CABINET CONVENTIONS : NSW PRACTICE*

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

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

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

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

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

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

---

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

Application of conventions

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

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

Composition of the NSW Cabinet

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

1. Cabinet is comprised of all Ministers of the Crown

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

---

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

2. Only Ministers of the Crown are members of Cabinet

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

3. All Cabinet members must be Members of Parliament

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

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

4. Each Minister must retain the confidence of the Premier

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

---

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

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

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

Collective ministerial responsibility

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

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

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

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

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

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

---

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

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

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

7. Cabinet is responsible for significant government policies and decisions

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

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

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

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

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

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

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

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

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

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

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

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

10. Ministers must not pre-empt Cabinet decisions

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

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

---

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

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

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

11. The confidentiality of Cabinet deliberations must be maintained

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

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

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

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

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

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

---

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

of exemption may continue to apply. Given the legal right of access to Cabinet documents, in principle, after ten years, convention must follow by only binding Ministers for a period of ten years, unless overriding public interests in maintaining confidentiality, such as public security, apply.

12. The Cabinet documents of former Governments remain protected

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

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

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

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

Administration of Cabinet

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

13. Ministers must declare conflicts of interest

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

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

14. Cabinet decisions must be recorded and implemented

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

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

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

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

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

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

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

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

---

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

tenders for a contract have already been called for prior to the commencement of the care-taker period.

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

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

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

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

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

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