



Australian Government

Department of the Prime Minister and Cabinet

Federal Executive Council Handbook 2019

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Federal Executive Council

Handbook 2019

Foreword

The Federal Executive Council Handbook is produced as a reference for departmental officers and ministerial staff as an aid in the preparation of papers for consideration by the Governor-General in Council.

This edition supersedes the 2017 version of the Handbook and incorporates information subsequently issued through circulars by the Executive Council Secretariat.

The Handbook outlines the diverse nature of matters that are submitted to the Executive Council and the form in which these matters are presented to the Governor-General and his Executive Councillors.

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

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



Paul Singer MVO

Official Secretary to the Governor-General

Contents

Introduction	1
The Handbook.....	1
The Federal Executive Council	1
Other References	2
The Federal Executive Council	3
What is the Federal Executive Council?.....	3
Meetings of the Federal Executive Council	4
The ‘caretaker’ period.....	5
Recommendations to the Federal Executive Council	6
Deadlines.....	7
Late items.....	7
Special meetings	8
Clearance of drafts and final documents.....	8
Withdrawal of papers	9
Ministerial changes affecting Executive Council documents	9
Documents contingent on assent to legislation	10
Preparing documents for the Administrator of the Government of the Commonwealth.....	11
The Document Package	12
The standard set of documents	12
Minutes	12
Instruments.....	12
Explanatory memoranda	13
Signing and initialling by the responsible minister	14
Alterations to documents	17
Numbering, making copies, and assembling documents	17
Explanatory statements	18

Preparing Specific documents	19
Appointments	19
Acting appointments.....	21
Resignations and terminations	22
Commissions (other than Defence Force Commissions).....	23
Defence Force Commissions	23
Legislative instruments, notifiable instruments and other instruments.....	24
Regulations and ordinances.....	24
Proclamations	25
Treaties	26
Documents involving Federal and state Executive Councils.....	26
Repeal, rescission, revocation, amendment and variation of instruments.....	27
Action Following Federal Executive Council Consideration.....	28
The Great Seal.....	28
Registration of legislative and notifiable instruments.....	28
Gazettal or other publications requirements for instruments.....	29
Announcements.....	29
Return of documents to departments.....	30
Access to Federal Executive Council Records	31
Application of the <i>Freedom of Information Act 1982</i>	31

Appendices

A	Reference sources	32
B1	Checklist for preparing draft Executive Council documents.....	33
B2	Checklist for lodging final Executive Council documents	36
C1	Format for a Minute (general)	38
C2	Minute - one appointment	39
C3	Minute - several appointments.....	40
C4	Minute - regulations.....	41
C5	Minute - several regulations	42
C6	Minute - proclamation	43
D1	Format for an Instrument (general).....	44
D2	Instrument - appointment	45
D3	Instrument - standing acting arrangements	46
D4	Commission of appointment.....	47
D5	Instrument - Commonwealth-State Agreement.....	48
E1	Format for an Explanatory Memorandum (general)	49
E2	Explanatory Memorandum - appointments	50
E2.1	Format for a Curriculum Vitae	51
E3	Explanatory Memorandum - regulations.....	52
E4	Explanatory Memorandum - proclamations.....	55
E5	Explanatory Memorandum - treaties	56

Introduction

The Handbook

1. This Handbook provides an overview of current Federal Executive Council operations, in particular the preparation of documents for consideration by the Governor-General in Council.
2. This edition replaces the 2017 version of the Handbook. Any updates will be advised through circulars issued by the Federal Executive Council Secretariat ('the Secretariat').

The Federal Executive Council

3. The Federal Executive Council is supported by a Secretariat located in the Department of the Prime Minister and Cabinet (PM&C). The Secretary to the Executive Council manages the work of the Secretariat and attends all Executive Council meetings. The Secretariat is assisted by a network of Executive Council Liaison Officers in each Australian Government department.
4. The Secretariat is responsible for:
 - (a) providing advice on Executive Council practices and requirements, in particular on the presentation of documents for the Executive Council;
 - (b) liaison with the Official Secretary to the Governor-General and with ministers' offices on Executive Council arrangements;
 - (c) providing secretariat support for meetings of the Executive Council;
 - (d) ensuring that the requirements of the Governor-General and executive councillors are met; and
 - (e) maintaining the records of the Executive Council.
5. All documents to be considered by the Governor-General and the Executive Council must be cleared through the Secretariat before they are finalised for ministerial signature. This practice aims to minimise the potential for embarrassment and delay if final papers are found to be incorrect or deficient and require redrafting.
6. Departments and agencies are encouraged to make full use of the Secretariat's expertise in ensuring that Executive Council requirements and standards are met. While the appendices to this Handbook provide models for the presentation of generic documents, the Secretariat can assist with advice on details of process and presentation.

7. The Secretariat's contact details are:
 - Federal Executive Council Secretariat
 - Department of the Prime Minister and Cabinet
 - One National Circuit
 - BARTON ACT 2600
 - telephone: (02) 6271 5779 / (02) 6271 5778
 - email: exco@pmc.gov.au
8. The Secretary to the Executive Council may be contacted on (02) 6271 5440.
9. Other important contact numbers are:
 - Office of Parliamentary Counsel (OPC)
 - Federal Register of Legislation
 - telephone: (02) 6120 1350
 - email: lodge@legislation.gov.au
 - General enquiries on instruments
 - telephone: (02) 6120 1400
 - email: instrument.instructions@opc.gov.au

Other References

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

The Federal Executive Council

What is the Federal Executive Council?

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

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

Meetings of the Federal Executive Council

19. The Executive Council generally meets every two weeks. The meetings are normally held at Government House, Canberra.
20. The express permission of the Governor-General is required for all meetings of the Council regardless of whether the Governor-General will be in attendance. The Federal Executive Council Secretariat liaises with the Official Secretary to the Governor-General to seek this approval.
21. The Secretariat provides departments with advance notice of scheduled meetings, including the cut-off dates for submission of draft and final documents. This advice is distributed through the Executive Council Liaison Officer network. The Secretariat also liaises with ministers' offices in drawing up a ministerial attendance roster at the beginning of each year.
22. Where an urgent and unexpected matter requiring early Executive Council consideration arises, a councillor with the support of the Prime Minister may request a special meeting of the Executive Council (paragraph 42).

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

The 'caretaker' period

27. Successive governments have accepted that special arrangements apply in the 'caretaker period', i.e. the period between the dissolution of the House of Representatives and the point in time when the outcome of the election is clear.
28. A special meeting of the Executive Council may be held after the announcement of an election but before dissolution of the House of Representatives to deal with outstanding appointments and other matters of an urgent nature.

It is rare for an Executive Council meeting to take place during the caretaker period, other than to approve the issuing of writs. A meeting would be held only if the matters involved could not be deferred. Any proposals to put business to the Executive Council during this period should be discussed with the Secretary to the Executive Council and the First Assistant Secretary, Government Division, in PM&C.

29. Normal Executive Council business resumes once the outcome of the election is known and a ministry has been sworn in.

Recommendations to the Federal Executive Council

30. Executive Council papers follow a standard pattern. For each item of business there will be:
 - (a) a formal minute, signed by the responsible minister or parliamentary secretary, recommending that the Governor-General take the desired action;
 - (b) a concise explanatory memorandum describing the legal basis for action to be taken and providing a description of that action and the reason for taking it, initialled by the responsible minister or parliamentary secretary; and
 - (c) in most cases, a formal instrument, (eg regulations, an appointment instrument, or a proclamation) to be executed by the Governor-General, which has been countersigned by the responsible minister or parliamentary secretary.
31. Where another minister or parliamentary secretary sponsors a proposal for the responsible minister, the formal minute and instrument is signed - and the explanatory memorandum is initialled - by the minister or parliamentary secretary who is acting for the responsible minister (see paragraph 88).
32. All items to be considered at an Executive Council meeting are listed under a schedule (a business list or agenda) prepared by the Executive Council Secretariat. The schedule, together with the original documents provided by ministers and parliamentary secretaries, is submitted by the Secretariat to the Governor-General at least two days before the meeting. Collated binders of these papers are also provided to the Executive Councillors who will be attending the meeting and to the Official Secretary to the Governor-General.
33. If all of the recommendations put to the Governor-General in Council are approved at the meeting, the Governor-General and the executive councillors sign the meeting minute at the conclusion of the meeting. This records that the Council has agreed to the recommendations and that the Governor-General has approved them.
34. The Governor-General will also sign each of the approved item minutes and any associated documents, such as instruments of appointment, proclamations, regulations, and orders. After the meeting, the meeting minute and approved item minutes are also signed by the Secretary to the Executive Council and incorporated into the records of the Council.

