



Australian Government

Department of the Prime Minister and Cabinet

FEDERAL EXECUTIVE COUNCIL

HANDBOOK

SEPTEMBER 2009

Federal Executive Council Secretariat

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FOREWORD

The *Executive Council Handbook* is produced as a reference for ministers, parliamentary secretaries, and their officials as an aid in the preparation of papers for consideration by the Governor-General in Council.

This edition of the Handbook outlines the diverse nature of matters that are submitted to the Executive Council and the form, developed over many years, in which these matters are presented to the Governor-General and her Executive Councillors.

All papers prepared for the Executive Council must be high quality; it is essential that they be accurate, reflect the Governor-General's legislative or constitutional powers, and clearly set out the recommendations being made.

The Executive Council Liaison Officer in each Australian Government department is the first point of contact for officials who are preparing draft papers for the Executive Council. The Executive Council Secretariat within the Department of the Prime Minister and Cabinet performs an important clearance role on these papers and is available to advise and assist with any procedural or presentational questions you may have.

Stephen Brady
Official Secretary to the Governor-General

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1 INTRODUCTION

1.1 The Handbook

- 1.1.1 This Handbook provides an overview of current Federal Executive Council operations, in particular the preparation of documents for consideration by the Governor-General in Council.
- 1.1.2 This edition replaces the June 2005 version of the Handbook. Any updates will be advised through circulars issued by the Federal Executive Council Secretariat ('the Secretariat').

1.2 The Federal Executive Council Secretariat

- 1.2.1 The Federal Executive Council is supported by a Secretariat located in the Department of the Prime Minister and Cabinet (PM&C). The Secretary to the Executive Council manages the work of the Secretariat and attends all Executive Council meetings. The Secretariat is assisted by a network of Executive Council Liaison Officers in each Australian Government department.
- 1.2.2 The Secretariat is responsible for:
 - (a) providing advice on Executive Council practices and requirements, in particular on the presentation of documents for the Executive Council;
 - (b) liaison with the Official Secretary to the Governor-General and with ministers' offices on Executive Council arrangements;
 - (c) providing secretariat support for meetings of the Executive Council;
 - (d) ensuring that the requirements of the Governor-General and executive councillors are met; and
 - (e) maintaining the records of the Executive Council.
- 1.2.3 Successive Australian governments have followed the practice of strict observance of the courtesies due to the Governor-General. This includes, for example, a requirement that there be no prior announcement of decisions requiring consideration by the Executive Council (unless, in exceptional circumstances, such an announcement has been agreed in advance by the Governor-General). Officials involved in the preparation of material for their ministers and parliamentary secretaries should be made aware of this long-standing convention, and consult the Secretariat if in doubt about any proposed action.
- 1.2.4 All documents to be considered by the Governor-General and the Executive Council must be cleared through the Secretariat before they are finalised for ministerial signature. This practice aims to minimise the potential for embarrassment and delay if final papers are found to be unsatisfactory or deficient and require redrafting.

1.2.5 Departments and agencies (departments) are encouraged to make full use of the Secretariat's expertise in ensuring that Executive Council requirements and standards are met. The Secretariat can assist with advice on details of process and presentation.

1.2.6 The Secretariat aims to clear drafts in the order of receipt. Drafters should aim to submit drafts to the Secretariat as early as possible, as requests for 'last minute' clearance may not be satisfied.

1.2.7 The Secretariat's contact details are:

Federal Executive Council Secretariat
Department of the Prime Minister and Cabinet
One National Circuit
BARTON ACT 2600
telephone: (02) 6271 5779
facsimile: (02) 6271 5537
email: exco@pmc.gov.au

The Secretary to the Executive Council may be contacted on (02) 6271 5322.

1.2.8 Other important contact numbers are:

Office of Legislative Drafting and Publishing (OLDP)

First Assistant Secretary:	(02) 6203 9001
Executive Council Liaison Officer:	(02) 6203 9029
Legislative Services and Publication Unit:	(02) 6203 9006
ComLaw Help Desk:	1300 726 631

1.3 Other References

1.3.1 The **Appendix** lists several reference sources which provide more detail on government and parliamentary processes relevant to the Executive Council.

2 THE FEDERAL EXECUTIVE COUNCIL

2.1 What is the Federal Executive Council?

- 2.1.1 The Governor-General exercises the executive power of the Commonwealth under section 61 of the *Constitution* of the Commonwealth of Australia. This power extends to the execution and maintenance of the *Constitution* and laws of the Commonwealth.
- 2.1.2 Section 62 of the *Constitution* establishes the Federal Executive Council to ‘advise the Governor-General in the government of the Commonwealth’.
- 2.1.3 Members of the Executive Council are chosen, summoned and sworn in by the Governor-General and hold office at the Governor-General’s pleasure. As with most powers of the Governor-General under the *Constitution*, the power to appoint and dismiss executive councillors is exercised on ministerial advice, in this case the advice of the Prime Minister.
- 2.1.4 In accordance with section 64 of the *Constitution*, all ministers of state (ministers and parliamentary secretaries) must be members of the Executive Council. The title ‘The Honourable’ may be used by all members for the duration of their appointment, i.e. usually for life. Only those executive councillors who are members of the current ministry are summoned to advise the Governor-General at meetings of the Council.
- 2.1.5 While the Governor-General presides over meetings of the Executive Council, she is not a member of the Council. The powers exercised by the Governor-General on the advice of the Executive Council are referred to as those of the ‘Governor-General in Council’.
- 2.1.6 The Vice-President of the Federal Executive Council is appointed by the Governor-General on the advice of the Prime Minister. The Vice-President is usually a senior minister; he or she may summon executive councillors and preside at Council meetings when the Governor-General is not present.
- 2.1.7 The Executive Council deals with some matters arising directly under section 61 of the *Constitution*, such as Australia’s entry into international treaties, but is mainly concerned with powers given to the Governor-General in Council in Acts of the Commonwealth Parliament. While Acts almost invariably refer to the ‘Governor-General’ when conferring these statutory powers, section 16A of the *Acts Interpretation Act 1901* provides that such references are to be read as referring to the Governor-General acting with the advice of the Executive Council.

- 2.1.8 Powers exercisable by the Governor-General in Council under the *Constitution* or, more commonly under Acts of Parliament, include:
- (a) the making of proclamations (notices given under an Act by the Governor-General of a particular matter such as the commencement of the Act on a specified day);
 - (b) the making of regulations and ordinances (under delegated authority under an Act);
 - (c) the making and terminating of appointments to statutory offices, boards, commissions, courts and tribunals and diplomatic posts;
 - (d) changes to the Administrative Arrangements Order, including the creation and abolition of government departments (*Constitution*, section 64);
 - (e) the issuing of writs for the election of members of the House of Representatives (*Constitution*, sections 32 and 33), and senators for the Territories (*Commonwealth Electoral Act 1918*, section 151);
 - (f) the approval of compulsory land acquisitions;
 - (g) the authorisation of Australia's entry into international treaties;
 - (h) the commissioning of officers in the Australian Defence Force;
 - (i) the authorisation of government borrowings overseas;
 - (j) grants of land to Aboriginals; and
 - (k) authorising the issue of Treasury Notes and Commonwealth Inscribed Stock.
- 2.1.9 Details of the operation of the Executive Council (including numbers of meetings held and of items considered) may be found in the PM&C Annual Reports.

2.2 Meetings of the Federal Executive Council

- 2.2.1 The Executive Council generally meets every two weeks, more frequently if necessary. The meetings are normally held at Government House, Canberra.
- 2.2.2 The express permission of the Governor-General is required for all meetings of the Council regardless of whether the Governor-General will be in attendance. The Secretariat liaises with the Official Secretary to the Governor-General to seek this approval.
- 2.2.3 The Secretariat provides departments with advance notice of scheduled meetings (which are usually settled by the start of each calendar year), including the cut-off dates for draft and final documents. This advice is distributed through the Executive Council Liaison Officer network. The Secretariat also liaises with ministers' offices in drawing up a ministerial attendance roster at the beginning of each year.

