Subordinate Legislation Act 1994 Guidelines

INTRODUCTION

The *Subordinate Legislation Act 1994* ('the Act') governs the preparation and making of statutory rules and legislative instruments in Victoria. Section 26(1) of the Act provides that the Minister administering the Act may make guidelines for or with respect to:

- the preparation, content, publication and availability of statutory rules and legislative instruments; and
- the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, co-ordination and uniformity in the preparation of statutory rules and legislative instruments.

Section 26(2) requires the Guidelines to deal with the matters in Schedule 1 to the Act.

The Act imposes obligations on responsible Ministers to comply with the Guidelines in matters such as consultation and in the preparation of regulatory impact statements ('RISs'). Thus, it is necessary for officers to familiarise themselves with both the Act and the Guidelines to properly inform their Minister of his or her responsibilities under the Act.

Ultimately, responsibility for decisions concerning statutory rules and legislative instruments lies with the responsible Minister. Failure to comply with the Act and the Guidelines may result in an adverse report from the Scrutiny of Acts and Regulations Committee ('SARC').

In exercising responsibilities and making judgements under the Act, officers should also draw on other relevant material such as the *Victorian Guide to Regulation*, the *Subordinate Legislation (Legislative Instruments) Regulations 2011* ('the Regulations') and reports of SARC.

Definitions

The definitions set out in section 3 of the Act apply to terms used in these Guidelines.

For example, 'statutory rule' and 'legislative instrument' are defined in section 3 of the Act. The definition of 'legislative instrument' does not include instruments of purely administrative character. Section 3(2) of the Act provides examples of instruments which are of purely administrative character. For further guidance on the definition of legislative instrument, see Part 1 of these Guidelines.

The distinction between 'the Minister', meaning the Minister administering the Act, and 'the responsible Minister' (the Minister administering the Act or statutory rule under which a statutory rule or legislative instrument is proposed to be made) should be borne in mind when reading both the Act and these Guidelines to ensure that the appropriate Minister complies with both as required.

The Guidelines use the term 'agency' rather than 'department'. Although it will largely be officers within government departments who are concerned with making statutory rules and legislative instruments, statutory bodies may also be responsible for preparing and making these instruments. Therefore, the Guidelines use the term 'agency', to capture all relevant bodies.

Mandatory and good practice requirements

The Act imposes some mandatory requirements on responsible Ministers, such as the requirement for consultation under sections 6 (statutory rules) and 12C (legislative instruments) and the requirement to prepare a RIS under sections 7 (statutory rules) and 12E (legislative instruments) (unless an exemption provision applies). These Guidelines expand on those requirements.

The Guidelines also include other relevant matters to assist agencies and responsible Ministers to observe good practice in regulation-making.

Further assistance

If you have any queries in relation to the Guidelines and the Act, please contact the Department supporting the Minister administering the Act.

The Office of the Chief Parliamentary Counsel ('OCPC') settles all statutory rules. Therefore, agencies should consult OCPC when developing proposed statutory rules. Agencies should also refer to OCPC's *Notes for Guidance on the Preparation of Statutory Rules* (April 2011).

PART 1

WHAT IS A STATUTORY RULE OR LEGISLATIVE INSTRUMENT?

1. The Act imposes requirements on the preparation and making of statutory rules and legislative instruments. Instruments that do not fall within these two categories, such as instruments that are purely administrative, are not subject to these requirements. Therefore, it is important to determine what type of instrument will be made and which requirements must be met.

2. In many cases, the responsible Minister will not be able to choose what type of instrument he or she wishes to make. Statutory rules and legislative instruments can only be made where there is power to make them under the authorising Act or statutory rule. Therefore, the type of instrument to be made will be dictated by the provisions of the authorising Act or statutory rule. However, in some cases it may be possible to achieve the same objectives through alternative, non-legislative means (see Part 2, Division 3 of these Guidelines).

Statutory rules

3. Section 3 of the Act provides an exhaustive definition of 'statutory rule'. If the proposed instrument does not fall within the definition, it is not a statutory rule.

4. Unless otherwise indicated in the instrument's authorising Act, if an instrument is not a statutory rule it will not be subject to the requirements that apply to statutory rules under the Act.

