

Executive Council Handbook

March 2018

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I INTRODUCTION

I.1 Purpose of the Handbook

The purpose of this Handbook is to assist departmental officers understand Executive Council processes and timeframes and to provide information for those involved in the preparation of documents for the Council.

All papers prepared for the Executive Council must be of a high standard. It is therefore important that the documents are accurate, reflect the Governor's legislative or constitutional powers and clearly set out the recommendations to be made. A checklist, templates and examples are provided to assist with this work.

I.2 What is Executive Council?

Letters Patent Constituting the Office of the Governor passed in 2005 constituted the Office of the Governor and revoked all other authorities. Clause V provides for the creation of the Executive Council to advise the Governor in the government of the State.

Under section 43 of the *Acts Interpretation Act 1931* the 'Governor' in Acts is taken to mean 'the Governor of this State, or the person for the time being administering the government of this State, acting with advice of the Executive Council'. Ministers are appointed as Executive Councillors immediately after being sworn in as Ministers.

While the Governor presides over meetings of the Executive Council, s/he is not a member of the Council. The powers exercised by the Governor on the advice of the Executive Council are referred to those of the 'Governor-in-Council'.

Various Acts of Parliament specify that the Governor is vested with authority to take particular actions or issue documents having particular legal effects, for example regulations, proclamations, orders, notices and instruments of appointment. A reference to the 'Governor' in any Act or regulation is taken to mean the 'Governor-in-Council'. In general this reference determines whether matters are referred to the Executive Council.

The Governor-in-Council gives legal force to all administrative acts by the Governor which cannot be, by law, authorised by individual Ministers, public servants or other government employees and officials.

I.3 Executive Council Secretariat

The Executive Council Secretariat in the Cabinet and Executive Council Office, Department of Premier and Cabinet provides executive support to the Council. The Council Clerk (or an Assistant Clerk) manages the work of the Secretariat and attends all Council meetings.

The Council Secretariat's responsibilities include:

- providing advice on Executive Council practices and requirements, in particular on the presentation of documents for the Council;
- liaising with the Official Secretary to the Governor, Ministerial Offices and departments on Council arrangements;
- providing secretariat support for Council meetings;
- ensuring the requirements of the Governor and Executive Councillors are met;

- communicating the approval of matters by the Governor-in-Council;
- maintaining the Council's records; and
- custodian of the State Seal.

To assist the Council Secretariat in its functions Executive Council documents should be prepared according to this Handbook. The Secretariat performs an important clearance role on these papers and is available to advise and assist with any procedural or presentation questions departments may have.

It is good practice to clear drafting of Executive Council documents with the Council Secretariat before they are signed by Ministers.

Enquiries about Executive Council processes and documents should be directed to the Council Secretariat:

by telephone: 6270 5669

by email: scott.kerr@dpac.tas.gov.au

by mail: Executive Council Secretariat
Department of Premier and Cabinet
GPO Box 123
HOBART TAS 7001

in person: Executive Building
Level 4
15 Murray Street
Hobart, Tasmania

1.4 Matters considered by Executive Council

1.4.1 Matters which have gone to Cabinet

Usually Executive Council matters require approval of both Cabinet and Executive Council and the matter must first be considered by Cabinet. Following Cabinet approval it is then submitted to the Council.

Please refer to the Cabinet Handbook to see which matters go to Cabinet¹.

1.4.2 Matters which have not gone to Cabinet – Explanatory Note required

In exercising their statutory powers Ministers may approve matters that have not previously been considered by Cabinet. Some of these matters may be submitted to the Executive Council, for example subordinate legislation. It is important that Cabinet members are aware of the purpose of all items which are being submitted to the Council.

Appropriate Cabinet consideration must occur before documents are forwarded to the Council Secretariat for inclusion on the Executive Council agenda. If a matter has not been to Cabinet previously, Ministers will need to submit a short Explanatory Note to Cabinet. An Explanatory Note is not required when Cabinet has already considered or agreed to a matter as a result of a Cabinet Submission.

¹ Department of Premier and Cabinet (Cabinet Office)'s Cabinet Handbook
(www.dpac.tas.gov.au/divisions/executive/cabinet_office/handbook)

Further information about the Explanatory Note is provided in the section 9.1 of the Cabinet Handbook. Should you have any queries in relation to whether a matter should be considered by Cabinet please contact the Cabinet and Executive Council Office in the first instance.

1.5 No Retrospective Approvals

The Executive Council does not have the authority to approve matters retrospectively. Executive Council Minutes seeking to approve matters retrospectively will not be accepted. When the Governor-in-Council gives effect to the recommendations contained in Executive Council documents, s/he does so on and from the date on which s/he signs the relevant documents or such future date as may be specified in the documents.

1.6 Confidentiality, Security and Right to Information

Executive Council documents are legal documents and should be treated as confidential and handled in the same way as Cabinet documents. Information should not be released to any party other than the Minister or department responsible at least until they have been approved at a Council meeting. Some of the documents are regarded as confidential for an indeterminate period. The terms of announcement of the Governor-in-Council's decision are a matter for the Minister to settle after Council meetings.

The Governor may, however, be prepared to consider information being released prior to the matter being approved by the Governor-in-Council where it is in the interest of the government that it should take place. In these circumstances requests for approval to make announcements should be made directly with the Council Clerk who will seek the necessary approval of the Governor through the Official Secretary. In the event of approval being granted by the Governor the announcement **must** include the following words:

"It is my intention to recommend to the Governor that ..."

Departments may request access to Executive Council records. Such requests are generally in writing and addressed to the Council Clerk. If the request is approved, the practice is to authorise a nominated departmental officer to view and copy certain documents from the Council's series retained by the Council Secretariat and/ or Archives.

Executive Council documents are generally exempt from release under Section 25 of the *Right to Information Act 2009*. Whenever requests for access are made, the Right to Information Officer in the Department of Premier and Cabinet will manage the request. Queries regarding the release of Executive Council documents should, in the first instance, be referred to the Council Secretariat.

1.7 Advice from the Solicitor-General

If there is any doubt as to the authority for the Governor-in-Council to take an action, then the department should seek advice from the Solicitor-General and/ or the Council Secretariat. The Explanatory Memorandum that accompanies an Executive Council Minute clarifies the source of the Governor's authority to act.