- 2.2.4 A quorum for an Executive Council meeting consists of the Governor-General and two executive councillors. The majority of meetings take place with two councillors.
- 2.2.5 Where an urgent and unexpected matter requiring early Executive Council consideration arises, a councillor may request a special (urgent) meeting of the Executive Council through the Secretariat (see section 3.3). If the Governor-General is in Australia but unavailable to attend a meeting, she may agree to a special meeting in her absence. This would normally occur only in exceptional circumstances. A quorum at a meeting held in the Governor-General's absence would consist of either:
- (a) the Vice-President of the Executive Council and two other executive councillors; or
 - (b) in the Vice-President's absence, three other executive councillors, one of whom is a senior minister authorised by the Governor-General to preside (a 'three minister' meeting).
- 'Three minister' meetings are held at a time and place agreed by the Vice-President of the Council or the senior minister presiding, according to requirements, most often at Parliament House, Canberra.
- 2.2.6 Where a meeting is held in the absence of the Governor-General, the papers from that meeting will be presented to the Governor-General for approval as soon as possible after the meeting (or on rare occasions they could be presented to a vice-regal deputy appointed under section 126 of the *Constitution*). The Vice-President of the Executive Council is not authorised to approve the documents.

2.3 The 'caretaker' period

- 2.3.1 Successive governments have accepted that special arrangements apply in the 'caretaker period', i.e. the period between the dissolution of the House of Representatives and the point in time when the outcome of the election is clear.
- 2.3.2 A special meeting of the Executive Council may be held after the announcement of an election but before dissolution of the House of Representatives to deal with outstanding appointments and other matters of an urgent nature.
- 2.3.3 It is rare for an Executive Council meeting to take place during the caretaker period, other than to approve the issuing of writs. A meeting would be held only if the matters involved could not be deferred. Any proposals to put business to the Executive Council during this period should be discussed with the Secretary to the Executive Council and the First Assistant Secretary, Government Division, in PM&C.
- 2.3.4 Normal Executive Council business resumes once the outcome of the election is known and a ministry has been sworn in.

3 RECOMMENDATIONS TO THE FEDERAL EXECUTIVE COUNCIL

3.1 Arrangement of papers for a meeting

- 3.1.1 Executive Council papers follow a standard pattern. For each item of business there will be:
- (a) a formal minute, signed by the responsible minister or parliamentary secretary, recommending that the Governor-General take the desired action;
 - (b) a concise explanatory memorandum describing the legal basis for action to be taken and providing a description of that action and the reason for taking it, initialled by the responsible minister or parliamentary secretary; and
 - (c) in most cases, a formal instrument, (e.g. regulations, an appointment instrument, or a proclamation) to be executed by the Governor-General, which has been countersigned by the responsible minister or parliamentary secretary.
- 3.1.2 Where another minister or parliamentary secretary sponsors a proposal for the responsible minister, the formal minute and instrument is signed - and the explanatory memorandum is initialled - by the minister or parliamentary secretary who is acting for the responsible minister (see section 4.5).
- 3.1.3 A complete document package or submission for Executive Council consideration is sometimes referred to as an 'Executive Council Minute', although technically the minute is only the recommending document which forms a part of the whole set of papers.
- 3.1.4 All items to be considered at an Executive Council meeting are listed under a schedule (a business list or agenda) prepared by the Secretariat. The schedule, together with the original documents provided by ministers and parliamentary secretaries, is submitted by the Secretariat to the Governor-General at least two days before the meeting. Copies of these papers are also provided to the executive councillors who will be attending the meeting and to the Official Secretary to the Governor-General.
- 3.1.5 If all of the recommendations put to the Governor-General in Council are approved at the meeting, the Governor-General and the executive councillors sign the schedule at the conclusion of the meeting. This records that the Council has agreed to the recommendations and that the Governor-General has approved them.
- 3.1.6 The Governor-General will also sign each of the approved minutes and any associated documents, such as instruments of appointment, proclamations, regulations, and orders. See paragraphs 2.2.5 and 2.2.6 above for arrangements when the Governor-General is not present at the meeting.

- 3.1.7 After the meeting, the schedule and approved minutes are also signed by the Secretary to the Executive Council and incorporated into the records of the Council. Each year's original records are collated, bound, and then archived by the Secretariat. Procedures for notifying the outcome of Executive Council meetings are described in Part 6 of this Handbook.
- 3.1.8 The following paragraphs give general guidance on the timetables and procedures to be followed when submitting documents to the Secretariat. For more details of requirements relating to specific types of Executive Council business, see Parts 4 and 5 of this Handbook.

3.2 Deadlines

- 3.2.1 Departments and agencies are encouraged to consult early with the Secretariat on the preparation of documents for Executive Council consideration, and to lodge drafts for clearance as soon as possible. The cut-off dates for clearance of drafts are notified by Executive Council circular and typically are at least six working days before a scheduled meeting.
- 3.2.2 The cut-off dates for lodgement of final documents with the Secretariat are also notified in Executive Council circulars. Typically, they are two working days after the deadline for lodging drafts. The cut-off dates are strictly enforced; these deadlines allow the Secretariat to ensure that papers are available for consideration by the Governor-General and executive councillors **at least** two full working days before each meeting.
- 3.2.3 Any final documents received after the cut-off date will be held over for a later meeting unless there are genuine urgent and unavoidable circumstances.
- 3.2.4 Requests for urgent consideration of a late item must be made in writing to the Secretary to the Federal Executive Council, providing **compelling reasons** for the request. The unavailability of the responsible minister to sign the documents is by itself not a valid justification for late items. The request should be made by:
- (a) the minister responsible for the item;
 - (b) another Executive Councillor on the minister's behalf;
 - (c) the most senior member of the office of the responsible minister; or
 - (d) the secretary or a deputy secretary of the relevant department who must clearly indicate that the request is being made on behalf of the responsible minister.
- 3.2.5 Departments should bear in mind that letters seeking consideration of late items are presented to the Governor-General and councillors.

3.3 Urgent business needing a special meeting

- 3.3.1 On the rare occasion where a matter is of such urgency that it cannot await consideration at a scheduled meeting, the Secretary to the Executive Council should be contacted to discuss the circumstances and possible arrangements for convening a special meeting of the Executive Council.
- 3.3.2 A request for a special Executive Council meeting should be made only in the most exceptional circumstances and be accompanied by a written request following the same principles set out in paragraph 3.2.4 above.
- 3.3.3 Such requests will be forwarded by the Secretariat to the Official Secretary to the Governor-General. The originator of the request will be informed of the outcome once a reply is received.
- 3.3.4 Under no circumstances should departments contact the Official Secretary to the Governor-General themselves. All such negotiations must be conducted through the Secretary to the Executive Council.
- 3.3.5 If a special meeting is approved, it would normally be expected that the requesting minister attend the special meeting. It is the responsibility of the minister requesting the meeting to organise the attendance of two councillors.
- 3.3.6 Documents for a special meeting should be prepared in the normal manner, as outlined in this Handbook, and close liaison maintained with the Secretariat.

3.4 Clearance of drafts and final documents

- 3.4.1 First drafts of documents for a scheduled Executive Council meeting should be delivered to the Secretariat as early as possible in advance of the relevant draft cut-off date to allow clearance processes to be finalised by that cut-off (see section 3.2 above). Drafts may be delivered by hand, email or facsimile; the Secretariat will usually provide any marked-up comments by fax. The name and telephone and fax numbers of a departmental contact officer should be included to facilitate the making of any changes that may be needed.
- 3.4.2 Draft documents may be forwarded to the Secretariat for clearance in anticipation of formal approvals, for example the Cabinet's consideration or the Royal Assent. Also see section 3.7 and paragraph 4.5.9 below.
- 3.4.3 Clearance of drafts by the Secretariat does not absolve departments from responsibility for the accuracy and completeness of the final documentation, both in terms of content and presentation. Officials preparing and clearing the documents should undertake a thorough final check of the draft documentation to avoid common mistakes such as spelling errors, formatting errors, incorrect cross referencing and inconsistencies with the associated draft instrument.

- 3.4.4 Final documents must have the highest standard of presentation; must not bear any extraneous markings, such as annotations, punched holes, tears or adhesive where stick-on tabs have been removed; and must be loose-leaved and not stapled or bound, although there are occasional exceptions to this (e.g. laws of an external self-governing territory). By prior arrangement, the Secretariat may accept faxed or scanned versions of final documents, provided the originals are made available before the meeting date.
- 3.4.5 Original Executive Council documents form part of the Commonwealth's permanent record, and should be produced on 'permanent' or 'archival' quality paper, not on recycled paper as that is not sufficiently durable.

