New South Wales Government

Ministerial Handbook

Department of Premier and Cabinet

General Counsel

(Policy and Strategy Division)

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Introduction

The Ministerial Handbook and its companion volume, the Ministers' Office Administration Handbook, have been prepared by the Department of Premier and Cabinet to assist Ministers and their staff in the effective, efficient and ethical discharge of their duties.

The Ministerial Handbook (prepared by the General Counsel) provides information on:

- the appointment and operation of the Ministry;
- the standards of conduct required of Ministers;
- the operation of Cabinet;
- the operation of the Executive Council; and
- the processes for drafting and enacting legislation, and making regulations.

The Ministers' Office Administration Handbook (prepared by Ministerial and Parliamentary Services) provides information on:

- office administration;
- entitlements of Ministers and their staff; and
- machinery of government.

The Ministerial Handbook and the Ministers' Office Administration Handbook will be reissued when warranted.

Ministers and their staff should also have regard to any changes to policies conveyed by the various Memoranda, Circulars and Directions issued by the Premier, the Department of Premier and Cabinet (DPC) and Treasury.

Further information or advice on the matters raised in the Ministerial Handbook may be obtained from the Director General or the General Counsel of DPC.

Director General

Department of Premier and Cabinet

Section One – The Ministry

Introduction

The Ministry, sometimes referred to as the Executive, comprises the Premier and the other members of the Government, designated as Ministers, who are commissioned by the Governor to be responsible for the day-to-day administration of the State.

Ministers hold one or more portfolios, which define the areas of administration which have been placed under their control.

The authority of a Minister stems from the Commission issued by the Governor and the legislation that is allocated to each of his or her portfolios.

Constitution and Convention

The *Constitution Act 1902* provides that the Premier and other Ministers of the Crown for the State shall be appointed by the Governor, after first being appointed by the Governor as members of the Executive Council.

In practice, the Governor asks the leader of the majority Party or Coalition of Parties in the Legislative Assembly if a Government can be formed and, being assured that it can, appoints that person as Premier. The Premier then nominates the persons recommended for appointment as Ministers.

The constitutional convention of Westminster-style Parliaments that Ministers are nominated by the Premier applies in New South Wales. The convention also empowers the Premier to require the resignation of a Minister.

If the Premier resigns, the entire Ministry is also taken to have resigned.

Appointment of a Ministry

When a Government is returned at a General Election, it is the usual practice for the Premier to resign both as Premier and as a Member of the Executive Council, thus dissolving the existing Ministry. The Governor then commissions the Premier to form a new Ministry. The way is then cleared for the appointment of a new Ministry nominated by the Premier.

On the defeat of the Government at a General Election, as soon as the election result is clear, the Premier, by convention, declares to the Governor his or her intention to resign. The Governor usually asks the outgoing Premier to remain in office, with his or her Ministers, until the leader of the new majority Party or Coalition of Parties is ready to form a Ministry. The outgoing Ministry continues in office in a caretaker capacity until that time. (An outgoing Minister who has lost his or her seat in Parliament may continue in office as a caretaker Minister by virtue of

the Governor's Commission, until the outgoing Premier resigns and a new Ministry is formed.)

The outgoing Premier then formally resigns (effecting the resignation of the entire outgoing Ministry), after which the new Premier is sworn in. Upon being sworn in, the new Premier nominates a Ministry for appointment.

The Premier identifies the persons to be appointed as Ministers, allocates the proposed Ministerial portfolios, and forwards a recommendation to the Governor that the persons so selected be appointed as Ministers in the portfolios nominated.

The persons nominated by the Premier are appointed by the Governor, in the order of seniority determined by the Premier, first as Members of the Executive Council and then as Ministers in their respective portfolios.

The *Constitution Act 1902* (section 35D) provides that the seniority of members of the Executive Council is determined according to the order of their respective appointments as members. This order sets the seniority of Ministers, which is not directly related to the portfolios they hold. (The Premier may choose to determine a different order of seniority by administrative means for any purposes other than the Executive Council.)

All appointments to or changes in the Ministry are published in the Government Gazette on the day of the Governor's approval and are announced in the Legislative Assembly by the Premier and in the Legislative Council by the Government Leader in that House on the first subsequent sitting day of Parliament.

On appointment to the Executive Council, Ministers are required to take the Pledge of Loyalty and the Executive Councillor's Oath of Office (or equivalent affirmation) as prescribed by the *Constitution Act 1902* as follows:

1. Pledge of Loyalty

Under God, I pledge my loyalty to Australia and to the people of New South Wales. (The words "Under God" may be omitted when the Pledge of Loyalty is being made.)

2. The Executive Councillor's Oath of Office

I, being appointed as a member of the Executive Council of New South Wales, do swear that I will perform the functions and duties of an Executive Councillor faithfully and to the best of my ability and, when required to do so, freely give my counsel and advice to the Governor or officer administering the Government of New South Wales for the time being for the good management of the public affairs of New South Wales, and that I will not directly or indirectly reveal matters debated in the Council and committed to my secrecy, but that I will in all things be a true and faithful councillor.

So help me God.

On appointment to the Ministry, Ministers are also required to take the Ministerial Oath of Office (or equivalent affirmation) as follows:

> *I, do swear that I will perform the functions and duties of [Name of Office eg Premier, Minister for Health] faithfully and to the best of my ability.*
>
> *So help me God.*

As it is constitutionally the Governor's role to appoint Ministers (not the Premier's), details of the proposed allocation of portfolios should not be made public prior to the Governor's swearing in of Ministers, unless the Governor has given approval to the making of such an announcement.

Legislative Council Ministers

The allocation of Ministers between the Legislative Assembly and the Legislative Council is not regulated by law, but it is the practice in this State to appoint at least two Upper House Ministers.

Reconstruction of a Ministry

For various reasons, it may become necessary to reconstruct a Ministry during the term of a Parliament. There are four alternatives:

1. *New Ministry:* If the reconstruction is a major one affecting the relative seniority of Ministers, the Premier may find it more appropriate to resign so as to effect the resignation of the entire Ministry, and then to recommend the appointment of a full Ministry.

2. *Minor re-shuffle:* If the reconstruction is relatively minor, the Premier may arrange for only the affected Ministers to resign as Ministers and as Members of the Executive Council, and then to recommend, in the desired order of seniority, the re-appointment of those who are to be re-appointed and the appointment of any new Ministers.

3. *Filling a Ministerial vacancy:* If, for any reason, a vacancy in the Ministry arises, new appointments may be made to the vacant portfolios. Any new appointee will take seniority in order of swearing-in (i.e., at the bottom of the seniority table). If it is desired for the new appointee to be ranked at a more senior level then it would be necessary to use alternative (1) or (2) above to achieve the desired order of seniority.

4. *Portfolio changes only:* If portfolios are to be exchanged without changes in the persons who are Ministers or their seniority, there is no need for the Ministers to resign as Executive Councillors. They need only resign as Minister in respect of the portfolio they are leaving and be appointed as Minister in respect of the new portfolio.

Change of Government

In the event of the defeat of the Government on a significant issue in Parliament, the Premier may decide to resign and the Governor may ask the Leader of the Opposition to form a Government. The procedure is the same as in the case of the reconstruction of the Ministry.

General Procedures for a Reconstruction of the Ministry

When a new Ministry is, or Ministers are to be appointed, new commissions as Ministers in each portfolio affected and new commissions as Members of the Executive Council are prepared by Cabinet Secretariat and signed by the Premier before the swearing-in ceremony. After the ceremony they are signed by the Governor and returned to the General Counsel, Department of Premier and Cabinet, for imprinting with the Seal and recording in the Register of Patents. They are then forwarded to the Ministers.

Forms for taking the Pledge of Loyalty, the Executive Councillor's Oath of Office and the Ministerial Oath of Office are prepared by the Official Secretary to His or Her Excellency the Governor.

Details of the appointment of, or changes in the Ministry are published in a special supplement to the Government Gazette on the day of the swearing-in. This action is arranged by the Department of Premier and Cabinet.

Portfolios of Ministers

The provision in the *Constitution Act 1902* (section 35F) which limited the number of persons who may hold office as Ministers of the Crown to 20 was repealed in 1997. Accordingly, there is no required minimum or maximum number of Ministers and the number of Ministers is determined by the Premier. It is the usual practice that the Ministry comprises the Premier, the Attorney General, the Vice-President of the Executive Council and other Ministers of the Crown.

If the number of administrative responsibilities the Government wishes to recognise with a specific portfolio is greater than the number of Ministers, some Ministers may be given more than one portfolio.

The titles and groupings of portfolios are determined by the Premier and may be changed from time to time to emphasise policy initiatives or reflect a response to community needs. When a change is made in the title of a portfolio or an

administrative responsibility is transferred from one portfolio to another, Executive Council action is necessary to vest the administration of all relevant legislation in the new portfolio.

Responsibilities of Ministers

It is a firmly established convention that the responsibility of Ministers is collective, as well as individual. The administration as a whole is answerable for the acts of its members. Similarly, Ministers are jointly and severally responsible for the decisions of Cabinet.

This doctrine of joint Ministerial responsibility applies not only to the actions, but also to the words of members of the Cabinet.

The observance of this principle means that, where Government policy is concerned or where a Cabinet decision is to be taken, Ministers should refrain from making any statement until the matter has been decided by Cabinet.

The administrative responsibilities of each portfolio are determined by the Premier and the legislation relative to those responsibilities is vested in the Minister by Executive Council decision on the recommendation of the Premier.

As soon as possible after each Sitting of Parliament, the Premier recommends the allocation of the administration of the Acts passed during the Sitting. Action to allocate the administration of individual Acts may be taken as soon as they are assented to when urgent allocation is necessary.

So far as is possible, legislation is drafted to refer only to “The Minister”. The *Interpretation Act 1987* provides that wherever in an Act the expression “The Minister” is used, it shall be construed to mean the Minister of the Crown for the time being administering the Act or part of the Act in which the expression is used.

This drafting form simplifies the allocation or re-allocation of the administration of an Act.

Ministers Assisting

The Premier may appoint a Minister to assist him/her or other Ministers in the discharge of their responsibilities. The appointments are commissioned by the Governor.

Their functions are to:

- receive deputations;
- attend meetings and functions;
- handle correspondence;
- assist in such other ways as may be determined by the Premier from time to time.

Parliamentary Duties of Ministers

Order of Business

On the morning of each sitting day, the Leader of the House issues a Programme for the Legislative Assembly setting out the proposed order of business.

In determining the order of business shown on the Programme, various matters need to be taken into account, including:

- the availability of Bills;
- endorsement by political party;
- the relative importance and urgency of Bills;
- special requests by Ministers;
- the availability of Ministers.

As a consequence, items not dealt with on one day's Programme do not necessarily appear in the same order on the Programme for the following day.

The preparation of the Programme necessitates close liaison between the Leader of the House, the Premier, the Parliamentary Counsel, the Leader of the Government in the Legislative Council, and the Government Whips.

It is therefore essential that a Minister wishing to be absent from the House for any reason should seek leave from the Premier, and consult with the Whips and the Leader of the House as early as possible.

Question Time

At Question Time Ministers may be called upon to reply to any question relating to their portfolios. It is therefore desirable that all Ministers be present in the House at that time unless there is a special reason to be absent, a pair has been arranged, and another Minister has been nominated to answer questions on their behalf (by notice given by the Premier).

Minister in the Chair

It is traditional for at least one Minister to be in the House at all times.

Generally this is the Minister whose business is under discussion and that Minister sits in the Minister's Chair at the Table of the House.

More recently, Parliamentary Secretaries have also performed this role from time to time.

During general debates, e.g., on the Budget and the Address-in-Reply to the Governor's speech, a roster prepared by the Whips is circulated to Ministers at the commencement of the Session.

The rostered Minister or Parliamentary Secretary represents the Government in the House and must ensure that the Government's standing is maintained and take appropriate action either in debate or in procedure.

Ministers in the Other House

Ministers in the Legislative Council are represented in the Legislative Assembly by nominated Ministers in that House. The nominated Minister is responsible for handling the Legislative Assembly Bills relating to the portfolio of the Minister in the Legislative Council, and for answering questions on behalf of that Minister. Similarly, the Ministers in the Legislative Council act for nominated Ministers in the Legislative Assembly.

There are provisions in the Standing Orders which enable a Minister in the Legislative Assembly to attend and speak at the Bar of the Legislative Council for the purpose of explaining a Bill relating to his/her administration. This provision has most commonly been used for the introduction of 'money Bills', which are required to originate in the Legislative Assembly, by a Treasurer who is a member of the Legislative Council. Section 38A of the *Constitution Act 1902* similarly provides a mechanism by which a Minister from the Legislative Assembly may attend and take part in discussions in the Legislative Council.

Absence of Ministers

The *Constitution Act 1902* (sections 36 to 37) makes provision for the continuation of administration when Ministers are absent from the State or are unable, through illness or for other reasons, to act in their portfolio.

Appointment of an 'Acting Minister'

Section 36 enables the Governor to authorise a Minister to act for and on behalf of another Minister for any period specified or described by the Governor. This action is usually recommended by the Premier when a Minister wishes to take private leave or will be overseas (other than in New Zealand or Papua New Guinea). This action is also recommended if a Minister expects to be on official leave outside the State for a period of some days such that he or she will be unable to perform his or her Ministerial duties. Arrangements under this section may be made for shorter periods, including when a Minister will be in New Zealand or Papua New Guinea, when necessary.

Ministers who propose to be absent in these circumstances should seek the Premier's approval well in advance so that appropriate recommendations may be submitted (by the Premier) for the approval of the Governor-in-Council prior to the date of departure.

Ability of Ministers for perform functions of another Minister

Section 37 provides that a Minister may exercise or perform for or on behalf of another Minister any function appertaining or annexed to the office of that other Minister if the Minister is satisfied that the other Minister, or Acting Minister, is

unavailable. Arrangements are made in pursuance of this section when a Minister is absent or unavailable for a short period only. Arrangements under this section do not require Executive Council approval. They may apply to a particular function or for a specified period, but should not extend to a period longer than *about two weeks*.

A Minister who proposes to be absent for a short period and who desires that another Minister carry out any functions on their behalf during that period should seek the Premier's approval. In considering the matter, the Premier will, if at all possible, meet any special wishes a Minister may have as to which other Minister might be asked to deal with matters relating to the Minister's portfolio.

Absences of the Attorney General

Section 38 limits the extent to which another Minister can act as Attorney General. Because the Solicitor-General is authorised by the *Solicitor-General Act 1969* to carry out, in the absence of the Attorney General, those functions of the Attorney General which relate to the Attorney General's role as the State's premier Law Officer, these functions may not be carried out by another Minister.

However, section 38(2) makes it clear that another Minister may carry out, on behalf of the Attorney General, a function which is annexed or incidental to the office of the Attorney General only by reason of the fact that the Attorney General administers an Act or part of an Act.

Regional Ministers

In recent years a practice has developed of appointing Ministers for particular regions. These Ministers generally do not exercise any regulatory or administrative function. Usually, no legislation is allocated to their portfolios and no budget allocation is made to them. Instead, their role is primarily to provide a 'face' to the Government in their region, and to advocate their region's interests in Cabinet.

Support to the Regional Ministers is provided through the Department of Premier and Cabinet (DPC) Regional Coordination Program (RCP). This is as an extension of the role the RCP plays for the Premier in facilitation and coordination of multi-stakeholder and cross agency issues arising in regions.

This support to Regional Ministers by the RCP is departmental and does not include electoral or political activities. Support functions include:

- Provision of briefings to the Regional Minister on regional priorities, issues and projects.
- Managing cross-sector responses to complex issues impacting on regional communities identified by the Minister as priority issues and not within the responsibility any one line agency.
- Providing strategic advice on issues of interest to the region; Ministerial correspondence (including regional constituent representations); advice on regional impacts of Cabinet proposals; and agency liaison.

Section Two – The Cabinet

The Cabinet and Cabinet Conventions[1]

There is no legal definition of Cabinet as it is not established formally in the Constitution. This is the case not only in New South Wales, but also in the other states and the Commonwealth, as well as in the British system of government from which most of our governmental practices are derived.

Our understanding of Cabinet is therefore dependent on convention. In Australia (and the United Kingdom), the term "cabinet" is applied to the meetings of Government Ministers held regularly to discuss and agree on major issues facing the Government of the day. In New South Wales, all Ministers are traditionally members of Cabinet.

Cabinet, however, is also considered to be more than the regular meeting of Ministers. It is a pattern of deliberations – of which the "full" Cabinet meeting is often the culmination – which form the process by which the Government makes decisions on major issues.

As it has no formal legal status or executive power, Cabinet is essentially a deliberative body which determines the legislative and executive policy of the Government. It operates under long established conventions (or principles) which give substance to its actions.

The main conventions are outlined in this section. For further information on Cabinet conventions, see *Cabinet Conventions: NSW Practice* which is Annexure D to this Handbook.

Convention requires that the members of Cabinet be Members of Parliament and that they be Ministers and Members of the Executive Council.

Collective Responsibility

The convention of collective responsibility is central to the functioning of Cabinet. It describes the need for decisions taken by Cabinet to be truly the result of agreement by the whole Cabinet and therefore to be binding on each member of Cabinet.

This does not mean that individual Ministers cannot disagree on matters under consideration. It does mean, however, that once all appropriate consultation has taken place between Ministers and advice has been freely given within the confines of the Cabinet process, the Cabinet stands collectively responsible for its decisions.

There are a number of aspects to this convention:

- Ministers must publicly support Cabinet decisions;

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[1] The material in this section is largely based on the *Commonwealth Cabinet Handbook* (1991) and *The Cabinet and Budget Processes*, edited by Galligan, Nethercote and Walsh (1990).

- if unable to do so, they should resign;
- Ministers should seek Cabinet approval for policy before it is announced;
- Ministers should not publicly criticise a colleague's actions; and
- Ministers should not express opinions on policy other than in an official manner; that is, Ministers do not express their “private” opinions on such matters.

There are both practical and political reasons for the importance of collective responsibility to the functioning of Cabinet government. Clearly, matters will arise which, although within the administration of an individual Minister, have implications for another portfolio. It is essential that on such cross-portfolio issues proper consultation is undertaken between affected Ministers so that all relevant administrations are involved in the development of policy and feel a commitment to implement those aspects which impact upon them. Indeed, the co-operation of other Ministers is essential to the successful implementation of many major policy decisions.

Also, where a matter will require later parliamentary consideration, in particular legislative proposals, the collective agreement of the Government will be essential to ensure unity during debate. This demonstration of unity of purpose and leadership is an important outcome of the successful application of the principle of collective responsibility.

Confidentiality

The second key convention is that of confidentiality. This convention inseparably supports the convention of collective responsibility. The strict observance of secrecy in relation to Cabinet deliberations enables full and frank discussions to be had before Ministers arrive at agreement. This convention applies to all documents prepared for Cabinet consideration and to discussions held in Cabinet meetings.

The *Commonwealth Cabinet Handbook* states at paragraph 2.8:

> “Ministers should not make public statements or comment on policy proposals which they are bringing or which are to be brought to Cabinet. Promotion in public of a particular line may pre-empt Cabinet deliberations. Identification of individual Ministers with particular views tends to call into question the collective basis of agreed outcomes. Each portfolio Minister is responsible for direction and public presentation of policy, and other Ministers should avoid separate policy stances becoming matters of public debate."

The principles underlying this rule are as follows:

- major issues of Government policy, even if they be within a Minister's own portfolio responsibility, must be submitted to Cabinet for its determination;
- in matters within a Minister's own portfolio which are not of such moment as to require the determination of the full Cabinet, the Minister is free to state Government policy and in so doing binds his or her Cabinet colleagues;

- public discussion in advance of a matter which should be submitted to Cabinet, especially a matter which has already been submitted to the Department of Premier and Cabinet or which is on the Cabinet agenda, would inappropriately pre-empt full and frank discussion within the Cabinet Room;
- where there were no full and frank discussion within the Cabinet Room, for example, should Cabinet be constrained by a pre-existing public commitment by the initiating Minister, then it would not be possible to say that there has been a truly collective decision. In these circumstances, it cannot be said that the collective responsibility of Cabinet can fully apply.

Ministers should also observe the convention of confidentiality by ensuring that Cabinet documents are kept secure. Cabinet documents should be handled only by responsible officers whose duties are directly related to the subject matter of the documents, and those officers should be made fully aware of the need to maintain complete security.

Cabinet confidentiality is recognised by the provisions of the *Government Information (Public Access) Act 2009* (GIPA Act), which provides that it is to be conclusively presumed that there is an overriding public interest against the disclosure of Cabinet documents for ten years. There is, however, provision for the Premier or the Cabinet to decide that Cabinet information should be published. Cabinet documents can be requested under the GIPA Act once ten years has passed since the calendar year in which the document was created. There is a presumption in favour of release unless there are overriding public interest considerations against disclosure.

In addition, all State records, including Cabinet documents, need to be considered for general public access when they are 30 years old. The public office responsible for the records can determine that they are open to public access or that they are closed to public access. The practice to date has been for Cabinet documents to be made available to the public through the State Records Authority automatically after 30 years.

Ministerial accountability

A third key convention is that of Ministerial accountability. The convention is that Ministers are individually accountable for all actions taken within their administration. Despite the centrality of this convention to the Westminster system of government, its practical application is somewhat unclear and inconsistent.

There are a number of reasons for the lack of clarity in this regard. The large scale of government activity means that Ministers are no longer, if they ever were, able to be held responsible for all administrative actions within their charge. The preponderance of semi-autonomous agencies within governments alongside more traditional departments has further complicated the issue.

The extent of Ministerial responsibility, in regard to a particular act, is often a political question rather than one which can be addressed by the application of a general principle. Actions of Ministers can be questioned both within and outside the political process. They can be sued in the courts, and can be subjected to

various forms of inquiries including, most commonly, Parliamentary and Independent Commission Against Corruption (ICAC) inquiries.

The outcome of such inquiries, however, often only has relevance to the particular situation and it has been difficult to define the convention in general terms any more clearly. The accumulated history of cases where the application of the convention has been an issue does shed some light, however, and the view is increasingly common that where the Minister is not personally at fault, and with all reasonable care could not have prevented the mistake, the Minister would not be held responsible in terms of the convention.

Other conventions

There are a number of other Cabinet conventions:

- *Ministerial integrity or probity* - which finds expression in New South Wales in a Ministerial Code of Conduct. The Ministerial Code of Conduct is reproduced in Annexure A of this Handbook.
- *Custody of Cabinet documents* - all Cabinet documents belong to the State and not to the Ministers of particular governments. Therefore a new set of records is created for each Government and the records of a previous Government are not available to the succeeding Government except where necessary for the administration of the State. In the case of Cabinet documents being accessed by courts or Royal or Special Commissions of Inquiry, the relevant former Premier's views are sought as a matter of courtesy. See for example the guidance issued by DPC (*Cabinet Documents and other State Papers – 2011 General State Election*), which is available on the DPC website.
- *Caretaker conventions* - certain principles apply to the activities of government during pre-election periods and in post-election periods where the outcome of the election remains uncertain. The practice has been for the Premier to issue a Memorandum reminding Ministers of these conventions a few months before a State election. See, for example, Premier's Memorandum M2010-15 (*Caretaker Conventions and other pre-election practices – 2011 General State Election*), which is available on the DPC website.

Matters to be brought to Cabinet

It is ultimately the responsibility of the Premier (with the advice of DPC) to determine the agenda of Cabinet.

The practice in New South Wales is that matters of the following kind must normally come before Cabinet, unless the Premier specifically approves otherwise:

- new policy proposals and significant or sensitive variations to existing policies;

- proposals requiring additional funding that cannot await consideration in the Budget context;
- proposals requiring legislation (all draft Bills require Cabinet endorsement, both prior to drafting (unless the Director-General or General Counsel of DPC determine otherwise) and prior to introduction)[2];
- proposed responses to recommendations made in the reports of Parliamentary Committees, Commissions of Inquiry and other significant reports;
- proposed issues papers, discussion papers, or "Green Papers" which aim to provide public opportunities for consideration of policy options, as well as ensuing "White Papers";

  (The terms "Green Paper" and "White Paper" come from established parliamentary practice. A Green Paper is intended to focus discussion on matters that the Government has targeted for attention. Its purpose is to provide a coherent framework for discussion of issues which, in due course, may be addressed through the legislative and executive arms of the Government. A Green Paper does not commit the Government or a Minister to any specific policy direction or action, although it will identify issues and options and may tentatively indicate the preferred option. In contrast, a White Paper is used to provide a statement of Government policy on a topic of significance.)
- proposed intergovernmental agreements or significant policy issues to be addressed at Ministerial Council meetings as well as reports on the outcomes of such meetings;
- all chief executive appointments, appointments to statutory offices, boards, commissions, and principal advisory bodies set up under statute, whether full or part time;
- significant portfolio policy announcements;
- matters likely to have a significant impact on intergovernmental relations or on parts of the community;
- politically sensitive Ministerial Statements to Parliament;
- proposed governmental or agency negotiating positions on significant industrial relations issues; and
- proposed referrals of matters by Ministers to Parliamentary Committees.

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[2] While Cabinet approves the drafting of legislation, the Cabinet Standing Committee on Legislation has been authorised to approve the introduction of legislation, provided it has been drafted substantially in accordance with Cabinet's in-principle approval – see Section 4 (Preparation and Enactment of Legislation).

Cabinet Meetings

Cabinet meetings are normally held in Governor Macquarie Tower on Monday afternoons at 2.00 pm. If Parliament is sitting on Monday, Cabinet will usually be held earlier in the day at Parliament House.

No public announcement is made in advance when a Cabinet meeting is to be held (except when a meeting is to be held, usually together with community consultations, as part of a 'Community Cabinet').

From time to time, a Cabinet meeting is held at a regional or metropolitan centre. The Cabinet Secretariat of the Department of Premier and Cabinet, in conjunction with the Premier's Office, is responsible for the organisation of Cabinet meetings outside of Sydney and for all arrangements associated with Ministers' travel and accommodation.

Ministers are expected to attend each meeting of Cabinet, unless for reasons previously conveyed to the Premier in writing, they have been formally excused from attending a particular meeting.

Only the Premier, Ministers and the Cabinet Secretary/Deputy Cabinet Secretary are permitted to attend Cabinet meetings. Occasionally, the Premier may invite a person who is not a member of Cabinet to address Cabinet on a particular issue. The person will be present in the Cabinet meeting only for the duration of his or her address to Cabinet on that issue.

Cabinet Minutes

It is of critical importance to the efficient and effective operation of Cabinet that matters to be considered by it are submitted in the form of formal submissions, which in New South Wales are referred to as Cabinet Minutes.

Unlike the modern usage of the term "minute", a Cabinet Minute is not a record of the discussions of Cabinet, but is rather the document that is actually submitted by a Minister to Cabinet for consideration. Consistent with the principles of collective decision making and Cabinet confidentiality, the detailed discussions within Cabinet are not recorded. Instead, a record is made of attendance and the consensus decision of Cabinet (the Cabinet Decision). Cabinet Minutes and Cabinet Decisions, together with the Cabinet Agenda, form the most important official records of Cabinet.

Cabinet Minutes can only be submitted by Ministers.

Minutes submitted for Cabinet approval for the preparation of legislation are referred to as "In-principle Cabinet Minutes". Minutes submitted for approval for the introduction of drafted legislation are referred to as "Bill Minutes". If the draft Bill varies Cabinet's original in-principle approval, the reasons for the variation should be detailed. Ministers should lodge the draft Bill with a Bill Minute, which usually contains the explanatory note to the Bill rather than the Bill itself.

Further guidelines on the preparation of Cabinet Minutes are set out in Annexure E to this Handbook. All Minutes must conform with the prescribed template and the requirements for Cabinet Minutes, which are set out as Annexure F to this

Handbook. Minutes that do not conform will be returned to Ministers to be reworked and resubmitted. These requirements are enforced strictly by DPC.

The "Ten Day Rule" and the "Four Day Rule"

It is important that all Ministers have the opportunity fully to participate in the decision-making processes of Cabinet and that, in doing so, they also have the opportunity to seek and obtain advice from their departments and advisers.

To ensure that this can happen it is imperative that the **ten day rule** for the lodgement of Cabinet Minutes be observed.

The ten day rule means that all Cabinet Minutes must be lodged with Cabinet Secretariat in the Department of Premier and Cabinet at least **ten working days** before the Cabinet meeting at which the matter may be listed for consideration.

The only exception is Bill Minutes for legislative proposals which are instead subject to a **four day rule**. The four day rule means that Bill Minutes must be lodged at least four working days before the Cabinet meeting at which the matter may be listed for consideration.

The ten day rule (and the four day rule for Bill Minutes) will be applied strictly. Minutes that do not comply with these rules will not be considered for listing on the Cabinet agenda until the relevant time periods have elapsed.

It should be noted that compliance with the ten day rule does not mean that the Minute will automatically be listed at the first Cabinet meeting that is ten days after lodgement of the Minute. Whether a Minute that has complied with the ten day rule will be listed for the next Cabinet meeting will depend on a number of considerations, including what other priority matters require Cabinet's consideration at that particular meeting and the status of any issues that have been raised in advice provided on the Minute's proposals.

The ten day rule means only that a Cabinet Minute will definitely not be considered eligible to be listed on the agenda of a Cabinet meeting that is less than ten working days after the Minute was lodged.

Exemptions to the ten day rule (and the four day rule for Bill Minutes) will only be considered in exceptional circumstances where urgent consideration of the Minute is necessary.

Any Minister who wishes to seek an exemption must, when lodging the Minute, also submit a letter addressed to the Cabinet Secretary formally requesting waiver of the relevant rule. Any request for an exemption that is only made verbally or by Ministerial staff will not be considered.

The letter seeking an exemption must set out reasons as to why the Minute is urgent and must be considered at the next available Cabinet meeting and why it has not been possible to lodge the Minute earlier in order to comply with the ten day rule. Requests will only be agreed to in the most urgent cases as a matter of clear necessity.

Requests for urgent consideration should not be made where the urgency has arisen merely because of administrative delays and inadequate planning. Ministers

must ensure that procedures are in place to anticipate deadlines and ensure that the above rules are complied with.

The ten day rule also applies to Minutes that are submitted for consideration by Committees of Cabinet, subject to such modifications and exemptions as may be determined by that Committee or its Chair.