Deadlines

35. Departments and agencies are encouraged to consult early with the Secretariat on the preparation of documents for Executive Council consideration, and to lodge drafts for clearance as soon as possible. The cut-off dates for clearance of drafts are notified by Executive Council circular and typically are at least seven working days before a scheduled meeting.
36. The cut-off dates for lodgement of final documents with the Secretariat are also notified in Executive Council circulars. Typically, they are two working days after the deadline for lodging drafts. The cut-off dates are strictly enforced; these deadlines allow the Secretariat to ensure that papers are available for consideration by the Governor-General and executive councillors **at least** two full working days before each meeting.
37. Any final documents received after the cut-off date will be held over for a later meeting unless there are genuine urgent and unavoidable circumstances.
38. Where an item has missed the cut-off date for final papers, and is of such urgency that it cannot await consideration at the next scheduled meeting, the Executive Council Secretariat should be contacted to discuss the circumstances and possible arrangements for consideration of a late submission.

Late items

39. The Governor-General will only consider requests for late items to be submitted to Executive Council, on a written request from the Prime Minister.
40. The letter must provide **compelling reasons** for the request, including the urgent and unavoidable circumstances that have caused the item to be late and why the item cannot wait until the next scheduled meeting. The unavailability of the responsible minister to sign the documents is by itself not a valid justification for late items.
 - (a) To progress the request, the responsible minister will need to write to the Prime Minister (to request the Prime Minister write to the Governor-General). Departmental officers should liaise with their Department of Prime Minister and Cabinet counterparts during this process.
 - (b) Under no circumstances should departments contact the Official Secretary to the Governor-General to seek agreement for late items to be considered. All such negotiations must be conducted through the Secretary to the Executive Council.

Special meetings

41. On the rare occasion where a matter is of such urgency that it cannot await consideration at a scheduled meeting, the Secretary to the Executive Council should be contacted to discuss the circumstances and possible arrangements for convening a special meeting of the Executive Council.
42. A request for a special Executive Council meeting should be made only in the most exceptional circumstances and be accompanied by a written request from the Prime Minister to the Governor-General following the same principles set out in paragraph 41 above.
43. If a special meeting is approved, it is expected that the requesting minister attend the special meeting. It is the responsibility of the minister requesting the meeting to organise the attendance of a second councillor.
44. Documents for a special meeting should be prepared in the normal manner, as outlined in this Handbook, and close liaison maintained with the Secretariat.

Clearance of drafts and final documents

45. All draft documentation must be provided to the Secretariat for clearance **prior** to signature by the relevant minister or parliamentary secretary.
46. Draft documents for a scheduled Executive Council meeting should be provided to the Secretariat as early as possible in advance of the relevant draft cut-off date. The Secretariat will usually provide any marked-up comments by email.
47. Draft documents may be forwarded to the Secretariat for clearance in anticipation of formal approvals, for example Cabinet consideration or the Royal Assent.
48. Clearance of drafts by the Secretariat does not absolve departments from responsibility for the accuracy and completeness of the final documentation, both in terms of content and presentation. Documents should be reviewed internally within departments prior to being submitted to the Secretariat. The checklist at **Appendix B1** should be given full consideration before draft documents are submitted to the Secretariat.
49. Final documents must have the highest standard of presentation; be printed single-sided (unless agreed otherwise with the Secretariat); must not bear any extraneous markings, such as annotations, punched holes, tears or adhesive where stick-on tabs have been removed; and must be loose-leaved and not stapled or bound, although there are occasional exceptions to this (e.g. laws of an external self-governing territory). By prior arrangement, the Secretariat may

accept faxed or scanned versions of final documents, provided the originals are made available before the meeting date. **Appendix B2** provides a checklist for packaging final documents for the Executive Council.

50. Original Executive Council documents form part of the Commonwealth's permanent record, and should be produced on 'permanent' or 'archival' quality paper, not on recycled paper as that is not sufficiently durable.
51. Instruments that require the Great Seal, including proclamations, defence force and judicial commissions and executive orders must be printed on parchment.

Withdrawal of papers

52. Occasionally a minister may wish to withdraw an Executive Council document package that has been signed and submitted to the Executive Council Secretariat.
53. Where the signed material has not been forwarded to the Governor-General, a senior officer of the responsible department should discuss the withdrawal with the Secretariat and follow the matter up in writing.
54. Where the signed minute has been forwarded to the Governor-General, the responsible department should notify the Secretariat immediately, then the request should be made in writing and addressed to the Secretary to the Executive Council by the minister, a senior member of the minister's office, or the secretary or deputy secretary of the relevant department. The letter must clearly indicate why the papers are being withdrawn and that the request is being made on behalf of the minister.

Ministerial changes affecting Executive Council documents

55. Should a minister either cease to be a minister or change portfolios, or there is a change in portfolio responsibilities after a matter has been submitted by the minister to the Executive Council, new papers with updated signature blocks and headings signed/initialled by the minister subsequently responsible are required

Documents contingent on assent to legislation

56. From time to time, particularly towards the end of parliamentary sittings, there may be a need for urgent regulations, statutory appointments, or other instruments to be made that are consequent upon legislation which has just been passed by the Parliament.
57. This may involve earlier preparation of Executive Council documents in anticipation of the legislation being given the Royal Assent by the Governor-General. In such instances departments should ascertain from the Office of Parliamentary Counsel (OPC) the expected timing of assent by the Governor-General and advise the Secretariat accordingly when lodging the Executive Council documents. Departments should also ensure their Legislation Liaison Officer has advised the Legislation Section in PM&C and the Parliamentary Liaison Officers of any such critical dates for passage of legislation.
58. The Secretariat will hold the documents for the Executive Council meeting on the understanding that they will not be submitted to the Governor-General if the legislation has not been given the Royal Assent by the deadline for delivery of final papers. It is the responsibility of departments to advise the Secretariat whether or not the Royal Assent has been given in time.
59. Proposed instruments must not refer to legislation that will not have received the Royal Assent before the Executive Council meeting considering those instruments, as this may render them invalid.
60. While instruments cannot be made in reliance on legislation which has not received the Royal Assent (and so cannot be recommended to the Governor-General), instruments may be made under an Act which has received Royal Assent but has yet to come into operation (see section 4 of the *Acts Interpretation Act 1901*). Where this applies, the circumstances must be highlighted in the explanatory memorandum.

Preparing documents for the Administrator of the Government of the Commonwealth

61. Section 4 of the *Constitution* provides for the appointment of an Administrator.
62. State governors hold commissions from The Queen to administer the Government of the Commonwealth in the event of the absence from Australia, or the death, incapacity or removal from office, of the Governor-General, or in the event of the Governor-General having absented him or herself temporarily from office for any reason. State governors are called upon to perform this function in the order of their seniority of appointment. The most senior state governor therefore usually acts as Administrator, subject to their availability.
63. Section 16A of the *Acts Interpretation Act 1901* provides that unless the contrary intention appears, reference in any Act to the Governor-General is to be read as including an Administrator and as a reference to the Governor-General (or Administrator) acting with the advice of the Executive Council.
64. Where an Administrator is to preside at an Executive Council meeting, departments will be informed of the particular style and title of the Administrator through an Executive Council circular. Officers should ensure that draft minute papers and instruments that were previously cleared by the Secretariat for the Governor-General are updated for the Administrator.

The Document Package

The standard set of documents

65. Documents prepared for the Executive Council always include a formal minute and explanatory memorandum and, in most cases, a formal instrument.
66. Where departments are concurrently dealing with several related matters, they may be combined in the one minute and one explanatory memorandum if considered appropriate. The minute and explanatory memorandum must clearly specify all the associated proposed instruments. Examples of matters which may be combined include several appointments to the one body, or a series of similar amendments to regulations under the same Act (see examples at **Appendices C3 and C5**).

Minutes

67. Business is submitted to the Executive Council under cover of a minute from a minister or parliamentary secretary. A minute is a single-page document. The standard format for a minute, and several examples, are at **Appendices C1 to C6**.
68. Each minute is a recommendation by the responsible minister for the approval of the Governor-General in Council that something be done, made or approved. It must bear the full signature of the recommending minister.
69. When preparing a minute, departments should ensure that the description given under the heading 'Subject' is a concise and accurate summary of the matter for consideration and is reflected in the accompanying explanatory memorandum.

Instruments

70. Most matters submitted to the Executive Council will require a formal instrument. Standard formats for, and examples of, various instruments are at **Appendices D1 to D5**.
71. For all instruments, such as commissions, appointments, proclamations and other legislative instruments which are to be executed in the name of the Governor-General, the appropriate expression of the Governor-General's style and title is:

'I, General the Honourable David Hurley AC DSC (Retd),
Governor-General of the Commonwealth of Australia, acting with the
advice of the Federal Executive Council...'