3.5 Withdrawal of papers

- 3.5.1 Occasionally a minister may wish to withdraw an Executive Council minute that has been signed and submitted to the Secretariat.
- 3.5.2 Where the signed minute has not been forwarded to the Governor-General, a senior officer of the responsible department should discuss the withdrawal with the Secretary to the Executive Council and follow the matter up in writing on behalf of the minister. The Secretary would return the minute to the department.
- 3.5.3 Where the signed minute has been forwarded to the Governor-General, it may be withdrawn only at the request of the minister concerned. The request should be made in writing and addressed to the Secretary to the Executive Council by the minister, a senior member of the minister's office, or the secretary or deputy secretary of the relevant department. The letter must clearly indicate why the papers are being withdrawn and that the request is being made on behalf of the minister.
- 3.5.4 As Executive Council documents are forwarded to the Governor-General at least two full working days before every scheduled meeting, the Secretariat must be advised as soon as possible of any proposed withdrawal. The minister's request should therefore be provided to the Secretariat as soon as it becomes available.
- 3.5.5 Where papers need to be withdrawn, but neither the minister's office nor the department is able to contact the minister before the Executive Council meeting, the Secretary to the Executive Council should be contacted immediately to discuss how best to handle the matter.

3.6 Ministerial changes affecting Executive Council documents

- 3.6.1 Should a minister either cease to be a minister or change portfolios, or there is a change in portfolio responsibilities after a matter has been submitted by the minister to the Executive Council, the minister subsequently responsible for the matter must confirm that consideration of that item is to go ahead. Arrangements would need to be made between the Secretary to the Executive Council and the relevant agency to ensure the papers prepared for the Council meeting are revised and signed by the new minister to reflect those changes.

3.7 Documents contingent on assent to legislation

- 3.7.1 From time-to-time, particularly towards the end of parliamentary sittings, there may be a need for urgent regulations, statutory appointments, or other instruments to be made that are consequent upon legislation which has just been passed by the Parliament.
- 3.7.2 This may involve earlier preparation of Executive Council documents in anticipation of the legislation being given the Royal Assent by the Governor-General. In such instances departments should ascertain from the Bills Officer of the Office of Parliamentary Counsel (telephone (02) 6270 1465) the expected timing of assent by the Governor-General and advise the Secretariat accordingly when lodging the Executive Council documents. Departments should also ensure their Legislation Liaison Officer has advised the Legislation Section in PM&C and the Parliamentary Liaison Officers of any such critical dates for passage of legislation.
- 3.7.3 The Secretariat will hold the documents for the Executive Council meeting on the understanding that they will not be submitted to the Governor-General if the legislation has not been given the Royal Assent by the deadline for delivery of final papers. The papers may be treated as late items if assent is given prior to the meeting but after the deadline, time permitting (see paragraphs 3.2.3 to 3.2.5).
- 3.7.4 It is the responsibility of departments to advise the Secretariat whether or not assent has been given in time. In matters involving instruments prepared by OLDP, departments should keep OLDP informed of the progress of the assent, especially in relation to the timing of registration.
- 3.7.5 Proposed legislative instruments must not refer to legislation that will not have received the Royal Assent before the Executive Council meeting considering those instruments, as this may render them invalid.

3.7.6 While legislative instruments cannot be made in reliance on legislation which has not received the Royal Assent (and so cannot be recommended to the Governor-General), instruments may be made under an Act which has received the Royal Assent but has yet to come into operation (see section 4 of the *Acts Interpretation Act 1901*). Where this applies, the circumstances must be highlighted in the explanatory memorandum.

3.8 Preparing documents for the Administrator of the Government of the Commonwealth

3.8.1 Section 4 of the *Constitution* provides for the appointment of an Administrator.

3.8.2 State governors hold commissions from the Queen to administer the Government of the Commonwealth in the event of the absence out of Australia, or the death, incapacity or removal from office, of the Governor-General, or in the event of the Governor-General having absented himself or herself temporarily from office for any reason. State governors are called upon to perform this function in the order of their seniority of appointment. The most senior state governor therefore always acts as Administrator unless he or she is unavailable in which case the next most senior performs the function.

3.8.3 Section 16A of the *Acts Interpretation Act 1901* provides that unless the contrary intention appears, reference in any Act to the Governor-General is to be read as including an Administrator and as a reference to the Governor-General (or Administrator) acting with the advice of the Executive Council.

3.8.4 Where an Administrator is to preside at an Executive Council meeting, departments will be informed of the particular style and title of the Administrator through an Executive Council circular. Officers should ensure that draft minute papers and instruments that were previously cleared by the Secretariat for the Governor-General are updated for the Administrator.

4 THE DOCUMENT PACKAGE

4.1 The standard set of documents

- 4.1.1 As noted in paragraph 3.1.1 above, documents prepared for the Executive Council always include a formal minute and explanatory memorandum and, in most cases, a formal instrument.
- 4.1.2 While the format of minutes, instruments and explanatory memoranda should follow a standard pattern, those documents will necessarily vary according to the specific matter being submitted for consideration. Part 5 of this Handbook deals with the more common types of documents submitted to the Executive Council.
- 4.1.3 Each year the Executive Council deals with several hundred document packages, each requiring one or more signatures by the Governor-General. Where departments are concurrently dealing with several related matters, they should be combined in the one minute and one explanatory memorandum if possible. Examples of matters which may be combined include several appointments to the one body, or a series of amendments to regulations under the same Act or related Acts.

4.2 Minutes

- 4.2.1 Business is submitted to the Executive Council under cover of a minute from a minister or parliamentary secretary for each separate item (although one minute may cover several closely related items – see paragraph 4.1.3 above). A minute is generally a single-page document.
- 4.2.2 Each minute is a recommendation by the responsible minister for the approval of the Governor-General in Council that some thing be done, made or approved. It must bear the full signature of the recommending minister.
- 4.2.3 When preparing a minute, departments should ensure that the description given under the heading ‘Subject’ is a concise and accurate summary of the matter for consideration and is reflected in the accompanying explanatory memorandum.

4.3 Instruments

- 4.3.1 Most matters submitted to the Executive Council will require a formal instrument. This will follow the minute and precede the explanatory memorandum in the package of documents prepared for the Executive Council.
- 4.3.2 For all instruments, such as commissions, appointments, proclamations and delegated legislation which are to be executed in the name of the Governor-General, the appropriate expression of the Governor-General’s style and title is:

‘I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council...’

- 4.3.3 Instruments declaring arrangements between the Commonwealth and the states will usually refer only to the titles of the Governor-General and Governor respectively. Their names should therefore be included as part of their respective signature blocks.
- 4.3.4 Most legislative instruments requiring Executive Council consideration are drafted by OLDP. Where departments have drafted their own instrument, they may wish to contact OLDP for advice or assistance.

4.4 Explanatory memoranda

- 4.4.1 Each Executive Council minute must be accompanied by an explanatory memorandum.
- 4.4.2 An explanatory memorandum explains the need for, and effect of, the action being recommended to the Governor-General. An explanatory memorandum should therefore:
- (a) provide a plain English explanation of the proposal, outlining the purpose of the proposed action, the reason for doing it, and the likely impact and effect of the action;
 - (b) clearly show the source of the Governor-General’s power to approve the proposed action, including specific reference to all relevant legislative or constitutional authority;
 - (c) detail any conditions that need to be satisfied before that power may be exercised, including all relevant legal or other pre-conditions and requirements (e.g. qualifications for appointment or consultation requirements); and
 - (d) advise how any conditions have been satisfied – this should take the form of an explicit certification by the recommending minister (see paragraph 4.4.7 below).
- 4.4.3 As a general rule, explanatory memoranda should not be more than two pages in length. If a more detailed explanation is necessary (e.g. for complex regulations), that information should be included in an attachment to the explanatory memorandum.
- 4.4.4 Explanatory memoranda must be self-contained and as free from jargon as possible, bearing in mind that the Governor-General and most executive councillors are not likely to have the background or subject knowledge available to the minister who initiated the minute.

