

# Analysis of 'Confidence and Stability Agreement' between the Hon. Jeremy Rockliff MP and the Parliamentary Members of the JLN, signed April 2024.

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## Was There a Timing Imperative for an Agreement to be Struck Quickly?

Other than the Liberal Party wanting to have the security a negotiated agreement can provide, there does not exist any constitutional nor prescribed timeframe by which power-sharing arrangements must be negotiated.

This Agreement did not need to be rushed, there was time for the JLN MPs to seek and receive independent advice and departmental briefings – including the opening of the Treasury books – before signing any agreement document.

The *Constitution Act 1934* section 8B (3) imposes a seven-day timeframe by which the Governor needs to have commissioned a Premier and (some) Ministers of the Crown, following the return of the writs after a state election.

However, there are no laws requiring any negotiations to be complete within that timeframe, and there is precedent of commissioning of minority Premiers-elect in compliance with the *Constitution Act 1934* provisions, while also allowing for considered negotiations to continue.

### Example: the Tasmanian 2010 State Election:

- 20<sup>th</sup> March 2010 - state election polling day;
- 7<sup>th</sup> April 2010 - the 10 Labor -10 Liberal -5 Greens results were formally declared and writs returned;
- 13<sup>th</sup> April 2010 - 6 days later, Governor Underwood swore in an interim cabinet, consisting of Premier David Bartlett, Lara Giddings as Deputy Premier and Attorney-General, and Michael Aird as Treasurer;
- 19<sup>th</sup> April 2010 - a further week later, Greens and Labor announce formal agreement.
- 21<sup>st</sup> April 2010 - new Labor-Green Cabinet sworn in by Governor.
- 4<sup>th</sup> May 2010 - Parliament recalled.

***Hence in 2024, there was no legal requirement for any cross-bench member to finalise any negotiations or enter into any agreement prior the recommissioning of the Premier or Cabinet.***

The fact the current Premier, Mr Jeremy Rockliff, intends to have his Liberal Cabinet sworn in on the 11<sup>th</sup> April 2024, while still short of securing 18 MPs support, demonstrates this fact.

## 'Good Faith' vs 'Bad Faith'

*"This Agreement is made in a spirit of goodwill."*

Formal negotiations should be undertaken in 'good faith'. The term 'good faith' – and also 'bad faith' - are recognised by the courts in the context as having a specific bearing on negotiations and contract deliberations.

Despite the Agreement document's opening sentence's emphasis upon 'goodwill', that is not the same as 'good faith' in the context of formal negotiations. Further, it is arguable that this Agreement was undertaken in part in 'bad faith' by apparently at least one of the negotiating parties.

## Confidence and Supply

### 1. CONFIDENCE AND SUPPLY

*JLN Members agree to:*

- i. Provide confidence to the Rockliff liberal Government by supporting the Government on all confidence and censure votes by attending and voting with the Government, except, in cases of malfeasance or corruption;*
- ii. Guarantee supply by voting to support all appropriation and revenue bills unamended*
- iii. Support the Rockliff Liberal Government on parliamentary motions that bind the Government;*

***Confidence and Supply are recognised by political scientists and commentators as the 'Crown Jewels' of any Westminster Parliament arrangement, particularly for the cross-bench. This agreement with the JLN MPs sees the Liberals receive them for a steal.***

Clause 1 (i) – signs away the JLN's right to abstain from a vote. Crucially it also fails to reserve the right to move no-confidence or censure motions of their own.

All recent examples of mature and negotiated in 'good faith' confidence and supply agreements include the proviso of confidence and supply except in the cases of malfeasance and corruption, and also excepting those the cross-bench signatory may move themselves.

The 1996-98 informal agreement between the Rundle Liberal minority government and the Tasmanian Greens was based on confidence and supply undertakings in which the Greens kept the right to move no-confidence motions of their own while not supporting those moved by other MPs.

Other recent examples include the following:

### **Example 1: Agreement between Prime Minister Gillard and Andrew Wilkie MP, 2 September 2010:**

#### *1. Purpose*

*1.1 This agreement establishes a basis for stable and effective government.*

*1.2 Mr Wilkie will maintain his right to vote on all legislation according to the needs of his electorate and his conscience, but undertakes to involve himself in negotiations with the Government before exercising that right.*

*1.3 Mr Wilkie will vote with the Government to ensure supply.*

***1.4 Mr Wilkie will oppose any motion of no confidence in the Government unless the motion is moved or seconded by Mr Wilkie.***

## Example 2: Agreement between Prime Minister Gillard and Australian Greens, 1 September 2010:

### **1. Purpose**

1.1 *This agreement establishes a basis for stable and effective government.*

1.2 *The Greens will vote with the ALP government to ensure supply.*

1.3 *The Greens will oppose any motion of no confidence in the government from any non-Greens member.*