72. Instruments declaring arrangements between the Commonwealth and the states will usually refer only to the titles of the Governor-General and Governor respectively. Their names should therefore be included as part of their respective signature blocks. (See the example at **Appendix D5**.)
73. Legislative instruments requiring Executive Council consideration are required, under the *Legal Services Directions 2017*, to be drafted by OPC.

Explanatory memoranda

74. An explanatory memorandum explains the need for, and effect of, the action being recommended to the Governor-General. An explanatory memorandum should therefore:
 - (a) provide a plain English explanation of the proposal, outlining the purpose of the proposed action, the reason for doing it, and the likely impact and effect of the action;
 - (b) clearly show the source of the Governor-General's power to approve the proposed action, including specific reference to any relevant legislative or constitutional authority;
 - (c) detail any conditions that need to be satisfied before that power may be exercised, including all relevant legal or other pre-conditions and requirements (e.g. qualifications for appointment or consultation requirements); and
 - (d) advise how any conditions have been satisfied - this should take the form of an explicit certification by the recommending minister (see paragraph 79 below).
75. Explanatory memoranda (excluding attachments) must not be more than two pages in length. More detailed explanation (e.g. a clause by clause explanation of regulations) should be included in an attachment to the explanatory memorandum. Dot points may be used. The standard format for, and examples of, explanatory memoranda are shown at **Appendices E1 to E5**.
76. Explanatory Memoranda are considered UNCLASSIFIED: For Official Use Only and the content must be consistent with this.
77. Explanatory memoranda must be self-contained and free from jargon, bearing in mind that the Governor-General and most executive councillors are not likely to have the background or subject knowledge available to the minister who initiated consideration of the item.

78. Each explanatory memorandum should begin with a brief description of the Act under which the action is recommended, and a factual statement of the power available to the Governor-General to do what is recommended, followed by a clear and concise statement of the purpose of the proposal including the source of technical advice.
79. The explanatory memorandum must spell out any relevant prerequisites or conditions, and how they have been met. For example, if a legislative provision requires the Governor-General to be satisfied about a particular course of action or to form an opinion about a matter, or if the Governor-General or the minister responsible is to have taken something into account as a prerequisite to consideration of the matter, the explanatory memorandum must include express advice in the form of a boxed certification signed by the minister.
80. The explanatory memorandum accompanying any legislative instrument or notifiable instrument that are expressed to commence, or include provisions expressed to commence, before the instrument is registered, must include a statement on the application of subsection 12(2) of the *Legislation Act 2003*; the Secretariat must be provided with written certification from the Australian Government Solicitor about whether the operation of the proposed instrument would be affected by that subsection.
81. It is essential that all legal and other requirements are met prior to Executive Council consideration, and explained in the explanatory memorandum so that the Governor-General may confidently rely on the memorandum in exercising his powers.
82. Accuracy and currency in references, such as to legislation or to the names of departments is also imperative, to ensure that the validity of Executive Council documents cannot be questioned.
83. An explanatory memorandum must be clearly expressed, succinct, and address all the requirements outlined above. If not, consideration of the recommended item may be deferred until adequate documentation is supplied.

Signing and initialling by the responsible minister

84. Executive Council minutes and accompanying instruments such as regulations must be signed by the responsible minister or parliamentary secretary or by another executive councillor for the responsible minister. Ministers' or parliamentary secretaries' electronic signatures must not be used.

85. If an amending instrument being signed by the responsible minister includes consequential amendments of instruments in another minister's portfolio, the signature block for the amending instrument should refer only to the signing minister. The explanatory memorandum should include a statement that the other minister has been consulted (and ideally supports) the consequential amendments. How this consultation is undertaken is a matter for the other minister and their department.
86. Where the minister responsible for a particular minute is absent or otherwise unavailable, and unless a contrary intention appears in the relevant legislation, section 19 of the *Acts Interpretation Act 1901* allows that the minute may be signed by:
- (a) another minister or parliamentary secretary in the responsible minister's portfolio; or
 - (b) another minister or parliamentary secretary from another portfolio (whether or not carrying on the responsible minister's duties) acting for the responsible minister.
87. Where the signing minister or parliamentary secretary is in the same portfolio as the responsible minister, if the matter is one involving the exercise of a power, whether statutory or non-statutory, by a minister within that portfolio, the legal position is that the minister or parliamentary secretary who signs, does not need to sign 'for' the responsible minister but may sign in his or her own right (and therefore may use his or her own letterhead and signature block).
88. On some occasions, it may be preferable for ministers or parliamentary secretaries in the same portfolio to sign 'for' the responsible minister where the subject matter is more readily identified with the responsible minister. In this instance, he or she would use the responsible minister's letterhead.
89. In all cases where a minister or parliamentary secretary signs for another minister, even where he or she is temporarily carrying the responsibilities of that minister, the expression 'Minister for X (or Parliamentary Secretary to the Minister for X) for the Minister for Y' should be used. In these cases, the signature block should appear as follows:
- Name + any post-nominals
 - Minister for Trade, Tourism and Investment
 - for the Minister for Home Affairs

90. An Executive Council minute must be sponsored using the formal title with which the relevant minister was sworn into the Ministry. Assistant Minister and Minister Assisting are informal titles in this context and may be used only in addition to formal titles. For example:

Name + any post-nominals
Assistant Minister to the Prime Minister
Parliamentary Secretary to the Prime Minister

91. The signature block on any accompanying instrument must be consistent with that on the covering minute.
92. Where a minute is signed by an executive councillor for the responsible minister, the letterhead on the formal minute and the headings on the explanatory memorandum should refer to the responsible minister.
93. Executive Council minutes dealing with matters that require Cabinet approval should not be signed until the relevant Cabinet minute has been issued. In cases where the arrangements for achieving this become complex (e.g. where a proposed appointment has a critical commencement date and a Cabinet decision is not expected until the day before the Executive Council meeting), departments should consult the Executive Council Secretariat.
94. The following procedural outline may assist in ensuring that all parts of the Executive Council document package are appropriately signed prior to lodgement with the Secretariat:
- (a) the minister/parliamentary secretary should sign above the signature block provided on the Executive Council minute and on any instrument;
 - (b) in the case of regulations, ordinances and proclamations, the minister/parliamentary secretary should sign above the signature block provided on the front page of the instrument itself, but need not initial every page except for the purpose of verifying an alteration (please note that the instrument must **not** be dated by the minister/parliamentary secretary);
 - (c) the minister/parliamentary secretary should initial the bottom right hand corner of every page of the explanatory memorandum and each attachment (e.g. curricula vitae of proposed appointees).

95. Officials submitting papers should ensure that:
- (a) each multi-page instrument, explanatory memorandum and attachment to an explanatory memorandum is internally page-numbered starting from the second page;
 - (b) the minister/parliamentary secretary has not signed the following classes of documents:
 - (i) Acts passed by the Legislative Assemblies of the self-governing Territories;
 - (ii) recommendations of authorities or bodies which have a statutory responsibility to make recommendations to the Governor-General, e.g. recommendations made by the Presiding Officers of the Parliament; or
 - (iii) other documents such as treaties or agreements which are independent of other Executive Council documents, including resignations that require acceptance by the Governor-General;
 - (c) the date in the left-hand margin of an Executive Council minute is left blank (as it is inserted by the Secretariat); and
 - (d) dates are **not** inserted elsewhere on minutes or instruments.
96. A checklist for the presentation of final papers for lodgement is provided at **Appendix B2**.

Alterations to documents

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

Numbering, making copies, and assembling documents

98. Departments should number their Executive Council minutes consecutively. The Executive Council Liaison Officer / Legislation Liaison Officer in each department maintains a register and assign these departmental minute numbers. Departments should commence a new series of minute numbers for each calendar year.
99. The same minute number should also be inserted on the accompanying explanatory memorandum.

100. In all cases, the original set of papers (for the Governor-General) is to be accompanied by five copies. One set will be stamped and returned to the originating department after the meeting. The remaining four copies are for the use of councillors, the Secretary to the Executive Council and the Official Secretary to the Governor-General.
101. When lodging final documents with the Secretariat, departments should provide an appropriately-sized envelope with the contact details of the officer to whom the departmental copies may be returned after the Executive Council meeting.
102. Final documents should be delivered by hand to the Secretariat at PM&C, and the Secretariat informed of the delivery by telephoning 6271 5779 from the foyer.
103. Departments should make and retain a scanned copy of the final documents prior to lodging the documents with the Secretariat.