2 EXECUTIVE COUNCIL MEETINGS AND TIMEFRAMES FOR LODGING DOCUMENTS

2.1 Meetings

A quorum for an Executive Council meeting consists of the Governor and two Executive Councillors. However, the majority of scheduled meetings take place with all the Councillors present as the meetings generally occur just prior to Cabinet meetings. The Council Clerk attends the Council meetings.

Executive Council meetings are not normally held during the caretaker period leading up to a State election. However, special sittings of the Executive Council may be held to consider limited business, where the business considered does not contravene the caretaker conventions.

The Council Secretariat provides departments with advance notice of scheduled meetings including the deadlines for submitting documents. A copy of such a notice is reproduced below.

There are two types of meetings:

- Scheduled Meetings; and
- Special Executive Meetings.

Executive Council Secretariat
Executive Building, 15 Murray Street, HOBART TAS 7000 Australia
GPO Box 123, HOBART TAS 7001 Australia
Ph: (03) 6270 5669
Web: www.dpactas.gov.au



2.1.1 Scheduled Meetings

The Executive Council usually meets fortnightly on a Monday or Tuesday in Hobart immediately prior to a Cabinet meeting. The meetings are held in the Premier's Office, Level 11, Executive Building, 15 Murray Street, Hobart. Under no circumstances will documents be accepted during the course of a Council meeting for submission at that meeting.

Heads of Office - Ministerial Offices
Heads of Department

EXECUTIVE COUNCIL MEETING NOTICE

DATE: Monday 30 October 2017
TIME: 10:00 am
VENUE: Cabinet Room, Level 11, Executive Building, 15 Murray St. Hobart
(to precede Cabinet meeting commencing at 10:00 am)

NOTE: The Governor, Her Excellency Professor the Honourable Kate Warner AC, will be presiding.

Documents for submission to the above meeting must be received in the Secretariat before close of business on **Wednesday 25 October 2017**. This deadline must be met in order to process documents before examination by the Governor prior to the meeting.

Advance notice is given that the following Executive Council meetings for 2017 are scheduled in Hobart on:-

Monday 20 November 2017	Note: At this meeting the Lieutenant-Governor will be presiding	Deadline 15 November 2017
Monday 4 December 2017		Deadline 29 November 2017
Tuesday 19 December 2017		Deadline 13 December 2017

Departmental Managers and Ministerial Advisers are reminded to make sufficient advance arrangements to ensure that Executive Council documents for submission to a particular Executive Council meeting are signed by the relevant Minister and forwarded to this Secretariat before the specified deadline.

Please distribute this notice to all relevant work groups.

Scott Kerr
Secretary/Clerk
EXECUTIVE COUNCIL

11 October 2017

Phone (03) 6270 5669

2.1.2 Special Executive Meetings

From time to time, unanticipated matters may arise requiring action before the next scheduled meeting. An 'extraordinary' or 'Special Executive' meeting can be convened but only when there is a compelling reason.

Enquiries about such meetings should be directed, in the first instance, to the Council Secretariat. Special meetings will be a matter of arrangement between the Minister's Office and the Council

Secretariat. The timing of a special meeting is, however, at the Governor's discretion and is generally held at Government House. **Under no circumstances should Ministerial Offices or departments contact Government House directly.**

The Governor will not summons a meeting of a Special Executive Council meeting unless she has received advice from the Premier approving such a meeting and there is sufficient time for the

Governor to be briefed on the matter(s). The responsible Minister is to be available to attend the meeting plus one other Minister.

The same documents are required as for a normal scheduled meeting. Where an item needs to be submitted for urgent consideration at a Special Executive meeting, the Executive Council documents must be accompanied by a letter addressed to the Council Clerk, Executive Council, requesting the urgent consideration of the documents and explaining the compelling reasons underlying the request. Such requests should be made by the responsible Minister.

The Council Secretariat is assisted if an unsigned copy of the urgent documents is provided as soon as it is drafted, together with the letter requesting urgent consideration. The original documents signed by the Minister and should be hand delivered to the Secretariat as soon as it becomes available.

2.2 Briefing the Governor

Prior to either the scheduled or Special Executive meeting the Council Clerk briefs the Governor on the items to be considered at the next meeting. For a scheduled meeting this briefing generally occurs on the Friday prior to the Monday Council meeting.

During the briefing the Governor may raise queries. These queries may need to be addressed by the responsible Minister's Office or department. On some occasions, depending on the advice received, this may require the Minister to formally withdraw the Minute, and resubmit it when the additional advice has been provided.

2.3 Agenda and Order of Business

An agenda for each meeting is prepared by the Council Secretariat. The Secretariat is bound to list on the agenda any items that are signed by a Minister and submitted to the Secretariat. It is important that all members of Cabinet are aware of the purpose of items which are to be submitted to the Executive Council (refer to Section 1.4 for further information).

The agenda and supporting documents for a scheduled meeting are delivered to Ministers at the same time as the documents for the related Cabinet meeting. Generally this delivery is done on the Thursday afternoon prior to the Council/Cabinet meeting on the following Monday.

At the meeting the Governor will call each item listed on agenda and invite comments on the related documents. Usually there are no comments, and the item is agreed.

The Governor signs and initials the Executive Council documents after the meeting.

2.4 Withdrawal of Minutes from Executive Council consideration

Occasionally situations arise where a Minister might wish to review documents that s/he has signed and forwarded to the Council Secretariat. If the matter has not been listed and circulated the Secretariat will return the documents to the Minister's Office.

If, however, the signed documents have been listed on the agenda and circulated it will be necessary for the Minister to request that the matter be withdrawn either in writing before the meeting or at the meeting. The Council Secretariat will return the documents to the Minister's Office confirming that they have been withdrawn.

2.5 After Executive Council meetings

After the meeting the Council Secretariat will arrange for the original Minutes and supporting documents to be returned to the responsible Minister or, in some cases, the department.

However, there is one exception, namely Statutory Rules. Statutory Rules are forwarded to the Chief Parliamentary Counsel to arrange publication in *The Gazette* (see Section 4.1 for further information). A note from the Council Secretariat is forwarded via the responsible Minister's Office to the department advising that the Statutory Rules were approved and that the documents have been forwarded to Office of Parliamentary Counsel (OPC) for gazettal and further action.

2.6 Lodging submissions and the associated timeframes

To enable a matter to be considered at a regular scheduled Executive Council meeting certain timeframes must be adhered to. An overview of this process is provided in the flow chart below.