Consultation and Ministers' Advices

It is essential for the efficient functioning of Cabinet that Cabinet meetings concentrate on the major issues, and that it not become overly enmeshed in detail.

For this reason, as much of the detailed discussions between Ministers as possible should be dealt with in advance of the matter being considered by full Cabinet and, in particular, areas of contention or disagreement should be identified and, to the extent possible, addressed through direct discussions between affected Ministers and agencies, often co-ordinated and mediated by DPC.

Accordingly, it has been required practice for Ministers to ensure consultation with DPC, Treasury and affected Ministers and agencies, before lodging a final Cabinet Minute with Cabinet Secretariat.

For this purpose Ministers' offices are requested to forward to the relevant DPC policy branch a draft of any Cabinet Minute before it is signed by the Minister. This allows DPC not only to identify any non-compliance with formal requirements, but it also allows early identification of issues that require further consultation or elaboration in the Minute itself.

Once a Minute has been signed and lodged by a Minister, and subject to DPC confirming that it complies with the formal requirements, the Minute will then be circulated for formal consideration and advice by Ministers. This process of formal post-lodgement consideration should not be seen as a substitute for pre-lodgement information consultation discussed above. Both processes are essential.

Generally, a Minute should not be listed for consideration by Cabinet until any areas of disagreement are resolved (unless a determination is made that the disagreement is such that it will only be able to be resolved through discussion in the Cabinet meeting itself). Requests for formal advice from Ministers on Cabinet Minutes are treated as both confidential and urgent.

Traditionally, the Treasurer and the Attorney General receive every Minute being considered for listing. Other Ministers are requested to provide advice on Minutes that touch on their portfolio areas. Ministers consulted about Minutes prior to listing usually seek advice from their agencies, before submitting their advice, usually in the form of a letter addressed to the Premier.

All Ministers need to ensure that all departmental and Ministerial advices on Cabinet Minutes are submitted to Cabinet Secretariat by the deadlines specified by the Department of Premier and Cabinet when that advice is requested.

Any concerns that Ministers wish to raise in respect of a Cabinet Minute should be outlined in their written advice. This ensures that the submitting Minister has the opportunity to obtain further advice and if necessary respond to those issues before the Cabinet meeting at which the Minute is to be considered.

It is essential that all advices be received in a timely fashion in order to ensure that all views can be fully considered and all issues can be properly addressed.

Cabinet Agenda

The draft agenda for each meeting is recommended to the Premier by the Director General of the Department of Premier and Cabinet, from the list of Cabinet Minutes which have been fully examined within DPC and in regard to which all necessary advices have been received from Ministers.

Each matter to be considered at the meeting is included on the agenda under the name(s) of the Minister(s) submitting the Minute.

The relevant Minutes and associated letters of advice are circulated to all Ministers with the agenda. Extracts from reports of Cabinet Committees dealing with any matters listed on the agenda may also be circulated.

Cabinet Decisions

The discussions of Cabinet are not recorded. The Cabinet Secretary records all the decisions made by Cabinet. Details of decisions are circulated to the relevant Minister or Ministers with a request that they implement the proposals. Where an endorsed proposal requires the preparation of legislation, a copy is also provided to the Parliamentary Counsel.

Ministers are responsible for ensuring that all appropriate action is taken to implement Cabinet decisions affecting their portfolios, including initiating drafting instructions to the Parliamentary Counsel's Office when legislation is required.

If a Cabinet decision requires action across a number of portfolios, and if Cabinet does not direct otherwise, it is generally for the Minister who raised the matter in Cabinet to initiate necessary follow-up procedures, usually by first writing to the other Ministers involved in implementing the decision.

Access to Cabinet Room

There should be no interruptions during Cabinet meetings. Ministers who find it necessary to contact advisers or officials can do so by telephone from the Cabinet foyer, or by arranging to see the person concerned in the vestibule area outside the Cabinet Room.

For security reasons only the Premier's security officer and officers from Cabinet Secretariat are able to remain outside the Cabinet Room. Any messages that need to be conveyed to the Premier or to Ministers are to be conveyed via the Cabinet Secretariat officers present.

Cabinet Committees

The Government may adopt whatever structure and organisation it considers most suitable for the operations of Cabinet.

Each Cabinet Committee is chaired by the Premier or a nominated Minister who convenes meetings whenever necessary in consultation with the relevant Committee Secretary, who is a senior officer of the Department of Premier and Cabinet.

A report of the attendance and decisions of each meeting of a Cabinet Committee is prepared by the Secretary for signature by the Chairperson. The original report is held in the Department of Premier and Cabinet and a copy is forwarded to each member of the Committee.

A Register of Cabinet Committees is maintained by the Cabinet Secretariat. No committee of Ministers may be regarded as a Cabinet Committee unless it has been formally established by the Premier or Cabinet.

Attendance at Cabinet Committee meetings

The effective operation of Cabinet Committees and the full involvement of relevant Ministers are essential if collective ministerial responsibility is to be properly maintained. The system of Standing Committees is designed to make the operation of the full Cabinet more efficient. It is important that Ministers make themselves available to attend all meetings of Cabinet Committees of which they are members. Where matters are listed for consideration at Cabinet Committee meetings, Ministers should come prepared to speak to those matters. If the relevant Minister is not in attendance the matter should not be dealt with.

A Minister who wishes to participate in the discussion of a matter which is being considered by a Committee of which the Minister is not a member may do so by arrangement with the Chairperson of the Committee.

As Cabinet Committees are serviced by the Department of Premier and Cabinet, relevant officers from the Department of Premier and Cabinet should always be in attendance.

With the concurrence of the Chairperson of a Committee, Ministers may arrange for officers of their Department to attend a Committee meeting to provide additional information or explanation in relation to any item being considered by the Committee. As a general rule, however, circulation of papers and attendance at Committee meetings should be limited. All Cabinet Committees operate under the same confidentiality principles as apply to full Cabinet.

If ministerial advisors are required to provide expert advice to Cabinet Standing Committees, they may attend for the time it takes to provide the information required from them. Generally, however, Ministers are expected to present their own cases.

Ministers who chair Cabinet Standing Committees should ensure that these requirements are adhered to.

Role of the Department of Premier and Cabinet

In support of the Premier's position as Chairman of Cabinet, the Department of Premier and Cabinet acts as a Secretariat to Cabinet. The Director General of the Department is the Cabinet Secretary and attends all Cabinet meetings in this capacity.

All Cabinet Committees are also serviced by the Department of Premier and Cabinet. A senior officer of the Department is appointed as Secretary to the relevant Committee, and the processing of all documentation is done by the Cabinet Secretariat.

The Cabinet Secretariat is responsible for the receipt of Cabinet Minutes from Ministers, preparation and circulation of meeting agendas and the promulgation of Cabinet and Cabinet Committee decisions.

Each Cabinet Minute is examined within the Department of Premier and Cabinet and, where the proposal might affect the administration of a Minister or Ministers other than the originator, the Premier seeks advice to ensure that all relevant information is available for Cabinet's consideration. Advice may also be obtained from Treasury and other areas of the Premier's administration.

In the formulation of their views on Cabinet proposals, Ministers may seek advice from their Department and/or associated statutory bodies etc. Any advice from such sources should be incorporated in a letter from the Minister, as an expression of the Minister's own view. However, where urgency or other circumstances are such that the Minister feels it appropriate to forward copies of advices furnished by the Department and/or an associated body, these must be accompanied by an indication as to whether they have the Minister's endorsement.

Before Minutes are placed on the Cabinet Agenda, the Department of Premier and Cabinet endeavours to resolve any areas of significant disagreement between Ministers. This is done by referencing Ministers' advices back to the originating Minister for consideration or by arranging meetings between the parties.

All requests for advice on Cabinet proposals must be dealt with promptly to ensure that proposals can be placed on the Cabinet Agenda within reasonable time frames and that, where applicable, the drafting of Bills is not delayed.

The Department of Premier and Cabinet also provides the Premier with independent whole-of-government policy advice on Cabinet proposals.

Better Regulation Requirements

All proposals for new and amending regulation (whether implemented through Acts or Regulations) must comply with gatekeeping requirements set out in the Guide to Better Regulation. The Better Regulation Office, which is a separate office within the Department of Premier and Cabinet, oversees compliance with the requirements which were introduced on 1 June 2008. The arrangements build on statutory requirements for regulation making and review set out in the *Subordinate Legislation Act 1989*.

The Guide to Better Regulation requires that regulatory proposals comply with seven better regulation principles:

1. The need for government action should be established.
2. The objective of government action should be clear.
3. The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
4. Government action should be effective and proportional.
5. Consultation with business and the community should inform regulatory development.
6. The simplification, repeal, reform or consolidation of existing regulation should be considered.
7. Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.

When seeking approval for a regulatory proposal by Cabinet, the Cabinet Minute must include sufficient detail to demonstration compliance with the gatekeeping requirements.

Significant regulatory proposals must be accompanied by a Better Regulation Statement which provides detail on how the better regulation principles have been met. If a Regulatory Impact Statement is required under the *Subordinate Legislation Act*, it may be provided in the place of a Better Regulation Statement (BRS) as long as the outcomes of consultation and justification for the final regulatory proposal are included. Unless Cabinet otherwise agrees, the BRS must be made publicly available.

Portfolio Ministers are responsible for determining whether a regulatory proposal is significant. In general, a proposal is significant if it would:

- introduce a major new regulatory initiative,
- have a significant impact on individuals, the community, or a sector of the community,
- have a significant impact on business, including by imposing significant compliance costs,
- impose a material restriction on competition, or
- impose a significant administrative cost to government.

Certain regulatory proposals are exempt from the better regulation requirements. Exempt proposals include those related to police powers and general criminal laws, electoral rules and management of the public sector, consequential or machinery amendments, standard fee increases, proposals already subject to detailed assessment in an earlier Cabinet Minute or proposals developed and assessed through external processes (such as a Ministerial Council, COAG or independent bodies on behalf of the government).

More information about the requirements can be obtained from the Better Regulation Office.

Cabinet Document Administration

Specific requirements apply concerning the administration of Cabinet documents.

The Department of Premier and Cabinet has established a secure electronic document system for Cabinet documents, the Cabinet Document Management System (CDMS). It provides for the electronic submission of Minutes and advices and the electronic distribution of agendas, Minutes and advices.

Minutes, advices and decisions are registered on CDMS. Minutes when they are printed have certain features to make them more identifiable as confidential Cabinet documents, including individual registration and copy numbers. Minutes and advices submitted by Ministers are required to be lodged electronically on CDMS. Cabinet documents must not be photocopied although additional copies may be printed from CDMS, which records the copies printed.

These measures are designed to ensure the confidentiality and security of Cabinet documents.

A detailed CDMS handbook is provided for Ministers and their staff by the Cabinet Secretariat. In addition, training is available to assist relevant Ministerial staff and the Cabinet Secretariat provides “help desk” assistance for Ministerial staff.

Cabinet Approval of Appointments

As noted above, all chief executive appointments, appointments to offices, boards, committees, commissions, and advisory bodies, whether full or part time and whether initial appointments or re-appointments, must be submitted to Cabinet.

Chief executive appointments are usually recommended to Cabinet by way of a Cabinet Minute. For other appointments, a one-page standard appointment form is used. A current pro-forma may be obtained from the Cabinet Secretariat.

Proposed appointments must be discussed with the Department of Premier and Cabinet, before formal documentation is prepared and submitted to Cabinet Secretariat. No commitments are to be made in relation to remuneration levels without prior approval of the Director General, Department of Premier and Cabinet.

Chief executive appointments being recommended by way of a Cabinet Minute may be submitted electronically using the CDMS system. Other appointments, however, should be recommended by way of the standard appointment form submitted by hand to Cabinet Secretariat. Appointment forms should be submitted at least one week before the Cabinet meeting at which the Minister wishes the appointment to be considered.

Disposal of Cabinet Documents

As noted above, all Cabinet documents belong to the State and not to the Ministers of particular governments. Cabinet documents must not be retained privately or be publicly accessible in document collections or otherwise.

When a Minister ceases to hold office, all Cabinet documents held by the Minister must be returned to the Cabinet Secretariat.

Section Three – The Executive Council

Introduction to the Executive Council

The Executive Council consists of those persons who are appointed by the Governor as members of the Executive Council.

The Governor may, on the recommendation of the Premier, appoint a Vice-President of the Executive Council. A quorum for a meeting of the Executive Council is two members.

Ministers of the Crown are appointed by the Governor from among the Executive Councillors.

Executive Councillors are sworn in as Ministers when they have subscribed to the Executive Councillor's Oath of Office. They are issued with Commissions as Members of the Executive Council and notification of their appointment is published in the Government Gazette.

When an Act confers a power or function on the Governor (such as a power to make regulations, to make an appointment to an office or to approve the exercise of a function), the Governor may (as a general rule) only exercise that power or function with the approval of the Executive Council. Such approvals are sometimes described as approvals of the Governor-in-Council.

Meetings of the Executive Council

Meetings of the Executive Council are usually held weekly, on Wednesday morning. A roster of attendance of Ministers at the weekly meetings is prepared by Cabinet Secretariat. Ministers rostered to attend must do so or arrange a substitute and advise Cabinet Secretariat in writing.

However, if a matter is required to be dealt with urgently, a meeting may be convened at another time provided that there are two members present in addition to the Governor or the member presiding (section 35D of the *Constitution Act 1902*).

Any requests for special meetings of the Executive Council should be made to the General Counsel, Department of Premier and Cabinet.

Administrative Arrangements

Lodging Executive Council Minutes

Matters are placed before the Executive Council in the form of Minutes conveying recommendations from portfolio Ministers. Ministers are required to forward

Minutes to the Cabinet Secretariat, Department of Premier and Cabinet, by noon on the Friday before the Council Meeting is held.

Where it is not possible to forward a Minute until after that time, the Cabinet Secretariat should be contacted and the reason for urgency stated. Minutes lodged late will not be considered except in exceptional circumstances of unforeseen urgency. In no circumstances will Executive Council Minutes be accepted after noon on the Tuesday before the Executive Council meeting.

Executive Council Minutes are recorded and examined in DPC and, where appropriate, are brought to the notice of the Premier. Minutes will not be forwarded for consideration by the Governor-in-Council unless they meet the formal requirements, provide sufficient detail in the Explanatory Note, demonstrate compliance with Better Regulation requirements and have received any necessary Cabinet approvals.

Once cleared, Minutes are forwarded by the Department of Premier and Cabinet to the Official Secretary to the Governor, who is also the Clerk of the Executive Council.

Proceedings of the Executive Council

The agenda paper of the recommendations to be considered at the meeting of the Council is prepared by the Official Secretary. At the meeting of the Council, when the Councillors have signified their concurrence in the matters placed before them, the agenda paper is so endorsed by the Governor.

After the meeting of the Executive Council the approved Minutes are signed by the Governor and the Clerk of the Council and returned to the Office of the originating Minister via the Cabinet Secretariat.

Numbering of the Executive Council Minutes

The official number allocated to an Executive Council Minute is the number of the Meeting at which it is considered. Meetings are numbered progressively in a separate series for each year. (Consequently, all Minutes considered at a particular meeting have the same number.)

Confidentiality of Executive Council Matters

There should be no prior public announcement of matters that are the subject of Executive Council consideration.

Although it is a general convention that the Governor should act only on the advice of his or her Ministers, the Governor may seek further information on matters submitted for the Executive Council's consideration before the Council's approval is signified. It is therefore imperative that the Explanatory Note accompanying the Minute is sufficiently detailed and clear to enable the Governor to understand the matter that he or she is being asked to approve. Further, the Governor possesses the right to dissent from the Council, although this would occur only in the most exceptional circumstances.

It would, therefore, be incorrect for a Minister or an officer to assume that the Governor-in-Council will adopt an unquestioning or mechanical approach to any business before the Council or that every Executive Council Minute will be approved on the day it is first submitted for consideration. Furthermore, premature public disclosure of confidential matters for which Council approval is necessary amounts to an act of discourtesy both to the Governor and to the institution of the Executive Council which has an important constitutional function under our system of government.

Accordingly, Ministers need to ensure that public announcements concerning matters requiring submission to the Executive Council are not made until after the approval of the Governor-in-Council has been given. This is particularly important when appointments are to be made to full-time and part-time statutory positions, or to positions of Heads of Declared Authorities, Boards, Commissions, etc.

Gazette Notices and notification on Legislation website

The Ministerial Office or Department concerned is responsible for making any necessary arrangements for a decision made or instrument approved by the Governor-in-Council to be notified as required in the Government Gazette or on the NSW Legislation website. The script of the notice in the Gazette may be made available confidentially to the Government Gazette staff when necessary, before the Executive Council meets, but care must be exercised to ensure that the matter is not published before it is approved.

Executive Council Minutes

General Guidelines

The primary purpose of the Minute is to convey to the Governor and the Executive Council a proposal which has been fully considered and recommended by the appropriate Minister, who should sign the Minute personally.

A template Executive Council Minute is set out in Annexure H to this Handbook. An electronic version of the template may be obtained from the Cabinet Secretariat. The Minute usually commences with the words “It is recommended for the approval of the Governor, with the advice of the Executive Council, that ...”.

An Executive Council Minute should not be submitted until all action necessary to obtain the Government’s endorsement of the proposal has been completed (Minister’s or Cabinet approval) and any other essential action has been taken.

A brief explanatory note should accompany each Minute to link the recommendations with the legislation or other requirement under which it is made but should not canvass policy considerations or options. Where the Minute relates to an appointment or re-appointment to a board or committee, the explanatory note should include details of the person’s qualifications and experience.

Further guidelines for the preparation of Executive Council Minutes are set out in Annexure G to this Handbook.

Better Regulation Requirements

All proposals for new and amending regulation must comply with the requirements of the Guide to Better. See Section 2 for more detail on these requirements.

When seeking approval for a regulatory proposal by the Executive Council, documentation must be submitted with the Executive Council Minute which demonstrates application of the better regulation principles. This may be in the form of a letter to the Minister responsible for regulatory reform, analysis prepared in accordance with the Schedule 1 of the *Subordinate Legislation Act*, relevant information from a Regulatory Impact Statement, Cabinet Minute or Ministerial briefing note or any other document which justifies a regulatory proposal.

Commissions and Proclamations

When an Executive Council decision requires the issue of a Commission or Proclamation by the Governor, the Commission or Proclamation should accompany the Minute and be signed by the Minister. They are impressed with the appropriate seal by Cabinet Secretariat. It is important that the Commission or Proclamation is not dated as this is affixed after approval by the Governor and the Executive Council.

Regulations and Orders

Regulations, Orders and any other form documents which accompany Executive Council Minutes should also be signed by the Minister. In addition, the provisions of the *Subordinate Legislation Act 1989* must be adhered to in respect of Regulations, specifically attention should be paid to the requirement for certificates under sections 6 and 7 of the Act.

Section Four – Preparation and Enactment of Legislation

Acts of Parliament

An Act of Parliament (or Statute) is a declaration made by the Sovereign with the advice and consent of both Houses of Parliament, the effect of which is either to declare the law in a particular respect, or to change the law, or to do both.

In certain circumstances, described in sections 5A and 5B of the *Constitution Act 1902*, an Act may be made with the advice and consent of the Legislative Assembly when the Legislative Council fails to pass the legislation.

Bills

A proposed law, as it is prepared for consideration by Parliament, is known as a "Bill".

It continues to be known by this title until such time as it has been passed by Parliament and has been assented to by the Governor. At that stage it becomes an Act.

The detailed provisions of a Bill are usually referred to as clauses and subclauses, rather than sections or subsections of an Act.

In preparing the draft legislation, the Parliamentary Counsel determines the format in which the details of the Act are expressed, including the form of sections, subsections, etc.

Legislative Program

The objectives of legislative programming are to:

- enable the Government to be aware of the legislation Ministers wish to bring forward;
- ensure the orderly consideration of Bills, having regard to administrative urgency, public commitments and other policy considerations;
- ensure prompt and efficient preparation of Bills;
- ensure an even flow of Bills throughout the sittings of Parliament and thus provide appropriate opportunities for proposals to be debated in the Parliament.

The Government's legislative program is determined, on the advice of the Department of Premier and Cabinet, by the Premier in consultation with the Leader

of the House in the Legislative Assembly and the Leader of the Government in the Legislative Council.

Ministers will be asked to inform the Premier of the details of legislative proposals they wish to bring forward in the Spring and Budget Sittings of Parliament.

To provide for the effective planning of the Legislative Program, the Department of Premier and Cabinet on behalf of the Premier requests information from Ministers prior to each sitting period on any legislative proposals they wish to bring forward in that sitting period. The Department of Premier and Cabinet circulates a pro-forma schedule, which is to be completed for each legislative proposal. It requires a description of the relevant proposal, an indication of its priority ("A" or "B"), and an estimated target date for each of the significant stages involved in the Cabinet/Parliamentary process. It is important that the target dates be as accurate as possible.

The sittings of Parliament are not fixed by law but there are usually two sittings in each year – March to June (the Budget or Autumn Session) and September to December (the Spring Session). The time tabling of arrangements for the preparation of Bills on the Legislative Program may need to be adjusted from time to time. It is important that as much legislation as possible be prepared in the non-sitting periods to ensure that Bills are available for consideration when Parliament is sitting. The priority of the measures should take into account both the governmental and political responsibilities of the Government. In establishing the program, allowance should also be made for genuinely unforeseen urgent measures which may arise during a session.

Approval for the Preparation (Drafting) of a Bill

When satisfied as to the need for legislation, the Minister requests the Premier to arrange for the matter to be included on the legislative program, and sets in train the action necessary to obtain Cabinet's approval for the preparation of a Bill.

Details of Cabinet processes are provided in Section Two of this Handbook.

Where the proposal could affect the responsibilities of another Minister, consultation should take place and the views of that Minister should be taken into account in the Cabinet Minute.

It is important that the Cabinet Minute submitted for approval at this stage should not recommend specific wording for the Bill. When the Cabinet Minute provides specific wording for the Bill rather than a prose explanation of the policy recommended to Cabinet, the Parliamentary Counsel has found that the policy intent is often not clear and that the words are not appropriate to the Bill as finally drafted.

If the proposal is considered and approved by Cabinet, the Cabinet Secretary will advise the Minister formally of the terms of the decision. The Parliamentary Counsel is informed of the decision at the same time.

Cabinet approval must be obtained before releasing an exposure or consultation draft of a Bill.

Only the Director-General or the General Counsel of the Department of Premier and Cabinet can authorise the drafting of a Bill in advance of Cabinet's consideration.

Drafting Instructions

Drafting instructions are required to be provided to the Parliamentary Counsel after Cabinet approval in principle has been given for a legislative proposal. These instructions will normally be provided by a senior Departmental officer.

Detailed drafting instructions to the Parliamentary Counsel are not required if the Cabinet Minute sets out comprehensively the matters to be addressed in the proposed legislation. However, in such a case, a formal letter of instruction should be sent to the Parliamentary Counsel, requesting preparation of the legislation.

Where relevant, additional information or material should be provided by the instructing officer as follows:

- Details of any consequential changes to legislation which the instructing officer considers may be necessary should be provided if they are not readily apparent.
- If the proposed legislation is necessary as a result of a court decision, any relevant decision should be provided to the drafting officer.
- If legislation in other jurisdictions deals with the same subject matter as the proposed Bill or has provided the model for the proposal, the instructing officer should provide copies or identify such legislation.
- Copies of reports of committees, etc., or if the reports are readily available, references to reports that deal with the proposal should also be provided.

The Parliamentary Counsel does not accept instructions in the form of a draft Bill. Any instructions, including additional instructions must be in prose form.

The Parliamentary Counsel is available for discussion on the form and substance of drafting instructions for any legislative proposal.

After instructions for the drafting of a Bill have been provided to the Parliamentary Counsel, the Departmental officer concerned in the preparation of the Bill should be readily available for consultation with the drafting officer.

Departmental officers instructing or attending conferences for the settling of Bills should have the detailed knowledge, ability and authority to make decisions on questions that arise in drafting. The drafting of the Bill is greatly delayed by the drafting officer having to await confirmation of tentative decisions. A Departmental officer instructing on the settlement of a proposed amending Bill should have a detailed knowledge of the provisions and operation of the principal Act to be amended.

Requests for the Parliamentary Counsel to include in a Bill additional provisions that were not approved by Cabinet should be avoided. Ordinarily, additional provisions of any importance will not be included in a Bill without Cabinet's prior approval.

The legislative drafting process provides an opportunity for the development of legislative policy, for refining the various concepts approved in principle, for devising the means of carrying out the approved policy, and for working out the associated provisions and consequential amendments that will be necessary.

On completion of the first draft of a Bill, it will be sent to the sponsoring Department for consideration as to whether its provisions meet the wishes of the Minister and the Department. Any alterations required will be made by the drafting officer following discussions with the Departmental officers concerned or a further draft will be prepared for consideration, and this process will be repeated to the extent necessary to make the draft satisfactory to the Minister and the Department.

It is essential that prompt consideration be given to these drafts and that the drafting officer be quickly advised of any remaining or unresolved issues. Where alterations may be necessary they should be given to the drafting officer in the form of written or oral narrative comments, and not in the form of actual amendments. The drafting officer will work out the best way of altering the draft to secure the desired result, and the Department will be given an opportunity to comment on the changes that have been made.

Approval of a Bill as drafted

When the terms of the draft Bill have been approved by the Minister, the Parliamentary Counsel provides the Minister and the Premier (via the Cabinet Secretariat) with a Parliamentary Counsel's Report (PC Report) detailing whether the Bill has been drafted in accordance with Cabinet's decision and what, if any, variations have been included in the Bill.

Where a Bill has been drafted in accordance with Cabinet's "in principle" approval, Ministers can proceed to have the Parliamentary Counsel's Report considered by the Cabinet Standing Committee on Legislation (Legislation Committee), rather than submit a further Cabinet Minute (known as a Bill Minute) seeking Cabinet approval for introduction.

The relevant policy branch of DPC will consult with the Minister's office to seek the Minister's views as to the appropriateness of having the Legislation Committee consider the Parliamentary Counsel's Report. The Department will determine whether the Bill can be approved by Legislation Committee or whether a Bill Minute needs to be submitted to Cabinet.

Amendments

Any proposed amendments to the Bill after its approval, whether before introduction or during its passage through Parliament, must be considered for compliance with Cabinet's approval.

All proposed Government amendments must therefore be submitted to the relevant policy branch of DPC which will assess consistency with Cabinet's approval. Where amendments deviate from Cabinet's approval it may be necessary for the amendments to be submitted to Cabinet for approval. Where this is not practicable, for example during time critical debate, approval from the Premier may be obtained.

Approval must similarly be obtained before supporting any amendments moved by non-Government members.

Reporting of Legislative Proposals to a Parliamentary Party

The Members of a Parliamentary Party are to be advised of legislative proposals prior to Bills being introduced in the House. Ministers are responsible for reporting to their Parliamentary Party proposals associated with their administrations.

It is a matter for the Parliamentary Party as to what processes are followed.

Consideration of a Bill by Parliament

Government Bills (also known as Public Bills) can be introduced by the responsible Minister in the House of which the Minister is a Member, i.e., the Legislative Assembly or the Legislative Council. The House in which a Bill is introduced will be determined by the demands of the Parliamentary program in each House.

The *Constitution Act 1902* (section 5) provides that certain Bills ("money Bills") cannot be introduced into the Legislative Council.

This Handbook describes the course of action in relation to a Bill introduced in the Legislative Assembly. Similar procedures (with different terminology in some cases) apply where the Bill is introduced in the Legislative Council.

Long and Short Title

A Bill has a Long Title and a Short Title. The Long Title briefly describes the purpose of the proposal, e.g.,

> "An Act relating to the employment of ancillary staff in the Department of School Education and the regulation of the conditions of their employment; and for other purposes."

The Short Title of the Bill is the "School Education (Ancillary Staff) Bill, 20..."

The Short Title provides a means of reference to and indexing of the legislation. For that reason, political slogans should be avoided as the Short Titles of Bills.

Consideration of a Bill by the Legislative Assembly

Notice of Motion

As the first step of introduction, the Minister gives a Notice of Motion in relation to the Bill.

The Notice to be read by the Minister is provided by the Parliamentary Counsel (through the office of the Leader of the House) and ordinarily takes the following form:

> "Mr Speaker
>
> I give notice of motion to introduce the *{short title of the Bill}*."

While the Minister is only required to make reference to the Short Title of the Bill, the Long Title of the Bill also appears on the Notice of Motion drafted by the Parliamentary Counsel and in the Business Paper of the House.

The routine of business of the Legislative Assembly makes provision for the Speaker to call for Notices of Motions.

Introduction of a Bill (known as the First Reading in the Legislative Council)

The Leader of the House sets the day for the Introduction of a Bill and circulates it in the Daily Program of Business.

The Standing Orders provide that the Motion to introduce the Bill must be decided without amendment or debate.

The Speaker calls on the Notice of Motion, the Minister moves the Motion and when agreed to, the Minister says "Mr Speaker, I bring up the Bill" and hands three copies of the Bill to the Clerk. The copies of the Bills are provided by the Parliamentary Counsel's Office to the Leader of the House, who delivers the Bills for tabling to the Minister at the time of introduction.

Copies of the Bill are then available to members in the Legislative Assembly Procedures Office. Bills are also available on the Parliamentary website.

Agreement In Principle (known as the Second Reading in the Legislative Council)

A motion to agree to the Bill In Principle may be moved immediately after introduction of the Bill or made an Order of the Day for a later time or a future day. Immediately following the Minister's speech seeking Agreement In Principle to the Bill, the debate is adjourned until a future day at least five clear days ahead.

However, if a Minister declares a Bill to be an urgent Bill and copies have been circulated to Members, the Question "that the Bill be considered an urgent Bill" is put immediately - no debate or amendment allowed - and if such Question is agreed to, the Agreement In Principle debate may proceed immediately or during any sitting of the House.

During or after a Minister's speech seeking Agreement In Principle to the Bill, additional detailed or explanatory information to assist Members in their understanding of the Bill may be tabled for incorporation in Hansard. The additional material should not be a mere duplication of the Explanatory Note attached to the Bill.

Subject to the requirements of the abovementioned resolution the day for the resumption of the Agreement In Principle debate is determined by the Leader of the House and notified in the Daily Program of Business which is circulated.

The Minister's speech seeking Agreement In Principle to the Bill is prepared in the Minister's Department or Office.