Legislative instruments

5. From 1 July 2011, the Act was extended to impose new requirements for making legislative instruments. When making instruments agencies will need to consider whether the instrument is a legislative instrument within the meaning of the Act, and therefore subject to these requirements.

6. Under the definition of 'legislative instrument' in section 3 of the Act, an instrument can only be a legislative instrument if it is of legislative character and is made under an Act or statutory rule.

7. The definition of legislative instrument is non-exhaustive, but excludes certain types of instruments, including instruments of a purely administrative character. Section 3(2) of the Act sets out a non-exhaustive list of instruments that are of a purely administrative character.

8. In deciding whether an instrument is a legislative instrument for the purposes of the Act, agencies should consult the Regulations. The Regulations prescribe certain instruments as follows:
   - Schedule 1 - instruments prescribed not to be legislative instruments (not subject to the Act's requirements);
   - Schedule 2 - instruments prescribed to be legislative instruments (subject to the Act's requirements); and
   - Schedule 3 - instruments prescribed to be legislative instruments that are exempt from most of the Act's requirements.

9. Whether an instrument is of a legislative character must be considered case by case. In most cases, the answer will be clear.

10. Schedules 1 and 2 of the Regulations aim to provide certainty for agencies where it may be unclear whether an instrument is a legislative instrument. The Regulations do not contain exhaustive lists of all instruments made in Victoria.

11. Where it is unclear whether an instrument is a legislative instrument under the Act, agencies should take into account all relevant considerations in determining legislative character. The factors outlined below are examples of the sorts of considerations that might be relevant. The factors are not all equally important. Further, the list is indicative only and is not an exhaustive checklist.

12. Where the question of legislative character is unclear, agencies may choose to seek legal advice before making a final decision.

Possible factors to consider when determining legislative character

General or limited application

13. This factor can be a strong indicator of legislative character. Where an instrument is of general application or determines a general rule, it is more likely to be legislative in character. This can be contrasted to the situation where an instrument applies a rule to particular facts. Instruments which apply in this way are more likely to be administrative in character.

14. For example, Part 2 of the *Safety on Public Land Act 2004* allows the Secretary to declare an area of State forest to be a public safety zone. A declaration may prohibit certain activities in this zone. Such a declaration has general application, as it applies generally within the specified zone. This suggests that the instrument may be of a legislative character.

Mandatory compliance

15. This is may be another key factor in assessing legislative character. Legislative instruments are generally binding in nature. They require mandatory rather than voluntary compliance. Whether an instrument requires mandatory compliance can be determined by looking at the words used in the instrument.

16. Also, if the instrument allows sanctions to be imposed, or if failure to comply with the instrument triggers an offence or penalty, the instrument is more likely to be legislative.

17. For example, a declaration of a public safety zone under Part 2 of the *Safety on Public Land Act 2004* may prohibit certain activities in that zone. The word ‘prohibition’ indicates that the instrument is mandatory, as does the creation of an offence under section 13 of that Act for non-compliance with the declaration.

18. While mandatory codes of conduct are likely to be legislative instruments, voluntary codes of conduct are unlikely to be legislative. Similarly, non-binding guidelines and Codes of Practice are unlikely to be legislative instruments for the purposes of the Act.

Disallowance by Parliament

19. Where an instrument's authorising Act or statutory rule expressly grants Parliament power to disallow it, it is more likely to be of legislative character.

Wide public consultation requirements

20. A requirement to consult broadly during the development of an instrument may indicate that it is of a legislative character.

21. For example, under the *Environment Protection Act 1970,* extensive consultation must be undertaken before declaring or varying a State environment protection policy or a waste management policy. Consultation must be with all affected government departments and statutory authorities, and a draft policy and impact assessment must be published. The requirement for such rigorous consultation suggests that the policies are of a legislative character.

Breadth of policy considerations

22. Where the instrument maker must consider a broad range of issues when making an instrument, this suggests it is of legislative character.

23. For example, under section 69 of the *Fisheries Act 1995*, the Governor in Council may declare particular marine life to be protected. In determining whether such a declaration should be made, there are likely to be social, economic and environmental considerations. The breadth of these issues points towards the instrument being of a legislative character.