- 4.4.5 Each explanatory memorandum should begin with a factual statement of the power available to the Governor-General to do what is recommended, followed by a clear and concise statement of the purpose of the proposal. The outline of the purpose should be located close to the beginning of the explanatory memorandum so that it is clear to what the following text relates.
- 4.4.6 It is important that recommended actions are put in context. For example, if the commencement of an instrument is contingent upon something else occurring, the explanatory memorandum must address this aspect and provide the reader with a complete picture.
- 4.4.7 The explanatory memorandum must spell out any relevant pre-requisites or conditions, and how they have been met. For example, if a legislative provision requires the Governor-General to be satisfied about a particular course of action or to form an opinion about a matter, or if the Governor-General or the minister responsible is to have taken something into account as a prerequisite to consideration of the matter at hand, the explanatory memorandum must include express advice in the form of a boxed certification signed by the minister.
- 4.4.8 Further details of the requirements for explanatory memoranda in relation to specific instruments, including appointments and regulations, are contained in Part 5 of the Handbook. An important common element for any instrument that would be taken to operate retrospectively is that the accompanying explanatory memorandum must include a statement on the application of subsection 12(2) of the *Legislative Instruments Act 2003*; the Secretariat must be provided with written certification from OLDP or the Australian Government Solicitor to the effect that the Governor-General in Council has the power to make such an instrument.
- 4.4.9 If the instrument being recommended is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, the associated explanatory memorandum (and explanatory statement) should include a clear statement to this effect.
- 4.4.10 It is essential that all legal and other requirements are met prior to Executive Council consideration, and explained in the explanatory memorandum so that the Governor-General may confidently rely on the memorandum in exercising her powers.
- 4.4.11 Accuracy and currency in references, such as to legislation or to the names of departments is also imperative, to ensure that the validity of Executive Council documents cannot be called into question.
- 4.4.12 An explanatory memorandum must be clearly expressed, succinct, and address all the requirements outlined above. If not, consideration of the recommended item may be deferred until adequate documentation is supplied.

4.5 Signing and initialling by the responsible minister

- 4.5.1 Executive Council minutes and accompanying instruments such as regulations must be signed by the responsible minister or parliamentary secretary or by another executive councillor for the responsible minister (see paragraphs 4.5.2 to 4.5.5 below). Under no circumstances should ministers' or parliamentary secretaries' facsimile signatures be used.
- 4.5.2 Where the minister responsible for a particular minute is absent or otherwise unavailable, and unless a contrary intention appears in the relevant legislation, section 19 of the *Acts Interpretation Act 1901* provides the authority for the minute to be signed by:
- (a) another minister or parliamentary secretary in the responsible minister's portfolio; or
 - (b) another minister or parliamentary secretary from another portfolio (whether or not carrying on the responsible minister's duties) acting for the responsible minister.
- 4.5.3 Where the signing minister or parliamentary secretary is in the same portfolio as the responsible minister, if the matter is one involving the exercise of a power, whether statutory or non-statutory, by a minister within that portfolio, the legal position is that the minister or parliamentary secretary who signs, does not sign 'for' the responsible minister but in his or her own right (and therefore may use his or her own letterhead and signature block). To give an example, the Minister for Small Business, Independent Contractors and the Service Economy under current arrangements could, when signing on an industry-related issue in the absence of the Minister for Innovation, Industry, Science and Research, use his or her own letterhead and signature block because it is a matter within the same portfolio.
- 4.5.4 On some occasions, it may be preferable for ministers in the same portfolio to sign 'for' the responsible minister where the subject matter is more readily identified with the responsible minister. In this instance, the Minister for Small Business, Independent Contractors and the Service Economy could sign for the Minister for Innovation, Industry, Science and Research using the letterhead of the Minister for Innovation, Industry, Science and Research.
- 4.5.5 In all cases where a minister or parliamentary secretary signs for another minister, even where he or she is temporarily carrying the responsibilities of that minister, the expression 'Minister for X (or Parliamentary Secretary to the Minister for X) for the Minister for Y' should be used. The terms 'Acting Minister' or 'Minister Assisting' are not acceptable. An Executive Council minute must be sponsored using the formal title with which the relevant minister was sworn into the Ministry. 'Acting Minister' and 'Minister Assisting' are informal titles in this context and therefore may not be used.

4.5.6 In these cases, the signature block should appear as follows:

Name
Minister for Trade
for the Minister for Foreign Affairs

or

Name
Parliamentary Secretary for Trade
for the Minister for Foreign Affairs

4.5.7 The signature block on any accompanying instrument must be consistent with that on the covering minute.

4.5.8 Where a minute is signed by an executive councillor for the responsible minister, the letterhead on the formal minute and the headings on the explanatory memorandum and explanatory statement should refer to the responsible minister.

4.5.9 Executive Council minutes dealing with matters that require the Cabinet's approval should not be signed until the relevant Cabinet minute has been issued. In cases where the arrangements for achieving this become complex (e.g. where a proposed appointment has a critical commencement date and a Cabinet decision is not expected until the day before the Executive Council meeting) departments should consult the Secretariat.

4.5.10 The following procedural outline may assist in ensuring that all parts of the Executive Council document package are appropriately signed prior to lodgement with the Secretariat:

- (a) the minister/parliamentary secretary should sign above the signature block provided on the Executive Council minute and on any instrument;
- (b) in the case of regulations, ordinances and proclamations, the minister/parliamentary secretary should sign above the signature block provided on the front page of the instrument itself, but need not initial any page except for the purpose of verifying an alteration (please note that the instrument must not be dated by the minister/parliamentary secretary); and
- (c) the minister/parliamentary secretary should initial the bottom right hand corner of every page of each multi-page:
 - (i) minute;
 - (ii) instrument (excluding proclamations, regulations and ordinances); and

- (iii) explanatory memorandum and each attachment (e.g. curriculum vitae of proposed appointees) to each explanatory memorandum, including the pages that are required to bear the minister's full signature; for example, pages containing confirmation of necessary prior action and which have a certification box with the minister's/parliamentary secretary's signature.

4.5.11 Explanatory statements do not need to be initialled.

4.5.12 Officials submitting papers should ensure that:

- (a) each multi-page minute, instrument, explanatory memorandum and attachment to an explanatory memorandum is internally page-numbered starting from the second page;
- (b) the minister/parliamentary secretary has not signed the following classes of documents accompanying a minute:
 - (i) Acts passed by the Legislative Assemblies of the self-governing Territories;
 - (ii) recommendations of authorities or bodies which have a statutory responsibility to make recommendations to the Governor-General, e.g. recommendations made by the Presiding Officers of the Parliament; or
 - (iii) other documents such as treaties or agreements which are independent of other Executive Council documents, including resignations that require acceptance by the Governor-General;
- (c) the date in the left-hand margin of an Executive Council minute is left blank (as it is inserted by the Secretariat immediately after the meeting); and
- (d) dates are not inserted elsewhere on minutes or instruments.

4.6 Alterations to documents

4.6.1 Where any alteration to an Executive Council document is required and it is not possible to have the document retyped or reprinted, the alteration should be made by striking out the words to be deleted and inserting the required words in their place. Any alteration must be initialled by the minister or parliamentary secretary who has signed the Executive Council minute. Alterations should not be made in any other way and obliteration devices or fluids should not be used. Where the document is a legislative instrument, the electronic copy will need matching revisions before it is registered on the Federal Register of Legislative Instruments.