The speech should deal in detail with the policies and proposals incorporated in the Bill and provide any relevant information on the measure and the benefits which are expected to derive from the new law when it is enacted.

The *Interpretation Act 1987* (section 34) provides that, in the interpretation of any Act, extrinsic material (including a Minister's speech seeking Agreement In Principle to the Bill and Parliamentary Debates) may be considered in order to determine the meaning of the Act. Accordingly, care should be exercised in the preparation of speech notes and other material used by a Minister in Parliament to ensure that all statements accurately reflect the purpose or object of the legislation.

(Explanatory material is not printed again in the Hansard record of debate by the Legislative Council for which a Bill has been first introduced in the Legislative Assembly.)

On the resumption of the Agreement In Principle debate it is usual for the Minister responsible for the Bill to occupy the Chair at the Table of the House. However, the Minister does not speak to the Bill again unless it is necessary to speak "in reply" after all other speakers.

Other Government members may rise to speak in support of the Bill during debate. Speeches in support should be prepared by the relevant member. The Minister's office can assist members with speeches in support, but it is inappropriate for the Minister's Department to do so (unless the member who wishes to speak in support is a Minister and wishes to speak on the Bill in relation to how it particularly affects his or her portfolio, in which case that Minister's Department could assist its Minister in the preparation of the speech).

Usually, a senior officer of the Minister's Department attends the Chamber when the Bill is being debated, using the seats outside the bar of the House. This officer assists the Minister on any matters which may need to be clarified or amplified. The Minister speaking "in reply" is not usually provided with a prepared speech but speaks from knowledge and such notes as may be provided by the officer assisting in the House in regard to any matters raised during the debate.

When the question has been put and passed, the Speaker declares the Bill to have passed the House (unless a member requests consideration of the Bill in detail, the Minister requests consideration of the Bill in detail pro forma or a motion is moved that the Bill not be passed).

Consideration in Detail (known as the Committee Stage in the Legislative Council)

After a Bill has been agreed to in principle, a member may request that the Bill be considered in detail. This stage is presided over by the Speaker, although he or she may leave the Speaker's chair and sit at the table with the Clerks. This stage of the Bill was previously known in the Legislative Assembly, and continues to be known in the Legislative Council, as the Committal or Committee stage and it was presided over by the Chairman of Committees.

In the Consideration in Detail Stage, the Bill is considered clause by clause, and schedule by schedule. Some Ministers find it helpful at this stage of proceedings to be provided with a copy of the Bill interleaved with plain paper on which prose explanations of the effect of each clause and any other relevant information are shown directly opposite the particular clause.

Amendment during Consideration in Detail

A Bill may be amended during the Consideration in Detail stage. All amendments must be presented in writing and would usually conform to the following format:

> "Amendment"
>
> Clause 10, page 6, lines 15 to 17. Omit "(old wording)" and insert "(new wording)".

Government amendments during Consideration in Detail are prepared by the Parliamentary Counsel before this stage is reached on the Bill. The Parliamentary Counsel's Office has a number of drafters on duty at its office whenever either House is sitting and can be contacted for urgent changes.

If it is a Government amendment, the Minister rises when the particular clause is proposed by the Chairman and says:

> "Mr. Chairman,
>
> "I move that the words "...(old wording)..." in lines 15 to 17 be omitted and that "...(new wording)..." be inserted."

(Alternatively, amendments may proceed by reference to "Government Amendment Number [X] on Sheet [XXX]".)

The Minister then outlines the purpose and effect of the amendment.

Whenever possible, speech notes should be provided for the Minister's use.

If the amendment is adopted by the Assembly it then becomes part of the Bill.

The Minister may speak as many times as is desired but is limited to 20 minutes on each occasion. There is no reply in the Consideration in Detail stage.

Consideration of a Bill in detail "pro forma"

If the Minister wishes to make comprehensive amendments to a Bill (in order to improve the measure and make it more generally acceptable to the House) he or she moves, once the Bill has been given Approval in Principle:

> "That the House consider the Bill in detail 'pro forma'."

The question is put without amendment or debate. (The Clerk Assistant should be advised in advance of the motion for Consideration in Detail 'pro forma'.)

When the question has been passed, the proposed amendments, which have previously been printed, are put in one question by the Speaker "that the amendments as printed be inserted in the Bill". No debate is permitted and, if the question is agreed to, the Bill is then reprinted in its amended form, set down for reconsideration and, on reconsideration, will be dealt with as if the Bill is at the Consideration in Detail stage for the first time.

The Speaker then fixes the Consideration in Detail of the Bill as an Order of the Day for the next day.

An alternative to the 'pro forma' procedure is for the amendments to be moved *in globo* with a single debate during the detailed consideration stage on all the amendments or for the Bill to be formally withdrawn so that a revised Bill can be re-introduced, usually with a suspension of standing orders so that debate can proceed without delay.

Motion for the Bill to be passed (known as the Third Reading in the Legislative Council)

Once the Consideration in Detail stage is complete, the Minister can move that "This Bill be now passed" or request that the Speaker set the passing of the Bill down for a later time.

A motion that a Bill be passed is usually taken as formal, and speech notes are not required. The motion can, on occasion, be debated and the mover has a right of reply.

If the motion that the Bill be passed is agreed to, the Bill has passed all stages in the Legislative Assembly.

A Member who wishes to raise a matter at this stage should move that the question be amended by leaving out all words after the word "That" with a view to inserting instead the words "the clause(s)…,schedule(s)…., the whole Bill be reconsidered".

If the Member's motion that the Bill or parts of the Bill be reconsidered is supported, a further Consideration in Detail stage proceeds.

The Departmental Officer responsible for the Bill must be prepared to provide any information required by the Minister for this stage.

After the further Consideration in Detail stage is complete, the Minister may again move that the Bill be passed.

If agreed to, the Bill is sent to the Legislative Council.

Consideration of a Bill by the Legislative Council

First Reading

A Bill received from the Legislative Assembly in the normal course is read a first time as soon as the Message from the Assembly is reported. No speeches are required.

After the First Reading a motion is made that the Bill be printed and that the Second Reading stand as an Order of the Day for a future day.

Second Reading and Committee Stage

Second Reading Speech notes, along the lines of those provided for the Minister's Second Reading speech in the Assembly, are provided for the use of the Minister handling the Bill in the Legislative Council.

The Second Reading and Committee stages proceed in a manner similar to that in the Legislative Assembly.

The Leader of the Government in the Legislative Council should be provided with a folder containing the Second Reading Speech, a copy of the Bill with comments (similar to that prepared for the Committee Stage in the Assembly) and any other material which may be of assistance in handling the debate on the Bill.

Third Reading

The Third Reading is usually formal and speech notes are not required.

Urgency

If the time for consideration of a Bill in the Legislative Council is to be reduced, a motion for the suspension of Standing Orders is necessary. Such a motion must be subject to Notice given at least one day in advance unless leave of the House (without a dissenting voice) can be obtained.

Due to this requirement, when an urgent Bill is to be introduced, the Leader of the Government in the Legislative Council gives contingent notice of the Motion for suspension of Standing Orders in respect of that Bill when the corresponding Notice of Motion is given in the Legislative Assembly.

Legislative Council Amendments

When a Bill amended in the Legislative Council is returned to the Legislative Assembly the amendments are Considered in Detail by the Assembly. (Any necessary speech notes, or explanations are to be made available for the Minister's use - the nature and extent of such notes would depend on the extent of the amendments and the attitude to be adopted by the Government.) The Assembly may agree to the amendments (with or without amendments) or disagree to them. If it disagrees with the amendments or further amends them, the amendments go

back to the Council for further consideration. If no agreement is reached between the Houses the deadlock provisions of the *Constitution Act 1902* (section 5B) may be invoked.

If the amendments are accepted by the Assembly, the Bill is considered to have passed both Houses.

Legislative Council deadlines

The Legislative Council has in the past adopted deadlines by which Government Bills must be in the Legislative Council in order that they be considered in the then current Parliamentary Sitting. Generally, the deadlines required that Bills be introduced before the last two scheduled sitting weeks of the Legislative Council in that Parliamentary Sitting. Provision was made for Bills that were introduced after the deadline to be dealt with as urgent Bills in that Parliamentary Sitting, provided that the Minister successfully moved that the relevant Bill was urgent on its introduction.

While this practice has not been pursued in recent sessions, if the Legislative Council decides to again adopt such deadlines, Ministers will need to ensure that their Bills are ready in time to pass through the Legislative Assembly and be introduced into the Legislative Council before the deadline.

Cognate Bills

When a legislative proposal involves a series of complementary matters, a series of separate Bills may be prepared. These Bills are known as Cognate Bills and special arrangements are made for them to be dealt with by Parliament.

The Standing Orders of the Legislative Assembly provide that:

> "193. The procedure for two or more bills to be dealt with as cognate bills is as follows:
>
> (1) The notice of motion for the bills shall state that the bills are cognate.
>
> (2) One motion may be moved and one question put in regard to, respectively, the introduction, the agreement in principle, the consideration in detail and the passing of the bills together.
>
> (3) The bills may be considered in detail together."

In the Consideration in Detail Stage, each Bill is considered separately.

Similar arrangements apply in the Legislative Council where, by consent, the Leader of the Government in the Legislative Council moves that as many of the Standing Orders be suspended as is necessary to allow the Cognate Bills to be considered on one motion, except in the Committee stage. (It has been agreed between the Party Leaders that consent should be granted for this purpose. If consent were not granted it would be necessary to give a notice of motion for suspension of Standing Orders.)

Assent to Bills

When a Bill has been passed by both Houses of Parliament it is then sent to the Governor for assent.

This action is initiated by the staff of the Legislative Assembly. Arrangements are made for the Bill to be re-printed on vellum (parchment) with a certificate signed by the Assistant Speaker indicating that it has been passed by both Houses. The Bill is forwarded to the Governor, who then seeks the advice of the Attorney General as to whether, under the provisions of the Constitution or any other Act, the Governor may assent to the Bill.

On receipt of the Attorney General's advice that there is no objection to assenting to the Bill, the Governor signs the following certificate at the foot of the Bill:

> "In the name and on behalf of Her Majesty, I assent to this Act."

The Governor sends a message to each House of Parliament advising of his or her assent to the Act. The vellum copy signed by the Governor is sent with the message to the Parliament where it is numbered and recorded and then transmitted to the Registrar General for filing.

An Act assented to by the Governor becomes law from the date provided for in the commencement provision of the Act, being either the date of assent, a specified date or event, or a date or dates to be proclaimed. If the Act does not contain a commencement provision, it commences on the day occurring twenty-eight days after the date of assent.

Subordinate Legislation

Subordinate legislation is any instrument having the character of a law made under the authority of an Act.

The instruments are variously described as rules, regulations, ordinances, by-laws, etc. For convenience they will be referred to here as regulations.

Regulations approved by the Governor-in-Council constitute an important part of the written law of New South Wales.

Acts of Parliament are usually drafted to deal with matters of principle or substance. To avoid the need for frequent changes to cover variations in matters of an administrative or functional nature, provisions may be inserted in an Act authorising specific matters to be dealt with by regulations.

When a Bill is being drafted, the Parliamentary Counsel should be given careful instructions to ensure that the regulation-making power included in the Bill is wide enough to meet the likely regulation-making requirements.

Regulations must be consistent with the terms of the Act under which they are made and with the general law; they can complete the details of the scheme but cannot add new aims or ideas, unless expressly authorised to do so. Regulations

cannot alter anything in the Act unless the Act expressly authorises the regulations to do so.

Where it is intended that regulations should confer judicial power, provide for the imposition of penalties or the charging of fees, or require the furnishing of a statutory declaration, express provision conferring power for this purpose must be included in the Act.

Approval of Regulations

Regulations are approved by the Governor-in-Council on the recommendation of the Minister responsible for the administration of the Act under which they are to be made.

The recommendation is made by way of an Executive Council Minute and must be accompanied by the relevant certificates required under section 7 of the *Subordinate Legislation Act 1989*.

The *Interpretation Act 1987* (section 39) provides that when a regulation has been approved by the Governor-in-Council it is to be published on the NSW Legislation website. The regulation commences on publication or on a later date specified in the regulation. Regulations may only commence on an earlier date if expressly permitted in the relevant Act.

The *Interpretation Act 1987* (section 40) also sets out the following procedure for the giving of notice of a regulation to Parliament:

- there is to be tabled in each House of Parliament a written notice of the making of a regulation within 14 sitting days after the regulation has been published on the NSW Legislation website;
- the written notice is to identify the regulation;
- a regulation is not invalid merely because a written notice concerning the regulation is not tabled in each House of Parliament. The notice must nevertheless be tabled even if the 14 sitting days have passed.

The Parliamentary Counsel's Office prepares and arranges for tabling of the written notice.

Disallowance

At any time within 15 sitting days of the tabling of a regulation in Parliament any Member may move that the regulation be disallowed.

Section 41 of the *Interpretation Act 1987* provides that the regulation becomes law from the date of publication on the NSW Legislation website or such later date as may be provided in the regulation but it has no further effect if either House of Parliament passes a motion for disallowance. However, action taken in the interim period is valid.

Procedure for Preparation of Regulations

The procedures for preparation of regulations involve the following steps.

- The Guidelines for the preparation of statutory rules (set out in Schedule 1 to the *Subordinate Legislation Act 1989*) require that, before subordinate legislation is proposed to be made, the objectives sought to be achieved must be formulated, alternative options for achieving those objectives must be considered, the costs and benefits of each option must be evaluated, and other affected authorities must be consulted.
- The Minister's approval in principle to the proposal is obtained.
- A regulatory impact statement (containing information about objectives, options, costs and benefits and consultation as described above) must (with certain exceptions) be made in connection with a principal statutory rule (i.e., a regulation, by-law, rule or ordinance which contains provisions apart from direct amendments or repeals and provisions dealing with citation and commencement, as defined in section 3 of the *Subordinate Legislation Act 1989*).
- Where a regulatory impact statement is required, notice of proposed principal statutory rules must be published on the NSW Legislation website and in a daily newspaper, inviting comments and submissions.
- Where a regulatory impact statement is required, consultation must take place with representatives of persons or groups likely to be affected by a principal statutory rule.
- Drafting instructions are forwarded to the Parliamentary Counsel.
- Draft regulations are returned by the Parliamentary Counsel with an opinion that in this form they may legally be made.
- Draft regulations are submitted to the Minister for approval, with an Executive Council Minute.
- Regulations are approved by the Governor-in-Council.
- Regulations are published on the NSW Legislation website.
- Notice of the making of the Regulations is tabled in the Legislative Assembly and the Legislative Council by the Parliamentary Counsel.

The requirements for a regulatory impact statement, notice and consultation in relation to a principal statutory rule need not be complied with in the following circumstances:

(i) where the Attorney General or the Parliamentary Counsel advises that the proposed statutory rule relates to matters of a machinery nature, direct amendments or repeals, matters of a savings or transitional nature, matters arising under legislation that is uniform with the legislation of the Commonwealth or another State or Territory, matters involving the adoption of international or Australian standards or codes of practice, or matters of no appreciable impact or burden;

(ii) where the Minister administering the *Subordinate Legislation Act 1989* (currently, the Premier) certifies that the public interest requires that those procedures not be followed; or

(iii) where the Minister proposing the regulation certifies that the principal statutory rule is to be made by a person or body who is not expressly subject to the direction and control of the Minister and it was not practicable to comply with these requirements in the circumstances of the case.

Drafting by the Parliamentary Counsel

Drafting instructions should be provided for the preparation of Regulations in the case of both principal and amending Regulations. Drafting instructions should set out clearly the purpose of the proposed regulations, etc.

Statutory Bodies

Some independent statutory bodies have been given power by their Acts of Incorporation to make their own regulations for approval or confirmation by the Governor. These regulations should also be forwarded to the Parliamentary Counsel before being submitted to the Governor.

Section Five – Integrity and Codes of Conduct

Conduct of Ministers

A code of conduct has been adopted by each Government to govern the conduct of Ministers. The code of conduct included as Annexure A to this section has been adopted.

(The Ministerial Code of Conduct has not been adopted for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*.)

Conduct of Members of Parliament

The Legislative Assembly and the Legislative Council have adopted a code of conduct for Members of Parliament. This code of conduct applies to Ministers in their capacity as Members of Parliament. It has been adopted for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*. For ease of reference the code of conduct adopted by the Parliament is included as Annexure B to this section.

Lobbying Code of Conduct

The NSW Government has adopted a Lobbyist Code of Conduct and, in accordance with the Code, a register of professional lobbyists. A copy of the Code is available at Annexure C of this Handbook.

All Ministers, Parliamentary Secretaries, Ministerial staff, staff working for a Parliamentary Secretary, staff of public sector agencies and Government Members of Parliament and their staff must comply with the Code.

Among other things, the Code provides that Government representatives must not permit lobbying by a professional lobbyist unless the lobbyist is listed on the Register of Lobbyists and has disclosed certain information in his or her initial contact with the Government representative. The Register of Lobbyists is available on the Department of Premier and Cabinet's website (www.dpc.nsw.gov.au). Breaches of the Lobbyist Code should be reported to the Director General of the Department of Premier and Cabinet.

Ministers should note that the Ministerial Code of Conduct expressly requires Ministers to comply with the Lobbyist Code.

Corruption allegations

Under section 11 of the *Independent Commission Against Corruption Act 1988*, Ministers have a duty to report any matter that the Minister suspects, on reasonable grounds, concerns or may concern corrupt conduct.

A Minister may comply with this obligation either by reporting the matter to the ICAC him or herself or by reporting the matter to the head of any agency responsible to the Minister.

If a matter is reported to the Minister's agency head, that officer is in turn under an obligation under the Act to report any matter the officer suspects, on reasonable grounds, concerns or may concern corrupt conduct to the ICAC.

If a Minister generally wishes to comply with the duty by referring all corruption allegations to the Minister's agency head, the Minister should put in place arrangements to ensure that referrals are made only where this is an appropriate course to take.

In circumstances where this might not be appropriate (for example, where the allegations relate to the conduct of the Minister's agency head), the Minister should:

a. form his or her own view as to whether the allegations should be reported to the ICAC under the test set out above, and, if they should, the Minister should report the matter to the ICAC; or

b. if there is another agency responsible to the Minister and it is appropriate to refer the allegations to the head of that agency, then the Minister may refer the allegations accordingly.

The option of referring corruption allegations to the Department of Premier and Cabinet is not available to Ministers if the allegations meet the test for referral to ICAC set out above. The Department remains available, however, to advise Ministers in relation to their obligations under the Act and in relation to allegations of corrupt conduct generally.

Under section 53 of the Act, the ICAC has the power to refer matters for investigation or other action to any person or body the ICAC considers to be appropriate in the circumstances. The ICAC may, therefore, choose to continue to refer matters to the Department of Premier and Cabinet for investigation or other action, even if the Department is not the agency that originally referred the relevant matter to the ICAC.

The ICAC publication "Section 11 Report guidelines for principal officers – Reporting corrupt conduct to the ICAC" (available at www.icac.nsw.gov.au under "Publications") provides guidance as to how to apply the "suspects on reasonable grounds" test and other useful information. It was published before Ministers were made subject to the duty to report and so it does not specifically refer to Ministers. Its guidance, however, is now of relevance to Ministers.

Consistent with the ICAC publication and the Department of Premier and Cabinet's approach to date, Ministers and agency heads are encouraged to err on the side of caution and report allegations to the ICAC if they are in any doubt as to whether or not the allegations satisfy the test for reporting.

Government Information (Public Access) Act 2009

The *Government Information (Public Access) Act 2009* (GIPA Act) commenced on 1 July 2010 and replaced the *Freedom of Information Act*.

Central to the new GIPA Act is the presumption that all Government-held information should be accessible to the public and that information should only be withheld if it is necessary to do so in the public interest.

Further, the GIPA Act establishes a new model of openness under which formal applications for access to information should be a last resort for members of the public wishing to obtain Government information. Instead, the Act authorises and encourages the release of information proactively, limited only by legitimate public interest considerations.

Ministers need to set the tone and cultural expectations which support the release of Government information. It is important that agency staff be given the confidence and support they need to make decisions that further the objects and intentions of the Act.

There continue, of course, to be certain types of information that will be inappropriate to release. Information revealing Cabinet deliberations, sensitive personal or commercial-in-confidence information, and information that could jeopardise public safety, law enforcement or the fair trial of a person are examples. In all cases, however, public interest is the relevant touchstone. Political considerations must not come into play.

Applications to Ministers' offices

Under the GIPA Act, each Minister (including their personal staff) is treated as a separate "agency". Accordingly, access applications may be made for Government information held by a Minister's office. It would be prudent for Ministers to nominate and authorise one of their Ministerial office staff to make determinations on access applications made to them.

Agency responsibility for access determinations

Ministers should also be aware that the new Act expressly provides that, in dealing with a particular access application, agencies are not subject to the direction and control of Ministers.

Determinations under the GIPA Act must be made by agencies on their merits, based solely on the criteria set out in the Act.

Ministers and Ministers' offices are not entitled to be provided with draft access determinations from agencies within their portfolios.

Agencies must not provide their Minister or Minister's office with draft determinations, or seek advice or comment from their Minister or Minister's office about determinations that have not been finalised.

Ministers or Ministers' offices might appropriately be involved in GIPA matters in the following circumstances:

- where the Minister or Minister's office staff are formally consulted under the third-party consultation provisions in the GIPA Act because the application seeks or catches information concerning their personal affairs; or
- where the application cannot be understood by the agency without clarification from the Minister or Minister's office (for example, because the application seeks information about a comment made by the Minister and the agency needs to obtain details of the comment and the circumstances in which it was made in order to process the application).

It is also appropriate for agencies to advise their Minister and Minister's office about applications on hand, and to provide them with copies of determinations once they have been made.

It is also appropriate for Ministers and Ministers' offices to request, and for agencies to provide, any additional briefing material in relation to determinations. It is not acceptable, however, for agencies to delay making determinations because they are preparing additional briefing material for their Minister or Minister's office.

ANNEXURE A

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ANNEXURE B

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ANNEXURE C

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ANNEXURE D

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ANNEXURE E

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ANNEXURE F

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ANNEXUREG

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ANNEXURE H

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ANNEXURE I

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ANNEXURE J

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Annexure A

Code of Conduct for Ministers of the Crown

It is essential for the maintenance of public confidence in the integrity of the Executive Government of the State that Ministers of the Crown exhibit, and be seen to exhibit, the highest standards of probity in the exercise of their offices, and that they pursue, and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest.

It is essential for the proper working of Executive Government that Ministers of the Crown should enjoy and retain the trust and confidence of their ministerial colleagues both in their official dealings and in the manner in which they discharge their official responsibilities.

Accordingly two principles must guide ministerial conduct in office:

1. MINISTERS WILL PERFORM THEIR DUTIES HONESTLY AND IN THE BEST INTERESTS OF THE PEOPLE OF NEW SOUTH WALES.
2. MINISTERS WILL BE FRANK AND HONEST IN OFFICIAL DEALINGS WITH THEIR COLLEAGUES AND WILL MAINTAIN THE CONFIDENTIALITY OF INFORMATION COMMITTED TO THEIR SECRECY.

This Code of Conduct seeks to uphold these two principles.

CODE

Introduction

The following is not intended to be a comprehensive statement of the ethical responsibilities of Ministers of the Crown. One cannot anticipate and make provision for every contingency which can raise an ethical issue for Ministers. The requirements and guidelines set out below merely provide the broad framework to aid Ministers in the resolution of ethical issues. It is to be emphasised that each Minister will bear personal responsibility both for the decisions he or she makes on ethical questions and for the manner in which he or she complies with this Code. Any ethical determination on a matter not provided for in this Code should be in conformity with the two principles stated above. In any case of doubt the Minister should refer the matter to the Premier.

Ministers are reminded that, quite apart from their ethical obligations they are subject to the civil and criminal law as holders of public office. In particular they are reminded that they can be held personally responsible in law for (a) their intentional misuse of their office and the powers and duties they have in it; (b) conflicts of interest and the possession of interests which will disqualify them from

parliamentary office; (c) the corrupt receipt or solicitation of benefits; and (d) the misuse of confidential information acquired by virtue of office.

Part 1. General Obligations

1.1 Ministers will exercise their office honestly and in the public interest.

1.2 Ministers should avoid situations in which they have or might reasonably be thought to have a private interest which conflicts with their public duty.

1.3 In conformity with their Executive Councillor's oath and the requirement of confidentiality of Cabinet proceedings, Ministers will make no unauthorised use or disclosure of information committed to their secrecy.

1.4 A Minister shall be responsible for ensuring that members of his or her staff are made aware of their ethical responsibilities and will require such disclosure or divestment of personal interests by staff members as seems appropriate to the Minister.

1.5 A Minister shall be frank and honest in official dealings with colleagues.

Part 2. Registration of Ministers' Interests

2.1 A Minister shall comply with the requirements of section 14A of the *Constitution Act 1902* and with any regulation in force under that section. (In this Code such a regulation, as in force at a relevant time, is referred to as "the relevant regulation").

2.2 A person accepting an appointment as a Minister of the Crown shall within four weeks of that appointment furnish to the Premier a copy of the return most recently made by him or her under the relevant regulation. If the person has had no occasion yet to furnish a return, then he or she shall furnish the same particulars as he or she would be obliged to furnish in a return made in accordance with the relevant regulation, using the form provided for by the regulation.

In the rest of this Part "return" is used to describe whatever form of document is furnished under this paragraph.

2.3 In addition to furnishing the return referred to in paragraph 2.2, the person shall furnish a written declaration supplying the Premier with the following information:

(a) particulars of events which have occurred since the period covered by the return, and which (or the consequences of which) would have to be disclosed in the next return made under the relevant regulation. The particulars are to include changes in the state of affairs disclosed in the return, such as changes in the ownership of real property, as well as new events, such as the receipt of gifts that would be required to be disclosed in a subsequent return;

(b) such further particulars as the Premier may require of anything dealt with in the return or declaration, or of anything the Premier considers ought to have been dealt with; and

(c) such particulars as the Premier may require of any other pecuniary interests, direct or indirect, that the person may have in any property or under any contract, arrangement or transaction yielding a material benefit to the person; or of pecuniary interests, similar to those described in the relevant regulation or in this sub-paragraph, that the person's spouse or children may have. The particulars must include such details as the Premier requires of the assets, sources of revenue or transactions of any company or other body in which the person, or the person's spouse or children, may have a direct or indirect pecuniary interest.

2.4 In the rest of this part, the subject-matter of a return, and of a declaration, furnished to the Premier under paragraph 2.2 or paragraph 2.3, including anything relating to a spouse or child of a person, is referred to as the "interests" of that person, and any particular item dealt with in the return or declaration is referred to as an "interest".

2.5 A person proposed to be appointed as a Minister should, at the request of the Premier, divest himself or herself of any interests which could create the impression of a material conflict with the responsibilities to be discharged in the portfolio to which the appointment is to be made.

In any event a Minister shall upon assuming office:

(a) resign any directorship of a public company, and of any private company whose interests are such as to be likely to give rise to the appearance of conflicting interests or responsibilities of the Minister; and

(b) cease to take an active part in any professional practice or in any business in which the Minister was engaged prior to assuming office.

2.6 The returns and declarations furnished to the Premier under paragraphs 2.2 and 2.3 will be kept as a Register of Interests by the Department of Premier and Cabinet.

2.7 Ministers must, throughout their period in office, furnish to the Premier in writing:

(a) particulars of all events which occur after the furnishing of the declaration under paragraph 2.3, and which (or the consequences of which) would have to be disclosed in the return next following the event and made under the relevant regulation; and

(b) particulars of any material change in any interests not covered by sub-paragraph (a) of this paragraph, for example, interests of a spouse or child,

and shall do so as the event or material change occurs.

Any such particulars will be recorded in the Register of Interests kept by the Premier.

2.8 Whenever there is any significant change in, or addition to, the responsibilities of a Minister, that Minister shall consult with the Premier for the purpose of determining whether that change warrants a divestment of any interests then held by the Minister.

2.9 The Premier shall review from time to time the interests and the official responsibilities of each Minister for the purpose of determining whether it would then be appropriate either for those responsibilities to be varied or for interests to be divested so as to avoid the appearance of any conflict of interest.

2.10 A Minister who divests interests under this or the following Part shall not transfer those interests to his or her spouse, to a minor child, to a nominee or to any trust, company or association in which the Minister has, or would thereby have, a substantial interest.

2.11 The returns and declarations required to be furnished to the Premier under this Part shall not relieve a Minister of any disclosure requirements prescribed in later Parts of this Code.

Part 3. Conflict of Interest

3.1 For the purposes of this Part a Minister shall be taken to have an interest in any matter on which a decision is to be made or other action taken by the Minister in virtue of office, if the range of possible decision or action includes decision or action reasonably capable of conferring a pecuniary or other personal advantage on the Minister or the spouse or any child of the Minister; but the Minister shall not be taken to have such an interest if the advantage is no greater than the advantage that would be conferred by the decision or action on any member of the public at large, or any substantial section of the public. Reference to a conflict of interest is reference to a possible conflict between the interest in question and the Minister's duty as a Minister.

"Undisclosed interest" means an interest not disclosed as required under this Part.

3.2 A Minister shall not:

(a) use his or her position for the private gain of the Minister or for the improper gain of any other person; or

(b) have any material or undisclosed interest in any decision or action taken in virtue of office.

So as to ensure that such does not appear to have occurred, a Minister shall avoid situations in which it might reasonably be thought that the ministerial position is being so used, or that a possible conflict of interest has arisen.

3.3 Where in the exercise of office an actual or apparent conflict of interest arises or is likely to arise in the matter, a Minister shall forthwith disclose the nature of that conflict to the Premier.

A record of that disclosure shall be placed upon a Schedule to the Register of Interests.

The Minister shall abstain from further acting in that matter unless and until the relevant interest has been divested or the Premier in writing directs the Minister to continue to act after full disclosure to the Premier.

Where the Minister is unable or unwilling to divest that interest, or where it is otherwise considered to be in the best interests of Executive Government in the State, the Premier may appoint another Minister to act in the matter.

3.4 Where in any meeting of the Executive Council, Cabinet or in any committee or sub-committee of Cabinet an actual or apparent conflict of interest arises or is likely to arise in any matter, the Minister shall, as soon as practicable after the commencement of the meeting, disclose the existence and nature of that conflict.

The disclosure shall be recorded in the minutes of the meeting.