Control over variation of the instrument

24. If the instrument cannot be varied or controlled by another part of the executive (other than the instrument-maker), this suggests that the instrument may be of a legislative character.

25. For example, section 27 of the *Biological Control Act 1986* grants the Victorian Biological Control Authority power to declare an organism to be an 'agent organism' for the purpose of that Act. Such a declaration cannot be controlled or varied by any other part of the executive, including the responsible Minister. This supports the view that the declaration may be of a legislative character.

No merits review process

26. Administrative instruments often affect individuals rather than the general public. For example, a permit or an instrument of appointment is an administrative instrument relating to the specific permit-holder or appointee.

27. Where an administrative instrument is made it is common for there to be a merits review process available, to allow the individual to apply for the review of a decision that affects them personally. Merits review for administrative instruments might involve a right to internal review, or a right to appeal to the Victorian Civil and Administrative Tribunal ('VCAT'). Such reviews involve an assessment of the original decision.

28. By contrast, there is generally no merits review process available for legislative instruments. Legislative instruments might be subject to other types of review (in

particular, a review to determine whether an instrument was made unlawfully). However, there is generally no process to consider whether the decision to make an instrument was the right decision to make in the circumstances.

29. For example, there is no provision for internal review or appeal to VCAT after the Governor in Council has declared particular marine life to be protected under section 69 of the *Fisheries Act 1995* (referred to above). This supports the view that such a declaration is a legislative instrument.

The instrument must be published

30. A requirement that an instrument be published is an indicator of legislative character.

PART 2

WHEN TO MAKE A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

DIVISION 1 – JUSTIFYING THE NEED FOR A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

31. Before deciding to make a statutory rule or legislative instrument, agencies should ensure the authorising Act or statutory rule provides power to make the instrument. Statutory rules and legislative instruments can only cover matters which are permitted by their authorising Act or statutory rule and must be consistent with the purposes and objectives of that Act.

32. A matter may be included in a statutory rule where:
    - the authorising Act allows for its inclusion, for instance by use of the word 'prescribed';
    - the authorising Act specifically provides power to make regulations with respect to that matter.

33. A matter may be included in a legislative instrument where an Act or statutory rule provides the power to make an instrument which would be of a legislative character.

34. Where the Act requires preparation of a RIS for the proposed statutory rule or legislative instrument (see Part 3, Division 3 of these Guidelines), the RIS should assess the economic, social and environmental costs and benefits of the proposal. Where a RIS is not required, agencies should still ensure the proposed instrument can be justified before it is made. Agencies should also consider the principles of good regulatory design as described in the *Victorian Guide to Regulation*.

DIVISION 2 – WHAT SHOULD BE INCLUDED IN A STATUTORY RULE OR LEGISLATIVE INSTRUMENT?

35. Statutory rules and legislative instruments can be effective policy tools. Government can use them to achieve a range of policy objectives. For example, they can be used to:
    - control how government agencies exercise power;
    - prevent or reduce activity which is harmful to business, the environment or to other people;
    - control the activities of companies or individuals that are in a position to exercise market power;
    - ensure that people engaged in certain occupations maintain a requisite level of knowledge and competence;
    - impose mandatory codes of conduct;
    - fix fees such as registration or application fees;
    - respond to emergencies such as power supply failures or pest and disease outbreaks;
    - protect consumers from harmful products; and
    - define rights, entitlements or obligations.

36. The level of regulation required will depend on the circumstances. For example statutory rules and legislative instruments may:
    - impose a total prohibition on an activity;
    - restrict the carrying out of an activity by regulating those who engage in the activity or imposing conditions and limitations on the activity;
    - create an obligation to do something;
    - encourage organisations and individuals to consider the effects of their activities on the community and the environment and modify their activities accordingly; or
    - make provision for a code of practice ('codes of conduct').

37. When considering the use of subordinate legislation to address a regulatory need, agencies and responsible Ministers should bear in mind that all statutory rules and legislative instruments must be made within the scope of the power conferred by the principal legislation or statutory rule.