## Example 3: Agreement between Prime Minister Gillard and Tony Windsor and Rob Oakshott, 7 September 2010:

### **1. Purpose**

1.1 *This agreement establishes a basis for stable and effective government.*

1.2 *Each of the Independent Members will maintain his right to vote on all legislation according to the needs of his electorate and his conscience, but undertakes to involve himself in negotiations with the ALP before exercising that right.*

1.3 *The Independent Members will vote with the ALP government to ensure supply.*

1.4 *The Independent Members will oppose any motion of no confidence in the government unless the motion is moved or seconded by the Independents, or one of them.*

**Example 4:** The most recent ACT Labor-Greens Agreement (for the 10<sup>th</sup> ACT Parliament)-reflecting multiple consecutive minority government arrangements between the two parties) does see the Greens promise to not move no confidence motions, however with an extensive range of concessions:

*ACT Labor and the ACT Greens will continue to provide the ACT with stable and effective Government. Subject to this Agreement, each ACT Labor and Greens Member will:*

*[...]*

**5. *Not move any motions of no confidence, or support any Opposition no-confidence motions, except in instances of proven corruption, conduct that threatens public confidence in the integrity of government or public administration, gross negligence, or significant and intentional non-adherence to this agreement or the Ministerial Code of Conduct.***

## Relinquishing Right to Vote to Bind the Government

Subclause 1 (iii) of the Liberal-JLN 2024 Agreement is an extraordinary and unprecedented inclusion in a Confidence and Supply clause:

***iii Support the Rockliff Liberal Government on parliamentary motions that bind the Government;***

The power of a crossbench during minority government periods is the capacity to vote to require the Executive government of the day to be responsive to the Parliament. This is the very rubber-stamp concession former independents Lara Alexander and John Tucker refused to agree to.

In a practical sense this means that should, for example, the Parliament vote to formally require the government against its will – hence, bind the government - all documentation regarding the proposed AFL stadium to be tabled, ***the JLN MPs will have to vote against that parliamentary motion***. Nor could the JLN MPs move their own motion to require the independent assessment of the state's finances' (which they apparently negotiated as Clause 5 of the Agreement), or the reviews proposed under Clause 6, to be tabled and released publicly should the government not want to do so.

## Clause 2: Other Parliamentary Proceedings

*Subclause 2 (iii) In the event of a JLN Member/s wishing to vote against the Government, they shall provide 24 hours' notice in writing to the offices of both the relevant Minister and the Premier;*

There are serious questions about the practicality of this clause, which the Liberal members would be aware of. Further, should the JLN MPs find themselves requiring to utilise this 24-hours in writing provision on a regular basis, they will be blamed and scape-goated for stalling government and parliamentary business, and ultimately making parliament ineffective and “unworkable”.

### **On the fly debate**

*Subclause 2 (viii) VIII. Where an adjournment is not immediately practicable, notwithstanding their views, the JLN Member/s shall nonetheless vote with the Government but be free to voice their concerns and reserve their right to vote as they wish in future on similar questions;*

This is the ‘conscience is inconvenient’ clause. Despite not agreeing with the government, the JLN MPs have agreed to vote with the government. Further, there may not be a similar question for the JLN MPs to vote according to their views as, presuming the initial question was defeated if the government has the numbers, Standing Orders tend to rule out a similar vote being put again for that session of Parliament.

*Subclause 2 (ix). Subsequently, the Government shall engage in good faith negotiations with the JLN Member/s to seek to reconcile their position with that of the Government.*

This is not about seeking common ground. All compromise is to be on the part of the JLN MPs to ‘shift’ towards the government’s position, there is no expectation the government should shift to meet the JLN’s position.

### **Procedural matters**

*Subclause 2 (xi) In any instance whereby a procedural motion is moved to allow for debate on any matter covered in this Agreement, JLN Members will support the Government.*

This means that should any Opposition or cross-bench member seek to move to suspend Standing Orders to allow for a non-confidence motion, or any other proposed urgent business to be considered by the House that the government does not wish to debate, the JLN MPs must now support the government in voting down the first vote on whether to allow even the debate on the substantive matter to occur. **This is the antithesis to a ‘transparent and accountable’ parliament. This potentially gags even the debate seeking to hold a debate on substantive policy matters before the vote is taken.**

## Clause 3: Working Relationship

*Subclause 3 (iv). Before the introduction of the budget, JLN Members shall be provided with a confidential briefing on the economic and budgetary situation by the Treasurer and the Secretary of the Treasury;*

Opposition MPs, media and stakeholders already receive this via the ‘Budget lock-up’. This does not provide for any influence over the budget priorities.