Explanatory statements

104. Explanatory statements are not required by the Executive Council. The *Legislation Act 2003* deals with the requirements for explanatory statements for legislative instruments.

Preparing Specific documents

Appointments

105. The enabling legislation for statutory authorities often requires appointments to the authority to be made by the 'Governor-General'. This means the Governor-General acting with the advice of the Executive Council.
106. In the case of significant Government appointments, ministers must write to the Prime Minister seeking his or her or, at his or her discretion, Cabinet's approval of the appointment (see the Cabinet Handbook, www.pmc.gov.au).
107. Where agreement by the Prime Minister, or by Cabinet, is required for an appointment, that and all other necessary clearances must be obtained before a recommendation is made to the Governor-General. Agreement should be obtained in sufficient time to allow documents to be prepared for a subsequent meeting of the Executive Council and in sufficient time for the appointment to be dealt with by the Executive Council before the expiration of the previous appointment.
108. In general, an appointment takes effect:
 - (a) if no date is specified in the Executive Council documents, on the date of approval (ie when the Governor-General signs and dates the instrument of appointment); or
 - (b) if a prospective date is specified in the instrument of appointment, on that day.
109. An appointment must not be made retrospectively unless the relevant legislation makes provision for retrospectivity, either expressly or by clear implication. Departments must exercise particular care with any appointment proposals involving retrospectivity, and appropriate legal advice should be supplied to the Secretariat before such proposals are submitted for Executive Council consideration.

110. The explanatory memorandum for a proposed appointment should, in addition to the basic framework set out in above:
- (a) indicate whether provision is made for a specific number of appointees to the relevant body and how many other appointments, if any, are required to reach the full complement;
 - (b) provide a brief statement of the proposed appointee's suitability for the office by reference to his or her qualifications and experience;
 - (c) state whether or not the statutory provision under which the proposed appointment is to be made sets out criteria to be met by appointees, and where it does - sign a boxed certification outlining the way in which the proposed appointee meets those criteria;
 - (d) indicate whether the proposed appointment is full-time or part-time and, where applicable, refer to any statutory age or time limitations on appointments;
 - (e) where applicable, indicate whether the proposed appointment is a new appointment or re-appointment and when the person was last appointed to, or last acted in, the office;
 - (f) include a brief explanation of who the proposed appointee would replace, and why (ie the expiry of their term or their resignation); and
 - (g) include a two-page (maximum) curriculum vitae (CV) of the proposed appointee as an attachment to the explanatory memorandum (refer to **Appendix E.2.1**).
111. An instrument of appointment must be prepared for execution by the Governor-General.
112. Care should be taken to follow the provisions of the enabling legislation, for example:
- (a) where the legislation requires that an appointment be made from among the members of an authority, the minute and instrument of appointment must also provide for the person's appointment as a member of the authority, unless the person is already a member by virtue of previous Executive Council action, in which case that fact should be made clear in the documentation;
 - (b) if the legislation provides that an appointment is to be made for a period determined by the Governor-General, the period must be specified in the minute, the explanatory memorandum and the instrument of appointment;

- (c) where the legislation provides for the Governor-General to determine terms and conditions of appointment:
 - (i) any terms and conditions being determined must be mentioned in the minute paper, set out in the instrument of appointment and explained in the explanatory memorandum; or
 - (ii) if there are no terms and conditions to be specified, then the provision for the Governor-General to determine terms and conditions should be introduced in the explanatory memorandum, together with a statement that no terms and conditions are being set.

113. Appointments that require the Great Seal of Australia (eg judicial appointments) must be printed on parchment.

Acting appointments

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

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

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

115. Section 33A of the *Acts Interpretation Act 1901* also relates to acting in offices and positions.

116. Where the legislation provides that acting appointments may be made by the Governor-General during any period, or during all periods, when the office is vacant or the office-holder is absent or not available, the minister may recommend to the Executive Council the making of standing acting arrangements by the Governor-General in relation to the office to come into effect on the occurrence of the specified circumstances (e.g. appointment of person B to act when person A (the office-holder) is absent).

117. Depending on the legislative provisions, it is possible for a sequence of standing acting appointments to be made to the same office whereby:
- (a) Person A is appointed to act during all periods when the office-holder is unavailable;
 - (b) person B is appointed to act during all periods when both the office-holder and person A are unavailable; and
 - (c) person C is appointed to act during all periods when the office-holder, and persons A and B are both unavailable.
118. Such standing arrangements should not, however, be drafted in terms of the Governor-General appointing persons A, B, and C to act, with the relevant minister having the power to decide which of them is to act on a particular occasion. In other words, it should be clear from the terms of the arrangement which of the persons specified will act in particular circumstances. An example is given at **Appendix D3**.

Resignations and terminations

119. Legislation often provides that an office-holder may resign from the office in writing delivered to the Governor-General. Generally such resignations are not dealt with by the Executive Council.
120. Termination is often specified in legislation for reasons such as the incapacity, misconduct or bankruptcy of the appointee. If the legislation requires termination by the Governor-General, it must be performed on the advice of the Executive Council. Where the legislation requires specific grounds to be made out, an appropriate statement of the grounds must be included in the explanatory memorandum accompanying the instrument of termination.
121. Where it is recommended the appointment of a member of the Defence Forces be terminated on medical grounds, sufficient information should be included in the explanatory memorandum to allow a judgement to be made about whether those grounds have been proven. In particular, the explanatory memorandum should make clear that all the necessary steps have been followed (including review procedures where appropriate) in arriving at the recommendation.
122. In general, a resignation takes effect:
- (a) if no date is specified in the letter, on the date of receipt by the Governor-General; or
 - (b) if a prospective date of resignation is specified, on that date.

123. It is important that letters of resignation not be drafted in such terms as to make the resignation conditional on some other event occurring, eg appointment to another office.
124. Where the legislation is silent on how a resignation may be tendered it is desirable for an office-holder appointed by the Governor-General to tender his or her resignation in writing to the Governor-General for acknowledgment.
125. Departments should check each particular case to ensure that termination is not sought in cases where resignation is more appropriate.
126. Particular care should be taken in all cases of termination to ensure that natural justice and procedural fairness have been properly exercised and that this is demonstrated in the explanatory memorandum.

Commissions (other than Defence Force Commissions)

127. A commission is a special form of written instrument signed by the Governor-General appointing a person to a significant post. After signature, commissions are sealed with the Great Seal of Australia.
128. A number of Acts including the *Royal Commissions Act 1902* provide for appointments to be made by commission. In the case of a Royal Commission, a directive to make a formal inquiry is given in Letters Patent issued under the Great Seal of Australia by the Governor-General in Council.
129. The original of a commission is to be printed on parchment.

Defence Force Commissions

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

Legislative instruments, notifiable instruments and other instruments

133. It is common for an Act of Parliament to empower some other person or body to make an instrument on matters of detail under the Act. Such an instrument will fall into one of three categories for the purposes of the *Legislation Act 2003*. The categories are legislative instruments, notifiable instruments and instruments that are neither legislative instruments nor notifiable instruments.
134. The *Instruments Handbook* provides guidance on how to determine whether an instrument is a legislative instrument or a notifiable instrument - if in doubt it would be prudent to seek legal advice in accordance with the *Legal Services Directions 2017*. The most common types of legislative instruments that are considered by the Executive Council are regulations, ordinances and proclamations other than commencement proclamations. The most common types of notifiable instruments that are considered by the Executive Council are commencement proclamations. Guidance on these types of instruments is provided below.

Regulations and ordinances

135. The Governor-General is empowered to make regulations under a wide range of legislation. Usually the regulation-making power in legislation is in general terms ‘prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act’. In some cases the legislation also specifies the particular matters that may be dealt with in the regulations or conditions that need to be met before regulations may be made. The Governor-General may also be empowered to make ordinances for the non-self-governing territories.
136. Regulations and ordinances are legislative instruments, and are prepared by OPC on instruction from the department whose minister administers the empowering legislation.
137. Regulations which deal with matters not within the regulation-making power of the empowering legislation will be invalid. If OPC has concerns about whether regulation is empowered OPC will raise it with the instructing department.
138. The explanatory memorandum for amending regulations or an amending ordinance should describe the relationship between the amendments and the existing regulations or ordinance and what will be the effect of the proposed changes. The explanatory memorandum should describe the substantial or significant changes, rather than recite each proposed amendment. An attachment to the explanatory memorandum should be used to set out the details of each section of the proposed Regulations.