4.7 Numbering, making copies, and assembling documents

- 4.7.1 Departments should number their Executive Council minutes consecutively. The Executive Council Liaison Officer in each department maintains a register and assigns these departmental minute numbers. As minutes approved by the Executive Council are bound annually in portfolio series, departments should commence a new series of minute numbers for each calendar year.
- 4.7.2 The same minute number should also be inserted on the accompanying explanatory memorandum.
- 4.7.3 In all cases, the original set of papers (for the Governor-General) is to be accompanied by five copies. In addition, for legislative instruments two copies of the explanatory statement and an additional copy of the legislative instrument (regulations, proclamation, ordinance) for certification purposes, are required. The explanatory statement is not submitted to the Executive Council by the Secretariat, but is forwarded to the Attorney-General's Department once the legislative instrument has been made (see paragraph 4.7.6 below). All copies must be clear, legible and of a high quality.
- 4.7.4 The set of original papers should be held together by a removable paper clip. One of the five full copy sets may be assembled and stapled together for date and signature stamping; this set will be returned to the originating department after the meeting.
- 4.7.5 The remaining four copies are for the use of councillors, the Secretary to the Executive Council and the Official Secretary to the Governor-General, and should be clipped (not stapled) together in sets.
- 4.7.6 In the case of legislative instruments, the 'for certification' copy should be clipped to the explanatory statement. After the Executive Council meeting, this copy will be returned to OLDP by the Secretariat to provide hard copy proof of the legislative instrument as made. Gazettal of non-legislative instruments, where required, should be arranged directly with the OLDP (see section 6.3 below).
- 4.7.7 When lodging final documents with the Secretariat, departments should provide an appropriately-sized envelope with the contact details of the officer to whom the departmental copies may be returned after the Executive Council meeting.
- 4.7.8 Wherever possible, final documents should be delivered by hand to the Secretariat at PM&C, and the Secretariat informed of the delivery by telephoning extension 5779 from the front desk.
- 4.7.9 The mail and delivery address, and telephone and fax numbers for the Secretariat are listed at paragraph 1.2.7 above.

4.8 Explanatory statements

- 4.8.1 An explanatory statement must also be prepared for each legislative instrument that is being submitted to the Executive Council. Section 5 of the *Legislative Instruments Act 2003* defines a legislative instrument, and further guidance may be found in the *Legislative Instruments Handbook* (see www.ag.gov.au) or by consulting OLDP.
- 4.8.2 Explanatory statements are not Executive Council documents, and the Secretariat is not responsible for clearing them. Subject to time and resource constraints, the Secretariat may assist in checking any explanatory statements included with draft Executive Council documents for obvious spelling or formatting errors. Other than the use of tense, which reflects the fact that a legislative instrument has been made (rather than that it is proposed to be made), the content of explanatory statements is often very similar to that of explanatory memoranda.
- 4.8.3 Explanatory statements are prepared for circulation to senators and members when legislative instruments are tabled in Parliament, following their making by the Governor-General in Council. Explanatory statements are also examined by the Senate Standing Committee on Regulations and Ordinances in its role of considering delegated legislation. Explanatory statements are held by the Secretariat and forwarded to OLDP following the making of the legislative instrument by the Governor-General, together with the related legislative instrument as hard copy proof of making of the instrument. The responsible agency should refer to the *Legislative Instruments Handbook* in relation to the required content of an explanatory statement and the requirement to lodge it in electronic form with OLDP for registration on the Federal Register of Legislative Instruments.
- 4.8.4 In preparing explanatory statements, departments should bear in mind the Senate Standing Committee's concern that a statement should aid parliamentarians' understanding of the legality and impact of the associated legislative instrument. Such an explanatory statement should therefore:
- (a) give a plain English explanation;
 - (b) state the authority for making the legislative instrument;
 - (c) state the reason for making the instrument;
 - (d) summarise the likely impact and effect;
 - (e) discuss any unusual aspects of the matter calling for special comment;
 - (f) give reasons for any imposition of, or change in, fees;
 - (g) advise that all legal and other requirements have been met, e.g. where the enabling Act provides for a mandatory duty to consult a particular authority before such regulations or ordinances are made this action should be confirmed in the explanatory statement; and
 - (h) for any legislative instrument that commences retrospectively, comment on the application of subsection 12(2) of the *Legislative Instruments Act 2003*.

- 4.8.5 The Senate Standing Committee has also requested that explanatory statements for regulations and ordinances incorporate, where appropriate, advice that those regulations or ordinances have been made, either wholly or partly, to implement undertakings given by ministers to the Committee.
- 4.8.6 Where appropriate, the advice outlined above may also be incorporated in explanatory memoranda. However, care will need to be taken to ensure that any references to the Committee's requirements do not inadvertently detract in any way from the responsibilities of the Executive in making its recommendations to the Governor-General.
- 4.8.7 Departments should also ensure that, for regulatory proposals that impact on business and individuals or the economy, they have complied with the requirements set out in the Best Practice Regulation Handbook, which is available at <http://www.finance.gov.au/obpr/proposal/ria-guidance.html>. The Office of Best Practice Regulation (OBPR) will assist departments and agencies in fulfilling their obligations regarding regulatory impact analysis. Information regarding the OBPR can be found on its website <http://www.finance.gov.au/obpr/about/>.
- 4.8.8 As explanatory statements are publicly available through the Federal Register of Legislative Instruments, they should not include attributed extracts from Cabinet minutes or refer to Cabinet minute numbers, nor, where an exemption has been given, indicate that a regulation impact statement is not required.
- 4.8.9 For further advice and technical assistance in the preparation of explanatory statements, departments may wish to contact the First Assistant Secretary, OLDPA, on telephone (02) 6203 9001.

5 PREPARING SPECIFIC DOCUMENTS

5.1 Appointments and acting appointments

- 5.1.1 The enabling legislation for statutory authorities often requires appointments to the authority to be made by the 'Governor-General'. As paragraph 2.1.7 above explains, this means the Governor-General acting with the advice of the Executive Council.
- 5.1.2 In the case of significant Government appointments, ministers must write to the Prime Minister seeking his or, at his discretion, the Cabinet's approval of the appointment (see paragraphs 124 to 135 of the *Cabinet Handbook*, www.pmc.gov.au/guidelines/index).
- 5.1.3 Appointments to be brought to the Prime Minister's attention include:
- (a) significant full-time or part-time appointments (including interim appointments) to boards, commissions or statutory offices;
 - (b) full-time chief executive officer (CEO) positions in such agencies (where a board selects the CEO, the Government should be consulted and the minister should not signify agreement without the approval of the Prime Minister);
 - (c) acting appointments in the above categories where the acting is for more than three months;
 - (d) appointments to significant non-statutory tribunals, advisory bodies and commissions of inquiry; and
 - (e) appointments as heads of mission (other than to Austrade managed posts).
- 5.1.4 Where agreement by the Prime Minister, or by the Cabinet, is required for an appointment, that and all other necessary clearances must be obtained before a recommendation is made to the Governor-General. Agreement should be obtained in sufficient time to allow documents to be prepared for a subsequent meeting of the Executive Council and in sufficient time for the appointment to be dealt with by the Executive Council before the expiration of the previous appointment.
- 5.1.5 In general, an appointment takes effect:
- (a) if no date is specified in the Executive Council documents, on the date of approval (i.e. when the Governor-General signs and dates the instrument of appointment); or
 - (b) if a prospective date is specified as the date of effect in the instrument of appointment, on that day.

- 5.1.6 An appointment must not be made retrospectively unless the relevant legislation makes provision for retrospectivity, either expressly or by clear implication. Departments must exercise particular care with any appointment proposals involving retrospectivity, and appropriate legal advice should be supplied to the Secretariat before such proposals are submitted for Executive Council consideration.
- 5.1.7 The minute for an appointment follows the basic format. When a large number of appointments are being made at the same time to the same body, an abbreviated form of the minute may be used.
- 5.1.8 The explanatory memorandum for a proposed appointment (including a re-appointment or an acting appointment) should, in addition to the basic framework set out in section 4.4 above:
- (a) indicate whether provision is made for a specific number of appointees to the relevant body and how many other appointments, if any, are required to reach the full complement;
 - (b) provide a brief statement of the proposed appointee's suitability for the office by reference to his or her qualifications and experience;
 - (c) state whether or not the statutory provision under which the proposed appointment is to be made sets out criteria to be met by appointees, and:
 - (i) where it does:
 - those criteria should be detailed; and
 - the recommending minister must sign a boxed certification outlining the way in which the proposed appointee meets those criteria; and
 - (ii) where it doesn't:
 - the recommending minister must sign a boxed certification attesting to the suitability of the proposed appointee;
 - (d) indicate whether the proposed appointment is full-time or part-time and, where applicable, refer to any statutory age or time limitations on appointments;
 - (e) where applicable, indicate whether the proposed appointment is a re-appointment and when the person was last appointed to, or last acted in, the office; and
 - (f) include a one-page curriculum vitae of the proposed appointee as an attachment to the explanatory memorandum.
- 5.1.9 An instrument of appointment must be prepared for execution by the Governor-General. In some cases, the enabling legislation specifically refers to the need for an appointment to be made 'by instrument in writing'; however, even where the enabling legislation does not refer to or imply the need for an instrument, a separate instrument of appointment must be prepared as clear evidence of the making of the appointment.