38. Agencies or Ministers may identify the need for a statutory rule or legislative instrument where there is a specific problem that needs to be addressed. Alternatively, key stakeholders such as business and community groups may identify problems or areas for improvement. Statutory rules and legislative instruments may be new initiatives or amendments to existing regimes.

Types of regulation

39. Methods of regulating activities include:
    - primary legislation (Acts);
    - subordinate legislation (e.g. statutory rules and legislative instruments);
    - voluntary codes of conduct or self regulation; and
    - administrative practices.

40. When deciding whether to make a statutory rule or legislative instrument, agencies and responsible Ministers should consider if primary or subordinate legislation is the most

appropriate way of achieving their objective, or if a legislative approach is appropriate at all.

41. Primary legislation is usually drafted in general rather than specific terms to avoid the need for frequent amendments. Matters of detail liable to frequent change should be dealt with by subordinate legislation rather than primary legislation where possible. However, the general rule is that matters of policy and general principle should be reserved to primary legislation.

42. Where authorised by primary legislation, subordinate legislation may deal with matters such as enforcement of the primary (authorising) Act, its administration or implementation. Subordinate legislation must be consistent with the general objectives of the authorising Act or statutory rule. Statutory rules and legislative instruments are often used to provide for the detailed components of a legislative scheme. However, they cannot add new aims or ideas unless expressly authorised to do so.

43. The following matters should be dealt with in primary rather than subordinate legislation:
    - matters of substance or important procedural matters (particularly where they also affect individual rights and liberties – e.g. provisions that reverse the onus of proof or certify evidentiary matters);
    - matters relating to a significant question of policy, including the introduction of new policy or fundamental changes to existing policy;
    - matters which have a significant impact on individual rights and liberties (e.g. powers of entry and search, arrest warrants, seizure and forfeiture), or which deal with property rights or traditional liberties and freedoms;
    - matters imposing significant criminal penalties (such as fines exceeding 20 penalty units or imprisonment); and
    - provisions imposing taxes.

44. By contrast, the following are more appropriately dealt with by subordinate legislation:
    - matters relating to detailed implementation of the policy reflected in the authorising Act;
    - prescribing fees to be paid for various services;
    - prescribing forms for use in connection with legislation;
    - prescribing processes for the enforcement of legal rights and obligations; and
    - times within which certain steps should be taken.

45. Alternative (non-legislative) means of achieving the regulatory objectives are discussed at Part 2, Division 3 of these Guidelines.

Setting of performance standards

46. Where it is proposed that a statutory rule or legislative instrument set performance standards rather than prescribing detailed requirements, agencies and responsible Ministers should consider which of these approaches is most appropriate to achieve the regulatory objectives.

47. Drafting officers should first refer to the terms of the authorising Act or statutory rule to determine that either approach is allowed for under the authorising Act or statutory rule.

48. If the authorising Act or statutory rule allows either approach, agencies should assess the advantages and disadvantages of each, including the cost of different regulatory

structures and their effectiveness in achieving the objectives. Chapter 3 of the *Victorian Guide to Regulation* provides more detail on relevant factors.

49. The responsible Minister will be aware of the nature of the relevant industry and the general risks associated with the different regulatory approaches. Consultation with industry groups and other stakeholders on a proposed statutory rule or legislative instrument will help to identify these advantages and disadvantages more specifically.

DIVISION 3 – ALTERNATIVE MEANS OF ACHIEVING OBJECTIVES

50. Statutory rules and legislative instruments have advantages and disadvantages. For example, they are usually quicker to implement than primary legislation, but are more inflexible than other mechanisms such as voluntary codes of conduct or administrative controls.

51. In most cases, when a responsible Minister is considering making a statutory rule or legislative instrument, the authorising Act or statutory rule will dictate what kind of instrument may be created. For example, where the authorising legislation provides for fees to be prescribed in statutory rules, there may be no discretion to set those fees by another method.

52. In these circumstances, the responsible Minister should consider whether a statutory rule or legislative instrument is the best way to achieve the objective. When developing options for regulation, agencies should refer to Chapter 3 of the *Victorian Guide to Regulation*, which sets out the characteristics of good regulatory design.