139. The explanatory memorandum should state whether or not the empowering legislation specifies any conditions that need to be met before the Governor-General may exercise the power to make the proposed regulations or ordinance. If there are conditions to be met, they must be detailed and the recommending minister must also provide a signed certification to the effect that those conditions have been met.
140. Any consultation process with industry or stakeholders and outcomes from this process should be included in the explanatory memorandum. If no consultation occurred it should be stated why not.

Proclamations

141. A proclamation is an official public notice of something by a person in authority. An Executive Council minute may recommend that the Governor-General issue a proclamation under a statutory provision, e.g. to fix the date of commencement of provisions of an Act.
142. Proclamations other than commencement proclamations are legislative instruments. Commencement proclamations are notifiable instruments. All proclamations are prepared by OPC on instruction from the department whose minister administers the primary legislation.
143. The explanatory memorandum for a proposed proclamation must explain the purpose and effect of the proclamation. Where the proposed proclamation relates to the commencement of an Act of Parliament (or to part of an Act), the explanatory memorandum should state the date the Act received the Royal Assent, explain what the Act does and why the particular date for the proclamation is recommended. Where only a part of an Act is to be proclaimed, the explanatory memorandum should explain what that part deals with, why other parts are not being brought into operation or, if they are in operation, why the commencement of the part concerned has been delayed.
144. Under subsection 12(1) of the *Legislation Act 2003*, a legislative instrument or a notifiable instrument (including a proclamation) commences at the start of the day after the day it is registered, unless the instrument provides otherwise. It is recommended that a proclamation specify a date of commencement not earlier than the day after the Executive Council meeting at which it is to be considered.
145. Once approved by the Governor-General, commencement proclamations must be registered on the Federal Register of Legislation no later than the day before the earliest specified commencement date. In urgent cases, departments may need to make registration arrangements with OPC in advance.
146. Proclamations are to be printed on parchment.

Treaties

147. The Minister for Foreign Affairs is responsible for seeking Executive Council approval for Australia to enter into treaties.
148. All recommendations relating to the signature, the issuing of full powers, ratification, acceptance, approval, accession, amendment or termination are prepared by the Department of Foreign Affairs and Trade and submitted through the Minister for Foreign Affairs to the Executive Council.
149. Provided the Prime Minister has at least been informed (and where necessary his or her agreement obtained), approval obtained by the Minister for Foreign Affairs of those ministers having primary carriage of the subject matter is sufficient authority to proceed to the Executive Council for consideration.

Documents involving Federal and State Executive Councils

150. Each state has an Executive Council. The Governor of the state is the presiding officer of the state's Executive Council. Special arrangements are sometimes required when both Federal and state Executive Councils are involved in considering an item of business.
151. For example, a proposed appointment may relate to a person who has been previously appointed by a Governor in Council to a full-time state office, and it is now necessary for the person to be discharged from that office in order to be appointed to a full-time Commonwealth office. In those circumstances, the responsible departments should ensure that appropriate resignation or termination action has been taken by the state Governor in Council before submitting the relevant Federal Executive Council documents for the Governor-General's consideration. The explanatory memorandum should indicate that the appropriate state action, including, where applicable, state gazettal action, has been completed.
152. In the case of Commonwealth-state agreements and arrangements, and appointments to joint Commonwealth-state offices, two original instruments must be produced (one for each jurisdiction). The signing pages of such documents should be set out so that the signatures of the Governor-General and the Commonwealth minister appear above that of the state Governor and the state minister. The names of each should appear as part of their respective signature blocks.
153. Departments should ensure that both original instruments have been approved by the relevant state Executive Council and signed by the state Governor before being submitted to the Federal Executive Council.

154. When the documents have been signed by the Governor-General, the Secretariat returns one original signed instrument to the relevant department for transmission to the state Governor concerned. The other original instrument is retained by the Secretariat as part of the permanent records of the Council.
155. It is essential that departments take action on Commonwealth-state agreements and arrangements, and appointments to joint Commonwealth-state offices, in sufficient time to allow for Cabinet consideration (if necessary) and for the matter to be considered by the relevant state Executive Council and Federal Executive Council before the critical date of the proposed appointment or agreement.

Repeal, rescission, revocation, amendment and variation of instruments

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

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

157. In preparing documents for the Executive Council, subsection 33(3) of the Act can be relied upon (i.e. cited in the explanatory memorandum as the authority for action) only where action to be taken is expressly required by legislation to be by instrument in writing. Where there is no such requirement, the explanatory memorandum must identify some other authority to revoke or vary a decision.
158. Even where the action to be taken is expressly required to be by instrument in writing, subsection 33(3) applies only in the absence of a contrary intention. Such a contrary intention may exist, for example, if the action to be taken by instrument affects a person's proprietary or contractual rights. Again in these circumstances the authority to take the proposed action must be identified and cited in the explanatory memorandum. Departments should discuss any such proposals with the Secretariat.

Action Following Federal Executive Council Consideration

The Great Seal

159. The Governor-General's Letters Patent issued in 1900 provided for a Great Seal for use by the Governor-General. Its purpose is to authenticate certain official documents. The Great Seal of Australia is used by the Secretariat to seal official documents in accordance with the terms of the Royal Warrant issued by The Queen to the Governor-General on 19 October 1973.
160. The Great Seal of Australia is affixed to commissions of appointment of Governors-General, Administrators, Judges, Officers of the Defence Force, Ambassadors and Consuls. The Great Seal is also applied to documents such as proclamations, administrative arrangements orders, orders under section 4 of the *Commonwealth Inscribed Stock Act 1911*, orders under section 19 of the *Acts Interpretation Act 1901* and letters patent. It is circular in shape and approximately seven centimetres in diameter - documents requiring the Great Seal should be printed on parchment and prepared so as to allow sufficient space for it to be affixed.

Registration of legislative and notifiable instruments

161. Departments are responsible for lodging legislative instruments and notifiable instruments with OPC for registration on the Federal Register of Legislation. OPC is also responsible for delivering legislative instruments (and their associated explanatory statements) for tabling in the Parliament after they are registered. Under the *Legislation Act 2003*, this must occur within six sitting days after registration.
162. Prior to the Executive Council meeting, the originating department for an instrument will have notified OPC of the expected consideration at that meeting. In addition, shortly before the meeting the Secretariat will have confirmed with OPC that the instrument is on the Council's agenda.
163. Normally, registration will be effected within two days of lodgement with OPC. Responsible departments should seek confirmation from the Secretariat that an instrument has been made before electronically lodging the instrument for registration on the Federal Register of Legislation. However, if registration is required in less than two days, the responsible department should contact OPC in advance to organise urgent registration.
164. Departments should refer to the *Instruments Handbook* for details of OPC's registration requirements.

Gazettal or other publications requirements for instruments

165. For all other documents, departments are responsible for the necessary gazettal action, and should arrange this directly with OPC.
166. Registration of gazettal or other publications should be arranged directly with OPC. Departments should refer to the *Instruments Handbook* for details of OPC's registration and gazettal requirements.

Announcements

167. The Executive Councillor's oath or affirmation on appointment includes an undertaking that councillors will not disclose the deliberations of the Executive Council.
168. Matters to be considered by the Executive Council are confidential to the Executive Council until they have been approved at a meeting, notwithstanding that they may have been agreed by the Cabinet or relevant ministers.
169. Where ministers need to make an urgent announcement of a matter requiring Executive Council consideration, departments should seek the Secretariat's confirmation that the matter has been approved by the Governor-General in Council before any ministerial statement is released.
170. Except with the prior agreement of the Governor-General, **no announcement may be made before a meeting** relating to any matters to be considered by the Executive Council.
171. A request for prior announcement should not be made unless there are compelling reasons. Concern about speculation over an appointment, for example, would not of itself be regarded as valid justification. In general, following consultation, the request should be made in writing to the Secretary to the Executive Council by the minister, the senior member of the minister's office, or the secretary, or deputy secretary of the relevant department. The letter must clearly indicate that the request is being made on behalf of the minister.
172. Under no circumstances should departments approach the Governor-General or Government House directly about such requests.
173. Where a request for prior announcement is agreed by the Governor-General, the Secretary to the Executive Council will inform the relevant department. Announcements must be expressed in such a way as not to appear to pre-empt the Executive Council's consideration. For instance, an announcement of an appointment should be in the form 'The Government will be recommending to the Governor-General that X be appointed as'.