5.1.10 Care should be taken to follow the provisions of the enabling legislation, for example:

- (a) where the legislation requires that an appointment be made from among the members of an authority, the minute and instrument of appointment must also provide for the person's appointment as a member of the authority, unless the person is already a member by virtue of previous Executive Council action, in which case that fact should be made clear in the documentation;
- (b) if the legislation provides that an appointment is to be made for a period determined by the Governor-General, the period must be specified in the minute, the explanatory memorandum and the instrument of appointment;
- (c) if the legislation specifies a qualification or condition precedent to the appointment, the explanatory memorandum must include an assurance, signed by the recommending minister, that the requirement has been satisfied (see paragraphs 4.4.2, 4.4.7 and 5.1.8 above); and
- (d) where the legislation provides for the Governor-General to determine terms and conditions of appointment:
 - (i) any terms and conditions being determined must be mentioned in the minute paper, set out in the instrument of appointment (or a separate Schedule to the instrument of appointment) and explained in the explanatory memorandum; or
 - (ii) if there are no terms and conditions to be specified, then the provision for the Governor-General to determine terms and conditions should be introduced in the explanatory memorandum, together with a statement that no terms and conditions are being set.

Acting appointments

5.1.11 It is increasingly the practice for legislation to provide that the responsible minister rather than the Governor-General makes acting appointments. However, where an Act provides for an appointment to be made by the Governor-General but is silent on acting arrangements, subsection 33(4) of the *Acts Interpretation Act 1901* provides that, unless a contrary intention appears, the appointment power of the Governor-General shall be construed as including a power to appoint a person to act in the office until:

- (a) a person is appointed to the office; or
- (b) the expiration of 12 months after the office was created (in the case of a new office) or became vacant (in the case of an existing office),

whichever happens first, and subject to the same conditions and approval process as applicable to a substantive appointment.

- 5.1.12 Where the legislation provides that acting appointments may be made by the Governor-General during any period, or during all periods, when the office is vacant or the office-holder is absent or not available, the minister may recommend to the Executive Council the making of standing acting arrangements by the Governor-General in relation to the office to come into effect on the occurrence of the specified circumstances (e.g. appointment of person B to act when person A (the office-holder) is absent).
- 5.1.13 Depending on the legislative provisions, it is possible for a sequence of standing acting appointments to be made to the same office whereby:
- (a) person A is appointed to act during all periods when the office-holder is unavailable;
 - (b) person B is appointed to act during all periods when both the office-holder and person A are unavailable; and
 - (c) person C is appointed to act during all periods when the office-holder, and persons A and B are both unavailable.
- 5.1.14 Such standing arrangements should not, however, be drafted in terms of the Governor-General appointing persons A, B, and C to act, with the relevant minister having the power to decide which of them is to act on a particular occasion. In other words, it should be clear from the terms of the arrangement which of the persons specified will act in particular circumstances.

Resignations and terminations

- 5.1.15 Departments should ensure that resignations and terminations are effected in accordance with any special terms and conditions of employment applicable, bearing in mind that such terms and conditions may often be found in documents such as employment contracts rather than in legislation.
- 5.1.16 Legislation often provides that an office-holder may resign from the office in writing delivered to the Governor-General. Generally such resignations are acknowledged in writing on behalf of the Governor-General, and are not dealt with by the Executive Council (however, see paragraphs 5.1.7 and 5.1.8 below).
- 5.1.17 Termination is often specified in legislation for reasons such as the incapacity, misconduct or bankruptcy of the appointee. If the legislation requires termination by the Governor-General, it must be performed on the advice of the Executive Council. Where the legislation requires specific grounds to be made out, an appropriate statement of the grounds must be included in the explanatory memorandum accompanying the instrument of termination.

- 5.1.18 When it is recommended the appointment of a member of the Defence Forces be terminated on medical grounds, sufficient information should be included in the explanatory memorandum to allow a judgement to be made about whether those grounds have been proven. In particular, the explanatory memorandum should make clear that all the necessary steps have been followed (including review procedures where appropriate) in arriving at the recommendation.
- 5.1.19 In general, a resignation takes effect:
- (a) if no date is specified in the letter, on the date of receipt by the Governor-General; or
 - (b) if a prospective date of resignation is specified, on that date.
- 5.1.20 It is important that letters of resignation not be drafted in such terms as to make the resignation conditional on some other event occurring, e.g. appointment to another office.
- 5.1.21 Where the legislation is silent on how a resignation may be tendered it is desirable for an office-holder appointed by the Governor-General to tender his or her resignation in writing to the Governor-General for acknowledgment.
- 5.1.22 Departments should check each particular case to ensure that termination is not sought in cases where resignation is more appropriate.
- 5.1.23 Particular care should be taken in all cases of termination to ensure that natural justice and procedural fairness have been properly exercised and that this is demonstrated in the explanatory memorandum.

5.2 Commissions (other than Defence Force Commissions)

- 5.2.1 A commission is a special form of written instrument signed by the Governor-General appointing a person to a significant post. After signature, Commissions are sealed with the Great Seal of Australia.
- 5.2.2 A number of Acts including the *Royal Commissions Act 1902* provide for appointments to be made by commission. In the case of a Royal Commission, a directive to make a formal inquiry is given in Letters Patent issued under the Great Seal of Australia by the Governor-General in Council.
- 5.2.3 The original of a commission is normally printed on cream goatskin parchment, A4 size, bearing the Commonwealth Coat of Arms.

5.3 Defence Force Commissions

- 5.3.1 Several packages of Defence Force commissions are considered by the Governor-General in Council each year. A list of the names of the officers being commissioned is included as a schedule to each Executive Council minute.
- 5.3.2 Once signed by the Governor-General, the commissions – each with the Great Seal of Australia affixed – are returned through the Secretariat to the Department of Defence (Defence). Defence then issues the commissions to the relevant officers.

5.4 Legislative instruments

- 5.4.1 It is common for an Act of Parliament to allow some other person or body to make a law on matters of detail under Act. Such a law is called a legislative instrument. The *Legislative Instruments Act 2003* requires legislative instruments, unless exempt, to be registered and published on the Federal Register of Legislative Instruments (a part of ComLaw) and tabled in the Parliament.
- 5.4.2 The *Legislative Instruments Handbook* provides guidance on how to determine whether an instrument is a legislative instrument – if in doubt consult OLDP (see paragraph 1.2.8 above for contact details). The most common types of legislative instruments that are considered by the Executive Council are regulations, ordinances and proclamations. Guidance on these types of instruments is provided below. If you have a legislative instrument of another type for consideration by the Executive Council, please contact the Secretariat for assistance with drafting the necessary documents.

Regulations and ordinances

- 5.4.3 The Governor-General is empowered to make regulations under a wide range of legislation. Usually the regulation-making power in legislation is in general terms ‘prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act’. In some cases the legislation also specifies the particular matters that may be dealt with in the regulations. The Governor-General may also be empowered to make ordinances for the non-self-governing territories. Paragraphs 5.4.4 to 5.4.10 below apply to ordinances as well as to regulations.
- 5.4.4 Regulations and ordinances are legislative instruments, and are prepared by OLDP on instruction from the department whose minister administers the primary legislation.
- 5.4.5 Regulations which deal with matters not within the regulation-making power of the principal legislation will be invalid. The instructing department should take advice from OLDP on whether a proposal is or is not within power.

- 5.4.6 An explanatory memorandum for a set of proposed regulations should not simply repeat the wording of those regulations. The purpose of an explanatory memorandum is to explain the need for and effect of the action being recommended to the Governor-General. In many instances a simple and concise description of the intended effect of the proposed regulations and the problem they are designed to overcome will be sufficient if the provisions themselves are self-explanatory.
- 5.4.7 If the regulations are not self-explanatory (e.g. where they consist of substantial amendments to existing regulations), the explanatory memorandum should describe the relationship between the amendments and the existing regulations and what will be the effect of the proposed changes. The explanatory memorandum should describe the substantial or significant changes, rather than recite each proposed amendment. An attachment to the explanatory memorandum may be used to set out the details of the proposed changes.
- 5.4.8 As noted in section 4.4 above, the explanatory memorandum should state whether or not the principal legislation specifies any conditions that need to be met before the Governor-General may exercise the power to make the proposed regulations. If there are conditions to be met, they must be detailed and the recommending minister must also provide a signed certification to the effect that those conditions have been met.
- 5.4.9 Amending regulations are prepared by OLDP with the expression ‘(No.)’ at the end of the title, which should also be reproduced in the Executive Council documentation. The relevant amendment number is inserted by the Secretariat following advice from OLDP.
- 5.4.10 Since regulations are legislative instruments, an explanatory statement will also need to be prepared to accompany the regulations for lodgement and registration on the Federal Register of Legislative Instruments. Registration and publication of regulations is undertaken by OLDP (see section 6.3 below). OLDP also arranges for the tabling of regulations in both houses of the Parliament.