53. Alternatives to subordinate legislation include:
    - providing better information to affected groups to raise awareness of their rights and/or obligations;
    - introducing voluntary codes of conduct (see below for the distinction between voluntary and mandatory codes);
    - expanding the coverage of existing primary legislation;
    - encouraging organisations and individuals to consider the impact of their activities on the community and the environment;
    - establishing a code of practice for the conduct of an activity; and
    - developing efficient markets where these would deal with the issue.

Codes of conduct

54. Codes of conduct are usually employed to incorporate large bodies of technical specifications or to provide guidance on compliance with generally-worded 'performance based' regulation. They can be voluntary or compulsory in nature. Compulsory codes of practice are likely to be legislative instruments and therefore subject to the requirements of the Act.

55. Self-regulatory codes can be an effective alternative to statutory rules and legislative instruments because they can educate and provide information to consumers and traders without adding to business costs.

DIVISION 4 – FORMULATION AND INCLUSION OF OBJECTIVES

56. Before proceeding with a proposed statutory rule or legislative instrument, agencies and responsible Ministers should consider the intended objectives and the reasons for those objectives. It is important that these be clearly defined and formulated to ensure that:
    - they are reasonable and appropriate for the intended level of regulation;
    - they can be clearly and succinctly set out;
    - they conform with the objectives, principles, spirit and intent of the authorising Act or statutory rule;
    - they are not inconsistent with the objectives of other legislation, subordinate legislation and stated government policies; and
    - any associated costs or disadvantages are not greater than the benefits or advantages.

57. Sections 10(1)(a) (statutory rules) and 12H(1)(a) (legislative instruments) of the Act require a statement of the objectives of a proposed statutory rule or legislative instrument to be included in the associated RIS. All proposed statutory rules and legislative instruments which require a RIS must comply with this requirement.

Inclusion of objectives in a statutory rule

58. The text of a statutory rule includes a statement of its intent and objectives. In addition, section 13 of the Act requires proposed statutory rules to be submitted to the Chief Parliamentary Counsel for the issue of a section 13 certificate.

59. Section 13 certificates specify, among other things, that the proposed statutory rule appears to be consistent with and to achieve the objectives set out in the proposed statutory rule. A clear statement of the objectives is therefore required so that the Chief Parliamentary Counsel can ensure that a section 13 certificate can be given on what appears on the face of the statutory rule.

60. The objectives stated in the statutory rule itself are likely to differ from those included in the RIS**.** RIS objectives should be stated in terms of ends (outcomes), rather than means. Statutory rules take a more narrow approach, stating the objectives of the statutory rule itself (i.e. the statutory rule provides the means for a change, which allows the wider policy outcomes to be achieved).

61. A clear statement of the effect of a proposed statutory rule must also be included in the Explanatory Memorandum that must accompany all proposed statutory rules submitted to the Governor in Council. The form of the Explanatory Memorandum is discussed in Part 3, Division 5 of these Guidelines.

62. There is no general requirement to include a statement of objectives in legislative instruments or obtain a certificate from the Chief Parliamentary Counsel. However, agencies should still consider the objectives of the proposal. This is the case even where a RIS is not required. The *Victorian Guide to Regulation* provides further advice on the rationale for, and development of, policy objectives (Chapter 3).

PART 3

MAKING A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

DIVISION 1 – CONSULTATION PRIOR TO THE RIS PROCESS

63. The Act generally requires proposed statutory rules and legislative instruments to undergo two separate consultation processes. The first is initial consultation, which happens in the early stages of policy development. This ensures the responsible Minister identifies other Ministers, agencies and stakeholders who will be affected by the proposed changes and take into account the impact the proposed statutory rule or legislative instrument is likely to have on those groups.

64. The second consultation process is formal public consultation. Where a RIS has been prepared, this happens following the public release of the proposed statutory rule or legislative instrument along with its RIS. This process gives members of the public the opportunity to comment on the proposed instrument before it is made. Public consultation is discussed at Part 3, Division 4 of these Guidelines.

65. Appropriate consultation is important in deciding whether a statutory rule or legislative instrument should be made and, if so, the objectives it will aim to achieve.