The Minister shall abstain from participating in discussion of that matter and from voting on it.

3.5 Where a Minister has been authorised under this Part to continue to act in a matter notwithstanding an actual or apparent conflict of interest, any change in circumstances affecting the nature or extent of that conflict shall be disclosed in accordance with, and shall be subject to the provisions of, this Part.

3.6 The responsibility for knowing of an actual or apparent conflict of interest rests with the individual Minister.

Part 4. Confidentiality of Information

4.1. Ministers will uphold their oath of secrecy as Executive Councillors and will maintain the confidentiality of information committed to their secrecy in the Executive Council or in Cabinet.

4.2. A Minister shall not use information obtained in office to gain a direct or indirect private advantage for himself or herself, or for any other person.

4.3. A Minister shall not communicate such information to any other person with a view to the private advantage of that other or of any third person unless that communication is authorised by law.

4.4. A Minister shall not make investments or enter into dealings in which the Minister might reasonably be thought to have, by virtue of office, access to relevant information not generally available to other persons.

4.5. On resignation or retirement a Minister shall maintain the secrecy of information acquired in office which could not properly be used or disclosed by the Minister if the Minister had remained in office.

Part 5. Misuse of Public Property and Services

5.1 Ministers shall be scrupulous in their use of public property, services and facilities. They should avoid any action or situation which could create the impression that such are being used for their own or for any other person's private benefit or gain.

Part 6. Gifts and Hospitality

RECEIVING OF GIFTS:

6.1 A Minister must not solicit or accept any gift or benefit the receipt or expectation of which might in any way tend to influence the Minister in his or her official capacity to show or not to show favour or disfavour to any person.

If any such gift, offer or suggestion thereof is made directly or indirectly to a Minister, the facts shall be reported to the Premier at the first opportunity.

Ministers' attention is drawn to the provisions of Part IVA of the *Crimes Act 1900* and especially to the sections dealing with corrupt rewards.

6.2 Ministers shall avoid all situations in which the appearance may be created that any person or body through the provision of hospitality or benefits of any kind is attempting to secure the influence or favour of a Minister.

6.3 In those circumstances where the offer of a benefit or gift is an act of goodwill towards the people of New South Wales and where offence might possibly be given by its rejection, such benefit or gift may be received by a Minister.

6.4 If the received gift is valued at $500 or above, the declaration form (Appendix A) is to be completed and submitted to the Director General of the Department of Premier and Cabinet. The Minister must elect on the declaration form to either:

(a) hand the gift to the State; or

(b) retain the gift and pay to the State the difference between $500 and the value of the gift.

6.5 If the Minister elects to retain the gift, the Minister must provide to the Director General of the Department of Premier and Cabinet:

(a) the completed declaration form (Appendix A);

(b) a cheque payable to the NSW Treasury for the relevant amount; and

(c) a valuation of the gift.

The valuation is to be made by a registered valuer at the wholesale price of the country of origin. This valuation must be procured by the Minister's Office.

6.6 If the Minister elects to hand the gift to the State, the Minister must:

(a) provide the completed declaration form (Appendix A) to the Director General of the Department of Premier and Cabinet; and

(b) arrange delivery of the gift to the Director General of the Department of Premier and Cabinet.

6.7 Those gifts handed to the State by the Minister will be located in NSW galleries, museums or other appropriate Government establishments. The gifts become the property of the State under the control of the Director General, Department of Premier and Cabinet.

6.8 The Director General of the Department of Premier and Cabinet will maintain a Register of Gifts to Ministers that records all gifts declared by submission of a completed Appendix A form.

6.9 Overseas gifts received in the course of official duty are to be declared:

(a) to Australian customs at the point of entry, if the gift falls outside the normal duty free passenger concession or if the gift is subject to quarantine inspection.

(b) Any customs duty and other relevant taxes are payable by the Minister at the appropriate rate.

6.10 Ministers shall take all reasonable steps to ensure that their spouses, their children and their staff members are not the recipients of such benefits or gifts as could give the appearance of an indirect attempt to secure the influence or favour of the Minister.

6.11 Gifts of token kind or moderate acts of hospitality (such as a lunch or dinner) may be accepted without the Minister needing to report their offer or receipt. In deciding to accept such benefits a Minister must satisfy himself or herself that ministerial independence will not in any way be compromised or appear to be compromised thereby and the Minister will bear personal responsibility for the decision taken.

GIVING OF GIFTS:

6.12 Although Australia is not traditionally a gift giving country, other countries customs, good manners and goodwill often necessitate the presentation of gifts.

Selection and Purchase

6.13 Gifts are chosen for their craftsmaking and Australian character and, where possible, items are purchased at source. However, for practical reasons, purchases may also be made through galleries and retail outlets. Wherever practicable products should be from New South Wales designers and suppliers.

Choice of Gifts

6.14 The choice of gifts is at the discretion of the Minister within Ministerial financial allocations, as determined by the nature of individual visits and their importance. Discreet enquiries are made well in advance of visits of likely presentations and their value.

6.15 Further, if Ministers are ordinarily to make their own selection and purchase arrangements for gifts, then it may be prudent for advice to be sought on their behalf from the Protocol and Hospitality Unit as to the nature and value of an appropriate gift. This may avoid embarrassment, and also ensure that gifts are not overly extravagant.

Issue of Gifts

6.16 The Protocol and Hospitality Unit will select and provide gifts of varying cost and quality for presentation by the Premier and on infrequent occasions by the Director General of the Department of Premier and Cabinet.

(a) In the case of a Minister, Parliamentary Secretary or Member formally representing the Premier, the Premier's private staff is to advise the Protocol and Hospitality Unit in writing requesting that a gift be made available for presentation;

(b) In the normal administration of their portfolios Ministers are to make their own selection and purchase arrangements for presentation of gifts, as is common practice amongst most Ministers.

Part 7. Employment or Engagement

7.1 The full-time nature of Ministerial office effectively precludes Ministers from accepting any form of employment or engagement, or otherwise providing services to third parties, while they remain in office.

7.2 Ministers need to be aware of the risks of conflicts of interest, or perceived conflicts of interest, which might arise when considering (either while in office or after leaving office) offers of employment or engagement to be accepted after the Minister leaves office. Similar issues arise in circumstances where a Minister proposes to establish a business to provide services to third parties.

7.3 Ministers, while in office or following resignation or retirement, should take care in considering offers of post-separation employment or engagement, or when proposing to otherwise provide services to third parties after they leave office, to avoid a perception that:

- the conduct of the Minister or former Minister while in office is or was influenced by the prospect of the employment or engagement or by the Minister or former Minister's intention to provide services to third parties; or
- the Minister or former Minister might make improper use of confidential information to which he or she has or had access while in office.

7.4 Ministers who, while in office, are considering an offer of post-separation employment or an engagement or who are proposing to provide services after they leave office to third parties (including establishing a business to provide such services) must obtain advice from the Parliamentary Ethics Adviser before accepting any employment or engagement or providing services to third parties which relates or relate to their portfolio responsibilities (including portfolio responsibilities held during the previous two years of Ministerial office).

7.5 Upon ceasing to hold Ministerial office for the period referred to in clause 7.6, former Ministers must also obtain advice from the Parliamentary Ethics Adviser before accepting any employment or engagement or providing services to third parties (including establishing a business to provide such services), which relates or relate to their former portfolio responsibilities during

the last two years in which they held Ministerial office. This requirement does not apply to any employment or engagement by the Government.

7.6 The requirement under clause 7.5 that former Ministers obtain advice from the Parliamentary Ethics Adviser in respect of post-separation employment or engagement applies for the period of 18 months following the former Ministers' ceasing to hold Ministerial office. (However, in accordance with the provisions of the Ministerial Code of Conduct that were in force at the time of the March 2011 election, the requirement applies for the period of 12 months in the case of Ministers who ceased to hold office before or immediately following the March 2011 election.)

7.7 The requirements in Part 7 apply to Ministers and former Ministers in addition to any requirements that may apply to them in their capacity as a Member of Parliament.

7.8 The *Lobbying of Government Officials Act 2011* also imposes additional restrictions on a former Minister's capacity to engage in lobbying activities in the first 18 months after leaving office that concern his or her former portfolio responsibilities in the 18 months prior to leaving office. A breach of those restrictions is a criminal offence. Ministers should take care to consider both the ethical and legal implications of any proposed future role upon leaving Ministerial office where that role may involve lobbying.

Part 8. Lobbying

8.1 Ministers must comply with the NSW Government Lobbyist Code of Conduct as published as an Annexure to the Ministerial Handbook and as updated from time to time and published on the website of the Department of Premier and Cabinet.

8.2 As noted in Part 7, Ministers should also be aware that the *Lobbying of Government Officials Act 2011* (the Act) creates a criminal offence for a former Minister or Parliamentary Secretary to engage in certain lobbying activities in the 18 months after leaving public office. The Act refers to this period as a "cooling-off" period. Before communicating with former Ministers and former Parliamentary Secretaries about matters that may have arisen in their previous portfolios, therefore, Ministers should take care to consider the restrictions that apply to former office-holders lobbying NSW government officials about former portfolio matters during the "cooling off" period.

8.3 Ministers should also note that the *Lobbying of Government Officials Act 2011* makes it a criminal offence for a person to give or receive success fees for lobbying NSW government officials.

APPENDIX A

DECLARATION OF AN OFFICIAL GIFT

DECLARATION OF AN OFFICIAL GIFT EXCEEDING VALUATION LIMIT

To: Director General
Department of Premier and Cabinet

From: The Office of ______________________________

The following gift was received in the course of official duties and its value exceeds the valuation limit of $500 for a gift.

Gift (Item or service): ______________________________

Received by: ______________________________

Presented by: ______________________________

Occasion and date: ______________________________

Current location of gift: ______________________________

Value (wholesale country of origin) - only required if Minister elects A, below, to retain the gift: $______________________

Please complete A or B

A	B
I wish to retain this gift. Attached are: • the valuation certificate (or details of the valuation process). • a cheque, payable to "NSW Treasury", for the amount of $____________ being the difference between the valuation limit and the value of the gift and delivered to Director General, Department of Premier and Cabinet. Signed: ________________ Minister for ____________ Date: ______________	I wish to surrender this gift to the Department of Premier and Cabinet and relinquish any future claim to ownership. My recommendation of the future location/disposal of this gift is – Signed: ________________ Minister for ____________ Date: ______________

Code of Conduct for Members of Parliament

PREAMBLE

The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.

Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate has the right to dismiss them from office at regular elections.

Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

Members of Parliament acknowledge that their principal responsibility in serving as Members is to the people of New South Wales.

THE CODE

Disclosure of conflict of interest

(a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.

(b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.

(c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

Bribery

(a) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the Member has received, is receiving or expects to receive.

(b) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:

(i) A member of the Member's family;

(ii) A business associate of the Member; or

(iii) Any other person or entity from whom the Member expects to receive a financial benefit.

(c) A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.

Gifts

(a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.

(b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.

(c) Members may accept political contributions in accordance with part 6 of the *Election Funding Act 1981*.

Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

Secondary employment or engagements

Members must take all reasonable steps to disclose at the start of a parliamentary debate:

(a) the identity of any person by whom they are employed or engaged or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member);

(b) the identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and

(c) the nature of the interest held by the person, client or former client in the parliamentary debate.

This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the parliamentary debate which goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in a debate. If the Member has already disclosed the information in the Member's entry in the pecuniary interest register, he or she is not required to make a further disclosure during the parliamentary debate.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

NSW Government Lobbyist Code of Conduct

1. Preamble

Free and open access to the institutions of government is a vital element of our democracy.

Lobbyists can enhance the strength of our democracy by assisting individuals and organisations with advice on public policy processes and facilitating contact with relevant Government Representatives.

In performing this role, there is a public expectation that Lobbyists will be individuals of strong moral calibre who operate according to the highest standards of professional conduct.

The Government has established the Lobbyist Code of Conduct to ensure that contact between Lobbyists and Government Representatives is conducted in accordance with public expectations of transparency, integrity and honesty.

2. Application

2.1 The NSW Government Lobbyist Code of Conduct has application through the Codes of Conduct that apply to Ministers, Ministerial Staff Members, senior public servants and public sector agencies, and through a Premier's Memorandum in relation to Parliamentary Secretaries.

2.2 The NSW Government Lobbyist Code of Conduct creates no obligation for a Government Representative to have contact with a particular Lobbyist or Lobbyists in general.

2.3 The NSW Government Lobbyist Code of Conduct does not serve to restrict contact in situations where the law requires a Government Representative to take account of the views advanced by a person who may be a Lobbyist.

3. Definitions

"Director General" means Director General of the Department of Premier and Cabinet.

"Lobbyist" means a person, body corporate, unincorporated association, partnership or firm whose business includes being contracted or engaged to represent the interests of a third party to a Government Representative. "Lobbyist" does not include:

(a) an association or organisation constituted to represent the interests of its members;

(b) a religious or charitable organisation; or

(c) an entity or person whose business is a recognised technical or professional occupation which, as part of the services provided to third parties in the course of that occupation, represents the views of the third party who has engaged it to provide their technical or professional services.

"Lobbyist's Details" means the information described under clause 5.1.

"Government Representative" means a Minister, Parliamentary Secretary, Ministerial Staff Member, or person employed, contracted or engaged in a public sector agency (which means a Division of the Government Service as defined in section 4A of the *Public Sector Employment and Management Act 2002*) other than staff employed under section 33 of the *Public Sector Employment and Management Act 2002*.

"Ministerial Staff Member" means a person employed under section 33 of the *Public Sector Employment and Management Act 2002* to carry out work for a Minister or a Parliamentary Secretary; a person seconded to the Department of Premier and Cabinet under section 86 of the *Public Sector Employment and Management Act 2002* and assigned to a Minister's office; or a person otherwise placed, contracted or engaged in a Minister's office or assigned to a Parliamentary Secretary.

4. Contact between Lobbyists and Government Representatives

4.1 A Government Representative shall not at any time permit lobbying by:

(a) a Lobbyist who is not on the Register of Lobbyists;

(b) any employee, contractor or person engaged by a Lobbyist to carry out lobbying activities whose name does not appear in the Lobbyist's Details noted on the Register of Lobbyists in connection with the Lobbyist;

(c) any Lobbyist or employee, contractor or person engaged by a Lobbyist to carry out lobbying activities who, in the opinion of the Government Representative, has failed to observe any of the requirements of clause 4.3.

4.2 Contact with a Government Representative for the purposes of lobbying activities by a Lobbyist includes:

(a) telephone contact;

(b) electronic mail contact;

(c) written mail contact; and

(d) face to face meetings.

4.3 When making an initial contact with a Government Representative about a particular issue on behalf of a third party for whom the Lobbyist has provided paid or unpaid services, the Lobbyist must inform the Government Representative:

(a) that they are a Lobbyist or employee, contractor or person otherwise engaged by the Lobbyist who is currently listed on the Register of Lobbyists;

(b) that they are making the contact on behalf of a third party;

(c) the name of the third party; and

(d) the nature of that third party's issue.

5. Register of Lobbyists

5.1 There shall be a Register of Lobbyists which shall contain the following information:

(a) the business registration details of the Lobbyist, including names of owners, partners or major shareholders as applicable;

(b) the names and positions of persons employed, contracted or otherwise engaged by the Lobbyist to carry out lobbying activities;

(c) the names of third parties for whom the Lobbyist is currently retained to provide paid or unpaid services as a Lobbyist; and

(d) the names of persons for whom the Lobbyist has provided paid or unpaid services as a Lobbyist during the previous three months.

5.2 A Lobbyist wishing to have contact with a Government Representative for the purposes of lobbying activities may apply to the Director General to have the Lobbyist's Details recorded in the Register of Lobbyists.

5.3 The Lobbyist shall submit updated Lobbyist's Details to the Director General in the event of any change to the Lobbyist's Details as soon as practicable but no more than 10 business days after the change occurs.

5.4 The Lobbyist shall provide to the Director General within 10 business days of 30 September, 31 January and 31 March of each year, confirmation that the Lobbyist's Details are up to date.

5.5 The Lobbyist shall provide to the Director General, within 10 business days of 30 June 2009 and each year thereafter, confirmation that the Lobbyist's Details are up to date together with statutory declarations for all persons employed, contracted or otherwise engaged by the Lobbyist to carry out lobbying activities on behalf of a client, or where the Lobbyist is a person, a statutory declaration by that Lobbyist, as required under paragraph 8.1.

5.6 The registration of a Lobbyist shall lapse if the confirmations and updated statutory declarations are not provided to the Director General within the time frames specified in clauses 5.4 and 5.5.

6. Access to the Register of Lobbyists

6.1 The Register of Lobbyists shall be a public document.

6.2 The Director General shall ensure that the Register of Lobbyists is readily accessible to members of the public.

7. Principles of Engagement with Government Representatives

7.1 Lobbyists shall observe the following principles when engaging with Government Representatives:

(a) Lobbyists shall not engage in any conduct that is corrupt, dishonest, or illegal, or cause or threaten any detriment;

(b) Lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided to parties whom they represent, the wider public, governments and agencies;

(c) Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions; and

(d) Lobbyists shall keep strictly separate from their duties and activities as Lobbyists any personal activity or involvement on behalf of a political party.

(e) A Lobbyist who has been appointed to a Government Board or Committee must not represent the interests of a third party to a Government Representative in relation to any matter that relates to the functions of the Board or Committee.

7.2 A Lobbyist shall ensure that each of their employees, contractors or persons otherwise engaged by the Lobbyist to carry out lobbying activities observes the principles set out in clause 7.1.

8. Registration

8.1 The Director General shall not include on the Register of Lobbyists the name of an individual unless the individual provides a statutory declaration to the effect that he or she:

(a) has never been sentenced to a term of imprisonment of 30 months or more, and

(b) has not been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty, such as theft or fraud.

8.2 The Director General shall remove from the Register of Lobbyists all of the details of a Lobbyist who has been found guilty of committing an offence under section 5 of the *Lobbying of Government Officials Act 2011* for a period of time specified in a notice to the lobbyist informing the lobbyist of the removal, being not less than 12 months.

8.3 Subject to clauses 8.1 and 8.2, the Director General may at his or her discretion:

1) refuse to accept part or all of an application to be placed on the Register of Lobbyists; or

2) remove from the Register of Lobbyists part or all of the details of a Lobbyist

if, in the opinion of the Director General:

(a) any prior or current conduct of the Lobbyist or the Lobbyist's employee, contractor or person otherwise engaged by the Lobbyist to carry out lobbying activities has contravened any of the terms of this Code or the *Lobbying of Government Officials Act 2011*; or

(b) the Lobbyist or the Lobbyist's employee, contractor or person otherwise engaged by the Lobbyist to carry out lobbying activities has represented the interests of a third party to a Government Representative in relation to any matter that relates to the functions of a Government Board or Committee of which the Lobbyist, employee, contractor or person is a member; or

(c) any prior or current conduct of the Lobbyist or association of the Lobbyist with another person or organisation is considered to be inconsistent with general standards of ethical conduct; or

(d) the registration details of the Lobbyist are inaccurate; or

(e) the Lobbyist has not confirmed the Lobbyist's Details in accordance with the requirements of clause 5.4 and/or clause 5.5; or

(f) there are other reasonable grounds for doing so.

Note: Section 5 of the *Lobbying of Government Officials Act 2011* prohibits giving or receiving, or agreeing to give or receive a success fee for the lobbying of a Government official. A success fee is an amount of money or other valuable consideration the giving or receipt of which is contingent on the outcome of the lobbying of the Government official.

Note: Under Premier's Memorandum M2011-13, a Lobbyist and the employees, contractors or persons otherwise engaged by the Lobbyist to carry out lobbying activities are ineligible for appointment to any Government Board or Committee if the functions of the Board or Committee relate to any matter on which the Lobbyist represents the interests of third parties, or has represented the interests of third parties in the 12 months prior to the date of the proposed appointment.

Cabinet Conventions: NSW Practice

CABINET CONVENTIONS : NSW PRACTICE*

Conventions guide practice precisely because they are recognized and used to guide practice. Their existence depends upon a general recognition that they are useful and should be followed and upheld by both sides of politics (bipartisan acceptance). Hence, it is important, from time to time, to step back and attempt to describe what is the content of conventions. To attempt to describe current practice. For that reason we have attempted in what follows to outline those conventions that govern the practice of Cabinet and collective decision making in New South Wales.

Cabinet is a body that has no formal legal status. But it is the central institution for Executive Government in Westminster-style systems of governance. Its workings are largely governed by practice and convention. The essence of its efficient operation is collective decision making. Many of the conventions and practices that have grown up around the institution of Cabinet are referable to the objective of efficient collective decision making.

It is important, for example, that once the government has made a decision, that it "speaks with one voice" and presents a united position to the community, whatever internal differences there may be. To do otherwise would create uncertainty and even confusion in the administration and more widely. Hence we see the imperatives for the collective responsibility as a convention of Cabinet.

Much more flows from this idea of collective responsibility. The secrecy or confidentiality of Cabinet proceedings is essential, not gratuitous. Ministers must be sure that what is said and done in Cabinet is not open to the full glare of publicity. If it were, Cabinet would cease to be an institution for robust debate and canvassing of a full range of policy options.

Similarly, with the simple but crucial idea that significant questions that affect the government as a whole, should come to Cabinet. Preempting Cabinet's role undermines the practice of collective decision making and the conventions of collective responsibility.

We have not attempted here to give an elaborate justification or rationale for the conventions we have identified. We have mainly attempted to identify them, and give them some structure or logic.

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* Compiled by Anne Twomey, Former Head of Legal Branch, The Cabinet Office and Roger Wilkins, Director-General, The Cabinet Office.

Application of conventions

The New South Wales Constitution is comprised of statutes, the common law, convention and practice. Convention is most commonly used to deal with the composition, structure and powers of the executive, because it is flexible, rather than prescriptive, and therefore allows change to occur slowly over time to meet changed conditions of government.

Constitutional conventions are not directly enforceable by the courts, but they may still be recognized by the courts and applied indirectly. For example, conventions concerning cabinet confidentiality are applied by the courts in holding that cabinet documents are the subject of public interest immunity[1] or confidentiality requirements[2] and that the Legislative Council may not order the production of such documents.[3] However, a court cannot make a judgment on the fitness for office of a Minister.[4]

Composition of the NSW Cabinet

By convention, the Governor commissions as Premier the Member of Parliament who holds the confidence of the Legislative Assembly (who is almost always the Member who leads the party that holds the greatest number of seats in the Legislative Assembly). The Premier then advises the Governor on the appointment of other Ministers of the Crown. The only express constitutional requirement is that they also be members of the Executive Council. There is no express constitutional requirement that members of Cabinet be Members of Parliament. However, the principles of 'responsible government' apply in New South Wales, and give rise to a number of conventions (four are listed below).

1. Cabinet is comprised of all Ministers of the Crown

In other jurisdictions, where the number of Ministers is larger,[5] Cabinet is comprised of a group of senior Ministers. In New South Wales, by convention, all Ministers of the Crown are members of the Cabinet and are bound collectively by its decisions. The maximum number of Ministers was previously limited by the *Constitution Act,* but this is no longer the case. However, for practical reasons the number of Ministers has remained at around twenty. Other Australian states have usually retained the convention that all Ministers are part of Cabinet.

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[1] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, at 615.
[2] *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752, per Lord Widgery at 770.
[3] *Egan v Chadwick* (1999) 46 NSWLR 563.
[4] R Brazier, *Ministers of the Crown,* (Clarendon Press, Oxford, 1977), p 271.
[5] See, for example, the Commonwealth Government and the United Kingdom Government. The Commonwealth Government moved to an inner Cabinet and outer ministry model (first and second eleven) in the 1950s.

2. Only Ministers of the Crown are members of Cabinet

By convention, only Ministers may be members of Cabinet. The Director-General of The Cabinet Office attends Cabinet meetings as its secretary, and other officers attend Cabinet committee meetings, but they are not members of Cabinet. In times of emergency, the situation may be different. For example, the United Kingdom War Cabinet during World War I was expanded to include representatives of the Dominions and the armed forces. In most cases this would be unnecessary. Where expert advice is required (for example from the Police Commissioner or anti-terrorism experts) it can be obtained through reports or presentations to Cabinet.

3. All Cabinet members must be Members of Parliament

The convention that Ministers (and hence Cabinet members) be Members of Parliament[6] finds its source in the principles of responsible government. These require that Ministers be collectively responsible to the Parliament and hold the confidence of the Legislative Assembly. Ministers are also individually responsible to the House of which they are a Member with respect to the administration of their portfolios. In order to be properly accountable to the Parliament, a Minister must therefore be a member of it.

There are circumstances, however, where this will not be the case. A common example is where the Legislative Assembly is dissolved prior to an election. Ministers who were Members of that House cease to be so upon its dissolution, but remain in office until a new government is commissioned. A less common example is where a person is commissioned as a Minister in the expectation of being elected to Parliament in a by-election, or where a Member resigns from one House in order to be a candidate for election to the other. Emergency circumstances may also arise which necessitate the appointment of non-parliamentarians to be Ministers. Those Constitutions, such as the Commonwealth and South Australian Constitutions, which expressly require Ministers to be Members of Parliament, give a period of grace, such as three months, for the Minister to become a Member after appointment as a Minister. The New South Wales convention is more flexible.

4. Each Minister must retain the confidence of the Premier

Ministers are appointed by the Governor on the advice of the Premier.[7] The Premier also advises the Governor on the withdrawal of a Minister's commission and the reallocation of portfolios. Accordingly, Ministers must retain the confidence of the Premier. Where circumstances arise that might warrant a Minister's resignation, an offer to resign should be made to the Premier, giving the Premier the choice of whether to accept it or to express continuing confidence in the Minister concerned. The formal resignation is made to the Governor in the case of Legislative Councillors and to the Speaker in the case of Members of the Legislative Assembly.

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[6] *Egan v Willis* (1996) 40 NSWLR 650, per Gleeson CJ at 660.

[7] Note that Labor Governments elect their proposed Ministers and the Premier advises the Governor to appoint those persons elected. However, in practice a Minister who does not hold the confidence of the Premier rarely survives, or at best is given little responsibility.

The same conventions and practices apply in the United Kingdom where it is expressly provided in the Ministerial Code that Ministers 'can only remain in office for so long as they retain the Prime Minister's confidence'.[8]

Collective ministerial responsibility

There are two main aspects to collective ministerial responsibility. First, the Cabinet must maintain the confidence of the Legislative Assembly. Second, Ministers are collectively responsible for all Cabinet decisions and must publicly support them, even if they do not personally agree with them. A consequence of this requirement is the necessity to maintain the confidentiality of cabinet deliberations. The relevant conventions flowing from collective ministerial responsibility are as follows:

5. The resignation of the Premier entails the resignation of all Ministers

As it is the Premier who is commissioned to form a Government, and all Ministers are appointed upon the Premier's advice, the resignation of the Premier has the effect of causing the resignation of all Ministers. This occurs after an election, even when the Government has been re-elected, in order to allow a new Government to be formed. It is also used as a means of providing for a Cabinet re-shuffle. In such a case the Premier resigns and is re-commissioned to form a Government. The Premier then advises the Governor to appoint Ministers to their new portfolios and in the appropriate order of seniority.

6. The Cabinet must maintain the confidence of the Legislative Assembly

By convention, if the Legislative Assembly withdraws its confidence in the Cabinet by, for example, passing a vote of no confidence in the Government, the Premier must either advise the Governor to hold an election or resign, resulting in the resignation of all Ministers.[9]

This convention has been affected by the enactment of s 24B of the *Constitution Act* 1902. It provides for fixed term Parliaments and limits the circumstances in which an election can be held prior to the fixed date. One such circumstance is the passage of a motion of no-confidence in the Government, but such a motion must comply with the requirements of the provision, and time must be given for a motion of confidence in the Government to be expressed before an election can be held. Where the requirements of s 24B have been met, the Governor is given a further discretion to decide whether to dissolve the Legislative Assembly or whether a 'viable alternative Government' could be formed without a dissolution. Where, for example, the Legislative Assembly has

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[8] A Code of Conduct and Guidance on Procedures for Minister, 1997, re-printed in *Prime Ministers and the Rule Book,* Politico's, 2000, p 153. This statement was inserted at the recommendation of the Nolan Committee in 1995: R Brazier, *Ministers of the Crown,* (Clarendon Press, Oxford, 1977), p 264.

[9] There has been a debate about whether this convention applies in relation to other defeats in the lower House (such as defeats on supply, major bills, minor amendments to bills or procedural motions). See: P Norton, 'Government Defeats in the House of Commons: Myth and Reality', in G Marshall (ed), *Ministerial Responsibility,* (OUP, 1989), pp 33-45.

expressed confidence in another Member to form a Government, the Governor may appoint that person instead of dissolving the House prior to an election.
Thus the original convention has been partly codified and partly transferred to the discretion of the Governor.

7. Cabinet is responsible for significant government policies and decisions

There is no legislative requirement as to which matters must be determined by Cabinet and which may be determined by the relevant Minister alone. By convention, however, matters which require the consideration of Cabinet include the following:

- All proposals for legislation;
- Proposals for significant or sensitive subordinate legislation;
- New policies and significant or sensitive changes to existing policies;
- Proposals that affect more than one portfolio and require ‘whole of government’ consideration;
- Policies and commitments (such as contracts) with a significant financial impact, or which require additional funding;
- Intergovernmental agreements and matters dealt with at Ministerial Council meetings;
- Government papers issued for public consultation or comment;
- Proposed responses to the reports of Parliamentary Committees, Commissions of Inquiry and other significant reports;
- Significant appointments.

The determination of whether a matter ought to be considered by Cabinet is ultimately made by the Premier and usually communicated through The Cabinet Office which administers the setting of the Cabinet agenda.

Given the importance of the Cabinet in determining Government policy, all Ministers are expected to attend Cabinet and their attendance takes priority over other commitments.

8. Ministers are collectively responsible for Cabinet decisions and must support them publicly

By convention, once a decision of Cabinet is made, all Ministers are required to support it, both in the Parliament and in public, regardless of their personal views.[10] This collective responsibility provides for stable government. It permits a unified approach to be taken to issues that arise across portfolios and prevents or resolves disputes between Ministers and between departments.