Proclamations

- 5.4.11 A proclamation is an official public notice of something by a person in authority. An Executive Council minute may recommend that the Governor-General issue a proclamation under a statutory provision, e.g. to fix the date of commencement of provisions of an Act.
- 5.4.12 All proclamations must be prepared or settled by OLDP and registered on the Federal Register of Legislative Instruments.

- 5.4.13 The explanatory memorandum for a proposed proclamation must explain the purpose and effect of the proclamation. Where the proposed proclamation relates to the commencement of an Act of Parliament (or to part of an Act), the explanatory memorandum should state the date the Act received the Royal Assent, explain what the Act does and why the particular date for the proclamation is recommended. Where only a part of an Act is to be proclaimed, the explanatory memorandum should explain what that part deals with, why other parts are not being brought into operation or, if they are in operation, why the commencement of the part concerned has been delayed.
- 5.4.14 Under subsection 12(1) of the *Legislative Instruments Act 2003*, a legislative instrument (including a proclamation) is taken to commence on the first moment of the day next following the day when it is registered, unless another date (including the date of registration) is specified. To avoid doubt, it is recommended that a proclamation specify a date of commencement not earlier than the day after the Executive Council meeting at which it is to be considered.
- 5.4.15 Since proclamations are legislative instruments, an explanatory statement will also need to be prepared to accompany the proclamation for lodgement and registration on the Federal Register of Legislative Instruments.
- 5.4.16 Once approved by the Governor-General, proclamations dealing with commencement of legislation must be registered on the Federal Register of Legislative Instruments no later than the day before the earliest specified commencement date, and tabled in the Parliament. In urgent cases, departments may need to make registration arrangements with OLDP in advance.

5.5 Treaties

- 5.5.1 The Minister for Foreign Affairs is responsible for seeking Executive Council approval for Australia to enter into treaties.
- 5.5.2 This responsibility extends to those instances where the substance of the treaty is primarily the concern of another department. All recommendations relating to the signature, the issuing of full powers, ratification, acceptance, approval, accession, amendment or termination are prepared by the Department of Foreign Affairs and Trade and submitted through the Minister for Foreign Affairs to the Executive Council.
- 5.5.3 Provided the treaty action proposed is within the scope of existing government policy and the Prime Minister has at least been informed (and where necessary his agreement obtained), approval obtained by the Minister for Foreign Affairs of those ministers having primary carriage of the subject matter is sufficient authority to proceed to Executive Council consideration.

5.6 Documents involving Federal and state Executive Councils

- 5.6.1 Each state has an Executive Council. The Governor of the state is the presiding officer of the state's Executive Council. Special arrangements are sometimes required when both Federal and state Executive Councils are involved in considering an item of business.
- 5.6.2 For example, a proposed appointment may relate to a person who has been previously appointed by a Governor in Council to a full-time state office, and it is now necessary for the person to be discharged from that office in order to be appointed to a full-time Commonwealth office. In those circumstances, the responsible departments should ensure that appropriate resignation or termination action has been taken by the state Governor in Council before submitting the relevant Federal Executive Council documents for the Governor-General's consideration. The explanatory memorandum should indicate that the appropriate state action, including, where applicable, state gazettal action, has been completed.
- 5.6.3 In the case of Commonwealth-state agreements and arrangements, and appointments to joint Commonwealth-state offices, two original instruments must be produced (one for each jurisdiction). The signing pages of such documents should be set out so that the signatures of the Governor-General and the Commonwealth minister appear above that of the state Governor and the state minister. The names of each should appear as part of their respective signature blocks.
- 5.6.4 Departments should ensure that both original instruments have been approved by the relevant state Executive Council and signed by the state Governor before being submitted to the Federal Executive Council.
- 5.6.5 When the documents have been signed by the Governor-General, the Secretariat returns one original signed instrument to the relevant department for transmission to the state Governor concerned. The other original instrument is retained by the Secretariat as part of the permanent records of the Council.
- 5.6.6 It is essential that departments take action on Commonwealth-state agreements and arrangements, and appointments to joint Commonwealth-state offices, in sufficient time to allow for the Cabinet's consideration (if necessary) and for the matter to be considered by the relevant state Executive Council and Federal Executive Council before the critical date of the proposed appointment or agreement.
- 5.6.7 Clearly for each of these processes to be accommodated, and the deadlines for draft and final papers to be met, departments undertaking such Commonwealth-state matters need to plan well in advance and keep the Secretariat fully informed on progress.

5.7 Repeal, rescission, revocation, amendment and variation of instruments

5.7.1 Subsection 33(3) of the *Acts Interpretation Act 1901* provides:

Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

5.7.2 In preparing documents for the Executive Council, subsection 33(3) of the *Acts Interpretation Act 1901* can be relied on (i.e. cited in the explanatory memorandum as the authority for action) only where action to be taken is expressly required by legislation to be by instrument in writing. Where there is no such requirement, the explanatory memorandum must identify some other authority to revoke or vary a decision.

5.7.3 Even where the action to be taken is expressly required to be by instrument in writing, subsection 33(3) *Acts Interpretation Act 1901* applies only in the absence of a contrary intention. Such a contrary intention may exist, for example, if the action to be taken by instrument affects a person's proprietary or contractual rights. Again in these circumstances the authority to take the proposed action must be identified and cited in the explanatory memorandum. Departments should discuss any such proposals with the Secretariat.

6 ACTION FOLLOWING FEDERAL EXECUTIVE COUNCIL CONSIDERATION

6.1 Signature of instruments

- 6.1.1 The Executive Council minute signed by the Governor-General is a record of approval by the Governor-General in Council of the recommendations put forward by the responsible minister.
- 6.1.2 In some instances where a formal instrument is not required (such as when granting approval for a person to sign a treaty for and on behalf of Australia), a matter is finalised once the minute is signed by the Governor-General. More often, depending on the relevant legislation, a formal instrument, e.g. regulations, orders or commissions of appointment, is also executed by the Governor-General.
- 6.1.3 The Secretariat is the custodian of Executive Council documents. At the end of each calendar year the documents are bound in portfolio order and retained as a permanent record for archival storage. Executive Council records have been maintained since Federation and are an important national record.

6.2 The Great Seal

- 6.2.1 The Governor-General's Letters Patent issued in 1900 provided for a Great Seal for use by the Governor-General. As with other national seals, its purpose is to authenticate certain official documents. The Great Seal of Australia is currently kept in the custody of the Secretary of PM&C. It is used by the Secretariat to seal official documents in accordance with the terms of the Royal Warrant issued by the Queen to the Governor-General on 19 October 1973.
- 6.2.2 The Great Seal of Australia is affixed to commissions of appointment of Governors-General, Administrators, judges, officers of the defence force, ambassadors and consuls. The Great Seal is also applied to documents such as proclamations, the administrative arrangements order, orders under section 4 of the *Commonwealth Inscribed Stock Act 1911*, orders under section 19BA or 19BB of the *Acts Interpretation Act 1901* and letters patent. It is circular in shape and approximately 7 cm in diameter; documents requiring the Great Seal should be prepared so as to allow sufficient space for it to be affixed.