As a scheduled Executive Council meeting occurs immediately before a regular Cabinet meeting, it is important that any Explanatory Note to Cabinet (if one is required) is considered by Cabinet at least at the Cabinet meeting held the week before the scheduled Council meeting.

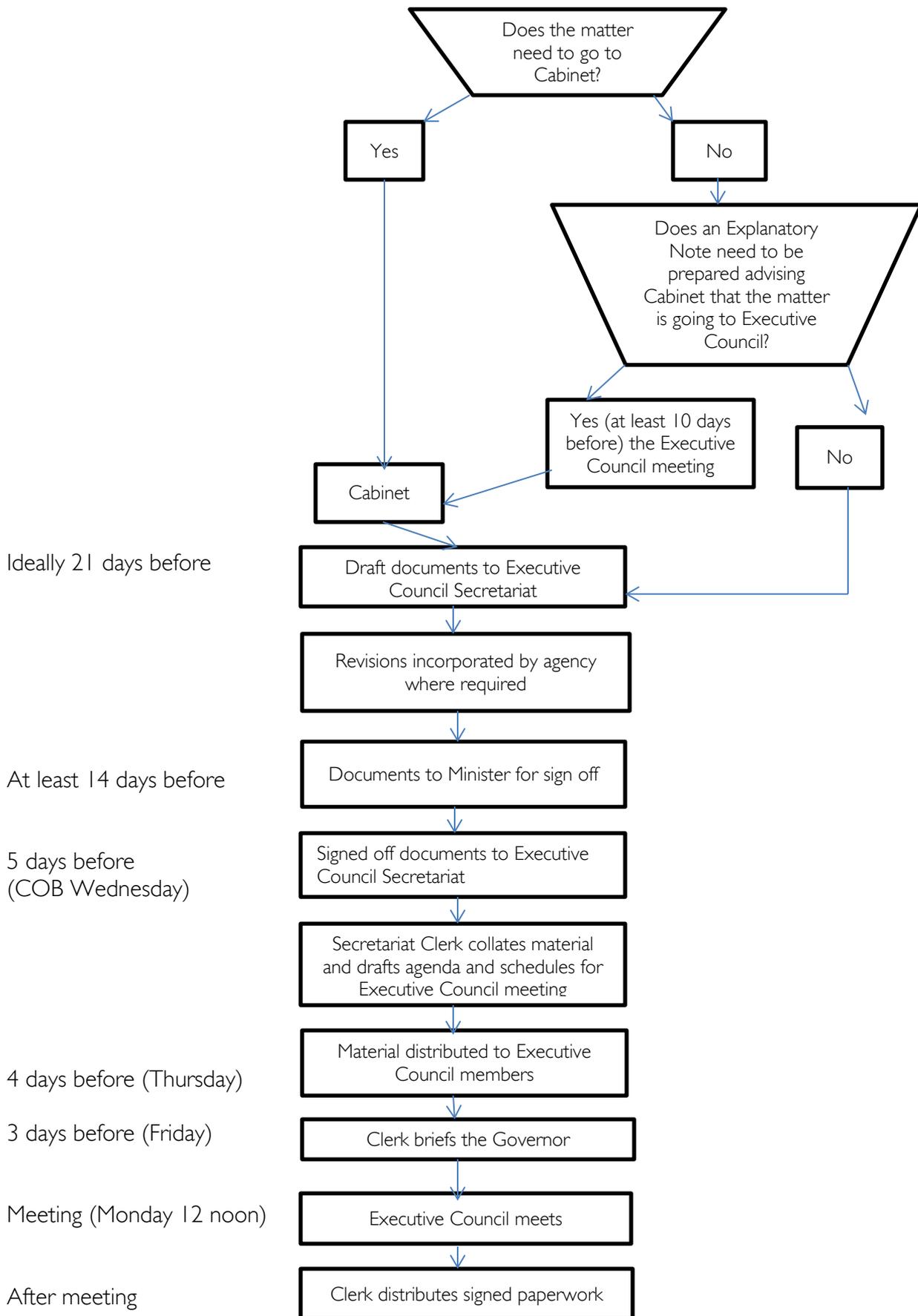
The Explanatory Note must be submitted to the Cabinet Office by 12 noon on the Friday one week prior to a scheduled Executive Council meeting. For example, if a Council meeting is scheduled for Monday 9 July that will mean that the Explanatory Note to Cabinet must be considered by the Cabinet Meeting of Monday 2 July and would therefore need to be submitted to the Cabinet Office by Friday 29 June.

Executive Council documents must be submitted to the Council Secretariat at least two clear working days before each Council meeting (the close of business on a Wednesday prior to a meeting held on the following Monday) which, using the example above, would be close of business 4 July for a 9 July meeting. Documents received by the Council Secretariat after close of business on the Wednesday will, in general, be deferred to the next meeting.

As noted in Section 2.1.2, urgent items will be listed for a Special Executive Council meeting if approved by the Premier and that there is sufficient time for the Council Clerk to brief the Governor (at least 24 hours prior to the Special Executive meeting).

It is important that departments and Ministerial Offices make sufficient advance arrangements to ensure that Executive Council documents for submission to a particular Council meeting are signed by the relevant Minister and forwarded to the Council Secretariat before the specified deadline. Departments should not hold on to documents in anticipation of a meeting being held on a regular day and time. The documents should be forwarded to the Council Secretariat as soon as they have been signed by the Minister concerned. Wherever possible, final documents should be hand delivered to the Council Secretariat.

Timeframe relative to the Executive Council meeting



Flow Chart: Executive Council processes and timeframes

3 PREPARING EXECUTIVE COUNCIL DOCUMENTS

It is important to determine whether a matter should be submitted to the Executive Council. Documents have been prepared and forwarded to the Council Secretariat on the mistaken assumption that the matter needs to be considered by the Governor-in-Council. It may be that the matter submitted is one that can be dealt with by the Minister.

It is therefore important that departmental officers carefully read the relevant sections of the Act. The documents need to be submitted to the Executive Council only where action is required by the Governor. If there is any doubt, then the officer should seek the advice of the Solicitor-General and/or the Council Secretariat.