Return of documents to departments

174. After each Executive Council meeting one copy of the approved documents is stamped to indicate Executive Council approval and returned to the originating department for its record.
175. Commissions (other than Defence Force Commissions) approved by the Executive Council and signed by the Governor-General are processed in the Secretariat as follows:
 - (a) the Great Seal of Australia is affixed to the original, the register of patents details are inserted, and the document is returned to the department for provision to the appointee;
 - (b) a copy is taken for inclusion in the register of civil patents, which is a chronological list of commissions issued under letters patent, and is retained by the Secretariat as a separate part of the permanent record of Executive Council documents; and
 - (c) a second copy is retained by the Secretariat and forms part of the general permanent record of Executive Council documents.
176. Defence Force Commissions are not included in the Secretariat's register of patents.
177. For Commonwealth-State agreements and arrangements, and appointments to joint Commonwealth-state offices, one original signed instrument is returned to the originating department to be forwarded to the Governor of the state concerned. The other original instrument is retained by the Secretariat with the minute and explanatory memorandum as part of the permanent record of the Council.

Access to Federal Executive Council Records

178. Records of the Federal Executive Council include minute papers, instruments, explanatory memoranda, schedules of business and the register of civil patents. After 21 years these records become subject to the 'open access period' in accordance with the *Archives Act 1983* and can be accessed by members of the public on request (provided they are not exempt under the *Archives Act 1983*).
179. Commonwealth departments may request access to Executive Council records before records become subject to the 'open access period'. Such requests must be in writing, addressed to the Secretary to the Executive Council. If the request is approved, the practice is to authorise a nominated officer of the requesting department to view and copy documents of a certain description (for example, subject matter, between certain dates, from a particular portfolio, or a combination) from the Executive Council series of documents retained by the Archives.

Application of the Freedom of Information Act 1982

180. Executive Council documents may be subject to exemption under the *Freedom of Information Act 1982* (the FOI Act).
181. An agency or minister who receives a request under the FOI Act which covers documents connected with the Executive Council process must consult the FOI co-ordinator within PM&C as well as their own Department's FOI co-ordinator.

Reference sources

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

- The *Constitution*: see <http://www.legislation.gov.au>
- *Cabinet Handbook* (PM&C): see www.pmc.gov.au
- *Legislation Handbook* (PM&C): see www.pmc.gov.au
- Guidance on Caretaker Conventions (PM&C): see www.pmc.gov.au
- Guides for agencies writing regulation impact statements (OBPR): see www.pmc.gov.au
- *Instruments Handbook* (OPC): see www.opc.gov.au
- Treaty making process: (Department of Foreign Affairs and Trade): see www.dfat.gov.au/treaties

A Checklist for Draft Executive Council Documents

Before submitting draft papers to the Secretariat for clearance, a check against the following list will help avoid some of the more common errors or omissions.

For more complex or infrequently prepared documents, please call the Secretariat on 6271 5778 for assistance.

General Issues
<ul style="list-style-type: none"> • Ensure that the minister signing and initialling the Executive Council documents has the necessary authority to do so.
<ul style="list-style-type: none"> • Closely proof-read all documents to ensure the highest standards of presentation, expression and punctuation.
<ul style="list-style-type: none"> • Ensure names, dates, and “Governor-General” are not split over two lines (eg use non-breaking spaces or hyphens: ctrl+shift+space/hyphen).
<ul style="list-style-type: none"> • Correctly cite names of Acts and instruments (including italicisation where needed).
<ul style="list-style-type: none"> • Ensure the signature block for the minister/parliamentary secretary is identical on the minute paper and instrument.
<ul style="list-style-type: none"> • All text should be in Times New Roman font, and must be a minimum of 12 point in size.
<ul style="list-style-type: none"> • Ensure there is at least a 2 cm left margin. This will allow documents to be bound and archived correctly.
Executive Council Minute Paper
<ul style="list-style-type: none"> • Provide sufficient space (6 returns) before the Governor-General’s signature block and above the line for the date.
<ul style="list-style-type: none"> • Left-align the “Department No.” and “Executive Council Meeting No.” - all other items in the left-hand column should be centred.
<ul style="list-style-type: none"> • The minister/parliamentary secretary title at the head of the page should match the signature block - except where a minister/parliamentary secretary is signing for the sponsoring minister.

Explanatory memoranda

- **Use plain English**, do not assume readers are familiar with the topic or specialised terms and ensure the memorandum is fully self-contained. Do not make reference to an issue or a legislative provision that is not otherwise explained.
- **Ensure the subject titles** (citation of Act and subject matter) **are consistent** with the minute paper and instrument.
- **The form of expression must not assume that approval will be given**, and the intended action should always be referred to as proposed.
Correct: “The proposed Regulations would ...”
Incorrect: “The Regulations will provide...”
- **Clearly and fully identify the source of authority.**
- Provide a **clear statement of what is being proposed**, e.g. “The purpose of the proposed Regulations is to ...”.
- **Identify any conditions that must be satisfied** before the power to do what is proposed may be exercised:
 - **If there are conditions to be satisfied:**
include a statement (in a box) certifying that the condition(s) have been met and explain how they have been met; or
 - **if there are no conditions to be satisfied:**
include a statement in the text that there are no conditions to be met.
- Include any **consultation** process and outcomes from this process.
- **Spell out the full form, in the first instance**, before any abbreviations or acronyms are used.
- **Clearly identify any attachments** in the memorandum (underline the word “Attachment”).
- **Clearly identify when the proposed action is to take effect.**
- If the proposed instrument, or a provision of the proposed instrument, is expressed to commence **before** the proposed instrument would be **registered**:
 - clearly identify this fact and include a statement on the application of subsection 12(2) of the *Legislation Act 2003*; and
 - provide a written certification from AGS about whether the operation of the proposed instrument would be affected by that subsection.

Explanatory memoranda
<ul style="list-style-type: none"> • Ensure the authority cited at the end of the memorandum matches the authority cited near the beginning.
<ul style="list-style-type: none"> • Include page numbers on multi-page memoranda and attachments. Page numbers are to be centred at the bottom of each page (excluding the first page). Page numbers are to continue on the attachments (eg first page of the attachment will be page 3 if the Explanatory Memorandum is two pages).
<ul style="list-style-type: none"> • Align text to the left hand side.

Appointments
<ul style="list-style-type: none"> • Where the legislation specifies required qualifications for appointment, include a certification box detailing how the proposed candidate meets that requirement.
<ul style="list-style-type: none"> • If the appointment is a re-appointment: <ul style="list-style-type: none"> a) ensure the subject titles on the Minute and memorandum reflect this; b) include any information about the proposed appointee’s previous term(s); and c) where legislation does not specifically provide for re-appointment, establish the validity of the proposed re-appointment. <p>Section 33AA of the <i>Acts Interpretation Act 1901</i> provides that “If an Act confers on a person or body a power to make an appointment, the power is taken to include a power of reappointment.”</p>
<ul style="list-style-type: none"> • Ensure that the date of effect of the proposed appointment is unambiguous by using the formulation “... beginning on [date]” or “...beginning on the date of this instrument”.
<ul style="list-style-type: none"> • For attached CVs, ensure they are in standard format, and confined to two pages.
<ul style="list-style-type: none"> • Include an explanation of who the proposed appointee would replace, and why (ie the expiry of their term or their resignation).
<ul style="list-style-type: none"> • Include an explanation of why the proposed appointee is a suitable candidate, with reference to skills, background, or experience as appropriate.

A Checklist for Lodging Final Executive Council Documents

The following details the requirements for lodging various types of documents for Federal Executive Council consideration. Papers that are not signed or initialled as required will not be presented to the Executive Council.

Please also ensure that the minister does not date the documents. If approved, they will be dated and signed by the Governor-General.

Appointments

- (a) 1 original set of documents:
 - minute (signed by the minister);
 - instrument of appointment (printed on parchment if the Great Seal is required, signed by the minister);
 - explanatory memorandum and attachments, if any (the certification box signed by the minister, and each page initialled by the minister); and
 - two page (maximum) curriculum vitae (each page initialled by minister);
- (b) 5 complete sets of the above; and
- (c) an envelope with the name and telephone number of the departmental contact, for return of papers to the department.

Commissions

- (a) 1 original set of documents:
 - minute (signed by the minister);
 - commission (printed on parchment and signed by the minister);
 - explanatory memorandum and attachments, if any (the certification box signed by the minister, and each page initialled by the minister); and
 - a schedule of all the commissions (initialled by minister);
- (b) 5 complete sets of the above; and
- (c) an envelope with the name and telephone number of the departmental contact, for return of papers to the department.

Treaties

- (a) 1 original set of documents:
 - minute (signed by the minister);
 - treaty (signed by the minister on the first page); and
 - explanatory memorandum and attachments, if any (each page initialled by the minister);
- (b) 5 complete sets of the above; and
- (c) an envelope with the name and telephone number of the departmental contact, for return of papers to the department.