6.3 Registration of legislative instruments and gazettal of other instruments

Registration of legislative instruments

- 6.3.1 Departments are responsible for lodging legislative instruments, including regulations, ordinances and proclamations, with OLDP in the Attorney-General's Department for registration on the Federal Register of Legislative Instruments. From 1 January 2005, registration has replaced gazettal for such instruments. OLDP is also responsible for tabling legislative instruments (and their associated explanatory statements, if they have been lodged at the same time) in the Parliament after they are registered. Under the *Legislative Instruments Act 2003*, this must occur within six sitting days after registration.
- 6.3.2 Prior to the Executive Council meeting, the originating department will have notified OLDP of the expected consideration at that meeting and have submitted a 'certification copy' of the instrument to the Secretariat. In addition, shortly before the meeting the Secretariat will have confirmed with OLDP that the item is on the Executive Council's agenda.
- 6.3.3 Once an instrument is made in Executive Council, the Secretary to the Executive Council signs the certification copy, and it is provided directly to OLDP. This occurs on the day of the Executive Council meeting.
- 6.3.4 Normally, registration will be effected within two days of lodgement with OLDP. Responsible departments should seek confirmation from the Secretariat that an instrument has been made before electronically lodging the instrument for registration on the Federal Register of Legislative Instruments. However, if registration is required in less than two days, the responsible department should contact OLDP in advance with reasons why urgent registration is required. The department should then confirm the special requirement when lodging information about the instrument and the explanatory statement in electronic form for registration.
- 6.3.5 Departments should refer to the *Legislative Instruments Handbook* for details of OLDP's registration requirements.

Gazettal of other documents

- 6.3.6 For **all other documents**, departments are responsible for the necessary gazettal action, and should arrange this directly with the Gazette Office in OLDP.

- 6.3.7 Generally, the registration of legislative instruments satisfies the requirement in an Act to gazette such documents. However, where an Act commencing after 1 January 2005 requires the gazettal of a legislative instrument, that requirement is **in addition** to the requirement to register it on the Federal Register of Legislative Instruments (see subsection 56(2) of the *Legislative Instruments Act 2003*).
- 6.3.8 Where urgent gazettal action is required, the department may arrange with the Gazette Office for a *Special Gazette* to be prepared in anticipation of Executive Council approval of the minute. The department must check with the Secretariat after the meeting to make sure that Executive Council approval has been given before proceeding any further.
- 6.3.9 It should be noted that gazettal of an instrument is not effective if the instrument as published is not complete. While it is not essential for an original signature to be reproduced in the *Gazette*, the gazetted version must show the date of signing and, in the absence of the original signature, a printed version of it, reflecting the content of the instrument as signed. Departments should contact OLDP's Publication Officer to ascertain the Office's requirements for special gazettal.

6.4 Announcements

- 6.4.1 The Executive Councillor's oath or affirmation on appointment includes an undertaking that councillors will not disclose the deliberations of the Executive Council.
- 6.4.2 Matters to be considered by the Executive Council are confidential to the Executive Council until they have been approved at a meeting, notwithstanding that they may have been agreed by the Cabinet or relevant ministers.
- 6.4.3 Once a matter has been approved by the Governor-General in Council, it is up to the responsible minister to decide whether to make an announcement, including the terms and timing of any announcement.
- 6.4.4 Where ministers need to make an urgent announcement of a matter requiring Executive Council consideration, departments should seek the Secretariat's confirmation immediately after the meeting that the matter has been approved by the Governor-General in Council before any ministerial statement is released.
- 6.4.5 Except with the prior agreement of the Governor-General, no announcement may be made before a meeting relating to any matters to be considered by the Executive Council.

- 6.4.6 A request for prior announcement should not be made unless there are compelling reasons. Concern about speculation over an appointment, for example, would not of itself be regarded as valid justification. It is best to consult the Secretary to the Executive Council in the first instance on the procedure to be followed. In general, following consultation, the request should be made in writing to the Secretary to the Executive Council by the minister, the senior member of the minister's office, or the secretary, or deputy secretary of the relevant department. The letter must clearly indicate that the request is being made on behalf of the minister.
- 6.4.7 Under no circumstances should departments approach the Governor-General or Government House directly about such requests.
- 6.4.8 Where a request for prior announcement is agreed by the Governor-General, the Secretary to the Executive Council will inform the relevant minister or department in writing or by telephone as appropriate. Announcements must be expressed in such a way as not to appear to pre-empt the Executive Council's consideration. For instance, an announcement of an appointment should be in the form 'The Government will be recommending to the Governor-General that X be appointed as ...'.

6.5 Return of documents to departments

- 6.5.1 After each Executive Council meeting one copy of the approved documents is stamped to indicate Executive Council approval and returned to the originating department for its record.
- 6.5.2 In the case of legislative instruments, a 'certification' copy is also forwarded by the Secretariat to OLDP (see section 6.3 above).
- 6.5.3 Commissions (other than Defence Force Commissions) approved by the Executive Council and signed by the Governor-General are processed in the Secretariat as follows:
- (a) the Great Seal of Australia is affixed to the original, the register of patents details are inserted, and the document is returned to the department for transmission to the appointee;
 - (b) a copy is taken for inclusion in the register of civil patents, which is a chronological list of commissions issued under letters patent, and is retained by the Secretariat as a separate part of the permanent record of Executive Council documents; and
 - (c) a second copy is retained by the Secretariat and forms part of the general permanent record of Executive Council documents.
- 6.5.4 Defence Force Commissions are returned to Defence and issued by that department to the commissioned officers. These commissions are not included in the Secretariat's register of patents.

- 6.5.5 For Commonwealth-state agreements and arrangements, and appointments to joint Commonwealth-state offices, one original signed instrument is returned to the originating department to be forwarded to the Governor of the state concerned. The other original instrument is retained by the Secretariat with the minute and explanatory memorandum as part of the permanent record of the Council.
- 6.5.6 Copies of the documents, stamped in the usual manner, are also returned by the Secretariat to the originating department. The responsible department should then forward a copy to the relevant state department for its records.

6.6 Access to Federal Executive Council records

- 6.6.1 Records of the Federal Executive Council include minute papers, instruments, explanatory memoranda, schedules of business and the register of civil patents. These records, if not already published, are generally exempt from the *Freedom of Information Act 1982* ('the FOI Act'); see section 6.7 below. After 30 years these records become subject to the 'open access period' in accordance with the *Archives Act 1983*.
- 6.6.2 Commonwealth departments may request access to Executive Council records within the closed period (currently 30 years, although the Government has announced its intention to change this to 20 years). Such requests must be in writing, addressed to the Secretary to the Executive Council. If the request is approved, the practice is to authorise a nominated officer of the requesting department to view and copy documents of a certain description (for example, subject matter, between certain dates, from a particular portfolio, or a combination) from the Executive Council series of documents retained by the Archives.

6.7 Application of the *Freedom of Information Act 1982*

- 6.7.1 Many Executive Council documents – including originals and copies of those submitted or proposed by a minister to be submitted, originals and copies of the official records of the Executive Council and any documents which disclose any deliberation or advice of the Executive Council - may be exempt under the FOI Act.
- 6.7.2 A department which receives a request under the FOI Act which covers documents connected with the Executive Council process must consult the FOI Contact Officer, PM&C, before any decision on access to the documents is made. Detailed guidance on handling FOI requests is available from the PM&C website <http://www.pmc.gov.au/foi/guidelines.cfm>

REFERENCE SOURCES

The following documents provide more detail of government and parliamentary processes that have a bearing on the work of the Federal Executive Council.

- The *Constitution*: see www.comlaw.gov.au
- *Cabinet Handbook* (PM&C): see www.pmc.gov.au/guidelines/index.cfm
- *Legislation Handbook* (PM&C): see www.pmc.gov.au/guidelines/index.cfm
- Guidance on Caretaker Conventions (PM&C): see www.pmc.gov.au/guidelines/index.cfm
- Legislative Instruments Handbook (Attorney-General's Department): see www.ag.gov.au
- Treaty making process: information and resources (Department of Foreign Affairs and Trade): see www.dfat.gov.au/treaties/making/index.html
- Best Practice Regulation Handbook (Office of Best Practice Regulation): see www.finance.gov.au/obpr/about
- *Odgers' Australian Senate Practice* (Department of the Senate)*: see www.aph.gov.au/Senate/pubs/odgers/index.htm
- House of Representatives Practice (Department of the House of Representatives)*: see www.aph.gov.au/house/pubs/practice/Index.htm

* These contain a detailed description of the parliamentary processes that follow the making of regulations by the Governor-General in Council, including the work of the Senate Standing Committee on Regulations and Ordinances.

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