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[10] Doubts have been expressed by Encel and Lindell as to whether this convention continues to apply, because it is breached from time to time: S Encel, *Cabinet Government in Australia,* (MUP, 1962) pp 260-3; and G Lindell, ‘Responsible Government and the Australian Constitution – Conventions Transformed into Law?’, in Centre for International and Public Law, Law and Policy Paper 24, 2004, p 14. Breaches, of their nature, are more noticeable than compliance. In practice, however, there is a high level of compliance with the convention and internal acceptance within government that it continues to apply.

Collective responsibility also has an impact upon individual ministerial responsibility. An individual Minister cannot be expected to resign for a policy failure if that policy has been adopted by the Cabinet as a whole. The entire Cabinet takes responsibility for policy determined by Cabinet, and is accountable to the Legislative Assembly and to the people at elections.

Only Ministers are bound by collective ministerial responsibility. Parliamentary Secretaries, for example, not being members of Cabinet, are not bound by collective ministerial responsibility, although they may be influenced by it.

9. Ministers who are not prepared to accept and support a Cabinet decision must resign from Cabinet

The convention requiring collective responsibility for Cabinet decisions also requires that Ministers resign if they are not prepared to maintain collective responsibility by supporting a Cabinet decision. There are exceptions, however, when Cabinet itself decides that on a particular issue Ministers may 'agree to differ'[11] or have a 'free vote' in the Parliament.[12] Such issues may also arise where there is a coalition of parties in government. Although collective responsibility applies generally, regardless of to which political party a Minister belongs, the Cabinet may decide that Ministers belonging to a particular party are permitted, in a particular case, to express their dissent.

By convention, if a Minister resigns because he or she cannot support a particular Cabinet decision, the former Minister may explain that this was the reason for his or her resignation, but may not further breach cabinet confidentiality by revealing the deliberations of Cabinet upon the issue, or upon any other issue.

10. Ministers must not pre-empt Cabinet decisions

Collective responsibility relies on Ministers not undermining it by announcing their views on issues prior to their determination by Cabinet. Such action may be seen as an attempt to pre-empt Cabinet's decision or to differentiate a Minister's position from that of the Cabinet as a whole.

Ministerial speeches must be consistent with existing government policy as determined by Cabinet[13] and where they include comments on other portfolios, should be checked with the relevant Minister.

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[11] For an English example, see Arthur Silkin, 'The "Agreement to Differ"' in G Marshall (ed), *Ministerial Responsibility,* (OUP, 1989), pp 62-4 concerning the effects on collective ministerial responsibility of the freedom given to Ministers to support or oppose the referendum on whether the United Kingdom should remain in the European Common Market.

[12] See, for example, the conscience vote given on the *Human Cloning and Other Prohibited Practices Bill* 2003, which allowed the Minister who moved the second reading speech in the Legislative Council on behalf of the Government to give personal support to amendments that had been rejected by the relevant Minister in the Legislative Assembly. New South Wales, *Parliamentary Debates,* Legislative Council, 26 June 2003, pp 2209-24.

[13] The same requirement is imposed in the United Kingdom: A Code of Conduct and Guidance on Procedures for Minister, 1997, re-printed in *Prime Ministers and the Rule Book,* (Politico's, 2000), p 179.

11. The confidentiality of Cabinet deliberations must be maintained

Cabinet confidentiality has been recognized by the courts as 'an application of the principle of collective responsibility'.[14]

It has been held to be in the 'public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made'.[15] The collective responsibility of Ministers for Cabinet decisions would be undermined if the deliberations of Cabinet were made known.

By convention, Ministers may not publicly reveal the position that they put to Cabinet, nor the response of other Ministers. Former Ministers also remain bound by the convention of Cabinet confidentiality.

By law, Cabinet documents are accorded 'public interest immunity' which protects them in most cases from being produced under compulsion in legal proceedings.[16]

The power of the Houses of the Parliament to require the production of government documents is also derived from the principle of ministerial responsibility. While the courts have concluded that the Houses, in the exercise of their functions of legislation or the scrutiny of the executive, may require Ministers to produce government documents, this is subject to the requirements of cabinet confidentiality. The inherent powers of the Houses cannot be used to undermine the principle of collective ministerial responsibility by disclosing the deliberations of Ministers in Cabinet. This includes Cabinet documents which reveal the position that a Minister intended to put to the Cabinet.[17] 'Cabinet documents' are generally taken to include: Cabinet Minutes, submissions concerning Cabinet Minutes, correspondence concerning Cabinet Minutes, analyses of Cabinet Minutes and briefings to Ministers on Cabinet Minutes, Cabinet Agendas and Cabinet decisions. The equivalent documents concerning Cabinet Committees are also considered Cabinet documents.

The rationale for Cabinet confidentiality passes away in time. Thus Cabinet records are released publicly 30 years after their creation, or before that date on the application of scholars and biographers. In the United Kingdom, Cabinet confidentiality ceases, for the purposes of ministerial memoirs, fifteen years after the events occurred,[18] and the courts are reluctant to enforce confidentiality requirements even 10 years after the relevant events.[19] In New South Wales, the exemption under the *Freedom of Information Act* 1989 for Cabinet documents ceases 10 years after their creation, although other sources of exemption may continue to apply. Given the legal right of access to Cabinet

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[14] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [56].
[15] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, at 615.
[16] *Commonwealth v Northern Land Council* (1993) 176 CLR 604; and *Evidence Act* 1995 (NSW), s 130.
[17] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [56] – [57], and [70] – [71]; and per Meagher JA at [154].
[18] 'Ministers' Memoirs – The Radcliffe Committee Report', in G Marshall (ed), *Ministerial Responsibility,* (OUP, 1989), pp 68-71.
[19] *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752, per Lord Widgery at 771.

documents, in principle, after ten years, convention must follow by only binding Ministers for a period of ten years, unless overriding public interests in maintaining confidentiality, such as public security, apply.

12. The Cabinet documents of former Governments remain protected

Cabinet documents are the property of the State, not Ministers. They must be returned by Ministers upon leaving ministerial office. Access by current Cabinet Ministers to the Cabinet documents of previous governments of a different political party is by convention usually refused. An exception arises where the documents are already in the public domain. An exception might also arise where the 'continuity of administration' requires reference to previous Cabinet documents. However, in such circumstances, it is more common for Ministers to be given information about the previous consideration of the issue, the arguments given and the decision made, without revealing the personal views of Ministers and undermining collective ministerial responsibility.

Where access is proposed to be given to the Cabinet documents of a previous Government, either to current Ministers or to third parties, such as scholars, the person who was the Premier at the time the documents were created is advised and consulted.

Current Ministers may usually see the Cabinet documents of previous Governments of the same political party if the need to do so arises in the course of their ministerial duties. The Premier from the time of the documents' creation is still consulted, if possible.

Former members of Cabinet may request special access to Cabinet documents with which they dealt personally when in office. This may be granted by the Director-General of The Cabinet Office on the understanding that the material not be used in a way that could damage the public interest.

Administration of Cabinet

To be effective, Cabinet must meet regularly and be administered in an efficient manner. Conflicts of interest need to be avoided to ensure the integrity of the cabinet process. Cabinet decisions need to be recorded and implemented. Procedures must also be put in place to deal with cabinet operation during care-taker government periods. These propositions give rise to the following further conventions or practices:

13. Ministers must declare conflicts of interest

Ministers must reveal to the Premier any subjects in relation to which they may have (or be perceived to have) a conflict of interest. This includes financial, personal and family interests. In some cases Ministers may leave the Cabinet room when a matter is being discussed in which they may be perceived to have a conflict of interest. In other cases, however, it may be appropriate for the Minister to stay and participate in the Cabinet debate as long as the interest is declared. This will be the case where expertise and advice from the Minister's departments is important to ensure that Cabinet is adequately informed in making its decision.

Failure to adhere to this requirement does not carry with it a specific sanction. That is a matter for the Premier, under the Code of Conduct for Ministers, that has been in place since the time of Premier Greiner.

14. Cabinet decisions must be recorded and implemented

Cabinet decisions are recorded by the Director-General of The Cabinet Office and circulated to the Ministers who are to implement the decision.

Cabinet decisions have no force at law although in some cases they are recognized by law. For example, the Administrative Decisions Tribunal, in reviewing administrative decisions, is required to give effect to any government policy, including a Cabinet decision, in force at the time the reviewable decision was made.[20] Equally the Auditor-General is not entitled to question the merits of policy objectives of the government including those recorded in Cabinet decisions.[21] As a matter of practice the Auditor-General requests access to Cabinet documents on an "as needs" basis, and has never been refused.

By convention, Cabinet decisions are given the highest status and priority, and it is the duty of Ministers and public servants to implement them.

15. The Cabinet's role is limited during periods of care-taker government

Once the Legislative Assembly is dissolved prior to an election, there is no House to which Ministers can be made responsible. Hence Cabinet operates pursuant to 'care-taker conventions' during the period from the dissolution or expiration of the Legislative Assembly until the election result is clear or a new Government has been commissioned.[22]

A Government, by convention, during the care-taker period may not:

- Implement major policies or make major policy decisions that are likely to commit an incoming government;
- Make significant appointments; or
- Enter into major contracts or commitments.

Governments may announce future policies that are to be implemented when they are elected to government. They may also take action in the caretaker period that has already been announced prior to the care-taker period commencing, or for example, where tenders for a contract have already been called for prior to the commencement of the care-taker period.

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[20] *Administrative Decisions Tribunal Act* 1997 (NSW), s 64.
[21] *Public Finance and Audit Act* 1983 (NSW), s 27B(6).
[22] A Memorandum outlining care-taker conventions is issued by the Premier prior to each period commencing. See, for example, Memorandum T2002-6, 19 December 2002. See also the Commonwealth's 'Guidance on Caretaker Conventions', Department of the Prime Minister and Cabinet, September 2001.

In relation to appointments, most are deferred until after the care-taker period, but if necessary, appointments can be made on an acting, temporary or short-term basis.

Departments continue to operate during the care-taker period, dealing with the ordinary business of government.

Due to the existence of fixed term Parliaments, the date of the commencement of the care-taker period is known and plans should be made well in advance to avoid having to deal with significant matters during that period.

Where a care-taker period continues for a significant period after an election, for example where there are many recounts or there is a hung Parliament which requires a period of negotiation with independents before a government can be formed, it may become necessary for decisions to be made and commitments entered into. Where it is in the public interest for decisions to be made that fall outside those generally permitted in a care-taker period, procedures need to be implemented to consult the leader of the main Opposition Party or to take measures to prevent a future Government being bound by decisions or commitments to which it objects.

Where the State needs to be represented at inter-governmental meetings, such as a Premiers' Conference, and the outcome of the election remains uncertain, both potential Premiers may attend and receive the same briefing material.[23]

[23] This occurred in 1991. In 1995 the Premiers' Conference was delayed until the election outcome was determined.

Annexure E

Guidelines for the Preparation of Cabinet Minutes

Cabinet Minutes should state clearly, and **as concisely as possible**, the decision that Cabinet is being asked to make, and the matters that Cabinet needs to consider that are relevant to that decision.

Every Minute must include the following numbered sections set out in the following order:

Cover Sheet

1. Executive Summary
2. Recommendation(s)
3. Consultation
4. Risks and Mitigation
5. Financial Impact
6. Background and Supporting Information
7. Impact on Regional and Rural Communities
8. Regulatory Impact
9. Attachments

FORM OF MINUTES

All Minutes must be in the form set out in Annexure F to the Ministerial Handbook. All Minutes must be in Arial 12 point font (except for the attachments).

An electronic template for Cabinet Minutes is available from Cabinet Secretariat.

"Cover Sheet"

The Cover Sheet must be in the form set out in Annexure F to the Ministerial Handbook. No sub-heading should be left blank. If the 'Relationship to Previous Decisions' is not relevant the words "Not applicable" should be inserted. The options provided in the last box are the only options to be used. Use the option that best describes your minute, further explanation may be provided in later sections.

The Cover Sheet must never exceed one page. If necessary, more detailed information is to be included in Section 6 of the Minute.

Title of Cabinet Minutes

The title of the Minute should appear in the Cover Sheet. The title given to a Cabinet Minute and its unique Cabinet Minute number (which will be allocated by Cabinet Secretariat upon lodgement) are used to identify it throughout all Cabinet procedures.

Care must be taken to avoid confusion between Minutes by avoiding titles which are identical or substantially similar (for example, where there are separate proposals involving the amendment of the same Act).

Where the Minute recommends Cabinet approve the introduction of a Bill that has been drafted (that is, a "Bill Minute"), the title of the Minute must be the short title of the Bill and nothing else. (Further requirements for Bill Minutes are set out below.)

The short title, or expected short title, of a Bill must never be used as the title of a Cabinet Minute at any other time (for example, when the purpose of the Minute is to seek approval to draft a Bill). Instead, where Cabinet is being asked to approve the preparation of legislation this should be reflected in the title of the Minute (for example, "Legislation to...").

Where an amendment to an existing Act is proposed, the title of the Minute should refer to the principal Act (for example, "Amendment of the [*Principal*] Act to..."

If the Minute does not seek approval for the preparation of legislation, the title could take another form (for example, "Response to the [*Relevant*] Report" or "Review of the [*Relevant*] Act").

(1) "Executive Summary"

The Executive Summary must set out, **in no more than half a page**, a plain English explanation of the proposal, the reason for doing it and the likely effect and impact (including financial) of the action.

The aim of this section is to introduce the topic of the Minute, to identify in general terms what Cabinet is being asked to decide, and to provide context for the formal recommendations that follow.

(2) "Recommendations"

This section is required to state fully, but as concisely as possible, what Cabinet is being asked to do. The section must commence with the words: "It is recommended that Cabinet…"

If they are endorsed, the recommendations in the Minute will form the basis of the text of the Cabinet decision. Accordingly the recommendations must be worded as closely as possible to the decision that is desired.

The recommendations must cover all significant matters of principle, but should not include minor or technical detail. Background and supporting information must not be included in this section. Recommendations that merely ask Cabinet to "note" a series of matters should be avoided. Instead the recommendations should focus on what Cabinet is being asked to "approve", "authorise", or "reject/oppose".

Generally, the recommendations section of the Minute would not be expected to exceed half a page in length.

It is important that the recommendations be self-contained and written in a way that enables them to be understood without Ministers having to refer to another part of the Minute.

For example, it would not be appropriate to recommend that Cabinet:

> "approve the amendments to the [*] Act described in paragraph [*] of the Minute". [**Wrong**]

Instead, Cabinet could be asked to:

> "approve the drafting of legislation to amend the [*] Act to…. [*described as briefly as possible the effect of the proposed amendments*]". [**Right**]

The recommendations must appear on the first page of the Minute immediately after the Cover Page.

Approval to prepare legislation

When a Minute is seeking approval to the preparation of a Bill, the recommendations must provide enough detail to give Ministers a full appreciation of the significant policy that will be included in the proposed Bill. The recommendations need not, however, itemise provisions of the Bill that are merely machinery or consequential.

As the recommendations will be used as the basis for the text of the final decision, they must also be sufficiently detailed to enable that decision to provide the necessary authority for Parliamentary Counsel to draft the Bill and, once that has been done, to issue a report confirming that the Bill has been drafted so as to implement the Cabinet decision (and to confirm that it does not include any additional matters they were not authorised by the Cabinet decision).

Approval to introduce a Bill (Bill Minutes)

When approval is being sought to the introduction of a Bill that has already been drafted (that is, a “Bill Minute), the recommendations should take the following form:

> “That Cabinet APPROVE the introduction of the [*] Bill 20[*] (the Bill), which will:
>
> (a)
>
> (b)
>
> (c)
>
> etc [*set out the key policy principles that will be implemented in the Bill*]”

(3) “Consultation”

All Minutes require to have gone through consultation processes before they are drafted in their final form. This section will set out which Ministers, Agencies and/or stakeholders have been consulted in drafting the Minute and any issues raised and not yet resolved in these consultations. If no consultation has occurred an explanation must be provided. If consultation is ongoing details of this should be provided.

(4) “Risks and Mitigation”

The risks and Mitigation strategies associated with the proposal must be included as concisely as possible.

(5) “Financial Impact”

All Cabinet Minutes must include a section summarising the Financial Impacts. Apart from detailing additional costs and/or revenue to the proponent agency, these sections must fully explore and identify any flow-on costs for other agencies as well as any indirect financial cost and offsets. How impacts will be funded and the scale of costs will also be included in this section.

Where there is a financial impact, Treasury should be consulted and its concurrence to the proposed costings should be obtained before the Minute is submitted to the Department of Premier and Cabinet. While Treasury will review the financial impact of the proposals, primary responsibility for the accuracy of the information provided in the Cabinet Minute, including the estimated financial impact, rests with the submitting Minister.

The mere fact that Cabinet approves a Minute with a particular Financial Impact table does not mean that approval has been given to provide additional financial and staffing resources as set out in the Minute. These matters will need to be determined through the usual budgetary processes.

Whether Treasury has been consulted or not or if supplementary funding is required or not, is separately noted under the financial impact section.

The below table is to be included at the end of the Financial Impacts section in all Minutes *(this replaces the old Financial Impacts Statements attachment in the previous guidelines)*

	Current financial year ($mill)	Current financial year +1 ($mill)	Current financial year +2 ($mill)	Current financial year +3 ($mill)	Current financial year +4 ($mill)	Total Cost ($mill)
Total Expenses [1]						
Total Revenues[2]						
Budget Result[(2-1)]						
Capital Expenditure ETC = $XXm						

Supplementary funding required: Yes or No

Treasury approval of financial impact: Yes or No

(6) "Background and Supporting Information"

Relevant background and/or supporting information is to be stated as concisely as possible, consistent with clarity and with the need to provide Ministers with the necessary facts to make an informed decision.

Reference is to be made, if appropriate, to financial considerations, relationship to existing policies and priorities, all social justice and other impacts on the community, and to possible courses of action other than those recommended.

Where a Minute sets out options available to the Government, it should clearly state the Minister's view on each option and the Minister's recommended option.

Sub-headings may be used in this section. If it would be useful to do so, these sub-headings may be cross-referenced to the individual recommendations in Section 2.

(7) "Impact on Regional and Rural Communities"

A Regional and Rural Communities Impact Statement should be prepared for all Cabinet proposals.

The purpose of this statement is to ensure that the potential economic, environmental and social impact of any changes on particular communities are considered, so that Government is aware of the full extent of the impact on services, staff numbers or facilities in regional areas or rural communities. It is also important to consider implications of a proposal in the context of other government decisions or developments affecting a particular region or community.

(8) "Regulatory Impact"

This section does not merely set out whether any regulations are proposed to be made (although if regulation-making powers are proposed to be utilised then this should be explained, with particular reference to the specific areas intended for coverage).

Rather, the primary purpose of this section is to explain the extent to which the proposed legislation, regulations or other measures will impose any regulatory impact on business and the community.

In accordance with Premier's Memorandum M2009-20 (*Guide to Better Regulation*), all new and amending regulatory proposals must demonstrate the application of the Better Regulation Principles. This applies irrespective of whether the regulatory proposals are to be implemented by legislation, regulations or in some other way (eg., Ministerial orders).

The Better Regulation Principles are outlined in the 'Guide to Better Regulation', which is available on the Better Regulation Office's website (www.betterregulation.nsw.gov.au) and as Annexure I to the Ministerial Handbook. These Principles require that the need, objective, and impact of government action has been established, that any relevant consultation has been undertaken, that regulatory simplification has been considered, and that there is periodic review of regulatory requirements.

Where the proposals will have a significant regulatory impact, a Better Regulation Statement (BRS) must also be prepared and submitted with the Cabinet Minute. For non-significant proposals, a separate BRS is not required, but compliance with the Better Regulation Principles must still be demonstrated in the Cabinet Minute (whether in this section or by reference to the matters set out in Section 1).

It should be noted that regulations and other subordinate legislation must also adhere to the requirements of the *Subordinate Legislation Act 1989*.

(9) "Attachments"

These are to be listed in this section, for example:

Attachment A:	Better Regulation Statement
Attachment B:	Explanatory Note to the [*] Bill (for Bill Minutes)
Attachment C:	(Title of attachment)

Include all attachments in order as listed in section 9. Documents that are referred to as attachments (including in the body of the Submission) must be included as an attachment to be complete. All attachments should be clearly labelled and must be kept to a minimum.

Note: a financial Impact Statement attachment is no longer required and is replaced by the mandatory table in Section 5 above. A media release attachment is optional.

If the attachment is large, it is recommended considering replacing it with an Executive Summary attachment. This will convey the most important information of the full version attachment concisely.

Hardcopies of attachments will be required by Cabinet Secretariat where the attachment:

- is greater than 1MB electronically,
- is over 60 pages in length,

- is not available electronically, or
- is a scanned document.

Where an attachment is only available in hardcopy this should be noted on the Cabinet Document Management System (CDMS) upon lodgement, and 45 copies must be delivered to Cabinet Secretariat in the Department of Premier and Cabinet. Cabinet Minutes cannot be processed by Cabinet Secretariat until all Attachments (including any hardcopy Attachments) have been received.

General formatting requirements

Minutes must be saved as “Word” documents only. Attachments may be in a Word, Excel or PDF format.

The **font** of Arial size 12 should be used throughout the Cabinet Minute.

The **page setup** must be:

Top and other margins = 2.54 cm

Header & Footer = 1.25 cm

Care should be taken to ensure that the correct formatting is followed throughout the document to ensure their compatibility with the CDMS system.

All paragraphs in a Cabinet Minute should be individually numbered, other than those on the Cover Sheet.

LODGING CABINET MINUTES

All Cabinet Minutes must be lodged on the Cabinet Document Management System (CDMS). CDMS is an electronic document management system administered by the Cabinet Secretariat, which provides for the secure lodgement and distribution of all Cabinet and Committee Minutes and related confidential documents.

Each document lodged on CDMS has an audit trail and each document that is printed from CDMS has a unique watermark specific to the users’ office. The Cabinet Secretariat can be contacted for any assistance regarding lodging of documents or any other enquires regarding CDMS.

Documents that have been printed from CDMS must not be copied, and must be returned to Cabinet Secretariat after use.

A "ten day rule" applies to lodged Cabinet Minutes unless special reasons for earlier consideration can be established by the Minister submitting the proposal. The ten day rule does not necessarily mean that a Minute will be listed after ten days. The ten day rule is the minimum time between lodgement of a Minute and the Cabinet Meeting at which the matter may be considered. This rule exists to give Ministers and other central agencies adequate time to review the proposals contained in the Minute and to furnish considered advice. A "four day rule" applies to Bill Minutes.

Minister's Signature

The Minister's name and signature must appear at the end of the Minute.

The hardcopy of the Cabinet Minute is to be signed by the Minister. The electronic Minute is then lodged on CDMS with the Minister's electronic signature attached. The original signed Minute must also be forwarded to Cabinet Secretariat to be kept on file. However, the Minute will be taken to be lodged as soon as the electronic Minute has been lodged.

No Cabinet Minute will be processed without the Minister's signature.

Joint Minutes may be lodged in one of two ways:

- one of the Ministers can submit the Cabinet Minute with all the signatures on CDMS; or
- each Minister can submit the same Cabinet Minute with only their signature on CDMS. Cabinet Secretariat will process the Minute with all signatures attached once it is received with the signatures from each of the originating Ministers.

PARTICULAR REQUIREMENTS FOR BILL MINUTES

The following additional requirements apply to Cabinet Minutes that seek approval for the introduction of a draft Bill (that is, Bill Minutes):

(a) The title of the Minute should simply be the short title of the Bill.

(b) If the Bill has not been drafted fully in accordance with Cabinet's earlier approval(s), the recommendations in Section 2 must include approval for the variations from the earlier approval(s).

(c) Any variations must be clearly explained in Section 6 (Background and Supporting Information), so that it is not necessary for Ministers to refer back to the earlier Minute(s). Any updated or additional matters of significance that were not previously considered by Cabinet should also be addressed.

(d) To the extent that the Bill has been drafted in accordance with Cabinet's earlier approval(s), it is not necessary for the Bill Minute to repeat in exhaustive detail those matters that have previously been approved. A short overview in Section 6 will usually be sufficient.

(e) The Explanatory Note that summarises the main provisions of the Bill must be attached to the Cabinet Minute. A full copy of the Bill may be attached if considered appropriate in the particular case.

(f) If the Bill is not attached, a copy must still be provided to Cabinet Secretariat when the Minute is lodged. This must be kept with the official Cabinet documents for record purposes, and will be made available to Ministers upon request. A Bill Minute will not be accepted for lodgement if it is not accompanied by a copy of the Bill.

(g) A Bill Minute and draft Bill are not to be submitted unless the Parliamentary Counsel has advised that the Bill is finally settled.

Annexure F

Template Cabinet Minute

[Note: Cover sheet must not exceed one page.]

Title	Full Title of Minute
Minister	Minister's name Title of the portfolio under which the Minute is submitted
Date of Minute	Date received by Cabinet Secretariat

Relationship to Previous Decisions	Show dates, Minute numbers and titles of related previous decisions Show departures from previous decisions for example: "Not applicable – new policy." "Implements previous decision to…" "Reverses Cabinet's previous decision to…" "Supplements previous decision by…"

Result of consultations	Agreed / Not agreed / No consultation / Ongoing
Priority	Urgent (Critical Date and Reason) / Not Urgent
Legislative Changes Required	Yes or No
Regulatory Impact	Yes or No
Minute Type	Legislation, Policy, State Plan, Election Commitment

1. EXECUTIVE SUMMARY

1.1 [*]

1.2 [*]

*[*Set out, **in no more than half a page**, a plain English explanation and objective of the proposal, and the likely effect and impact of the action.]*

2. RECOMMENDATION(S)

It is recommended that Cabinet:

i) [*]; and

ii) [*].

*[*State fully, but as concisely as possible, what Cabinet is being asked to do. The recommendations must cover all significant matters of principle, but should not include minor or technical detail.*

Background and supporting information must <u>not</u> be included in this section. Recommendations that merely ask Cabinet to "note" a series of matters should be avoided. Instead the recommendations should focus on what Cabinet is being asked to "approve", "authorise" or "reject/oppose". Generally, the recommendations section of the Minute would not be expected to exceed half a page in length.]

3. CONSULTATION

3.1 [*]

3.2 [*]

*[*Set out which Ministers, Agencies and/or stakeholders have been consulted in drafting the Minute and any issues not yet resolved]*

4. RISKS AND MITIGATION

4.1 [*]

4.2 [*]

*[*Set out as concisely as possible the risks and mitigation strategies associated with the proposal]*

5. FINANCIAL IMPACT

5.1 [*]

5.2 [*]

*[*Explicitly discuss any financial impacts arising from the proposal. The scale of costs and any substantial risks around costings and financial implications in forward estimates should be noted. Supplementary funding and Treasury approval must be separately noted below the table]*

[Summary financial table must be completed]

	Current financial year ($mill)	Current financial year +1 ($mill)	Current financial year +2 ($mill)	Current financial year +3 ($mill)	Current financial year +4 ($mill)	Total Cost ($mill)
Total Expenses [1]						
Total Revenues[2]						
Budget Result(2-1)						
Capital Expenditure ETC = $XXm						

Supplementary funding required: Yes or No

Treasury approval of financial impact: Yes or No

6. BACKGROUND AND SUPPORTING INFORMATION

6.1 [*]

6.2 [*]

*[*Set out relevant background and/or supporting information as concisely as possible, consistent with clarity and with the need to provide Ministers with the necessary facts to make an informed decision. This section will generally be the longest part of the Minute, and may be a number of pages.]*

7. IMPACT ON REGIONAL AND RURAL COMMUNITIES

7.1 [*]

7.2 [*]

*[*Describe whether there are any potential economic, environmental and social impacts of any proposals on particular communities. If there are no differential impacts write “Not applicable.”]*

8. REGULATORY IMPACT

8.1 [*]

8.2 [*]

*[*Explain the extent to which the proposed legislation, regulations or other measures will impose any regulatory impact on business and the community.*

In accordance with Premier's Memorandum M2009-20 (Guide to Better Regulation), all new and amending regulatory proposals must demonstrate the application of the Better Regulation Principles. This applies irrespective of whether the regulatory proposals are to be implemented by legislation, regulations or in some other way (e.g. Ministerial orders).]

9. ATTACHMENTS

9.1. Attachment A – [*]

9.2. Attachment B – [*]

*[*Include all attachments in order as listed in section 9. Documents that are referred to as attachments (including in the body of the Minute) must be included as an attachment before the Minute can be processed.]*

Note: a financial Impact Statement attachment is no longer required and is replaced by the mandatory table in Section 5 above. A media release attachment is now optional.

Attachments must be kept to a minimum.

If the attachment is large, it is recommended considering replacing it with an Executive Summary attachment. This will convey the most important information of the full version attachment concisely.

[Minister's Signature Block]
Portfolio

Guidelines for the Preparation of Executive Council Minutes

Deadlines

1. The Executive Council meets each Wednesday morning. All Minutes must be received by the Department of Premier and Cabinet by **midday on the Friday preceding the Executive Council meeting at the latest**. Any Minutes which arrive after this time will be held over for a future meeting.

2. In instances where it is proposed that a Minute proceed to a particular meeting but where the deadline outlined in paragraph 1 above is for some exceptional reason not able to be met, a request seeking exemption must be made in the first instance to the Branch Manager, Cabinet Secretariat. Formal approval of the Director-General or General Counsel of the Department of Premier and Cabinet may be required. The request should demonstrate the reasons for the Minute's urgency and reasons why it could not have been submitted earlier.

3. All Executive Council material should be addressed to: Branch Manager, Cabinet Secretariat, Level 39, Governor Macquarie Tower.

4. All Minutes should be signed by the Minister prior to despatch to Cabinet Secretariat.

Explanatory Notes

5. All Executive Council Minutes must have an adequate explanatory note which briefly but comprehensively:

   - describes the proposal, why it is necessary, and any relevant history;
   - identifies relevant current Government policy and explains any departures from such policy;
   - identifies other administrations affected by the proposal and outlines any consultations that have taken place;
   - briefly outlines anticipated impacts;
   - explains the reason for any delay in processing appointments (see below); and
   - identifies an appropriate contact officer and telephone number.

The Explanatory Note should generally not exceed one page, although additional material may be attached if necessary.

Proclamations

6. Papers submitted to Executive Council regarding proclamations should consist of the Minute, the Proclamation (signed by the Minister), an opinion from the Parliamentary Counsel (where applicable) and an explanatory note.