In the event it is a matter for Executive Council then the documents follows a standard pattern:

- an Explanatory Note for Cabinet (if required);
- an Executive Council Minute submitting the proposed course of action for the Governor-in-Council;
- an Explanatory Memorandum describing the legal authority for action to be taken and providing a description of that action and the reason for taking it; and
- in many cases, a formal document (for example regulations, proclamations and instruments of appointment) to be executed by the Governor-in-Council.

The documents prepared for Executive Council's consideration is generally referred to as an 'Executive Council Minute', although technically the Minute is only part of the documentation. Each Minute constitutes a recommendation for approval of the Governor-in-Council.

While the format of Minutes, Explanatory Memoranda and supporting documents should follow a standard pattern, these documents will necessarily vary according to the specific matter being submitted for consideration. There is a range of material which goes to Executive Council which includes regulations, proclamations, orders and notices. These particular types of documents are described in more detail in Section 4.

Each package has a departmental number allocated to it by the relevant department. Further information about the numbering is provided in Section 6.

To ensure Executive Council documents reach the standard required by the Council, the Council Secretariat is available for consultation and clearance on the draft documents prior to a department obtaining its Minister's approval/ signature. This is best achieved by the department contacting the Council Secretariat and forwarding the draft documents by email (scott.kerr@dpac.tas.gov.au) as well as the name and telephone number of the contact officer. In most cases, suggested amendments to the draft documents can be settled quickly in discussion with the contact officer and/or by return email.

Clearance of the drafts by the Council Secretariat does not absolve departments from responsibility for the accuracy and completeness of the final documents, both in terms of content and presentation. When finalising the documents departments should undertake a thorough and final check of the draft documents to avoid common mistakes such as spelling errors, formatting errors, incorrect cross referencing and inconsistencies.

Final documents must have the highest standard of presentation; must not bear any extraneous markings, be hole punched or torn; and must be loose-leaved single sided and are generally not stapled or bound (exceptions include subordinate legislation such as the documents produced by

OPC). By prior arrangement, the Council Secretariat may accept scanned versions of final documents, provided the originals are made available before the meeting.

A set of examples have been prepared to show the correct style and layout of Executive Council documents. These examples are provided on the Cabinet Office's website at www.dpac.tas.gov.au/divisions/executive/cabinet_office/handbook/examples (example 9) as well as the Executive Council Secretariat's website at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

A checklist has also been prepared to assist departments in compiling the necessary documents. This checklist is provided at Section 5. In summary the documents could include:

- an Explanatory Note for Cabinet (if required)
 - o an A4 copy which has been signed by the Minister;
- the Executive Council Minute:
 - o an A3 copy which has been signed by the Minister;
 - o an A4 copy (unsigned);
- the Executive Council Memorandum:
 - o an A4 copy which has been initialled by the Minister; and
- supporting documents (for example regulations, proclamations, orders and instruments of appointments).

3.1 Executive Council Explanatory Note for Cabinet

An Executive Council Explanatory Note is used to advise Cabinet of the purpose and substance of matters which require Executive Council approval but have not already been considered by Cabinet.

NOTE: Explanatory Notes are Cabinet documents, not Executive Council documents.

3.1.1 Form

The standard Executive Council Explanatory Note should be used. A scanned image of the Explanatory Note is provided at Appendix 7.2. An electronic word version can be downloaded from example 9 of the Cabinet Handbook which is available on the Cabinet Office's website at www.dpac.tas.gov.au/divisions/executive/cabinet_office/handbook/examples.

3.1.2 What text appears in each document?

The Explanatory Note should indicate the purpose and the substance of the matter being considered by the Executive Council. The content of an Explanatory Note is at the Minister's discretion.

3.1.3 Copies and signatures

The original Explanatory Note is on A4 paper. The Minister must sign over his/her signature block. No copies are required.

3.2 Executive Council Minute

This is the 'executive' document which authorises the particular action. Each Minute and enclosure signed by the Minister responsible constitutes a recommendation for approval by the Governor-in-Council for something that must be done, made or approved.

3.2.1 Form

The standard Executive Council Minute should be used. A scanned image of the Minute is provided at Appendix 7.3. An electronic word version can be downloaded from the Council Secretariat's website at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat.

When drafting a Minute consideration should be given to the following:

- Minutes must be concise but specific in their content so that it is clear as to what is actually required. In particular the subject should be a concise and accurate summary of the matter for consideration and is reflected in the accompanying Explanatory Memorandum.
- Minutes must specify the legislative authority under which the approval is being sought (that is the relevant Act and section).
- The wording must reflect the wording (if not the actual wording) of the relevant Act. Exceptions are for subordinate legislation where the precise wording for the Minute is provided by OPC (refer to Section 4.1).
- Minutes must 'stand on their own' wherever possible, not simply refer to supporting attachments (that is the recommendation should be fully outlined in the body of the Minute), however they may refer to an accompanying instrument of appointment, if relevant.
- Minutes must include all relevant details (for example dates, names, terms of appointment).

3.2.2 What text appears in each document?

If OPC has prepared associated documents (for example regulations, proclamations and orders) the words provided by OPC for the Executive Council documents should be used verbatim.

Every endeavour should be made to restrict the content to around nine typed lines. The Minute should not include acronyms and other abbreviations.

3.2.3 Copies and signatures

The original Minute is an A4 document printed on A3 paper, which is folded in half to an A4 size to enable other documents to be enclosed (like a manilla folder). The original Minute must be signed by the responsible Minister above his/her portfolio block.

An A4 copy of the Minute is also included. This copy does not need to be signed by the Minister.

3.3 **Explanatory Memorandum**

Each Minute must be accompanied by an Explanatory Memorandum. The Memorandum is supportive of the Minute and is a document with its own identity and should be able to stand alone.

The Memorandum ensures Council members are fully briefed and are able to give due consideration to the proposal. It explains the reason and purpose of the action requested, the legal authority for that action and clearly states what is required of the Governor and what he is being asked to do. The Memorandum does not usually refer to the policy reasons for the actions as the Governor relies on the advice of the Minister.

3.3.1 Form

The standard Explanatory Memorandum should be used. A scanned image of the Memorandum is provided at Appendix 7.4. An electronic word version can be downloaded from the Council Secretariat's website at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat.