Legislative and notifiable instruments, including regulations, ordinances and proclamations

- (a) 1 original set of documents:
 - minute (signed by the minister)
 - instrument (signed by the minister)
 - explanatory memorandum and attachments, if any (each page initialled by the minister);
- (b) 5 complete sets of the above; and
- (c) an envelope with the name and telephone number of the departmental contact, for return of papers to the department.

Documents involving Federal and state Executive Councils

- (a) 1 original set of documents:
 - minute (signed by the minister);
 - instrument (signed by the minister, the relevant state minister and the state Governor) - at least two original copies, both signed in the original, are required (one for each jurisdiction). Please ensure the instruments are not bound; if necessary, this should take place after the Governor-General has signed and dated the papers; and
 - explanatory memorandum and attachments, if any (each page initialled by the minister);
- (b) 5 complete sets of the above; and
- (c) an envelope with the name and telephone number of the departmental contact, for return of papers to the department.

FORMAT FOR MINUTES - GENERAL



MINISTER FOR XYZ
[Title to be same as the instrument]

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Title of Act

Description of Subject [wording to be the same as the instrument]

Approved in Council

Recommended for the approval of His Excellency the Governor-General in Council that he..... [outline of the recommendation].

David Hurley Governor-General

John Smith Minister for XYZ [signature block to be the same as the instrument]

Filed in the Records of the Council

[OR John Smith Minister for ... (or Parliamentary Secretary) for the Minister for XYZ]

Secretary to the Executive Council

FORMAT FOR AN APPOINTMENT MINUTE



MINISTER FOR XYZ

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Export Development Act 1982

Export Development Commission - Part-time Member - Appointment 2019 [wording to be the same as the instrument]

Approved in Council

Recommended for the approval of His Excellency the Governor-General in Council that, by instrument in the attached form and under subsection 6(2) of the Export Development Act 1982, he appoint Jane Elizabeth Doe to be a part-time member of the Export Development Commission for a period of three years, beginning on 1 July 2019.

David Hurley Governor-General

Filed in the Records of the Council

John Smith Minister for XYZ

Secretary to the Executive Council

FORMAT FOR A MINUTE RECOMMENDING SEVERAL APPOINTMENTS TO THE SAME BODY



MINISTER FOR XYZ

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Social Security Act 1991

Social Security Decisions Tribunal - Two Part-time Senior Members and Ten Part-time Members – Appointment 2019 [wording to be the same as the instrument]

Approved in Council

Recommended for the approval of His Excellency the Governor-General in Council that, by instrument in the attached form and under subsection 1324(1) of the Social Security Act 1991, he appoint the persons named in the attached instrument as Senior Members and/or Members of the Social Security Decisions Tribunal for the periods specified.

David Hurley Governor-General

Filed in the Records of the Council

John Brown Minister for XYZ

Secretary to the Executive Council

FORMAT FOR A MINUTE FOR REGULATIONS



MINISTER FOR XYZ

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Export Development Act 1982

Export Development Amendment Regulations 2019 [wording to be the same as the instrument]

Approved in Council

Recommended for the approval of His Excellency the Governor-General in Council that he make Regulations in the attached form.

David Hurley Governor-General

John Smith Minister for XYZ

Filed in the Records of the Council

Secretary to the Executive Council

FORMAT FOR A MINUTE COVERING SEVERAL RELATED REGULATIONS



ASSISTANT MINISTER FOR XYZ
PARLIAMENTARY SECRETARY FOR XYZ

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Fisheries Act 1988

Fisheries Amendment Regulations 2019

Fisheries (Eastern Trawl Fishery) Amendment Regulations 2019

Approved in Council

Fisheries (Northern Coast) Repeal Regulations 2019
[wording to be the same as the instrument]

.....
David Hurley
Governor-General

Recommended for the approval of His Excellency the Governor-General in Council that he make Regulations in the attached form.

.....
Filed in the Records
of the Council

.....
Secretary to the Executive Council

Mary Smith AO
Assistant Minister for XYZ
Parliamentary Secretary for XYZ

FORMAT FOR MINUTE FOR A COMMENCEMENT PROCLAMATION



MINISTER FOR XYZ

Departmental No.

Minute Paper for the Executive Council

Executive Council Meeting No.

Subject

Trade Act 2014

Trade Act Commencement Proclamation 2019 [wording to be the same as the instrument]

Approved in Council

Recommended for the approval of His Excellency the Governor-General in Council that, by Proclamation in the attached form and under subsection 2(3) of the Trade Act 2014, he fix 1 July 2019 as the day on which Schedules 1 and 2 to that Act commence.

David Hurley Governor-General

John Smith Minister for XYZ

Filed in the Records of the Council

Secretary to the Executive Council

FORMAT FOR INSTRUMENTS - GENERAL

COMMONWEALTH OF AUSTRALIA

Title of Act

Description of Subject
[to match that in the Minute]

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and under [*provision*] of the [*title of Act*], [*action and details*].

Dated

2019

David Hurley
Governor-General

By His Excellency's Command

John Smith
Minister for XYZ

FORMAT FOR AN INSTRUMENT OF APPOINTMENT



Export Development Commission – Part-Time Member - Appointment 2019

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and under subsection 10(3) of the *Export Development Act 1982*, appoint Joe Bloggs as a part-time member of the Export Development Commission for a period of 5 years beginning on 1 October 2019.

Dated 2019

David Hurley
Governor-General

By His Excellency's Command

Susan Smith
Minister for XYZ

FORMAT FOR AN INSTRUMENT OF APPOINTMENT
- STANDING ACTING ARRANGEMENTS



Export Development Commission – Acting Chairperson - Appointment 2019

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and under subsection 10(3) of the *Export Development Act 1982*, appoint to act as Chairperson of the Export Development Commission during any period when the Chairperson is absent from duty or from Australia or is, for any other reason, unable to perform the functions of that office:

- (a) Jane Doe; and
- (b) if Jane Doe is absent from duty or from Australia or is, for any other reason, unable to perform the functions of the Chairperson—John Brown; and
- (c) if Jane Doe and John Brown are absent from duty or from Australia or are, for any other reason, unable to perform the functions of the Chairperson—Mary Black

Dated 2019

David Hurley
Governor-General

By His Excellency's Command

Susan Smith
Minister for XYZ

FORMAT FOR AN INSTRUMENT OF COMMISSION



Export Development Act 1982

COMMISSION OF APPOINTMENT
OF A COMMISSIONER
OF THE EXPORT DEVELOPMENT COMMISSION

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and under subsection 10(3) of the *Export Development Act 1982*, appoint

JANE ELIZABETH CITIZEN

to be a Commissioner of the Export Development Commission for a period of three years, beginning on 1 July 2019.

Signed and Sealed with the
Great Seal of Australia on
2019

David Hurley
Governor-General

By His Excellency's Command

Mary Smith AO
Minister for XYZ

ENTERED ON RECORD by me, in Register of Patents No. page , on
Secretary to the Federal Executive Council

FORMAT FOR AN EXPLANATORY MEMORANDUM - GENERAL

EXPLANATORY MEMORANDUM

Minute No. of 2017 - Minister for XYZ [Title to be same as the Instrument]

Subject - *Title of Act*

Description of Subject (to match that in the minute)

Authority

This section should contain a brief description of the Act and a description of the Governor-General's legislative authority to approve the proposal or otherwise follow the recommendation set out in the Minute. Any other relevant legislative provision should also be quoted/paraphrased. While comprehensive, this will need to be concise. If this is likely to extend to more than a few paragraphs, this section should focus on the source of power and an attachment should be used to set out any other relevant legislative provisions.

Purpose

This section should contain / include a clear statement of precisely what it is that the Governor-General is being asked to do. It should be expressed in concise, non-technical language in terms of 'The purpose of the proposed Regulations is' or 'The Minute proposes that'

Context / Background

This section should contain the (policy) context in which the proposal is being made (e.g. Budget initiative) and provide relevant background details.

Details and Effect

If the details of the proposal are brief and will not take the explanatory memorandum to more than two pages in length they may be included here. Otherwise, they should be included in an attachment to the memorandum.

Conditions

The memorandum must spell out the particulars of any conditions which need to be satisfied before the Governor-General's power can be exercised, and provide explicit advice on how those conditions have been satisfied.

Consultation

This section should include any consultation process and the outcomes from this process.

Authority: Section [#] of the *title of Act*

Please note that the headings used in the above example should not be included in an explanatory memorandum - they are provided only as a guide to the standard layout of an explanatory memorandum.