Regulations

7. Papers submitted to Executive Council regarding regulations should consist of the Minute, the regulation (signed by the Minister), a subordinate legislation certificate (signed by the Minister) an opinion from the Parliamentary Counsel (where applicable) and an explanatory note.

Compulsory Acquisition of Land

8. Papers submitted to the Executive Council regarding compulsory acquisition of land should consist of the Minute, a schedule (unsigned), a map clearly identifying the area affected, and the explanatory note.

Medical Retirements

9. Papers submitted to the Executive Council regarding medical retirements from the Public Service should consist of the Minute, a Health Quest medical certificate, and an explanatory note.
10. Resignations of officers from the Public Service do not require the approval of the Governor.

Appointments

11. All Executive Council Minutes relating to general appointments must:
    - be accompanied by an explanatory note; and
    - a schedule identifying name, position title, grading and commencement date.
12. All Executive Council Minutes relating to appointments to Government Boards/Committees or the Senior Executive Service must:
    - identify the agency and title of the position, name of appointee, period of appointment and commencement date;

- be accompanied by an explanatory note; and
- be accompanied by a brief resume for each appointee (except in cases of reappointment).

Retrospective Appointments

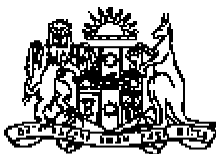
It is the duty of Ministers to ensure that arrangements are in place for the making of appointments by the Governor within their portfolio areas well before the proposed date of appointment.

As a general principle, it is unacceptable for appointments which have a retrospective effect to be submitted to the Executive Council. Subject to the terms of the legislation under which they are made, serious questions can arise regarding the validity of such appointments.

Nonetheless, it is recognised that on occasion exceptional circumstances can arise which render it impossible to avoid having to make an appointment that contains a retrospective element. In these instances, Ministers are to include in the explanatory note a full explanation as to why a retrospective appointment is necessary and what measures have been put in place to prevent a recurrence.

In respect of retrospective appointments, two separate Executive Council Minutes need to be submitted, namely one Minute which deals with the retrospective period of appointment and a second Minute which covers the period from the Executive Council meeting at which the appointment is approved.

Template Executive Council Minute



Minute Paper for the Executive Council

Subject: - [Insert subject]

[Insert name of Department]

Regd. No. of Papers: -

Sydney, ...

I RECOMMEND for the approval of Her Excellency the Governor, with the advice of the Executive Council, that [insert relevant text]

Approved by the

Executive Council,

Clerk of the Council.

Minute No.

Date

Approved,

[Insert Minister's name]
[Insert Minister's title]

Governor.

Her Excellency the Governor

and The Executive Council.

Guide to Better Regulation

Better Regulation Office

November 2009

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NSW Department of Premier and Cabinet

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The Guide to Better Regulation applies to all new and amending regulatory proposals.

Please provide any feedback to the Better Regulation Office:

Phone: 02 9228 5414
Fax: 02 9228 4408
Email: betterregulation@dpc.nsw.gov.au
Website: www.betterregulation.nsw.gov.au
Address: GPO Box 5341
SYDNEY NSW 2001

Introduction

The Guide

The Guide to Better Regulation assists agencies develop regulation which is required, reasonable and responsive. The Guide provides details on how to apply the seven better regulation principles to meet the Government's commitment to cut red tape.

- **The Better Regulation Requirements**
  This section outlines the better regulation principles, explains how to determine if a regulatory proposal is significant and details how to apply the better regulation principles.
- **Preparing a Better Regulation Statement**
  This section provides guidance on preparing and submitting Better Regulation Statements.
- **Appendices**
  The appendices provide more detailed information to supplement the Guide. Appendix A describes types of market failure. Appendix B provides details on non-regulatory and regulatory approaches, together with case studies. Appendix C provides information on assessing the costs and benefits of various options.

It is important to note that many aspects of the Guide are consistent with regulatory development approaches that are currently practised in NSW Government agencies. The Guide clarifies what is expected in terms of good regulatory practice, and introduces some new concepts and processes to ensure consistency.

The Guide implements the requirements set out in Premier's Memorandum 2009-20. It supports achievement of the Government's renewed commitment to develop and enhance existing processes for regulation making and review under the Council of Australian Governments (COAG) Seamless National Economy National Partnership Agreement.

The Better Regulation Office is available to provide agencies with assistance and advice at any time. Agencies working on significant regulatory proposals should consider approaching the Better Regulation Office early in the development process.

Minister for Regulatory Reform

The Minister for Regulatory Reform is the champion for better regulation making in the Cabinet, working right at the heart of government decision making. The Minister, who is responsible for implementing the Government's commitment to cut red tape:

- provides strategic policy advice on whether regulatory proposals submitted to Cabinet or the Executive Council demonstrate compliance with the better regulation principles
- reviews and approves Better Regulation Statements submitted with all significant regulatory proposals, and
- brings the assessment underlying that approval to the attention of Cabinet or, in the case of Executive Council proposals, the Premier.

Better Regulation Office

The Better Regulation Office is situated within the Department of Premier and Cabinet and supports the Minister for Regulatory Reform.

The Office drives regulatory reform and is an advocate for better practice regulation making across government. The Office:

- acts as a gatekeeper, reviewing and advising the Minister on compliance with the better regulation requirements. This role includes providing advice on Cabinet proposals and on Regulations and other Statutory Instruments going before the Executive Council, as well as providing advice on whether Better Regulation Statements are adequate and should be approved
- conducts targeted reviews, as directed by the Minister, into specific regulatory areas or industries where reducing red tape will benefit the State's economy including small business
- monitors and reports on compliance with the better regulation requirements and reform outcomes including through the release of an Annual Update and reporting on progress towards the Government's $500 million red tape reduction target, and
- provides ongoing advice and practical tools to assist agencies meet the better regulation requirements.

What is expected?

The better regulation requirements have been in place since 1 June 2008. As part of meeting these requirements:

- New and amending regulatory proposals must demonstrate compliance with the better regulation principles.
- A Better Regulation Statement is required for significant new and amending regulatory proposals and must be approved by the Minister for Regulatory Reform.
- The impacts of the proposed regulation must be identified and justified through quantitative and qualitative analysis. The level of analysis should be proportionate to the level of significance of the proposal.
- Opportunities to simplify, repeal, reform or consolidate existing regulation should be considered.
- Planning for implementation, compliance, enforcement and monitoring must be undertaken as part of regulatory development to improve regulatory design and avoid unnecessary compliance costs.
- Effective consultation with stakeholders is required to inform the development of regulatory proposals and to assist the Government to thoroughly understand the impacts.
- Regular review is required so regulation remains relevant, continues to meet its policy objectives and does not impose unnecessary regulatory burdens as circumstances change.

Definitions

The term **regulatory proposal** is used in this Guide in the broadest possible sense to cover any scheme or requirement imposed by Acts of Parliament, regulations made under those Acts, or by Statutory Instruments.

Regulatory burdens are costs imposed by regulatory requirements, including unnecessary regulation (or '**red tape**'). Costs may be borne by businesses, government, and the community and include:

- *administrative compliance costs* associated with demonstrating compliance with a regulation (such as paperwork and record-keeping costs)
- *substantive compliance costs* related to required capital and production expenditure (such as equipment and training expenses)
- *financial costs* which are payments made directly to the Government (such as fees, levies and fines), and
- *indirect costs* relating to the impact that regulation has on market structures and consumption patterns (such as restrictions on innovation and barriers to entry through licensing) and the cost of delays.

The better regulation requirements

Regulation

Regulation is an important tool available to government. Well designed and properly targeted regulation helps deliver the community's economic, social and environmental goals. However, regulation can also impose administrative and compliance burdens on business, consumers, government and the wider community. These burdens must be weighed against the benefits that the regulation generates.

An effective and efficient regulatory environment creates the climate for a competitive and productive economy. Effective and light handed regulation minimises the time businesses spend complying with regulatory requirements, increasing their ability to innovate, be entrepreneurial and respond creatively and quickly to market opportunities or threats.

The NSW Government is committed to cutting red tape as a key part of its economic policy. Under the State Plan, the Government has committed to cut red tape by $500 million by June 2011. The Government's emphasis on good regulation will help NSW remain an attractive place for Australian and international business investment with an economy that continues to generate jobs and growth. **Figure 1** (page 8) outlines the NSW Government's framework for cutting red tape.

Better regulation principles

The NSW Government has articulated what characterises good regulation and the minimisation of red tape through seven better regulation principles. Better regulation is the result of sound policy development and regulatory design processes. The principles are the cornerstone of the Government's commitment to good regulation and must be followed in the development of every regulatory proposal. In doing so, it is demonstrated that the proposal is required, reasonable and responsive.

THE BETTER REGULATION PRINCIPLES

Principle 1: The need for government action should be established

Principle 2: The objective of government action should be clear

Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options

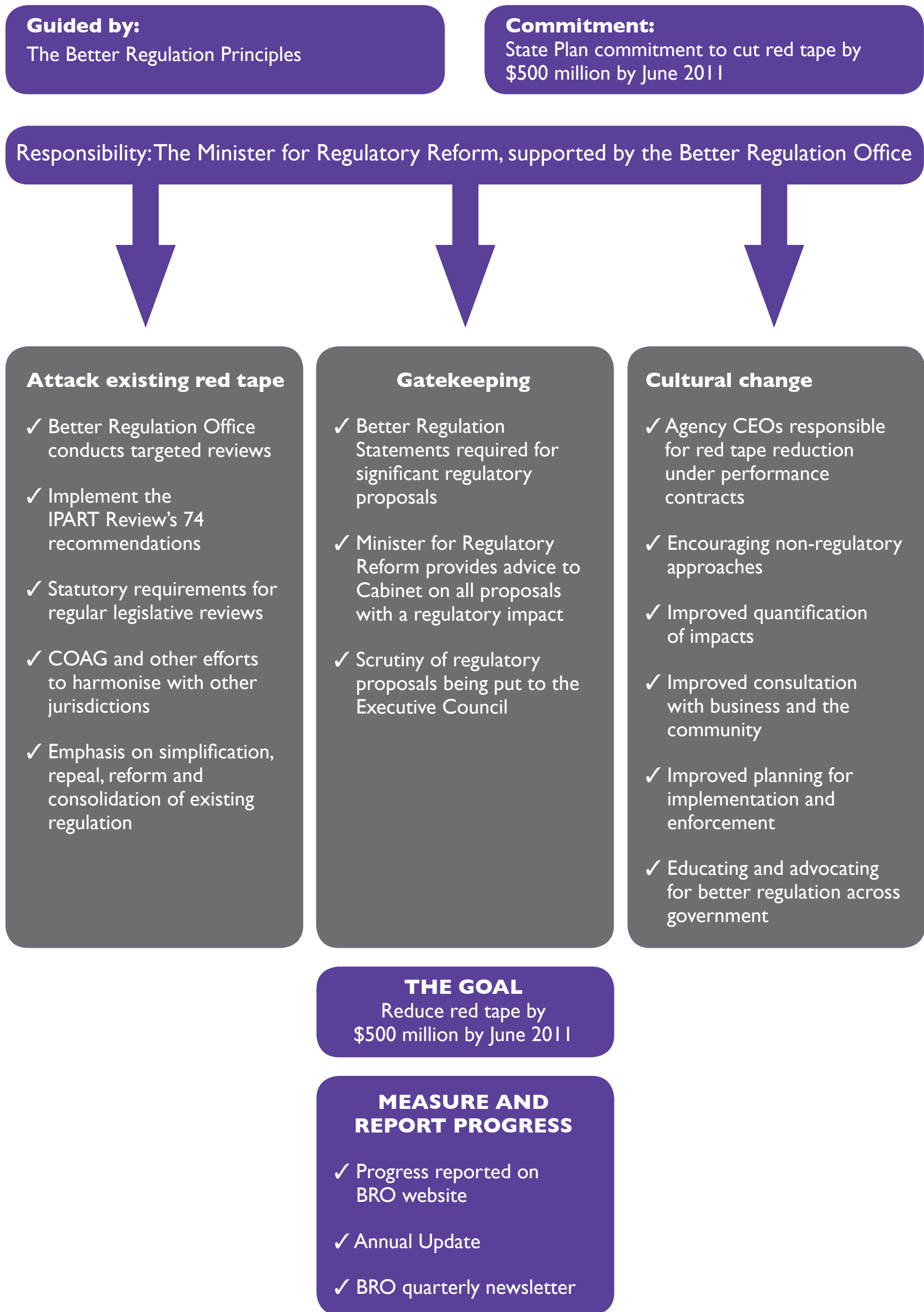
Principle 4: Government action should be effective and proportional

Principle 5: Consultation with business and the community should inform regulatory development

Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered

Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

Figure 1: NSW Government framework for cutting red tape



Requirements

All new and amending regulatory proposals submitted for the approval of **Cabinet** or the **Executive Council** must demonstrate that the better regulation principles have been applied[1]. For significant proposals a Better Regulation Statement is required.

The Minister for Regulatory Reform provides advice to the Premier on whether the principles have been applied and whether the regulatory burden being proposed is justified. If the Minister for Regulatory Reform has concerns about a regulatory proposal, the Minister may ask the Premier to defer consideration of the proposal until the concern is resolved.

Significant regulatory proposals

All significant new and amending regulatory proposals are required to demonstrate that the better regulation principles have been met through a Better Regulation Statement. The Statement must be submitted with the Cabinet Minute or Executive Council Minute and be approved by the Minister for Regulatory Reform.

Portfolio Ministers are responsible for determining whether a regulatory proposal is significant. This will need to be determined on a case by case basis, but in general, a regulatory proposal is considered significant if it would:

- introduce a major new regulatory initiative
- have a significant impact on individuals, the community, or a sector of the community
- have a significant impact on business, including by imposing significant compliance costs
- impose a material restriction on competition, or
- impose a significant administrative cost to government.

The decision of the portfolio Minister is subject to the views of the Premier and Cabinet, informed by the Minister for Regulatory Reform.

The next section of the Guide provides guidance on how to prepare a Better Regulation Statement. Agencies can also contact the Better Regulation Office for advice and guidance on preparing a Better Regulation Statement.

Non-significant regulatory proposals

For non-significant proposals, portfolio Ministers must demonstrate that the better regulation principles have been applied through the following processes:

- Where a regulatory proposal is being submitted to **Cabinet** for approval, evidence of the application of the better regulation principles must be provided in the Cabinet Minute. Clearly addressing the principles in the Minute will minimise delays in the approval process.
- Where a regulation or other Statutory Instrument is being submitted to the **Executive Council** for approval, documentation must be submitted with the Executive Council Minute which demonstrates that the better regulation principles have been applied. This may be in the form of a letter to the Minister for Regulatory Reform, analysis prepared in accordance with Schedule 1 of the *Subordinate Legislation Act 1989,* relevant information from a Regulatory Impact Statement, Cabinet Minute or Ministerial briefing note or any other document which justifies a regulatory proposal.

[1] *Regulation which is amended in Parliament is not captured by the better regulation requirements.*

Exempt regulatory proposals

Certain regulatory proposals are exempt from the better regulation requirements. If a proposal is exempt, then articulating how the proposal meets the better regulation principles is not required. The following are exempt:

- Regulatory proposals which are related to police powers and general criminal laws or the administration of justice, such as rules of court and sentencing legislation.
- Regulatory proposals which are related to electoral rules.
- Regulatory proposals which are related to the management of the public sector.
- Regulatory proposals which correct drafting errors, make consequential amendments or are of a machinery nature.
- Excluded instruments under Schedule 4 of the *Subordinate Legislation Act 1989*.
- Regulatory proposals which propose standard fee increases, specifically, changes in line with or below increases in the Consumer Price Index.
- Regulatory proposals which have already been subject to a detailed assessment against the better regulation principles as part of an earlier Cabinet Minute or Executive Council Minute. In such cases, this should be identified and no further demonstration of meeting the principles is required. This exemption is contingent on adequate and prior assessment of the specific regulatory proposal.
- Regulatory proposals developed and assessed through external processes. This may include Ministerial Council and COAG processes or other processes undertaken on behalf of government by independent bodies such as the Independent Pricing and Regulatory Tribunal (IPART) or the Productivity Commission. Where these processes demonstrate the elements of good quality regulatory development, which at a minimum includes detailed regulatory impact assessment and public consultation, it is not necessary to duplicate this work when seeking approval at a NSW level. However, a short description of the process undertaken and a web link to relevant supporting information should be provided.

Agencies can obtain further clarification of exempt proposals by contacting the Better Regulation Office.

Subordinate Legislation Act 1989 requirements

The requirements of the *Subordinate Legislation Act* (the Act) continue to apply to statutory rules in NSW. Under the Act:

- statutory rules (that is, regulations, By-laws, Rules or Ordinances) must be reviewed every five years
- a Regulatory Impact Statement must be prepared for all new statutory rules in accordance with Schedule 2 of the Act. Requirements for consulting on Regulatory Impact Statements and providing advice to the Legislation Review Committee also apply, and
- analysis must be prepared for all amending statutory rules in accordance with Schedule 1 of the Act.

Where a new regulation is significant[2], the Regulatory Impact Statement can be submitted with a Cabinet Minute or an Executive Council Minute in the place of a Better Regulation Statement. To meet the better regulation requirements, however, the outcomes of consultation and justification for the final regulatory

[2] *As significance depends on the nature of the proposal and impacts rather than the type of regulatory instrument, a new statutory rule is not necessarily significant. As such, the requirement to submit a Better Regulation Statement or a revised Regulatory Impact Statement will not apply for all new statutory rules.*

proposal must also be presented. This can be done through revising the Regulatory Impact Statement or providing this information in the Cabinet Minute itself or a separate document.

The Act is available on the NSW Government legislation website at **www.legislation.nsw.gov.au.**

Applying the better regulation principles

The basic process for demonstrating compliance with the better regulation principles is illustrated in **Figure 2** (page 12). Guidance on how to apply the better regulation principles follows, including questions to consider when developing a regulatory proposal.

Principle 1: The need for government action should be established

It is important to establish that a problem exists before determining whether government action is necessary.

The source, nature and scale of the problem, and its impacts, should be clearly identified. A problem should be demonstrated with evidence, using data if possible. Understanding the problem may require some research to ensure the 'root cause' of the problem is identified rather than the symptoms. Consultation with key stakeholders may also help accurately identify a problem.

Government action is commonly justified on the basis of responding to market failures or imbalances. It is important to determine whether there is a need for government to be involved, or whether the problem will be solved through market forces or by existing regulations at the State or Commonwealth level. **Appendix A** provides information on the types of market failure.

Government intervention may be justified in order to achieve social or environmental objectives that would not be achieved by the market. These may include:

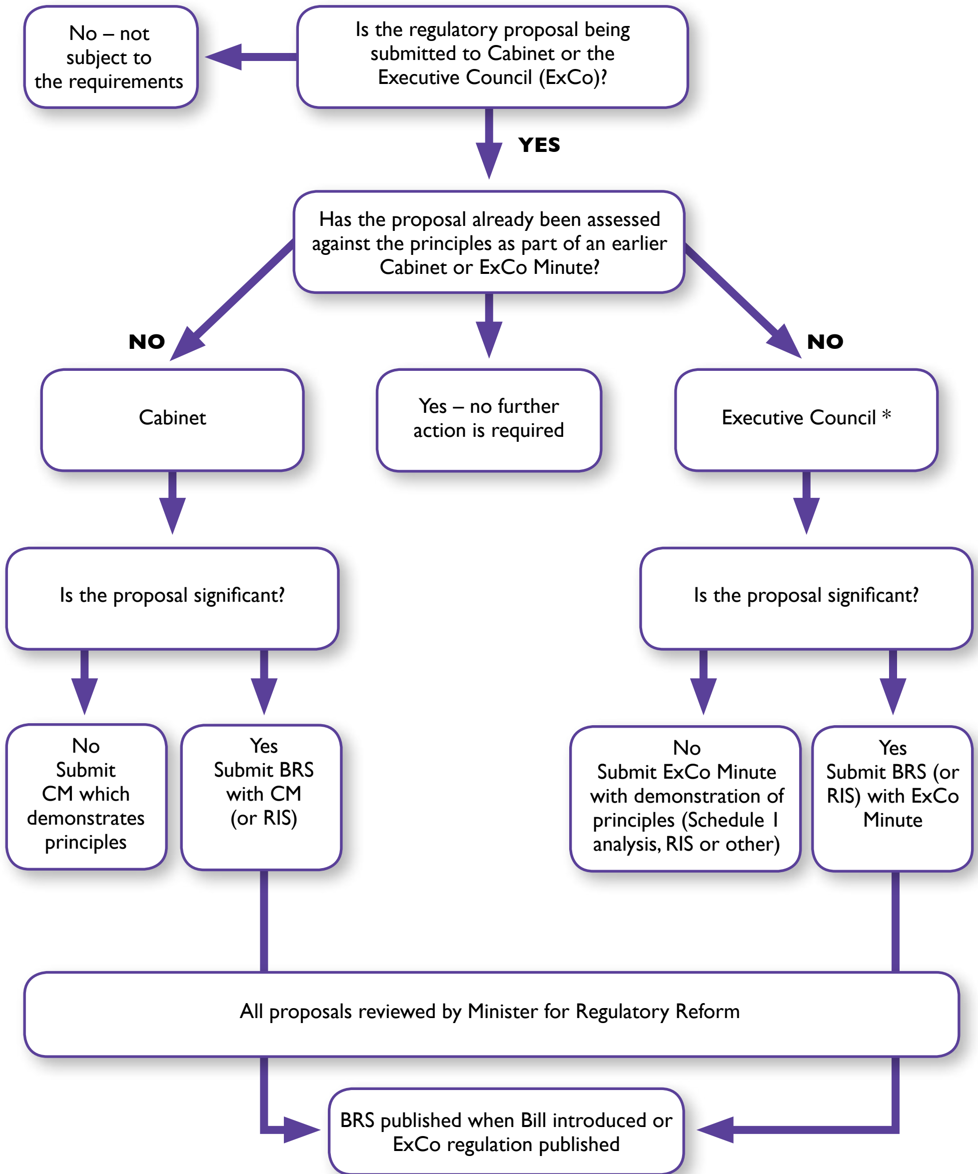
- promoting equitable outcomes or a minimum standard of living across the community. Examples include social security systems and public health
- providing 'merit' goods and services that society as a whole values, even if the individuals that make up that society do not always demand them. Examples include 'high art' forms such as opera and ballet as well as 'demerit' goods like problem gambling, and
- ensuring the safety of society by protecting people from crime or abusive behaviour.

Agencies need to consider taking no action. A balance between the level of risk associated with a problem and the impact of government action needs to be achieved. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

Quick reference guide – NEED FOR ACTION

- What is the problem to be solved?
- How big is the problem and how severe are its consequences?
- What are the broad impacts of the problem and who is affected?
- Have affected parties been consulted on the nature and impact of the problem?
- What will happen if no action is taken?

Figure 2: Demonstrating compliance with the better regulation principles



** Subordinate Legislation Act 1989 requirements apply to all statutory rules (see page 10)*

Principle 2: The objective of government action should be clear

The objectives of a regulatory proposal should:

- be clear, concise and specific
- directly target the root cause of the problem
- where possible, be measurable (eg by specifying an outcome and a time period over which the objective is to be achieved), and
- be consistent with existing government objectives or policies.

Objectives should be expressed in terms of the ends to be achieved, rather than the means of achieving them. For example, the objective of a regulatory proposal might be 'to reduce road injuries and fatalities' rather than 'to ensure that all car users wear a seatbelt' (the means to achieve the objective).

Any constraints on the objectives should be identified. For example, if an objective must be defined within a certain budget it will not be possible to consider options which are more costly.

Clear objectives are also valuable when conducting reviews later in the regulatory development process. They help to evaluate the success of a regulatory solution by determining how it is achieving its stated objectives.

Quick reference guide – OBJECTIVES

- What is the outcome to be achieved?
- Are objectives specified clearly?
- Do objectives relate to the problem which has been identified?
- Are objectives consistent with existing government objectives and policies?

Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options

The key components of determining the impact of government action include: developing viable options; assessing the impact of options; developing a plan for implementation and compliance; and considering how performance will be monitored and reported.

Develop Viable Options

A range of options should be considered, starting with the least interventionist. You must consider the option of taking no action or maintaining the status quo. Other options that may be considered include:

- non-regulatory approaches like provision of information, self-regulation, quasi-regulation or co-regulation
- creating markets or developing market based instruments such as through imposing government charges or creating financial liability for the detrimental effects of an activity, and
- performance based versus prescriptive regulatory approaches.

These options are discussed in more detail in **Appendix B.**

Consultation with relevant stakeholders can help identify options and provide information on their feasibility and expense. For example, consultation with stakeholders can help determine the kinds of information and/or penalties that they will respond to.

National or cross border harmonisation of regulation should be considered as an option where possible, recognising that businesses that operate in several jurisdictions can face significant costs when forced to

comply with different regulatory regimes. Harmonisation can minimise duplication of effort, save money and enhance consistency for business. Of course, a decision on the preferred option should be based on an assessment of the costs and benefits. Harmonisation should not be a goal in itself – NSW policy objectives and the impacts of regulation on NSW businesses and community should be the key consideration.

Design options to promote innovation

Well designed options can encourage innovation. 'Innovation' is generally defined as the development of improved products, services and processes, the creation of new markets, and the use of new products.

Where appropriate, regulation should adopt an outcome focused approach rather than being prescriptive. Efficient firms will respond by developing more innovative ways to operate and comply. Leaving the path open for firms to choose how they achieve a certain outcome can also reduce the real cost of regulation to a level lower than the cost originally predicted by government.

Setting minimum performance levels to ensure certain standards can have some negative effects on innovation. Mandated minimum standards do little to encourage good performers to do better and can actually impede the best performers by creating unnecessary burden – or red tape. An alternative option is to consider incentives for better than average performance.

Quick reference guide – OPTIONS

- Have a number of options been considered, including non-regulatory alternatives?
- Has the status quo been considered as an option?
- Do the options reflect the significance of the problem to be addressed and the availability of resources?
- Can existing regulation be amended to achieve the objectives?
- Have options used to address similar policy problems in other jurisdictions been considered?
- Can national or cross border harmonisation be pursued?
- Is there a less interventionist form of regulation available that will achieve stated objectives?
- Have the interaction with existing regulatory schemes, the type and structure of the industry involved (including existing institutional structures), the need for flexibility or certainty in the regulatory approach and the potential burdens associated with implementation and compliance been considered?
- Have stakeholders been consulted to assist with options development?

Assess the impact of options

The elements of good impact assessment processes are discussed below.

Identify those affected

The assessment of costs and benefits should examine the impacts of options on particular groups as well as the community as a whole. Particular attention should be paid to the impacts of proposed options on small businesses, which constitute approximately 95 percent of all enterprises in NSW[3]. The burden of regulation can impact disproportionately on small business as they have less ability to absorb compliance costs. They also have limited resources to interpret and implement compliance requirements, and to keep pace with the cumulative burden of regulation and the changing regulatory environment.

[3] *Australian Bureau of Statistics 2007, Counts of Australian Businesses, including Entries and Exits, December (Cat No. 8165.0).*

Identify costs and benefits

Costs and benefits of each proposed option can include compliance costs, economic impacts, social impacts and environmental impacts. Thoroughly understanding costs and benefits is a key element of applying the better regulation principles.

- **Compliance costs** are the direct cash flow effects of a regulatory requirement. These costs relate to capital and production costs and administrative requirements. Examples include developing and maintaining reporting systems, obtaining professional advice, educating or training staff about new regulatory requirements and procedures, purchasing equipment or changing production processes and other activities involved in complying with regulation.
- **Economic impacts** affect the allocation of resources, productivity, competition and innovation. Other economic impacts include opportunity costs (i.e. the benefits that would have been received from other options which will not be realised by the preferred option) and externalities (the costs or benefits arising from a transaction that do not accrue to either party to the transaction).
- **Social impacts** include such considerations as quality of life, equity, achieving community norms, ensuring public health and safety, reducing crime and protecting human rights. While many of these impacts have a financial dimension, the full impacts are more difficult to quantify than pure financial and economic impacts because they often do not have a market value.
- **Environmental impacts** like improvements to air quality for example, can also be difficult to quantify in dollar terms because they are not traditionally valued in the marketplace but should be taken into account in any impact assessment process.

The information required to estimate impacts can come from a range of sources, including consultation with businesses, industry associations and peak bodies and surveys or data from organisations such as the Australian Bureau of Statistics.

Both the direct and indirect impacts of options must be considered. Direct impacts are those clearly related to the purpose of an option. Indirect impacts are incidental to the main purpose and may affect parties other than those targeted by the option.

Consider any competition restrictions

Regulatory proposals should be assessed using the NSW Government's Assessment Against the Competition Test, available at **www.betterregulation.nsw.gov.au**, which is consistent with the *Competition Principles Agreement 1995*[4]. The competition test specifies that regulation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction as a whole outweigh the costs, and
- the objectives of the legislation can only be achieved by restricting competition.

An option is likely to restrict competition if:

- it affects the market structure of the regulated industry
- it creates barriers to firms entering or exiting the industry
- the impacts of the option affect some stakeholders significantly more than others
- it restricts the ability of businesses to choose the price, quality, range or location of their products
- there will be higher ongoing costs for new entrants compared to existing players, or
- it inhibits innovation or the development of new products or services.

[4]The Competition Principles Agreement is one of three intergovernmental agreements that underpin the National Competition Policy (NCP). The three agreements outline the reforms which governments undertook to put in place under the NCP process. For further information see: National Competition Council (2nd edn.), 1998, Compendium of National Competition Policy Agreements, p 13–23, www.ncc.gov.au

The assessment of competition impacts should be proportionate to the likely impact of the policy option on competition. Where there is only a minor impact, a simple assessment will suffice but where there is a significant impact, then a more detailed assessment should be provided.

Evaluate costs and benefits

Estimating the net impact of an option involves assessing each of the costs and benefits of the option. Costs and benefits can be compared across key stakeholder groups and the net impacts can be compared between the options.

The level and depth of quantitative analysis applied should depend on:

- the significance of the problem and the impacts of proposed options
- the type of impacts and the availability of data on costs and benefits (financial and economic impacts can be more readily quantified than social or environmental impacts), and
- the techniques available to reliably quantify costs and benefits.

Wherever possible, quantitative or dollar values for costs and benefits must be determined. This allows for clearer comparison both across and between options, and supports independent validation of the results.