The Memorandum explains the need for, and effect of, the action being recommended to the Governor. It should include the following matters:

- a clear statement of precisely what it is the Governor is being asked to do;
- a reference and quotation to the source of the power in the legislation that enables the Governor to take action;
- particulars of any conditions in the legislation that need to be satisfied before that power can be exercised; and

- explicit assertions by the Minister stating how those conditions have been satisfied (this may require accompanying documentation, for example a recommendation of another Minister or a Board).

If the prerogative powers of the Crown are being relied upon as the appropriate authority, then that should be stated. If there is any doubt as to the authority for the purposes of the Memorandum, then the department should first seek advice from the Solicitor-General and/ or the Council Secretariat.

It is important that the Governor is aware if legal advice has been obtained. If written advice has been sought then a copy of the relevant correspondence, including the Solicitor-General's reply, should be included in the Governor's information. This should also be referred to in the Explanatory Memorandum.

Accuracy and currency in references, such as to legislation or to the names of departments is also important to ensure that the validity of Executive Council documents cannot be called into question. However, the Memorandum should be as free from jargon as possible, bearing in mind that the Governor and most Executive Councillors are not likely to have the intimate background or subject knowledge available to the responsible Minister. A decision to approve the recommendations in a Minute should be able to be made solely on the documentary evidence provided.

As a general rule an Explanatory Memorandum should not be more than two pages in length. If a more detailed explanation is necessary (for example for complex regulations) that information should be included as an attachment. Where the prose exceeds more than one page, the second page and subsequent pages are to be on the same headed paper as the first page – including the subject reference – and all pages to be numbered.

3.3.2 What text appears in each document?

There is no simple set of prose that can be universally used. The content of each Memorandum must be tailored to the powers and pre-conditions specified in the relevant legislation.

The words used in the Executive Minute are replicated in the first part of the Explanatory Memorandum with the addition of "I recommend, " at the beginning of the text in the Memorandum.

The next paragraph(s) generally deals with citing the authority for the action requested of the Governor, for example "Section 132 provides that the Governor to make regulations for the purposes of the Act". In some instances where the statutory text for the authority is long or involved, it is possible to extract the relevant part or, less preferred, paraphrase the nature of the authority.

3.3.3 Copies and signatures

The original Memorandum is an A4 size. The front page and any subsequent page must be initialled by the responsible Minister in the designated space. No copies are required.

3.4 **Supporting documents**

Many matters submitted to the Executive Council will require a formal enclosure such as regulations, proclamations, orders and Instruments of Appointment. These enclosures are part of the package of documents prepared for Executive Council.

Further information about such supporting documents which are to be executed in the name of the Governor is provided in Section 4.

3.5 Signing when the responsible Minister is not available

Executive Council Minutes and accompanying documents must be signed by the responsible Minister. However, that Minister may not be available. Section 25 of the *Acts Interpretation Act 1931* provides the power for a Minister to act for and on behalf of another and, as such, there is no formal appointment documentation. This section does not, however, apply to the Ministerial portfolio of Attorney-General because of the special provision in section 8C of the *Constitution Act 1934* for the appointment by the Governor of another Minister as Acting Attorney-General.

In relation to the ministerial portfolio of the Premier it is the longstanding practice for another Minister (usually the Deputy Premier) to be appointed as Acting Premier (a requirement under Clause VII of the *Letters Patent constituting the Office of Governor*) to enable Executive Council meetings to be convened and to clarify who is the 'acting chief minister' for a range of constitutional purposes to act in the ministerial portfolio of Premier in the absence of the incumbent.

The signature blocks used in the case of an acting Minister are detailed in Appendix 7.1.

3.6 Signing when the Governor is unable to preside at an Executive Council meeting

In the event the Governor is absent from Office and is therefore unable to preside at an Executive Council meeting then arrangements are made for the Lieutenant-Governor to assume administration of the government of the State so that s/he can preside. In the rare case that the Lieutenant-Governor is also unavailable an Administrator will assume administration.

Details of the appropriate wording to use on official documents in such cases are provided in Appendix 7.1.

3.7 Alterations to documents

Where any alteration to an Executive Council document is required and it is not possible to have the documents 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 who has signed the Council documents. Alterations should not be made in any other way and tape or correction fluid should not be used.

4 SUPPORTING DOCUMENTS

There is a range of documents which go to the Executive Council for Governor-in-Council approval and signature and includes:

- proclamations for commencement of Acts or provisions of Acts;
- regulations so that once an Act has come into effect there is the necessary subordinate legislation to support implementation;
- instruments of appointment; and
- miscellaneous matters that various Acts require the Governor (rather than individual Ministers or senior officials) to approve.

Broadly this material can be categorised as (i) statutory rules and subordinate legislation; (ii) statutory appointments and resignations; and (iii) other statutory items such as messages to the Public Works Committee.

Further information on preparing documents in respect to categories (i) and (ii) is outlined below. Examples are also provided on the Executive Council Secretariat's website at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook. Further information about category (iii) documents can be obtained by contacting the Council Secretariat.

4.1 Statutory Rules and Subordinate Legislation

Statutory rules are legislative instruments made under the authority of Acts to activate, expand on, support or give more detailed effect to their provisions. Statutory rules can play a useful part in a legislative scheme by:

- prescribing detail that would clutter the primary legislation;
- giving the scheme a measure of flexibility and responsiveness (particularly for matters such as fees, forms and minor administrative procedures); and
- relieving the legislature of the need to be directly involved with each and every minor adjustment in the scheme.

The essential feature of statutory rules is that nearly all of them are made under, and derive their entire authority from, delegated Parliamentary power. This is why statutory rules are often generally referred to as subordinate legislation. However, care should be taken with these terms because not every item of subordinate legislation is a statutory rule and, in some contexts, the term has a very precise technical meaning. Further information is provided in OPC's Manual for the Preparation of Statutory Rules.²

Under the *Rules Publication Act 1953* statutory rules include regulations, proclamations, orders and notices. Whether a statutory instrument is classified as subordinate legislation depends on the provisions of the empowering Act. For example, an empowering Act may provide for a statutory instrument to be made by an entity (for example, a board) but require the instrument to be approved by the Governor-in-Council. Under the *Subordinate Legislation Act 1992* the instrument is subordinate legislation.

OPC drafts all proposed subordinate legislation that are statutory rules on instructions from the responsible department. OPC will also advise on the procedures involved in submitting the statutory rules to the Executive Council and the words to be used in the Council documents.