66. The nature and degree of consultation that is appropriate for any particular statutory rule or legislative instrument will vary with the nature of the subordinate legislation. However, in all cases instrument makers must comply with the consultation requirements imposed by the Act.

Initial consultation

67. Sections 6 (statutory rules) and 12C (legislative instruments) of the Act require consultation to occur in accordance with these Guidelines. Where initial consultation is required, it must take place before the RIS is prepared and before the statutory rule or legislative instrument is released for public consultation.

68. As a general rule, initial consultation is required for all proposed statutory rules and legislative instruments, even where the responsible Minister anticipates there will be no significant burden imposed. However, initial consultation will not be required where the responsible Minister proposes to make:
- a legislative instrument that is prescribed under the Regulations as being exempt from Part 2 of the Act; or
- an extension regulation under section 5A of the Act.

69. Part 3, Division 2 of these Guidelines sets out a number of additional circumstances in which initial consultation will not be required for a proposed statutory rule or legislative instrument that will be exempted under sections 8 or 9 (statutory rules) or sections 12F or 12G (legislative instruments) of the Act. However, in some cases initial consultation will be needed for exempt instruments as the consultation will assist in determining whether an exemption should, in fact, apply.

70. Among other things, the initial consultation should ensure that the need for, and the scope of, the proposed statutory rule or legislative instrument is presented for

consideration by those affected. The type of the proposed regulation should also be presented at this stage of consultation and alternative means of achieving the objectives discussed.

71. During initial consultation, the responsible Minister must consult with:
    - any other Minister whose area of responsibility may be affected by the proposed statutory rule or legislative instrument; and
    - any sector of the public on which a significant economic or social burden may be imposed by the proposed statutory rule or legislative instrument.

Initial consultation with other Ministers – sections 6(a) and 12C(a)

72. The responsible Minister must ensure that there is consultation in accordance with these Guidelines with any other Minister whose area of responsibility may be affected by a proposed statutory rule or legislative instrument. The aim of the consultation is to avoid any overlap or conflict with any other existing or proposed legislation, statutory rule or legislative instrument.

73. Ministers considering a new regulatory initiative, a change to an existing regulatory regime or the re-enactment of that regime should therefore identify areas of responsibility of another Minister or agency which may be affected by the proposed statutory rule or legislative instrument. It is important to seek the views of those who may be affected by the proposal or the policy position it represents. This consultation should occur early in the development of policy options, to avoid any potential overlaps or conflicts before the proposal becomes significantly developed.

74. Consultation between Ministers and agencies under sections 6(a) (statutory rules) and 12C(a) (legislative instruments) should take place prior to the initial consultation with external public stakeholders under sections 6(b) (statutory rules) and 12C(b) (legislative instruments). This ensures a whole of Victorian Government perspective is achieved before consulting external stakeholders.

Initial consultation with the public – sections 6(b) and 12C(b)

75. The responsible Minister must ensure that there is consultation in accordance with these Guidelines with any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument. This may include, for example, business groups, community groups, special interest groups and local government.

76. When making an initial assessment of whether a significant burden may be imposed, only potential costs or negative impacts (the burden) should be assessed. While relevant at other stages in the RIS process, the benefits of a proposal do not change the significance of the burden it imposes and one cannot be offset against the other at this stage of development.

77. In addition, costs and benefits may not fall equally on the same groups. This highlights the importance of ensuring groups upon whom a significant burden may be imposed are consulted as part of the process, as they may not benefit from the final regulation. See Part 4 of these Guidelines in relation to what constitutes a significant burden.

78. It is important that all relevant costs and benefits are identified. It is particularly important to ensure indirect costs and benefits which may not be readily apparent are identified early in the policy development process.

79. To assist in ensuring that all effects are identified, it is helpful to consider in turn the impact of the proposed statutory rule or legislative instrument on:
    - individuals directly affected by the regulation;
    - particular industries and sectors directly affected; and
    - the economy and the community more broadly.