There are several methods and tools which can be used to quantify costs and benefits. Agencies are encouraged to employ the methodology most appropriate to their circumstances, and a level of effort in proportion to the significance of the issue.

A guide to assist agencies to measure the costs of a regulatory proposal, Measuring the Cost of Regulation, is available at **www.betterregulation.nsw.gov.au.**

Table 1 provides examples of the types of costs and benefits associated with regulatory options for different groups within society. **Appendix C** provides detailed information on the use of quantitative and qualitative methods to determine the costs and benefits of proposals, along with worked examples showing how impacts can be quantified in practice.

Table 1: Examples of costs and benefits of regulation for different groups

Group	Example of Cost	Example of benefits
Businesses	Quantifiable • administrative costs, including time, associated with complying with and reporting on regulatory requirements • licence fees or government charges • changes to procedures required as a result of the measure (eg production changes or higher input costs) Qualitative • innovation stifled	Quantifiable • increased efficiency or productivity • reductions in workplace accidents and injuries • reductions in compliance costs Qualitative • better market information and certainty • improved competitiveness • better conditions for innovation
Consumers	Quantifiable • higher prices for goods and services Qualitative • reduced choice, quality or availability of goods and services • delays in goods coming on the market and obtaining services • needs not met	Quantifiable • lower prices • improved safety of products Qualitative • quality and choice of goods and services • availability of better product information • needs and preferences met
Government	Quantifiable • regulation set up costs • compliance activities • collection of information and record keeping • administration of regulatory instruments	Quantifiable • better information • licence fees • reductions in administrative costs • improved economic outcome
Community and the environment	Quantifiable • taxes, licence fees and charges • lower employment levels • increased paperwork Qualitative • inequitable distribution of wealth	Quantifiable if possible, otherwise qualitative • better environmental health • better public health and safety • reductions in crime and anti-social behaviour • increased leisure time • economic growth

Identify the recommended option

Once the regulatory impact assessment is completed, the relative merits of different options considered should be compared. The assessment should take into account the results of quantitative and qualitative analysis, distributional impacts, any cumulative regulatory burden, and risk and uncertainty.

The recommended option should be identified with an explanation of why it is the preferred option, reasons for rejecting other options and the main assumptions used in the analysis.

Quick reference guide – ASSESSING IMPACTS

- Is the level and detail of the assessment of costs and benefits proportionate to the size of the problem and the potential impacts of options?
- Have all groups affected by proposed options been identified, including sub-groups?
- Have financial, economic, social and environmental impacts been identified, including both direct and indirect costs and benefits?
- Has the most appropriate method of assessment of each option been considered, taking into account availability of data, ability to quantify costs and benefits, and the significance of the impacts?
- Have distributional impacts, cumulative regulatory burden, and risk and uncertainty been considered in the analysis?
- Have any competition restrictions resulting from options been identified and justified?
- Have compliance costs to business been assessed?
- What is the recommended option, based on meeting objectives and achieving the greatest net benefit or least cost to the community?

Develop a plan for implementation and compliance

An implementation and compliance strategy should be developed for the preferred option to ensure the objectives will be effectively and efficiently achieved. This is an important part of the process, as even a well designed regulatory solution can impose unnecessary administrative or compliance costs if it is not implemented well. Planning can help to achieve the greatest level of compliance at the lowest possible cost.

Features of an effective compliance assurance strategy include:

- identifying the regulated community
- identifying roles and responsibilities, including resources required and sources of funding
- establishing program priorities, using a risk-based approach
- promoting compliance, including providing assistance such as guidance and working with co-regulators
- monitoring compliance, using tools such as self-reporting, inspections, audits, complaints, and
- enforcement response to non-compliance, using tools such as orders, notices and prosecutions.

A risk-based approach to compliance means targeting compliance efforts towards those players who pose the highest risk. A hierarchy of compliance tools from information, education and guidelines through to enforcement action like fines should be used to tailor compliance activities to the risks involved.
For example, where there are sectors of the community seeking to comply with regulations and who pose a low risk, actions to assist compliance such as education and guidance may be most effective.

More punitive enforcement measures may be needed for groups with little incentive to comply and where the consequences of non-compliance are more severe. The penalties should be explained clearly in the strategy.

Well targeted implementation and compliance activities should be supported by the collection of data which can help identify and target problems or non-compliance and can assist with ensuring a more proportionate regulatory and compliance response. A transparent decision making, recording and reporting framework is also integral to effective implementation of regulatory reforms.

A guide to assist agencies to implement a risk-based approach to compliance, Risk-Based Compliance, is available at **www.betterregulation.nsw.gov.au.**

Quick reference guide – IMPLEMENTATION

- Does the implementation strategy clearly set out how the proposal would be implemented and enforced?
- Does the strategy communicate the purpose and objectives of the proposal?
- Are roles and responsibilities clearly defined in the implementation strategy?
- Does the implementation strategy set out regulatory requirements and actions needed for compliance?
- Are compliance burdens imposed consistently across different groups?
- Are compliance burdens commensurate with the size of the problem?
- Are compliance strategies and penalties explained in the implementation strategy?

Consider how performance will be monitored and reported

The Government is committed to more robust performance monitoring by agencies. The traditional measures of compliance success such as the number of proceedings launched or the level of penalties imposed give some indication of the outcome of compliance activities. However, they may not give a clear picture of whether the objectives of the regulation are being achieved.

These types of measures also fail to provide information on whether the implementation of the regulation is effective and efficient. Poor implementation can contribute significantly to the costs and administration burdens imposed on business and the community.

It is important that agencies develop performance indicators based on the objectives of regulations. Such 'outcomes' based performance indicators should be reported alongside the more traditional 'output' or process-based indicators like the timeliness of decision making and approval processes and indicators of compliance and enforcement activity.

Agencies should also routinely monitor the performance of regulation by collating and analysing queries or complaints from the public, external stakeholders and internal government officers.

Principle 4: Government action should be effective and proportional

Effective government action will ensure regulation achieves its objectives without imposing unnecessary costs. The scope of the regulatory proposal should be proportionate to the seriousness of the problem being dealt with.

In keeping with this principle, the amount of time, effort and other resources spent developing any regulatory proposal should also be proportionate to its importance and its impact. This is an overarching principle and should be applied at all stages of the regulatory development process. The effort spent on a regulatory proposal should be considered in terms of the:

- significance of the problem and associated risks
- scope of consultation required, including timeframes and stakeholders
- appropriate level of detail needed to understand the impacts, including the measurement of compliance costs, and
- need to include compliance and reporting procedures.

Quick reference guide – PROPORTIONALITY

- Is the scope of the regulatory proposal proportionate to the seriousness of the problem being dealt with?
- Is the amount of time, effort and other resources spent developing the regulatory proposal proportionate to its importance and its impact?

Principle 5: Consultation with business and the community should inform regulatory development

The Government is committed to consulting on all regulatory proposals. Consultation should be applied at all relevant stages of the regulatory development process.

The minimum consultation period on draft regulations is 28 days although this does not prevent longer consultation periods being employed for more significant or complex proposals, or where otherwise appropriate to the stakeholders or issues concerned.

Consultation may be necessary at a number of different points during a regulatory development process. Conducted early in the process, it can help to properly identify a perceived problem and determine viable regulatory or non-regulatory options to deal with it. Consultation can help government fully understand all the risks and impacts of regulatory proposals and help identify any unintended consequences of those proposals. Both government and stakeholders should understand that consultation does not always lead to consensus, as governments often need to balance competing considerations when deciding on the best option to follow.

The Government's **consultation policy** on regulation making should be followed when developing regulatory proposals and is available at **www.betterregulation.nsw.gov.au.**

Quick reference guide – CONSULTATION

- Is consultation planned to occur throughout the regulatory development process?
- Does the consultation period allow stakeholders adequate time to prepare responses?
- Is the approach to consultation commensurate with the size of the problem to be addressed, the significance of the impacts of the proposal and the stakeholder concern about the policy issue?
- Will all stakeholders that may be affected by the options be consulted?

Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered

The Government has made a commitment to simplify, repeal, reform or consolidate existing regulation, rather than adopting a 'one in, one out' rule. This principle should be considered in all regulatory development processes, including amendments to existing regulations. This will help ensure:

- new regulation is necessary and consistent with existing regulation
- existing regulation is repealed where new regulatory proposals supersede it
- the use of existing instruments or regulation has been considered, and
- the administrative and compliance burden of regulation is reduced.

To reduce compliance costs, it is important to ensure all regulation which covers the same area works effectively and efficiently and without duplication. Unnecessary layers of regulation should be repealed and regulatory instruments should be consolidated wherever possible.

There may be opportunities for 'offsetting' new regulation. For example, where a proposal would impose an additional reporting burden on business, this may provide an opportunity to update or repeal existing reporting requirements that are outdated or redundant.

Harmonisation with other jurisdictions should also be considered.

Quick reference guide – SIMPLIFYING EXISTING REGULATION

- Does the new proposal make other regulatory requirements obsolete which can now be repealed?
- Does the new proposal fit with existing regulatory requirements?
- Can the policy objectives be achieved by 'piggy-backing' on an existing regulatory instrument?
- Is it feasible to consolidate the requirements in a number of instruments into a single regulation?
- Can reporting requirements imposed under existing approvals, licences or regulatory instruments be simplified or repealed?
- Is existing regulation still valid?

Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

The Government has committed to a program of ongoing review of all regulation unless it has a minimal impact. Apart from such cases, a review clause should be included in all Bills. Statutory rules will continue to be reviewed under the provisions of the *Subordinate Legislation Act* every five years.

Reviews should generally be conducted after five years, although a longer review period may be warranted for example, where the impact of the regulation is minor and the policy is well settled. For regulation where an extended period of certainty is required, for example where regulation sets the framework for major private sector investment, longer review periods may also be justified.

In other cases reviews may be held after shorter periods. For example, a review should be considered within two to three years where a regulatory scheme is contentious, has a potentially significant impact or cost, or where there is considerable uncertainty about how it will operate in practice.

Most reviews should consider:

- whether the policy objectives of the regulatory scheme remain valid
- whether the terms of the regulatory scheme remain the most efficient way to achieve those objectives with the least impact, and
- whether the regulatory scheme is being implemented and enforced in the most efficient manner with the least administrative burden and cost impacts necessary.

After the first review, a new review clause should be added when principal legislation is amended.

Quick reference guide – REVIEW

- Have monitoring and review requirements been included in the regulatory proposal?
- Does the review strategy take into account the form and content of regulation?
- Can a group of regulatory instruments be reviewed together to increase the effectiveness and efficiency of the review process?
- Does the planned type and frequency of reviews reflect the significance and scope of impacts, complexity of the regulation and the impacts of reviews on affected parties?

Preparing a Better Regulation Statement

What is a Better Regulation Statement?

A Better Regulation Statement must be prepared for all **significant** new and amending regulatory proposals. It must demonstrate that a significant regulatory proposal is justified by documenting the analysis undertaken to apply the better regulation principles.

The purpose of a Better Regulation Statement is to provide:

- decision makers with sufficient information to enable them to make an informed decision about whether to approve the proposal. An important element is demonstrating that the impacts of the proposal, including compliance costs, are well understood. Wherever possible, the assessment must be supported by quantitative analysis, and
- business and the community with information about decision making, ensuring transparency and accountability in the regulatory development process.

A Better Regulation Statement should be a succinct, stand alone document. Depending on the nature of the regulatory proposal, it might only be 6 pages long, for example. Other proposals may require more detailed explanation. The preparation of a Better Regulation Statement should not require external consultants.

How to submit a Better Regulation Statement

If a Better Regulation Statement is required for a regulatory proposal, it should be submitted to Cabinet Secretariat with the Cabinet Minute or Executive Council Minute.

The timetables for submission to the Cabinet Secretariat remain the same for Cabinet Minutes (10 days before the Cabinet Meeting) and Executive Council Minutes (noon on the Friday before the Executive Council Meeting). However, agencies are encouraged to seek early feedback from the Better Regulation Office on regulatory approaches and draft Better Regulation Statements to avoid delay.

Approval process for Better Regulation Statements

The Minister for Regulatory Reform approves Better Regulation Statements.

The Better Regulation Office examines Better Regulation Statements and advises the Minister on whether they demonstrate that the better regulation principles have been applied in the development of a regulatory proposal.

If a Better Regulation Statement does not demonstrate compliance with the better regulation principles, the Minister for Regulatory Reform may refuse approval. In such cases, the Minister will advise the Premier that the matter should not proceed to Cabinet or to the Executive Council until the concern is resolved.

If the Premier agrees with this advice, the proposal will be deferred until compliance can be demonstrated. This may involve amending the Better Regulation Statement to provide additional information, undertaking additional analysis or consultation to ensure the option which has been chosen can be justified or considering an alternative option.

A copy of the Minister for Regulatory Reform's advice to the Premier will be circulated to the portfolio Minister prior to Cabinet. As noted above, agencies are strongly encouraged to seek advice from the Better Regulation Office prior to formal submission of a Better Regulation Statement to avoid delay. The Better Regulation Office will advise agencies if it provides 'in-principle' approval of the Better Regulation Statement.

Publishing Better Regulation Statements

Better Regulation Statements must be made publicly available, except in limited cases determined by Cabinet.

Better Regulation Statements must be made publicly available by the relevant agency on their website as soon as practicable after a Bill is introduced into Parliament, or after a regulation is published on the NSW Government legislation website at **www.legislation.nsw.gov.au**. Statements should remain on agency websites while the regulation is in force.

Better Regulation Statement template

The following structure of a Better Regulation Statement has been provided as a guide only. While all of the better regulation principles need to be addressed, agencies can use their discretion in respect to structuring this information and should only use the elements which are relevant to, and best support, the proposal.

1. Executive summary (Principle 4)
Provide a summary of the proposal and a short justification for why the preferred option is recommended.

- Demonstrate that the proposed regulatory approach is proportionate to the policy problem.
- Outline the consultation approach adopted and provide a brief summary of stakeholder views of the proposal.
- Demonstrate that the preferred option provides the greatest net benefit or least cost to the community.

2. Need for government action (Principle 1)
Demonstrate that government intervention is justified.

- Clearly identify and provide evidence of the policy problem.
- Advise whether consultation was used to help identify the problem.
- Explain the actual or potential impacts of not taking action and summarise the outcome of any risk analysis.

3. Objective of government action (Principle 2)
Demonstrate that the objectives of government action are well understood.

- Clearly describe the objectives of the proposal.
- Ensure the objectives are consistent with existing government policies.

4. Consideration of options (Principle 3 and Principle 6)
Outline the various options that were considered in developing the proposal.

- Ensure the status quo is considered as an option.
- Consider non-regulatory alternatives.
- Show opportunities to simplify, repeal, reform or consolidate existing regulation have been considered and acted on.
- Show any opportunities for national or cross border uniformity or harmonisation have been pursued.
- Outline if stakeholders have been consulted in the development of options.

Outline the costs and benefits of these options. This is a very important part of the Better Regulation Statement and must be comprehensive. The aim is to demonstrate that the potential impacts of the proposal are understood. Where possible, impacts should be quantified. For some aspects of a regulatory proposal, qualitative assessment may be appropriate. The method of assessment should reflect the significance of the proposal and likely impacts. A detailed analysis of the costs and benefits is not needed for options that are clearly less optimal, for example, those that will not meet stated objectives or are prohibitively expensive for businesses to comply with.

While every proposal is different, it is recommended that the following be addressed:

Compliance costs

- Identify the potential costs of the regulation on business.
- Outline the compliance issues raised during consultation.
- Costs should include resources, time and financial costs likely to be incurred by business[5].
- Identify any particular impacts on small business.

Administrative costs

- Identify potential costs on government that will be incurred from implementing the options.
- Identify time constraints on government.

Competition impacts

- Identify potential competition restrictions that may result from each option.
- Identify potential impacts on innovation.

Other costs

- Identify direct and indirect costs and benefits.
- Identify any social costs or impacts on community.
- Identify any environmental impacts.
- Identify any distributional impacts across regions.
- Identify any cumulative impacts of the regulatory options.

Implementation and compliance

- Demonstrate how the preferred option will be implemented and enforced.
- Identify roles and responsibilities for implementation and compliance.
- Outline compliance strategies and penalties.

5. Consultation (Principle 5)

Demonstrate that consultation was conducted in a way which informed the development of the options considered, as well as the determination of the final regulatory proposal.

- Show how consultation helped to identify the problem, understand the impacts of the options and inform the selection of the preferred option.
- Provide information on which stakeholders were consulted, when consultation occurred, matters on which input was sought and the time period for comment[6].
- Describe the central themes arising during consultation and key areas of support and dispute.
- Describe how the proposal addresses the major concerns raised in the consultation process.

6. Preferred option (Principle 3 and Principle 4)

- Identify the preferred option.
- Justify the preferred option based on its ability to meet the objectives and achieve the greatest net benefit or least cost to the community.

7. Evaluation and review (Principle 7)

- Identify the monitoring strategy for the performance of the regulatory proposal and show why this strategy is appropriate.
- State when a review of the policy objectives will be undertaken, and explain any divergence from a review period of five years.
- Where relevant, given the likely impact and complexity of the regulation and the impact on stakeholders, report on whether the regulation should be reviewed with other instruments, and whether any specific elements should be reviewed at an earlier time.

[5]*It is not expected that all impacts will be reported in financial terms. This should be done where sensible and appropriate to the regulation being proposed. For example, it would be appropriate to estimate the dollar costs where a new regulatory requirement requires a specific capital investment. Where new operational requirements or reporting processes are proposed, it may be more sensible to estimate the number of additional staff or work hours required to comply with the regulation*

[6]*A minimum consultation period of 28 days is required*

Appendices

Appendix A: Market failure

Competitive markets:

- provide the most efficient means of allocating resources to maximise the benefits to the community
- ensure the goods and services that consumers demand are produced efficiently, and
- encourage innovation and broader consumer choice.

'Market failure' has a very precise meaning in economics. It does not simply mean dissatisfaction with market outcomes. It refers to a situation when a market left to itself does not allocate resources efficiently. Where market failure exists, there is a potential role for government to improve outcomes for the community, the environment, businesses and the economy.

Governments may intervene to change the behaviour of businesses or individuals to address market failure or to achieve social and environmental benefits that would otherwise not be delivered. Government intervention is not warranted in every instance of market failure; in some cases the private sector can find alternative solutions. The four main types of market failure are outlined below.

Public Goods

Public goods exist where provision of a good (product, service, resource) for one person means it is available to all people at no extra cost. Public goods are therefore said to be 'non-excludable' and 'non-rival'.

Free-riding is a problem with public goods. Because the good is non-excludable, everyone can use it once provided. This makes it impossible to recoup the costs of provision by extracting payment from users.

The definition of a public good should not be confused with phrases such as 'good for the public', 'public interest' or 'publicly produced goods'. There are very few absolutely public goods. Examples include national defence, law enforcement, clean air, street lights and flood control dams.

There may be a role for government in providing public goods or funding private provision. However, such intervention should only take place where it is clear the market would not find a solution to this form of market failure. Government intervention should not stifle private innovation.

Externalities

Externalities are costs or benefits arising from an economic transaction received by parties not involved in the transaction. Externalities can be either positive (external benefit) or negative (external cost). The existence of externalities can result in too much or too little of goods and services being produced and consumed than is economically efficient. For example, where the cost of producing a good does not include its full costs, say in relation to environmental damage, then a negative externality is said to exist. This results in the good being over-produced (and under-priced).

The government may try to address negative externalities through:

- regulation that mandates corrective measures
- persuasion (eg an advertising campaign to 'Do the right thing' and not litter)
- establishing property rights in the externality, and
- charging for pollution generating behaviour.

Goods associated with positive externalities are sometimes termed 'merit goods'. Governments may have a role in encouraging increased consumption of merit goods through subsidisation of or public provision of such goods (eg free access to vaccinations). Mandating consumption is a regulatory alternative (eg compulsory schooling for all children).

Information Asymmetry

Information asymmetry occurs when one party to a transaction has more or better information than the other party. Typically, it is the seller that knows more about the product than the buyer, however, it is possible for the reverse to be true. Information asymmetry can prevent consumers from making fully informed decisions.

Regulation requiring information disclosure or placing restrictions on dangerous goods can be used to address this type of market failure. For example, when providing financial advice, financial service providers are required to disclose information about significant benefits and risks, and the fees and charges associated with the financial products, as well as remuneration they receive in relation to the services offered.

It should be noted, however, that information disclosure alone may not be sufficient to change behaviour where there is information asymmetry. Behavioural economics suggests that individuals do not always make decisions in their best interests based on the information provided. It may be necessary to use other instruments in conjunction with providing information to overcome this market failure.

Imperfect Competition and Market Power

Market power exists when one buyer or seller in a market has the ability to exert significant influence over the quantity of goods or services traded, or the price at which they are traded.

In perfectly competitive markets, market participants have no market power. The ability of an incumbent firm to raise its price above competitive levels is limited by the existence of or threat of competition.

The existence of market power can result in economic inefficiency because it may:

- allow firms to increase prices without a commensurate reduction in demand, and
- restrict competition by creating barriers to entry by other firms.

Examples of market power include monopoly (where there is a single supplier) and oligopoly (where a small number of firms control the market). Where market power exists, governments may intervene to correct the operation of the market or set prices at a competitive level.

Appendix B: Non-regulatory & regulatory options

Taking no action or maintaining the status quo

The option that maintains the status quo should always be considered. Taking no action may be the best response if the cost of action would be greater than the costs of the problem. Even if it is not, exploring this option establishes a base against which other options can be compared. The status quo can reflect an environment with no regulation or one that is already regulated.

A review of the current state of affairs may identify ways to improve the effectiveness of existing instruments to achieve policy objectives at low cost. It may also highlight previous regulation that has caused or exacerbated the problem. It may be possible to amend existing instruments to expand their coverage, remove flaws, improve compliance or strengthen enforcement. If a new approach is needed, the existing regulation may need to be repealed or consolidated.

Non-regulatory instruments

If it has been determined that there is a need for government action, the starting point should be a non-regulatory approach. Some policy problems may be more efficiently or effectively addressed by the market or by individuals acting without government involvement.

Non-regulatory approaches are options to deal with a policy problem that do not involve government intervention to direct the actions of people or organisations. It is important to consider non-regulatory options because these often have lower costs and less impact on markets than regulatory options. Stakeholders should be consulted to help determine whether a non-regulatory approach might be appropriate in a given situation. Types of non-regulatory approaches include:

- provision of information
- self-regulation
- quasi-regulation, and
- co-regulation.

Provision of information

When sellers have information that is not available to buyers (information asymmetry), government intervention may be justified. Without access to information, buyers may make decisions that have negative social consequences (for example, buying dangerous cars, eating an unhealthy diet or investing in businesses that are hopelessly in debt). An information based strategy that educates can be the best way to remedy these kinds of problems.

One type of information based strategy is publication by the Government. For example, the US Department of Transportation publishes the ontime record of commercial airlines. This not only gives airlines an incentive to keep to their schedules, it also encourages them to publish a realistic schedule in the first place. By publishing such data, the Government acts as a neutral referee.

An information based strategy preserves consumer choice. Even poorly informed consumers have a lot of information that governments do not about their preferences, their financial situation, their skills etc. Governments on the other hand can provide critical information for consumers by buying expertise or testing resources. It can be easier and more effective for the Government to pass on relevant information to inform decisions by consumers than vice versa.

Another variation of an information based strategy is 'persuasion', in which governments seek to leverage values of good citizenship, good corporate behaviour, self preservation or peer pressure to achieve public ends. However, this approach has an inherent 'free rider' problem and may only be effective where

individuals or businesses are morally sensitive or have low compliance costs. Sometimes, this option may be effective when used in conjunction with other instruments.

Information based strategies may not always lead to the outcome intended by Government. In these circumstances, the strategy may not be ineffective; consumers may simply have a different view to the Government about what is in their best interest. It may be time to rethink the rationale for government action. If consumers have all the information they need and price signals are accurate, then an information based strategy is likely to be a viable option.

Example of an information campaign – NSW Health 'Go for 2 & 5' campaign

The 'Go for 2 & 5' campaign, being implemented by NSW Health, the Cancer Institute NSW and Horticulture Australia, aims to reduce health problems caused by poor diet. The campaign recognises that some of these problems are caused by a lack of knowledge about the benefits of healthy eating.

The 'Go for 2 & 5' campaign focuses on increasing fruit and vegetable intake to two serves of fruit a day and five servings of vegetables (the recommended adult intake for good health). If successful, the campaign may significantly reduce health care costs by helping to prevent diabetes, heart disease, obesity and other chronic illnesses.

The campaign involves providing information through a number of media, including television and radio advertising, a web site, and a series of publications in 11 languages. It also includes in-store promotions in major supermarkets across NSW such as trolley ads, recipe cards, tastings and product sampling.

Mandatory information provision

Information strategies are sometimes based on a regulation that mandates disclosure directly from sellers to buyers. For example, regulations may require the meaning of words such as 'fresh' or 'lite' to be defined or that the results of standardised tests, such as energy efficiency ratings be disclosed.

Mandatory information disclosure can be costly. Often, the administrative burdens of collecting and maintaining information are very great. Sometimes the mandated information turns out to be more confusing than helpful to consumers. But where disclosure strategies are expected to achieve the goal of informed consumer choice, they can be much less costly than alternatives that set mandatory standards.

Self-regulation

Self-regulation uses industry development of voluntary rules or codes of practice, with the industry in question solely responsible for compliance. The Government usually has no role under this form of regulation although in some cases it may provide information or advice.

Effective voluntary industry self-regulation can generate benefits for industry, the consumer and for regulators. Self-regulation can be effective where there is a cohesive industry association that is representative of the industry. Compliance with the voluntary rules may be a condition of membership of the association.

Self-regulation will only be effective if the industry is committed to making it work. Where this is not the case, there will be costs imposed on the community without the offsetting benefits.

Example of self-regulation – Supermarket Scanning Code

The Supermarket Scanning Code was developed to protect the interests of customers in the operation of supermarket scanning systems. The Code is voluntary and applies to supermarkets and food stores who are signatories to it, currently including: Woolworths Supermarkets; Coles Supermarkets; Bi-Lo Supermarkets; and Franklins.

Under the Code, supermarkets are required to ensure the price accuracy of their checkout systems and self-pricing procedures. When an error occurs the customer could be entitled to that item free of charge.

The Australian Competition and Consumer Commission sees the Code as a positive step by the industry to implement self-regulation to gain fair trading outcomes, prevent disputes and to introduce a mechanism to deal with disputes when they arise.

Quasi-regulation

Quasi-regulation refers to the range of rules, arrangements or standards which governments pressure businesses to comply with but which are not legally binding. Quasi-regulation can include industry codes of practice which the government has endorsed but is not responsible for enforcing, negotiating directly with industry on agreed standards of behaviour, or making compliance with such codes or agreements necessary in order to compete for government contracts or funding. This type of regulation may be useful where an industry specific solution to a problem is required.

Co-regulation

Co-regulation typically refers to the situation where an industry or professional body develops the regulatory arrangements in consultation with a government. While the industry administers its own arrangements, the Government provides legislative backing to enable the arrangements to be enforced.

Example of co-regulation – Industry code for motor vehicle repairers and insurers

The Code was developed collaboratively by the motor vehicle repair industry and the insurance industry to promote transparent and cooperative relationships between smash repairers and insurance companies.

The Code applies to all motor vehicles that are repaired in NSW, irrespective of where they are registered, but does not apply to motor vehicles owned or used by repairers. The Code covers the major aspects of the relationship between repairers and insurers, including network smash repairer schemes, the estimation, authorisation and repair process, repair warranties, payment terms, disclosure obligations and the dispute resolution process. The Code provides for mediation between repairers and insurers for disputes over the repair process or a failure to comply with the Code.

The Code was developed as a voluntary national code. The NSW Government decided to mandate the Code from March 2007 to ensure that the standards it puts into place can be enforced. *The NSW Fair Trading Act 1987* was amended to require insurers and repairers to comply with the Code. Failure to comply is a breach of the Act and may lead to action being taken under the Act for compensation or other orders made against the party contravening the Code.

APPENDICES

Creating Markets or Developing Market Based Instruments

Market based instruments are an alternative to prescriptive regulation that create economic incentives to achieve policy objectives. Market based instruments can minimise the cost to society of achieving policy outcomes. They recognise businesses may innovate to find ways to achieve the outcomes which have been established, rather than prescribing the ways in which businesses must operate. Market based instruments are particularly useful in dealing with externalities from private activities when free markets lead to too little or too much production of a particular good or service.

Examples of market based instruments are discussed below and include:

- creating markets in tradeable property rights
- imposing government charges
- providing government subsidies, or
- creating financial liability to encourage firms to take precautions.

Creating markets in tradeable property rights

This type of instrument assigns property rights to resources, activities or undesirable outcomes of production such as pollution and then creates trading schemes to allow them to be traded in the marketplace. They use dynamics already present in the marketplace to achieve the desired result. Trading schemes can be particularly useful where activities create significant externalities or require access to public resources such as fish stocks or water.

Example of tradeable property rights – Hunter River Salinity Trading Scheme

Market based instruments can minimise the impact of regulation by using economic incentives to businesses to modify their behaviour. The Hunter River Salinity Trading Scheme (HRSTS) is a licensing scheme for discharges of saline water in the Hunter River catchment in NSW. The objective of the scheme is to minimise the impacts of salinity in the river catchment by limiting discharges of saline water by heavy industry.

Each participant in the HRSTS holds a number of 'salt credits' entitling them to discharge a share of the total allowable discharge on any day. Credits may be traded between participants so that those holders who do not need to discharge can sell their entitlement to others with the greatest need.

Through trading, the overall costs of saline water management are minimised while compliance with scheme rules guarantees that water quality goals are never compromised by discharges.

Imposition of government charges

Charges can be useful where resources are under-priced due to the existence of externalities or where they are not priced at all, for example, access to clean air. Corrective charges on resources that are priced too low may improve the efficiency of the economy by assigning prices to the use of otherwise unpriced (but not zero-cost) resources.

Charges can encourage the economically efficient allocation of resources. They can help to encourage innovation through encouraging the adoption of the use of efficient technologies and methods of compliance. Generally they have low enforcement costs.

It can, however, be difficult to estimate the precise quantum of the charge required to achieve the desired behavioural response and policy outcomes.