² Department of Premier and Cabinet (Office of Parliamentary Counsel)'s Manual for the Preparation of Statutory Rules (November 2010) (www.dpac.tas.gov.au/divisions/opc)

Where the Minute is proposing that subordinate legislation be made, the draft words and format are provided by OPC. That draft **must** be reproduced **exactly** on to the Minute Paper - including prose, format, punctuation, italics, numerals, etc. Any perceived errors should not be corrected. If there are concerns with the draft provided by OPC then clarification should be sought from the drafter and, if necessary, the drafter will provide a fresh draft.

Furthermore, the Department of Treasury and Finance's Economic Review Unit has issued a Handbook³ to be used by departments which are involved in the preparation of subordinate legislation. The requirements set out in the Handbook must be strictly adhered to. The certificates provided by the Unit must be part of the Executive Council documents and reference must be made to the certificates and OPC's advice in the Explanatory Memorandum.

When preparing an Explanatory Memorandum for a statutory rule reference should be made to any statutory conditions for exercise of the power having been satisfied, for example in relation to statutory rules/ documents under the Subordinate Legislation Act.

There is a range of statutory rules/ subordinate legislation which needs to be considered by the Governor-in-Council. It includes regulations, proclamations, orders, notices and management plans. Further information about such documents is outlined below.

4.1.1 Regulations

Regulations are the most common form of subordinate legislation, that is binding rules that are made by another body, usually the Governor-in-Council with the authority of Parliament. They provide a lot of the detail within the statutory framework created by Acts.

Regulations must:

- be within the limits of power specified in the principal Act to make regulations;
- comply with any preconditions set out in the principal Act, such as consultation with specified office-holders or bodies;
- be consistent with the purpose and intent of the principal Act; and
- not confer discretionary power, unless the principal Act allows this sort of delegation.

The Governor 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 the carrying out or giving effect to the Act. In some cases the legislation also specifies the particular matters to be dealt with in the regulations.

Regulations are legislative instruments and are prepared by OPC on instruction from the department whose Minister administers the primary legislation. Regulations which deal with matters not within the regulation-making power of the principal legislation will be invalid. The instructing department should take advice from OPC on whether a proposal is or is not within power.

Papers submitted to Executive Council regarding regulations should consist of:

- Executive Council Minute (signed by the Minister);
- Executive Council Explanatory Memorandum (initialled by the Minister);

³ Department of Treasury and Finance (Economic Reform Unit)'s Legislation Review Program: Procedures and Guidelines Manual (September 2011) (www.treasury.tas.gov.au > Home > Economic Policy Branch Homepage)

- Regulations (3 copies – one signed (but not dated) by the Minister on the page with their signature block and two unsigned copies);
- Certificate of Compliance (signed by the Minister and is commonly referred to as the Minister's Certificate), except when the Department of Treasury and Finance issues a section 6(a) certificate (see below);
- Original certificate issued by the Secretary, Department of Treasury and Finance in relation to section 5(1A) or 6(a) of the Subordinate Legislation Act; and
- Original advice given by the Chief Parliamentary Counsel under section 7(2) of the Subordinate Legislation Act.

An example of an Executive Council package involving a regulation is provided at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

OPC will provide the words for the Executive Council Minute. These words are then replicated in the Explanatory Memorandum with the addition of "I recommend, " at the beginning of the text in the Memorandum.

The purpose of the Memorandum is to explain the need for, and effect of, the action being recommended to the Governor. In many instances a simple and concise description of the intended effect of the proposed regulations and the problems they are designed to overcome will be sufficient if the provisions themselves are self-explanatory.

The Memorandum should state whether or not the principal Act specifies any conditions that need to be met before the Governor may exercise the power to make the proposed regulation. If there are conditions to be met, they must be detailed and the responsible Minister must also provide a signed certificate (Certificate of Compliance/ Minister's Certificate) to the effect that those conditions have been met.

4.1.2 Proclamations

A proclamation is an official public notice of something by a person in authority. An Executive Council Minute may submit to the Governor that he issue a proclamation under a statutory provision, for example to fix the date of commencement of provisions of an Act.

Papers submitted to the Executive Council regarding proclamations should consist of:

- the Minute;
- the Explanatory Memorandum;
- a copy of the advice from OPC (where applicable); and
- three copies of the Proclamation – one of which has been signed by the relevant Minister on the page with their portfolio block.

An example of an Executive Council package involving a proclamation is provided at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

OPC will provide the words for the Executive Council Minute. These words are then replicated in the Explanatory Memorandum with the addition of "I recommend, " at the beginning of the text in the Memorandum.

The Explanatory Memorandum for a proposed proclamation must explain the purpose and effect of the proclamation. There are different types of proclamations and include:

- a whole Act is coming into operation;
- parts of an Act are to come into operation;

- certain parts of an Act are to be suspended;
- alteration of council or park boundaries; and
- varying controls on the use of land.

4.1.3 Orders

Papers submitted to Executive Council regarding orders should consist of:

- Executive Council Minute (signed by the Minister);
- Executive Council Explanatory Memorandum (initialled by the Minister);
- a copy of the advice from OPC (if drafted by OPC); and
- three copies of the statutory instrument – one of which has been signed by the relevant Minister on the page with their portfolio block.

An example of an Executive Council package involving an order is provided at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

OPC will provide the words for the Executive Council Minute.

4.1.4 Notices

Some official notices must be issued by the Governor-in-Council. The notices are generally drafted by OPC.

OPC will provide the words for the Executive Council Minute. These words are then replicated in the Explanatory Memorandum with the addition of "I recommend, " at the beginning of the text in the Memorandum. The documents submitted must include reference to the precise provisions of the Act or power pursuant to which the notice is issued; a brief summary of the purpose of the notice; and any statutory preconditions that need to be met have been met.

Papers submitted to Executive Council regarding notices should consist of:

- Executive Council Minute (signed by the Minister);
- Executive Council Explanatory Memorandum (initialled by the Minister);
- a copy of the advice from OPC; and
- three copies of the Notice – one of which has been signed by the relevant Minister on the page with their portfolio block; and
- any other supporting material (for example, a copy of Title Searches for Forestry Notices).

An example of an Executive Council package involving a notice is provided at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

4.1.5 Management Plans

Due to the infrequency and often the unique nature of statutory management plans that go to the Executive Council, please contact the Council Secretariat during the finalisation of the documents.