*Subclause 3 (v). JLN Members are able to put forward "budget bids" directly to the office of the Premier, which will then be forwarded to the appropriate Department and the Treasury for analysis and consideration.*

- 1. While these proposals will be considered in good faith, the Government gives no commitments that they will be enacted;*

- II. *Such bids need to be lodged no less than three months prior to the scheduled delivery of the budget.*

This indicates the JLN MPs have waived any expectation to influence the imminent state budget for 2024-25, (which is expected to be handed down within the next three months). If this is the case, they will now be required to allow through what will be the unfettered delivery of Liberal Party election spending promises.

‘Budget bids’ can be submitted by community stakeholders through the community consultation process for each state budget some months before the budget is delivered, so subclause 3(v) provides nothing more than what currently is available to the general community.

## Clause 5: Independent Review of State Finances

The promise by JLN to “open the books” has not been delivered. Despite an undertaking for an independent review of the state’s finances to be concluded within six months, there is no commitment that the review must report to Parliament, or even be tabled in Parliament, and nor is there any commitment to act on any review recommendations.

The Treasury books should have been opened to the JLN MPs **prior** to negotiations in order to inform those negotiations.

There is precedent for this request.

In 2010, Independent MPs, Tony Windsor, Robert Oakshott and Bob Katter wrote to Prime Minister Gillard on the 25 August formally requesting a Treasury briefing – amongst others – to inform any negotiations expected to commence on 3 September 2010. Ms Gillard wrote back on the same day agreeing to make Treasurer Ken Henry and the Finance Secretary available to provide the basis of informed negotiations going forward.

## Clause 6: Transparency and Accountability

The three reviews under *Clause 6 Transparency and Accountability* further highlight the extent the JLN have been duded:

None of the three listed reviews stipulate:

- that they are to be independently undertaken rather than in-house;
- that they are to report to the Parliament;
- that their respective Reports will be made public;
- that they are to include community consultation processes;
- that the government is required to accept and implement and resulting findings and recommendations.

“*An eye to...*” is optional. For example, it does not provide a commitment to ensuring the Integrity Commission is reformed to provide ‘teeth’, or any other structural reform to be considered or implemented. Once the 12 month window for these reviews has concluded, there is no commitment that any reforms will be funded and/or implemented.

But what it **has delivered** for the Liberals is that for the first 12 months of this minority government - and combined with the other constraints detailed in this Agreement – these key issues of reform of the Integrity Commission, our RTI system and political donations laws will not be progressed in the legislative agenda for that 12 month period, and will not trouble the government.

## 7. Commission of Inquiry into The Tasmanian Governments Responses to Child Sexual Abuse in Institutional Settings

*7 (i) All public servants named for misconduct In the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings are immediately referred to appropriate authorities.*

The Liberal government is well aware the Commission of Inquiry Final Report only named one public servant for misconduct. Hence this is a meaningless, and potentially bad faith, provision.

The Commission of Inquiry did state that 22 other persons received Section 18 notices – it is the secrecy and lack of transparency surrounding the identity of those 22 public servants who received Section 18 notices (regarding potential misconduct or adverse findings) that has distressed and angered victims/survivors and other community stakeholders.

*7 (ii) Complete shutdown of the Ashley Detention Centre within the timeframe of this agreement.*

This is the inadequate status quo. Prior the state election, the Liberals had indicated a closure date of 2026. This is also a breach of a key Commission of Inquiry Recommendation that the AYDC is shut immediately.

*7 (iii) Parliamentary oversight of the implementation of the recommendations from the Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings.*

This was already going to happen whether there is an agreement with any cross-bench members or not. The Legislative Council has the means to hold its own parliamentary committee hearings into this matter, outside of any agreement MPs of the Lower House may or may not enter into between themselves.

*7 (iv) A JLN member of parliament is to be a member of the committee overseeing the implementation of the recommendations.*

This is fair enough, and amongst the few meaningful 'gains' for non-government oversight considerations in this Agreement.

## 8. Administration

*8 (i) This Agreement shall come into force on the day the Rockliff Government is commissioned.*

This provides a narrow window for the JLN MPs to reconsider and withdraw from this agreement, and request a return to the negotiating table – before the Governor recommissions the government upon Mr Rockliff's recommendation.

*8 (ii) This agreement will be reviewed 12 months after the date it comes into effect.*

This is standard – and it does not necessarily infer the Agreement is only for 12 months, just that it will be reviewed. However, it fails to include a dispute resolution mechanism should either Party wish to renegotiate in good faith, as part of that review.