80. There are many benefits of effective consultation with business and members of the public who are affected by a proposed statutory rule or legislative instrument. For example, these stakeholders can:
    - play an important role in identifying and considering alternative methods of achieving the stated objectives. People involved in a particular industry can build up a wealth of knowledge about its historical development, current operation and future direction and the interrelationships with other industries and economic activities;
    - greatly assist in the identification of innovative techniques for dealing with the particular community concerns about the industry. Submissions that provide further relevant information on alternatives to a regulatory proposal should always be considered carefully;
    - have extensive knowledge about the costs of regulatory proposals. For example a firm may be able to estimate the impact of a new statutory rule or legislative instrument on the cost of its operations. This kind of information greatly assists in evaluating the alternatives; and
    - gain a better understanding of how the regulatory framework will actually function and how it will be enforced, which can help promote a culture of compliance ahead of the regulations being introduced.

81. It is only possible to state that the proposed statutory rule or legislative instrument will yield the maximum net benefit if all the relevant effects have been identified and assessed. The question of net benefit is distinct from the question of whether the statutory rule or legislative instrument would impose a significant burden (see Part 4 of these Guidelines).

82. While every effort should be made to identify all effects prior to initial consultation, ensuring proper consultation with all those who may be affected may reveal effects which would otherwise not be identified.

Process for initial consultation

83. The responsible Minister should determine the level of initial consultation required depending on the proposed statutory rule or legislative instrument.

84. Factors to be taken into account when determining the appropriate level of consultation include:
    - whether the statutory rule or legislative instrument is being introduced into a previously unregulated area;
    - the nature of the industry the statutory rule or legislative instrument will affect – does it have peak bodies that can or should be consulted?
    - whether the proposed statutory rule or legislative instrument will replace an existing regime – e.g. voluntary code of conduct; and

- whether the proposed statutory rule or legislative instrument will impose criminal or civil penalties.

85. Preliminary consultation may occur through conducting focus groups and briefing sessions with key stakeholders before deciding that a regulatory proposal is the most appropriate response to an issue. Peak industry bodies should be notified during the development of regulatory proposals. Issues papers can also be used as a preliminary vehicle for communication.

86. The procedures to be adopted will also vary with the nature of the proposed statutory rule or legislative instrument. For example, where the area was previously unregulated, consultation may take the form of a discussion paper on the issue, or issues, and calling for a response from interested groups, or where only relatively minor changes to the regulatory environment are proposed, a minimal approach to consultation may be more appropriate.

Certificates of consultation – sections 6(c) and 12C(c)

87. The responsible Minister must ensure that where these Guidelines require initial consultation, a certificate of consultation is issued under section 6(c) (statutory rules) or 12C(c) (legislative instruments). A consultation certificate should provide details of who was consulted. An example form of certificate is included in Appendix D to the *Victorian Guide to Regulation*.

88. Initial consultation requirements may be affected where a Ministerial exemption certificate is issued under section 8 (statutory rules) or 12F (legislative instruments). Where an exemption certificate is issued, limited consultation or no initial consultation may be required, and a consultation certificate may not need to be issued by the responsible Minister. Refer to Part 3, Division 2 of these Guidelines for the consultation requirements applicable to each exemption ground.

89. Sections 12B (statutory rules) and 12K (legislative instruments) of the Act provide that certain individual certificates required by the Act can be incorporated into a single ‘composite certificate’. A certificate of consultation may form part of a composite certificate (see also Part 5, Division 1 of these Guidelines).

90. Sections 15 and 15A (statutory rules) and 16B and 16C (legislative instruments) of the Act provide that the certificate of consultation must be laid before Parliament and sent to SARC. See generally Part 3, Division 5 of these Guidelines.

DIVISION 2 – EXEMPTIONS FROM THE RIS PROCESS

91. Unless an exemption applies, all statutory rules and legislative instruments must undergo a RIS process (see Part 3, Division 3 of these Guidelines).

92. While the RIS process is a valuable part of the best-practice regulation making process, the Act recognises that there are certain circumstances in which it is not appropriate or necessary to prepare a RIS and release it for formal consultation. As such, the Act provides for exemptions from the process in certain circumstances. These exemptions may be determined on a case-by-case basis by the responsible Minister (or, in special circumstances, by the Premier) or prescribed in the Regulations.