4.2 **Appointments and resignations**

4.2.1 Appointments and acting appointments

(i) *Appointments*

The enabling legislation for statutory authorities often requires the appointment to the authority to be made by the Governor with the advice from the Executive Council. Where a number of

appointments are being made at the same time for the same body then the one Executive Council Minute should be used.

When such appointments need to be endorsed by Cabinet, this endorsement must occur prior to a recommendation being made to the Governor. Furthermore, the appointment should be dealt with by the Council before the expiration of the previous appointment. In general, an appointment will take effect on the date specified on the Instrument. This may be on the date of approval (that is the date of the Executive Council meeting) or a prospective date.

Papers submitted to the Executive Council regarding appointments should consist of:

- the Minute;
- the Explanatory Memorandum; and
- Instrument of Appointment (if applicable).

An example of an Executive Council package involving an appointment is provided at www.dpac.tas.gov.au/divisions/executive/executive_council_secretariat/handbook.

The Explanatory Memorandum for a proposed appointment(s) should:

- identifying the name, position title and commencement date;
- 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;
- state whether or not the statutory provision under which the proposed appointment is to be made sets out specific criteria to be met by the appointee and, where it does, information provided confirming that the proposed appointee meets those criteria;
- indicate whether there are any statutory time or other limitations; and
- indicate if the proposed appointment is a re-appointment and when the person's term of office expires (Note: reference to re-appointments only appear in the Memorandum and not in the Minute).

There are different types of appointments that can be made by the Governor. Generally the same words in the Executive Memorandum are used as those that appear in the Executive Council Minute with the words "I recommend, " added at the beginning of the Memorandum.

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

- if the legislation provides that an appointment is to be made for a term determined by the Governor, the term must be specified in the Minute, the Explanatory Memorandum and the Instrument of Appointment;
- if the legislation specifies a qualification or condition precedent to the appointment, the Explanatory Memorandum must include an assurance that the requirement has been satisfied;
- where the legislation provides for the Governor to determine the terms and conditions of the appointment they must be mentioned in the Minute, set out in the Instrument of Appointment (or a separate Schedule to the Instrument of Appointment) and explained in the Explanatory Memorandum;
- the legislation may specifically refer to the need for an appointment to be made 'by an instrument in writing'; and
- if the legislation provides that acting appointments may be made by the Governor during any period(s) when the office is vacant or the office-holder is absent or not available, the Minister may recommend to the Executive Council that standing acting arrangements be made by the Governor in relation to the office to come into effect on the occurrence of the specified

circumstances (for example the appointment of person B to act when person A (the office-holder) is absent).

Where an Instrument of Appointment is submitted it must also be signed by the responsible Minister.

Where supporting documentation is required, such as in the case of a Government Business Enterprise (GBE) appointment, where a joint recommendation must be signed by both portfolio Ministers, that documentation must be provided.

4.2.2 Resignations and terminations

Departments should ensure that resignations and terminations are effected in accordance with any special terms and conditions of employment applicable, bearing in mind that such terms and conditions may often be found in documents such as employment contracts rather than in legislation.

Where legislation is silent on how a resignation may be tendered it is desirable for an office-holder appointed by the Governor to tender his or her resignation in writing to the Governor for acknowledgement. Section 21(2) of the Acts Interpretation Act provides that an office-holder may resign from an office in writing addressed to the person who appointed him/her. Resignations to the Governor go to Executive Council. Further information can be obtained by contacting the Council's Secretariat.

In general, a resignation takes effect:

- if no date is specified in the letter, on the date of receipt by the Governor; or
- if a prospective date of resignation is specified, on that date.

It is important that letters of resignation are not drafted in such terms as to make the resignation conditional on some other event occurring, for example an appointment to another office.

Departments should check each particular case to ensure that termination is not sought in cases where resignation is more appropriate. Particular care should be taken in all cases of termination to ensure that natural justice and procedural fairness have been properly exercised and that this is demonstrated in the Explanatory Memorandum.

5 CHECKLIST FOR EXECUTIVE COUNCIL DOCUMENTS

1 Executive Council Explanatory Note for Cabinet

- correct template
- one A4 original – signed by the Minister

2 Executive Council Minute

- correct template
- one A3 original – signed by the Minister (used as the ‘folder/ wrap around’ for all the other documents to be included)
- one A4 copy – not signed
- signature block should only be the relevant Ministerial portfolio
- relevant ‘department’ listed
- Departmental Minute Number included
- no spelling errors
- correct dates quoted in the body of the text
- document not to be dated
- single sided
- not hole punched or stapled

3 Executive Council Memorandum

- correct template
- one A4 original – each page initialled by the Minister
- Minister has the authority to deal with the matter (listed in bottom right hand corner)
- the section of legislation quoted has been checked against relevant Act
- relevant ‘department’ listed
- Departmental Minute Number included
- the ‘subject’ clearly identifies the matter to be addressed
- for statutory rules/ subordinate legislation (for example regulations, proclamations, orders and notices) attachments are listed
- no spelling errors
- correct dates quoted in the body of the text
- document not to be dated
- if the document is more than a page long then the second and subsequent pages are to be on the same headed paper as the first page including the subject reference and all the pages are to be numbered
- single sided
- not hole punched or stapled

4 Supporting documents

Regulations

- one copy of the regulations signed (but not dated) by the Minister
- two unsigned copies of the regulations
- original advice given by the Office of Parliamentary Counsel under section 7(2) of the Subordinate Legislation Act
- original certificate issued by the Secretary of the Department of Treasury and Finance in relation to section 5(1A) or 6(a) of the Subordinate Legislation Act
- one signed Certificate of Compliance by the Minister (if Treasury has issued a certificate under section 5(1A))

Proclamations

- one copy of the proclamation signed by the Minister on the page with his/her signature block
- two unsigned copies of the proclamation
- original advice given by the Office of Parliamentary Counsel

Orders

- one copy of the order signed by the Minister on the page with their signature block
- two unsigned copies of the order
- original advice given by the Office of Parliamentary Counsel (if drafted by OPC)

Forestry Notices

- recommendation from the Forests Practices Authority
- one copy of the notice signed by the Minister on the page with their signature block
- one unsigned copy of the notice
- two copies of the Title searches for each 'Land Title Reference' on the notice which includes a map of the 'private timber reserve'. If only 'part of a 'private timber reserve' is being dealt with then a second diagram is necessary defining the specific area with appropriate references

Management Plans

- three copies of the plan (one for the Governor, one for the agency and one for the Executive Council records)

Appointments

- where appropriate
 - instrument of appointment signed by the Minister
 - certificate signed by the both portfolio Ministers in the case of a Government Business Enterprise
 - other supporting documentation

Resignations

- original letter of resignation

6 REGISTERS KEPT BY DEPARTMENTS

6.1 Executive Council registers kept by departments

Departments submitting Executive Council Minutes should keep a Register which contains the Department Minute Number, the subject of the Minute and the date submitted. Departments should commence a new series of Minute numbers for each calendar year and they should be numbered consecutively from the beginning of the year.