FORMAT FOR EXPLANATORY MEMORANDUM
FOR APPOINTMENTS**EXPLANATORY MEMORANDUM**

Minute No. _____ of 2017 - Minister for ABC

Subject - *Ferries Act 1997*

Ferry Authority - Appointment of Part-time Member

The *Ferry Act 1997* (the Act) establishes the Ferry Authority to regulate ferry operations in Australia. Section 2 of the Act provides that the Authority shall consist of the Director and not more than five Members appointed by the Governor-General, being persons who, in the opinion of the Governor-General by their knowledge and experience can advance the operations of the Authority.

Section 3 of the Act provides that the maximum age for appointment as a Member is 65 years and that a person shall not be appointed as a Member if he or she has attained that age.

Subsection 6(2) of the Act provides that a Member may be appointed in a full-time or a part-time capacity.

The Minute proposes the appointment of Mr John Smith as a part-time Member of the Ferry Authority for a period of three years from 10 March 2017. The appointment of Mr Smith would fill a vacancy on the Authority created by the retirement of Mr Joe Bloggs.

Mr Smith has been a ferry skipper for 10 years, with a very good safety record. Prior to being a ferry skipper he was a boat builder. He is aged 42 years, is held in high regard within the industry, and is qualified for appointment in terms of section 2 of the Act because of his extensive involvement with the XXX Authority as XXX and XXX. His proposed appointment would not result in there being more than the prescribed number of Members allowed under section 2 of the Act.

Mr Smith's curriculum vitae is attached.

The Minute recommends that the appointment be made in the form proposed.

Authority: Section 2 of the *Ferries Act 1997*

FORMAT FOR A CURRICULUM VITAE

CURRICULUM VITAE

Name: Julia Ann Person AO

Address: 14 Any Street
COOGEE NSW 2034

Date of birth: 3 December 1958

Present position: Executive Director, xxxxxxxx

Educational and professional qualifications: Master of Economics, University of Sydney (1996)
Bachelor of Economics, Macquarie University (1990)

Relevant experience: 1999-2005: Director, ABC Corporation
1995-1998: Assistant Manager, DEF Bank
1990-1995: Media Adviser, Minister for Foreign Affairs
1983-1990: Policy Adviser, International Policy Division, Department of Defence

Current board memberships: Chair, XXX

Former board memberships: 1989-1990: Member, XXX

EEO categories: NESB
(if available)

EXAMPLE OF EXPLANATORY MEMORANDUM FOR REGULATIONS

EXPLANATORY MEMORANDUM

Minute No. _____ of 2017 - Minister for ABC

Subject - *Ferries (ACT) Act 2001*

Ferries (ACT) Amendment Regulations 2019

The *Ferries (ACT) Act 2001* (the Act) established the Canberra Ferry Service (CFS) as a Statutory Authority to provide ferry services in the National Capital.

Section 9 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 10 provides that regulations may provide for charges to be payable to the CFS for the provision of services.

The *Ferries (ACT) Regulations 2002* (the Principal Regulations) prescribe fees and charges for the operation of the ferry service.

The purpose of the proposed Regulations is to amend the Principal Regulations to update the rates of charge applicable to passengers carried by the CFS.

The amended charges would reflect the recent agreement reached between the Commonwealth and the peak industry body (the Ferry Council of Australia) on reform of the CFS.

(Insert the following paragraph if there are conditions)

Section 20 of the Act provides that any prescribed charges require the Governor-General to take into consideration any recommendation that has been made to the Minister by the Ferry Council of Australia. The Minister has received such a recommendation recommending returns of \$xxxx for 2019-20. The proposed charges are consistent with the Council's recommendations.

The proposed Regulations would specify that:

- each ferry service will carry no more than 24 passengers;
- individual fares are \$5; and
- animals can be transported free of charge.

Details of the proposed Regulations are set out in the Attachment.

(Insert the following paragraph if there are no conditions)

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulations would commence on 1 July 2019.

The Minute recommends that the Regulations be made in the form proposed.

(Insert the following box if there are conditions)

In accordance with section 20 of the *Ferries (ACT) Act 2001*, I am in receipt of a recommendation from the Ferry Council of Australia to prescribe the amount of money to be returned from operation of the Canberra Ferry Service for 2019-20.

I also confirm that the revised charges in the proposed Regulations are consistent with the Council's recommendations.

.....
Minister for ABC

Authority: Section 9 of the
Ferries (ACT) Act 2001

Details of the proposed *Ferries (ACT) Amendment Regulations 2019*

Section 1 - Name of Regulations

This section would provide that the title of the Regulations is the *Ferries (ACT) Amendment Regulations 2019*.

Section 2 - Commencement

This section would provide for the Regulations to commence on 1 July 2019.

Section 3 - Authority

This section would provide that the *Ferries (ACT) Amendment Regulations 2019* is made under the *Ferries (ACT) Act 2001*.

Section 4 - Schedule(s)

This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 - Amendments

Item [1] - subsection 4(2)

Subsection 4(2) of the Principal Regulations would provide that the maximum number of passengers allowed on a ferry service is 20. This item increases the maximum number of passengers to 24, reflecting the acquisition of higher capacity ferries in August 2008.

Item [2] - section 5

Existing section 5 sets out the rate of charge for using ferry services. This item would substitute section 5, incorporating two amendments:

- the family rate is decreased from \$15.00 to \$12.00; and
- the rate for non-passengers (in effect, animals - primarily guide dogs) is decreased from \$2.00 to \$0.00 (no charge).

Based on projected use of the ferry service, the reduced rates still ensure that the returns of \$xxxx for 2019-20, recommended by the Ferry Council of Australia, will be reached.

EXAMPLE OF EXPLANATORY MEMORANDUM FOR A COMMENCEMENT PROCLAMATION

EXPLANATORY MEMORANDUM

Minute No. 18 of 2019 - Minister for ABC

Subject - *Trade Act 2013*

Trade Act Commencement Proclamation 2019

Subsection 2(1) of the *Trade Act 2013* (the Act) provides that Schedules 1 and 2 to the Act commence on a day to be fixed by proclamation. However, if any of the provisions of Schedules 1 and 2 do not commence within six months of the date the Act receives the Royal Assent, then those provisions commence on the first day after the end of that six month period. The Act received the Royal Assent on 11 May 2019.

The purpose of the proposed Proclamation is to fix 1 October 2019 as the day on which Schedules 1 and 2 to the Act commence.

The Act corrects technical faults in the main trade legislation and consolidates the provisions of 22 other Acts dealing with trade and consumer affairs. All the provisions of the Act, other than Schedules 1 and 2, commenced on 1 June 2019.

Schedule 1 to the Act provides the framework for the technical amendments to be made whilst Schedule 2 provides for all 22 trade and consumer Acts to be repealed and consolidated into two Acts, namely the *XYZ Act 2019* and the *YZX Act 2019*. The proposed commencement date will allow time for industry to make appropriate changes to conform with the requirements of the Schedules. The proposed commencement date was reached after extensive consultation with industry and consumer associations.

The proposed Proclamation would be a notifiable instrument for the purposes of the *Legislation Act 2003*.

The Minute recommends that the Proclamation be made in the form proposed.

Authority: Subsection 2(1) of the
Trade Act 2009

EXAMPLE OF EXPLANATORY MEMORANDUM FOR TREATIES

EXPLANATORY MEMORANDUM

Minute No. _____ of 2019 - Minister for Foreign Affairs

Subject - *The Constitution*

Acceptance of the Accession of the Kingdom of Zed to the *Convention on International Cooperation*

Australia's treaty-making power is exercisable by the Governor-General by virtue of Chapter II of the *Constitution* which provides, among other things, that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General.

The Minute recommends that Australia communicate its acceptance of the accession of the Kingdom of Zed to the *Convention on International Cooperation* (the Convention). Australia's acceptance would be communicated by means of a diplomatic Note deposited with the Convenor of the International Conference for International Cooperation (the Conference), in Geneva.

The Convention was adopted at the Fifth General Session of the Conference in 1999. Australia acceded to the Convention on 11 May 2002.

The Convention deals with general issues of international cooperation, with particular attention to standards and protocols.

Article 2 of the Convention allows accession by States which are not members of the Conference. The Kingdom of Zed acceded to the Convention on 20 September 2008. In accordance with Article 2, the Convention will enter into force between Australia and the Kingdom of Zed 20 days after Australia notifies the Conference that Australia declares its acceptance of the accession.

No legislation is required to give effect to acceptance of the accession in Australia.

The Attorney-General and the Minister for Foreign Affairs have approved acceptance of the Kingdom of Zed's accession to the Convention and the Prime Minister has been informed.

The Minute recommends that approval be given in the form proposed.

Authority: Chapter II of the *Constitution*