Example of charges and subsidies – the Parking Space Levy

The NSW Government's Parking Space Levy is paid by owners of non-residential parking spaces in declared areas within Sydney's major commercial centres. The levy was introduced to discourage car use in congested areas, encourage the use of public transport and to improve air quality.

All revenue from the levy is used to fund the construction of projects which make it easier and more convenient for people to access public transport services. These include building and maintaining bus, rail and ferry interchanges, commuter car parks, bus shelters, taxi stands, kiss and ride facilities, bicycle lockers, light rail systems and better passenger information and security systems.

To the extent that the levy is passed on as higher costs for parking within these areas, it sends a signal to car owners about the value of scarce space and may provide an incentive to use public transport, particularly if these services are improved via the revenue raised from the levy.

Providing government subsidies

Government subsidies can be used to reduce the financial costs to industry or to the community of complying with government requirements where the policy outcomes sought will provide significant social benefits or where a market is not yet established. Well designed subsidies can provide incentives for innovation and the development of cost effective solutions.

For example, the NSW Government has established the Water and Energy Savings Fund to assist businesses to pay for sustainable and cost effective projects to reduce water and energy demand. Often the additional government funding needed to make these projects viable is much less than the cost to government of implementing alternative programs to achieve the same objectives.

Creating financial liability

This approach is often used to deal with behaviour that may have significant impacts on the environment and can ensure that the costs of environmental damage or rehabilitation are not borne by the wider community. By placing responsibility for restoration of the environment or compensation for environmental damage on the polluter, the economic incentives associated with engaging environmentally risky behaviour are changed.

Example of financial liability – performance bonds

Performance bonds are often used in the mining industry, where resource extraction companies are required to set aside funds to pay for the clean-up of environmental damage caused by their operations. The funds are independently held and refunded when compliance with environmental requirements is achieved. Performance bonds can provide an incentive for mining companies to use less environmentally damaging approaches to extraction in the first place if they cost less than the amount paid for the bond.

A combination of instruments

Sometimes policy problems are best addressed through a combination of regulatory instruments and non-regulatory approaches. This may improve effectiveness of regulation by better targeting tools to achieve compliance.

Regulatory approaches can be combined in a number of ways. In some cases, tools may be used simultaneously to improve compliance. For example, to achieve reductions in health problems caused by cigarette smoking, a combination of economic instruments (Commonwealth excise to increase the price of cigarettes), legislation (forbidding the sale of cigarettes to children and prohibiting smoking in certain places) and information campaigns (advertising and warnings on packets) has been used.

Alternatively, a range of instruments can be used in the implementation and enforcement of regulation. For example, the NSW Department of Environment, Climate Change and Water uses a range of responses for breaching provisions of the *Protection of the Environment Operations Act 1997*, including warnings, clean-up notices, pollution reduction programs that become binding through licence conditions, and prosecution as a last resort.

Performance Based Versus Prescriptive Regulation

The different regulatory approaches form part of a continuum, ranging from performance based options which specify desired outcomes or objectives but not the means by which these outcomes must be met,

through to prescriptive rules that focus on inputs, processes and procedures and generally impose punitive sanctions (such as fines or even custodial sentences) or remedies (such as statutory warranties, access to compensation or dispute resolution) for non-compliance.

Prescriptive regulatory instruments are likely to be more justifiable where a high level of certainty is required and where the risks associated with non-compliance are high. This type of regulation can provide greater consistency and clarity of expectations. However, it can also lock in inefficient practices and inhibit innovation. If regulation is overly prescriptive, it can increase compliance costs and the regulatory burden.

Performance based alternatives which allow business to determine how it will meet performance standards can be more flexible and encourage innovation. This approach is particularly important where rapid change is being experienced, for example, with fast paced technological advances. Performance based regulatory schemes can also be cheaper to implement and/or administer than prescriptive regulation. However, it is important to consider the full range of impacts as compliance can be more difficult than for prescriptive regulation.

Performance based regulation can also be difficult to develop, as it can require detailed specification and measurement of desired outcomes, which are not always apparent. Similarly, it may require the development of operational guidance to provide adequate understanding and knowledge of the requirements to ensure compliance. This may present a greater impost on smaller businesses in relation to developing the necessary compliance strategies. In these cases, consideration should be given to deemed compliance provisions that smaller businesses can rely on if they choose.

Appendix C: Assessment of cost & benefits

This appendix provides more detail on alternative methodologies to assess costs and benefits. As many of these methodologies are resource intensive, they should generally be applied when the impacts or risks of a proposal are large.

When assessing the impacts of a regulatory proposal, agencies should also refer to Measuring the Costs of Regulation, available at **www.betterregulation.nsw.gov.au.**

Cost Benefit Analysis

Cost benefit analysis involves expressing all relevant costs and benefits of a regulatory proposal in monetary terms in order to compare them on a common temporal footing. This technique is most usefully applied to proposals where the major benefits can be readily quantified.

Two main decision criteria can be applied in cost benefit analysis:

- **Net present value (NPV)** – The NPV of an option is the estimated value in present terms (today's dollars) of the flow of benefits over time less costs. Calculating the NPV involves estimating the annual costs and benefits of an option over a fixed period, and then discounting that stream of net benefits to its present value. A positive NPV indicates that an option results in a net benefit. The higher the NPV, the greater the net benefit.
- **Benefit cost ratio** – The benefit cost ratio for a particular option is derived from dividing the present value of total estimated benefits by the present value of total estimated costs. A benefit cost ratio of greater than one indicates a net benefit.

The key strength of cost benefit analysis is it allows a range of options to be compared on a consistent basis. However, the focus on valuing impacts can sometimes lead to the omission of impacts which cannot be valued quantitatively. Cost benefit analysis can also require considerable data. Where the impacts of a proposal are not significant, the cost and effort required for this type of analysis may not be warranted.

Cost Effectiveness Analysis

Cost effectiveness analysis is a useful approach where benefits of an option cannot be quantified readily in dollar terms but where the desired outcome can be clearly specified. In cost effectiveness analysis, the level of benefit desired is pre-specified and held constant for all options. Options are then assessed to identify the least cost means of achieving that objective.

For example, where an environmental outcome can be quantified in terms of environmental quality (such as the volume of environmental flows needed to ensure a healthy river) but not in dollar terms, cost effectiveness analysis can be used to determine the least costly way of achieving the outcome.

A technique for comparing alternative options which have varying outcomes is known as 'levelised cost'. This allows options to be ranked according to cost per unit of outcome. For example, to compare options to improve the efficiency of water supply in a particular system, the costs of each option could be compared on the basis of cost per litre of water saved.

Multi-Criteria Analysis

If it is not feasible to assign monetary values to costs or benefits of an option, qualitative analysis should be used to compare options or elements of those options. Multi-criteria analysis (MCA), or the balanced scorecard approach as it is sometimes called, is one technique for doing this. MCA requires judgments about how proposals will contribute to a set of criteria that are chosen to judge the benefits and costs associated with the proposals.

A number of different evaluation criteria are defined. A score is then assigned for each criterion depending on the impact of the policy option being considered. In its simplest form:

- a score of '–1' could be assigned if the impact is negative/undesirable/poor
- a score of '0' could be assigned if there is no impact or if the impact is neutral, and
- a score of '+1' could be assigned if there is a positive/desirable/good impact.

More complex scoring schemes with a greater number of point scales can also be devised. Weightings should also be assigned to each of the criterion, reflecting their relative importance in the decision making process, and an overall score can be derived by multiplying the score assigned to each criterion by its weighting and summing the result.

Economic valuation techniques

In many cases, there is no market price for costs and benefits associated with a regulatory proposal. Economists have developed a range of approaches to estimate the economic value of non-market or intangible impacts. These techniques include:

- **Contingent valuation method** is a 'stated preference' method of valuing intangible impacts. It involves asking people to state directly their willingness to pay (or to accept compensation) for a particular outcome.
- **Contingent choice method** is similar to the above method, but is based on asking people to make trade-offs among sets of outcomes with associated costs.
- **Hedonic pricing** estimates costs or benefits of a characteristic with no market price, on the basis of how the market price of another good that has the characteristic is affected. For example, variations in prices of similar houses in different neighbourhoods may reflect the value of local environmental attributes.
- **Travel cost method** assumes the value of a recreational site is reflected in how much people are willing to pay to travel to visit the site.
- **Damage cost avoided, replacement cost and substitute cost methods** estimate the values of ecosystem services based on either the costs of avoiding damages due to lost services, the cost of replacing environmental assets, or the cost of providing substitute services. An example is the value of clean water measured by the cost of cleaning the water up, or by stopping it from becoming polluted in the first place.
- **Productivity method** estimates values for ecosystems or environmental systems that contribute to the production of commercially marketed goods (eg the value of certain insects by measuring their impacts on crop productivity through better pollination).
- **Benefit transfer method** estimates values by transferring existing benefit estimates from studies already completed for another location or issue.

In considering significant regulatory proposals, agencies may wish to seek expert advice to assist in selecting and developing the most appropriate framework for a robust evaluation of costs and benefits, including the estimation of the value of any intangible or non-market impacts.

The NSW Government Guidelines for Economic Appraisal[7] provide further details on techniques for estimating non-market and intangible impacts.

Other issues to consider in evaluating costs and benefits

Transfers and double counting

When assessing aggregate costs and benefits, it is important to identify those which are purely transfers or redistributions from one group in the community to another, and those which represent an absolute increase or decrease for society as a whole.

An example of a transfer is the imposition of a pollution tax. The tax amount would show as both a cost to polluting businesses and a benefit to governments. While the costs and benefits to the different parties should be identified in the assessment, care should be taken they are not both included in the overall net impact. The double counting of costs and benefits can occur if the redistributive impacts of particular measures are not recognised.

Distributional impacts

Cost benefit analysis shows the net social benefit of different proposals, regardless of whom the costs and benefits accrue to. If the net social benefit is positive, those who stand to gain from the option could, in theory, compensate the losers and at least one person would be better off. As this does not occur in practice, some options may not produce a fair distribution of costs and benefits. Benefits of an option may accrue to one group, while another bears most of the cost.

Where there are distributional impacts, it is important to include an assessment of the impacts of proposals on different groups as part the assessment of costs and benefits. For example, this could include examination of the relative costs of complying with regulation for disadvantaged groups within the community.

Cumulative regulatory burden

Regulated parties can be affected by the burden imposed by multiple layers of regulatory requirements. Accordingly, it is important the cumulative impacts on business and other relevant groups in society are considered when developing proposals.

Risk and uncertainty

Cost benefit assessment should include an examination of the risk and uncertainty associated with policy options. In cases where the degree of uncertainty associated with a proposal is high, agencies should consider an early review of the proposal to ensure it is on track to achieve its policy objectives.

Sensitivity analysis

Sensitivity analysis can be used to show how changes in particular assumptions affect the outcomes of the impact assessment. Sensitivity analysis involves estimating outcomes using the plausible range of values for the uncertain inputs. The sensitivity analysis can demonstrate how the outcomes vary with changes in input assumptions. If outcomes are very sensitive to a change in a particular input, greater certainty about that input should be sought where possible to improve the assessment of costs and benefits.

[7] *NSW Treasury 2007, 'NSW Government Guidelines for Economic Appraisal', Policy & Guidelines Paper TPP07-5 (July), http://www.treasury.nsw.gov.au/tppdex*

Worked examples of quantification

The following examples are provided to illustrate simple methods of calculating impacts.
For many regulatory proposals, particularly non-significant proposals, this type of information will be sufficient to meet the better regulation requirements.

Table 2: Examples of quantification

Legal profession admission reforms

The establishment of uniform principles for assessing overseas qualifications will reduce costs for a person applying for admission to the Australian legal profession. In particular, the reforms will remove the need for applicants who obtained a law degree or diploma in law in Australia to undergo an International English Language Test System (IELTS) test.

Assumptions:

- The Legal Profession Admission Board estimates the reforms will remove the need for around 300 applicants per year to produce IELTS results.
- The cost of an IELTS test is $310 per person.

Cost savings per year:
(Number of applicants x saving per application) = 300 x $310 = **$93,000 per year**

Seafood store audit reforms

The reform of food safety requirements for premises that only store seafood will reduce costs for businesses by removing the need for an annual audit by the NSW Food Authority and weekly record keeping. This expected to reduce costs for business and Government without reducing food safety standards for the community.

Considerations and assumptions:

- Each business will save around 52 hours per year (1 hour per week) by not having to complete food safety program records, and 1 hour per year in auditing time.
- There are 145 licensed seafood stores in NSW.
- It is assumed that seafood store workers are paid at the economy wide default rate of $47 per hour.
- The annual audit fee is $143.05 plus $35.77 travel costs.
- These businesses will continue to be subject to regular inspection.

Cost savings to business per year:

Calculate the reduction in costs from removal of weekly record keeping:

(Number of businesses x time saved x hourly rate) = 145 x 52 x $47 = $ 354,380 per year

Calculate the reduction in costs from removal of audit requirement:

(Number of businesses x fee) = 145 x $178.82 = $ 25,929 per year

Saving: $354,380 + $25,929 = **$380,309 per year**

The savings to Government from fewer audits has not been costed.

Liquor licensing reforms

Major changes to liquor licensing regulation commenced on 1 July 2008. The reforms included moving away from a court-based to an administrative-based licensing system, a new licence fee system and changes to the social impact assessment process for some types of licence.

Key regulatory impacts which can be quantified include:

- The availability of a new 'general bar' licence with a lower licence application fee. This facilitates entry into the liquor market by certain licensed venues that would have previously needed to apply for a more costly *'Restaurant/nightclub – permit for sale of liquor without meal'* licence.
- A lower cost community impact statement (CIS) replaces the social impact assessment (SIA) process that must be followed by applicants.
- A reduction in the period allowed for submissions on an application for a general bar licence reduces the borrowing (holding) costs for businesses.

Considerations and assumptions:

- The application fee for a *'Restaurant/nightclub – permit for sale of liquor without meal'* licence is $10,000 – fees range from $5,000 to $15,000 depending on the size and location of the premises, and a midpoint of $10,000 is chosen as a reasonable estimate.
- The application fee for a general bar licence is $500.
- The typical consultancy fees to undertake an SIA are assumed to be three times the application fee, or $30,000[8].
- The relatively low risk surrounding establishments applying for a general bar licence is assumed to reduce the typical consultancy fees for a CIS to $10,000.
- The application process under the new licence is reduced by 3 weeks.
- The typical value of capital held by a business applying for a licence is $150,000 and this is fully financed through debt at a cost 9% per year.

Cost savings per year:

Calculate the costs (excluding capital costs) of applying for a licence under the old system:

(Application fee) + (cost of preparing SIA) = $10,000 + $30,000 = $40,000

Then calculate what it costs to apply for a general bar licence (excluding capital costs):

(Application fee) + (cost of preparing CIS) = $500 + $10,000 = $10,500

Reduced cost of applying for a licence = $40,000 - $10,500 = $29,500

Estimate the reduction in capital costs:

($150,000 x 9% x 15 days) = $555

Saving: $29,500 + $555 = **$30,055 per business**

Assuming that 4 new bars are established in NSW each year, these reforms provide an estimated saving to business of $30,055 x 4 = **$120,220 per year.**

The largest impact of these reforms is the reduction of the opportunity cost associated with these types of businesses potentially being restricted from the market due to the high regulatory costs and other barriers to entry. This cost has not been quantified.

[8] *An article by Tracy Ong ('Binge drinking Sydney eschews mini-bars' Australian Financial Review, Monday 7July 2008) indicates that typical consultancy fees to develop an SIA may be three times the cost of the application fee.*

APPENDICES

State tax administration reforms

E-learning modules have been introduced by the Office of State Revenue to make it easier for existing and potential clients to understand and comply with State taxes, duties and benefits.

Payroll tax modules: Three new e-learning modules educate clients about matters including grouping, contractors and employment. These modules reduce tax errors by clients and the number of telephone and written enquiries from existing and potential clients, benefiting business and Government.

Considerations and assumptions:

- In 2008-09, 3000 clients accessed the payroll modules.
- It is assumed that each access saves the client around 1 hour of time in training, rework and contact with the Office of State Revenue.
- The cost for a client is $39 per hour[9]

Cost savings to businesses for the first year:

(Number of accesses x time saved x wage rate) = 3000 x 1 hour x $39 = $117,000

The savings to Government from fewer errors, and the cost savings to business and Government from fewer enquiries has not been costed.

Electronic duties returns (EDR) modules: Seven new e-learning modules assist clients such as solicitors and conveyancers to gain skills and correctly use the EDR system. These modules reduce phone enquiries, benefiting business and Government.

Considerations and assumptions:

- OSR makes around 800 client visits per year to provide training.
- It is assumed that each client visit saves around 1 hour of time in training by OSR.
- Client training costs $35.91 per hour. Travel costs and incidentals have not been included.

Cost savings to OSR per year:

(Number of training visits avoided x training time saved x cost per hour) = 800 x 1 hour x $35.91 = $28,728

The savings to OSR from fewer client enquiries has not been costed.

First Home Owner Grant module: A new module released in 2008-09 assists personnel from Financial Institutions and Mortgage Brokers to lodge Grant applications correctly, removes the need for clients to attend a training course and reduces the number of telephone enquiries.

Considerations and assumptions:

- Around 50 new clients attend one of 7 training courses held by OSR each year.
- It is assumed that by not attending a training course, each client saves around 4 hours (including travel), and the cost of a client's time is $47 per hour[10]
- Each training course costs OSR around $900.

Cost savings to businesses per year:

(Number of training courses avoided x time saved x cost per hour) = 50 x 4 hours x $47 = $9,400 per year

Cost savings to OSR per year:

(Number of training courses avoided x cost) = 7 x $900 = $6,300 per year

The savings to OSR from fewer client enquiries has not been costed.

Total savings to business in the first year = $117,000 + $9,400 = **$126,400**

Total savings to Government in the first year = $28,728 + $6,300 = **$35,028**

The typical cost of developing an e-learning module is estimated to be $10,000 comprised mainly of staff costs.

[9] *Measuring the Costs of Regulation, Better Regulation Office, 2008. $39 per hour is the default hourly wage for clerical and administrative workers (page 5).*

[10] *Measuring the Costs of Regulation, Better Regulation Office, 2008. $47 per hour is the economy wide default hourly wage (page 5).*

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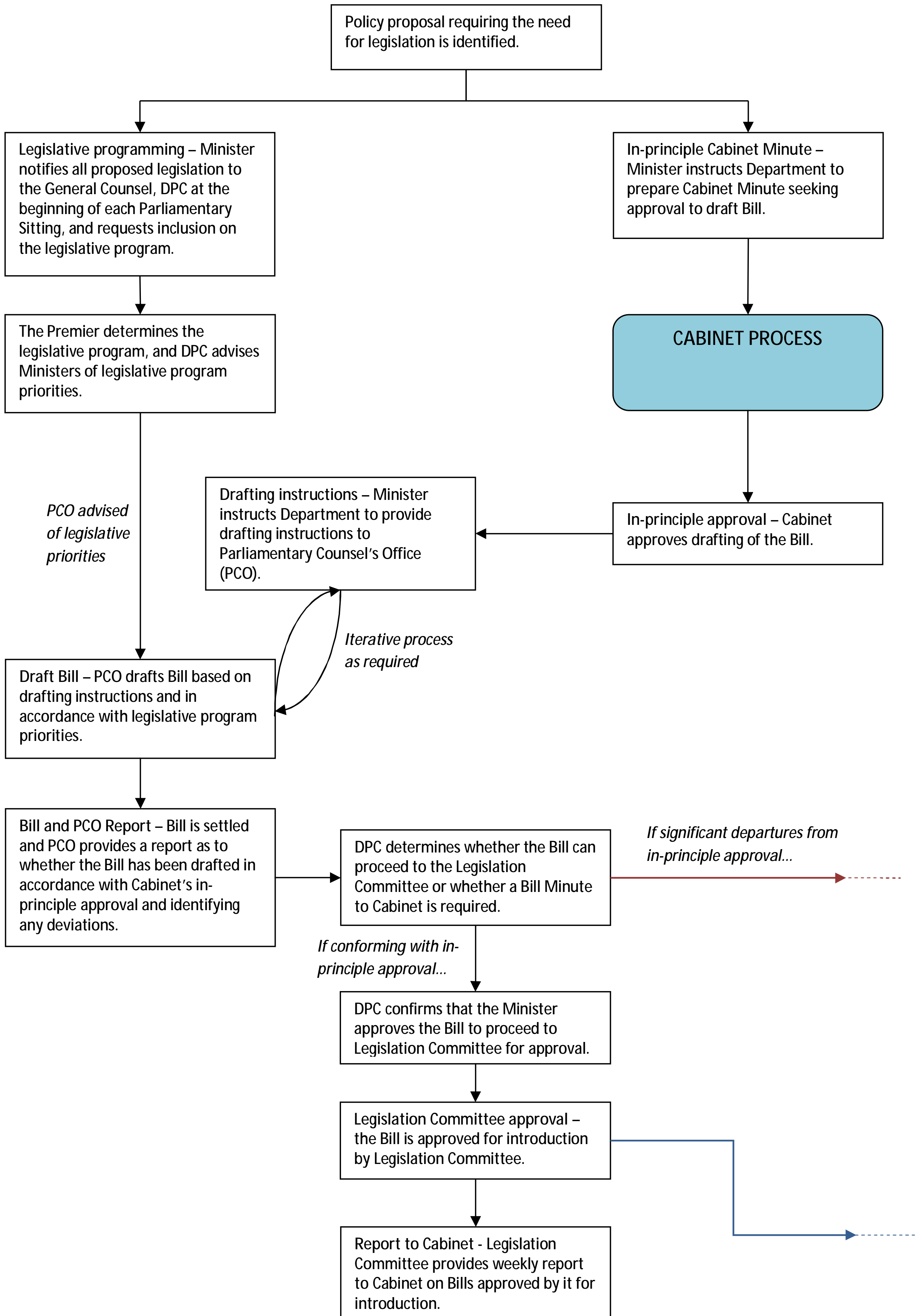
Better Regulation Office

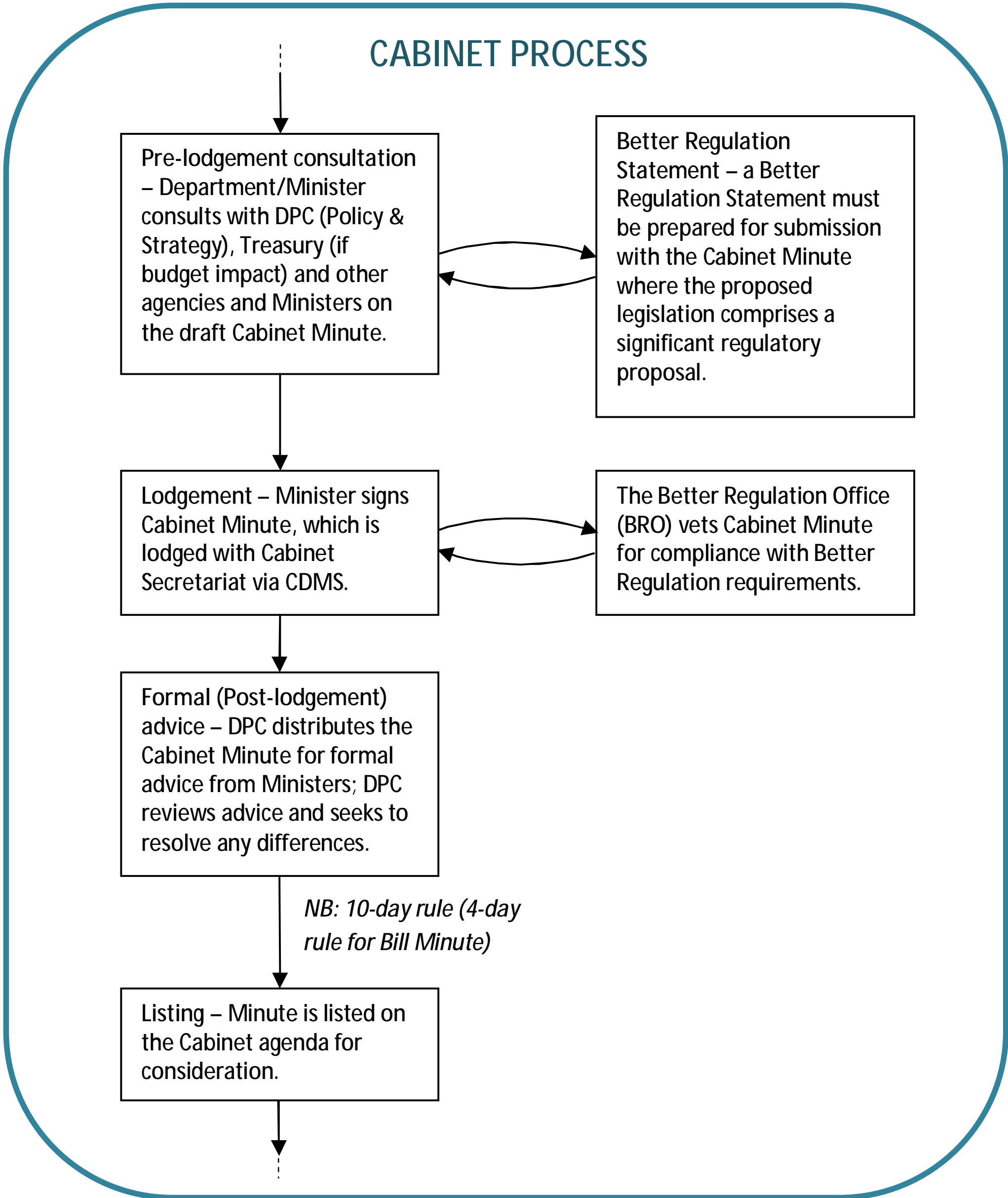
Governor Macquarie Tower
1 Farrer Place, SYDNEY NSW 2000

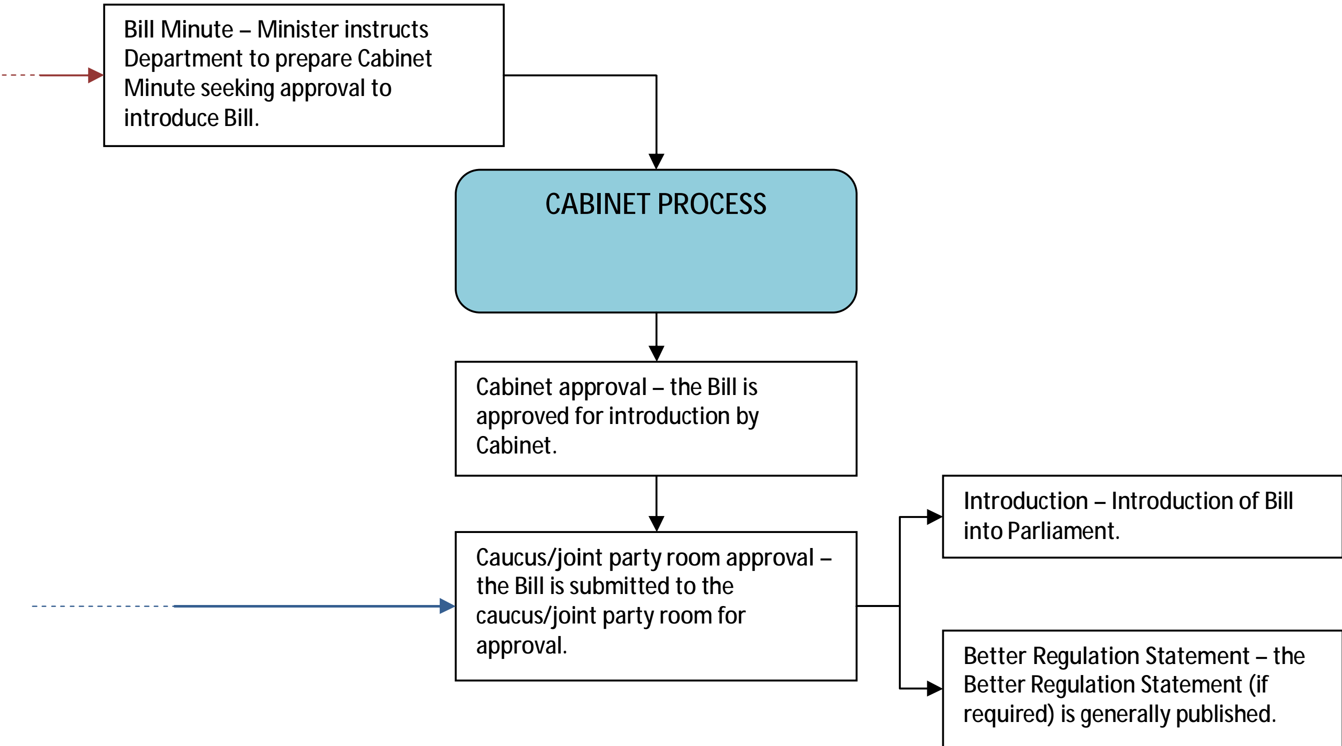
Phone: 02 9228 5414
Fax: 02 9228 4408
Website: www.betterregulation.nsw.gov.au

Summary of legislative process (prior to Introduction)

Summary of legislative process (prior to Introduction)




CABINET PROCESS
Pre-lodgement consultation – Department/Minister consults with DPC (Policy & Strategy), Treasury (if budget impact) and other agencies and Ministers on the draft Cabinet Minute.
Better Regulation Statement – a Better Regulation Statement must be prepared for submission with the Cabinet Minute where the proposed legislation comprises a significant regulatory proposal.
Lodgement – Minister signs Cabinet Minute, which is lodged with Cabinet Secretariat via CDMS.
The Better Regulation Office (BRO) vets Cabinet Minute for compliance with Better Regulation requirements.
Formal (Post-lodgement) advice – DPC distributes the Cabinet Minute for formal advice from Ministers; DPC reviews advice and seeks to resolve any differences.
NB: 10-day rule (4-day rule for Bill Minute)
Listing – Minute is listed on the Cabinet agenda for consideration.


Bill Minute – Minister instructs Department to prepare Cabinet Minute seeking approval to introduce Bill.
CABINET PROCESS
Cabinet approval – the Bill is approved for introduction by Cabinet.
Caucus/joint party room approval – the Bill is submitted to the caucus/joint party room for approval.
Introduction – Introduction of Bill into Parliament.
Better Regulation Statement – the Better Regulation Statement (if required) is generally published.