The Department Minute No. is to be typed by the Department on the top right hand corner of each Minute paper (folded sheet). The same Minute number should also be inserted in the accompanying Explanatory Memorandum.

If, for any reason, a Minute is not approved by the Executive Counsel the department will record the Meeting and Minute Numbers and the reasons for non-approval. The reason for non-approval will be provided by the Executive Council's Secretary/Clerk.

If a Minute is subsequently re-submitted it is to be treated as a new one.

7 APPENDICIES

- 7.1 Signature blocks and forms of address
- 7.2 Executive Council Explanatory Note
- 7.3 Executive Council Minute
- 7.4 Executive Council Memorandum

7.1 Signature blocks and forms of address

7.1.1 A Minister acting for and on behalf of another Minister (commonly known as 'Acting Minister')

Ministerial signature blocks in acting situations are to specify:

- The title of the acting Minister. This identifies that the person signing the official document is actually a Minister. If the acting Minister has more than one portfolio, then only use one main title.
- Immediately after (or below) the acting Minister's title are all of the following words in lower case:
"acting for and on behalf of the "
- After (or below) the above phrase is the relevant portfolio title of the responsible Minister to whom the official document relates. Where long ministerial titles are involved all relevant titles they must be fully and correctly shown.
- Ministers **do not sign** using the term 'Acting Minister'

Sample signature blocks

The use of upper or lower case and bold type for ministerial titles can be varied according to the style of the official document and the preference of the Ministers.

For a Minister acting for and on behalf of another Minister:

Joe Smith
PREMIER acting for and on behalf of the
MINISTER FOR ECONOMIC DEVELOPMENT

Or

Joe Smith
PREMIER
acting for and on behalf of the
MINISTER FOR ECONOMIC DEVELOPMENT

David Brown
MINISTER FOR ENVIRONMENT, PARKS AND HERITAGE
acting for and on behalf of the
MINISTER FOR ECONOMIC DEVELOPMENT

7.1.2 Premier and Attorney-General

Section 3.5 outlines the special provisions relating to the appointments of an acting Premier and acting Attorney-General.

Sample signature blocks

The use of upper or lower case and bold type for ministerial titles can be varied according to the style of the official document and the preference of the Ministers.

For the acting Premier:

John Citizen
ACTING PREMIER

For the acting Attorney-General:

Greg Jones
ACTING ATTORNEY-GENERAL

7.1.3 Forms of address

(i) **Reference to the Governor**

The current and correct form of address is:

"Her Excellency Professor The Honourable Kate Warner, Companion of the Order of Australia, Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia".

However, if the Governor's title is used in the first person in documents the words "Her Excellency" are omitted and it would commence as follows:

"Now therefore I, Professor The Honourable Kate Warner..."

Short title:

Her Excellency Professor The Honourable Kate Warner, AC, Governor of Tasmania.

(ii) **Reference to the Lieutenant-Governor**

The Executive Council Minute Paper is to express the phrase:

"...Lieutenant-Governor-in-Council..." in lieu of the Governor-in-Council the prose.

The Executive Council Explanatory Memorandum is to express the phrase:

"...Lieutenant-Governor-in-Council..." in lieu of Governor-in-Council in the first paragraph of the prose.

The full style and title of the Lieutenant-Governor to be used in Instruments of Appointment is:

His Excellency the Honourable Alan Michael Blow, Officer of the Order of Australia, Lieutenant-Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia.

If the Lieutenant-Governor's title is used in the first person in documents the words "His Excellency" are omitted and it would commence as follows:

"Now therefore I, The Honourable Alan Michael Blow, Lieutenant-Governor..."

Short title:

His Excellency The Honourable Alan Michael Blow, AO, Lieutenant-Governor..."

The signature block is:

LIEUTENANT-GOVERNOR

(and indented from the right margin as shown)

(iii) **Reference to the Administrator**

The Executive Council Minute Paper is to express the phrase:

"...Administrator-in-Council ..." in lieu of Governor-in-Council in the first paragraph of the prose.

The full style and title of the Administrator to be used in Instruments of Appointment is:

His (Her) Excellency the Honourable [first name] [middle names] [surname], Administrator in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia.

If the Administrator's title is used in the first person in documents the words "His Excellency" are omitted and it would commence as follows:

"Now therefore I the Honourable [first name] [middle names] [surname], Administrator..."

Short title:

His Excellency The Honourable [first name] [middle names] [surname],
Administrator..."

The signature block is:
(and indented from the right margin as shown)

ADMINISTRATOR

7.2 Executive Council Explanatory Note for Cabinet

CABINET IN CONFIDENCE

EXPLANATORY NOTE ABOUT A FUTURE EXECUTIVE COUNCIL AGENDA ITEM

Title

[This should be the title of the relevant Executive Council Minute]

Purpose

[A short statement of the purpose which may be an extract from the Executive Council Memorandum or Minute]

Background

[Statements (if any) about the reasons for the Minute or an explanation of the policy being implemented by the Minute]

[Name of Minister]

Minister for

[Date]

7.3 Executive Council Minute

Departmental Minute No.

MINUTE PAPER

FOR

HER EXCELLENCY THE GOVERNOR-IN-COUNCIL

DEPARTMENT:

SUBMITTED

.

MINISTER FOR

7.4 Executive Council Explanatory Memorandum

Executive Council
Meeting No.
of
Minute No.

Departmental Minute No.

EXECUTIVE COUNCIL
EXPLANATORY MEMORANDUM

DEPARTMENT

Subject:

Initialed
Minister
(MINISTER TO INITIAL EVERY PAGE OF ORIGINAL)

AUTHORITY: