealth, to deal with claims promptly, not cause unnecessary delay in litigation or dispute resolution, and keep the costs of litigation to a minimum.¹
6. Responsibility for observing the caretaker conventions ultimately rests with the agency head and the following principles should be taken into account before making decisions regarding the conduct of ADR and litigation during caretaker period.

ADR during the caretaker period

7. Commonwealth agencies are required to consider ADR prior to initiating court proceedings and continually assess the use of ADR during those proceedings.²
8. ADR should generally continue (as part of ordinary matters of administration) but the caretaker conventions may restrain making major decisions, such as sensitive settlements, or the provision of complex or sensitive advice in relation to ADR. The vast majority of ADR would be expected to continue during caretaker periods.

¹ See Appendix B to the *Legal Services Directions 2017*.

² Paragraph 2(d) and 5.1, Appendix B to the *Legal Services Directions 2017*.

9. Seeking to defer ADR may be appropriate where the matter involves a high level of legal risk or sensitivity, and where it is acceptable to non-Commonwealth parties. In circumstances where delay would not be in the interests of justice, agencies should seek ways to progress ADR, being mindful to avoid creating major commitments for an incoming government. Where decisions which would involve major commitments, including significant settlements in either scale or sensitivity, are unavoidable, the relevant Minister should be advised to consult with the relevant Opposition spokesperson.

Litigation during the caretaker period

10. During litigation the Commonwealth has a responsibility to conduct itself in accordance with the highest professional standards.³ This responsibility is not affected by the commencement of caretaker periods.
11. Court timeframes, including the filing of submissions, evidence, and the scheduling of appearances are not generally adjourned due to the caretaker period. However the deferral or adjournment of steps in legal proceedings that would materially commit an incoming government should be carefully considered, taking into account the circumstances of the matter.
12. In some cases, it may be appropriate to seek an adjournment from the court or tribunal, or seek consent from the other party to delay settlement negotiations, until the result of the election is known.
13. If deferral is not possible or appropriate in the circumstances, the agency should take only those steps that are essential to the further conduct of the litigation. For example, if the Commonwealth's right to appeal needs to be preserved, a protective appeal should be lodged.
14. In cases where some action is essential, the agency should consider whether the caretaker Minister should be advised to consult (or authorise consultation) with the relevant Opposition spokesperson before the action is taken, on the grounds that it would be a significant commitment in terms of scale or sensitivity.
15. If the agency would normally instruct in the matter without reference to the Minister, for example on the basis that relevant government and agency policies are well established, then the agency may be able to issue instructions without consultation, but the agency should still consider whether the significance of the matter, in particular possible tension between the government and the Opposition on a point of policy, is such that consultation would be appropriate.
16. If the agency would need, in accordance with standing arrangements, to seek clearance from the Minister before filing documents or issuing other instructions, then the need for consultation should normally be raised with the caretaker Minister as part of the provision of advice.
17. The caretaker conventions restrict the provision of policy advice. Factual information about litigation involving the Commonwealth can be provided on request. Factual information can be volunteered in certain circumstances, for example where the Minister is a party to litigation, the Minister may be provided with information about a decision handed down (such as where the Commonwealth's arguments were, broadly speaking, accepted or rejected, and a copy of the judgment). Advice on the policy implications of a decision should not be given unless exceptional circumstances might require an urgent

³ Note 2 of Appendix B to the *Legal Services Directions 2017*.

response. In this situation, agencies should consult with the Department of the Prime Minister and Cabinet.

18. If legal proceedings which may be the subject of an application for Ministerial assistance under the *Parliamentary Business Resources Regulations 2017* are commenced or threatened during the caretaker period, the Attorney-General's Department should be notified as soon as possible.
19. A flowchart is set out at **Attachment A**.
20. Information about the conventions is available in the guidelines issued by the Department of the Prime Minister and Cabinet.
21. If specific advice is required in relation to other issues that arise during the caretaker period, agencies should contact the Department of the Prime Minister and Cabinet.
22. If further advice is required regarding handling litigation during the caretaker period, the Office of Legal Services Coordination should be contacted for further guidance.

Office of Legal Services Coordination
Telephone: (02) 6141 3642
E-mail: olsc@ag.gov.au
Re-issued: June 2018

Flowchart: Dispute Resolution in Caretaker Period