Exemption certificates

93. There are two types of exemption certificates which can exempt a statutory rule or legislative instrument from the obligation to undertake a RIS process. These are:

- exemption certificates issued by the responsible Minister – ss 8 (statutory rules) and 12F (legislative instruments); and
- exemption certificates issued by the Premier – ss 9 (statutory rules) and 12G (legislative instruments).

94. Sections 8 (statutory rules) and 12F (legislative instruments) of the Act outline the circumstances in which the responsible Minister may issue a certificate of exemption from the RIS process.

95. In accordance with sections 8(3) (statutory rules) and 12F(3) (legislative instruments), exemption certificates should contain detailed reasons for the exemption. These reasons must justify the exemption and not merely assert that the exemption ground is applicable.

96. Where a Ministerial exemption certificate is issued in relation to a statutory rule or legislative instrument, the applicable initial consultation requirements may be affected. The following paragraphs contain further detail on the initial consultation requirements under sections 6 (statutory rules) and 12C (legislative instruments) that apply in relation to each exemption ground.

Ministerial exemptions applicable to statutory rules – section 8

97. **Section 8(1)(a)** allows exemption of a proposed statutory rule if the statutory rule would not impose a significant economic or social burden on a sector of the public. Initial consultation should be undertaken under section 6(b) for the responsible Minister to obtain sufficient evidence to form a view as to whether the proposed statutory rule imposes a significant burden. See Part 4 of these Guidelines for detail on what constitutes a significant burden.

98. For statutory rules imposing fees or charges, the responsible Minister issuing an exemption certificate under section 8(1)(a) should specify in that certificate whether he or she has issued or amended any other statutory rules in the current financial year imposing fees or charges for substantially the same purpose. See paragraph 102 for further information on what constitutes fees for substantially the same purpose.

99. **Section 8(1)(b)** allows exemption of a proposed statutory rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal. Where such statutory rules are made by a court, consultation under section 6 is not required unless the judges or magistrates of that court determine that there should be consultation. In other cases falling under section 8(1)(b), sufficient consultation should take place with the courts, representative bodies of the legal profession and other relevant interest groups to ensure that the statutory rule is the most effective option available.

100. **Section 8(1)(c)** allows exemption of a proposed statutory rule if the proposed statutory rule is of a fundamentally declaratory or machinery nature. For such a statutory rule, no consultation is required under section 6(b), as consultation on instruments of a minor machinery nature would be of little benefit in light of the limited nature of the matters allowed under this exemption.

101. **Section 8(1)(d)** allows exemption of a proposed statutory rule if the proposed statutory rule only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget for the purposes of section 8 (the fee may be rounded to the nearest whole dollar).

102. The exemption cannot be applied if there is an increase in fees collected for substantially the same purpose multiple times within one financial year (for example, quarterly fee amendments), and the aggregate increase across the year is greater than the Treasurer's annual rate. This promotes transparency in the collecting of fees and charges, by ensuring the additional burden on those paying the fee or charge is considered in light of all other fee or charge increases in that year and allowing for fully informed scrutiny when the statutory rule is laid before Parliament and sent to SARC for review (see Part 3, Division 5 of these Guidelines). Fees are likely to be imposed for substantially the same purpose if they are issued under the same Act and relate to the same regulatory scheme and subject-matter.

103. A statutory rule can set a package of fees. This is often known as a 'basket approach'. However, the section 8(1)(d) exemption does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee component is increased above the annual rate, a RIS process may need to be undertaken as the fee increase could have a significant and adverse impact on the community and business.

104. Where a proposed statutory rule does no more than effect an increase in accordance with the Treasurer's annual rate, no additional consultation is required under section 6 of the Act. Extensive consultation is undertaken by the Treasurer and the Department of Treasury and Finance in the development of the Budget strategy, which sets out the financial plan for the State for a twelve month period. Additional consultation about an individual statutory rule which implements part of that strategy would be of little benefit.

105. Under section 10(1)(ba), when a proposed statutory rule amends fees in an existing statutory rule, a table must be prepared comparing the proposed and existing fees, including an indication of the percentage increase or decrease for each fee. This includes when a proposed statutory rule sets new fees to replace existing fees in a statutory rule which is sunsetting or otherwise being superseded.

106. **Section 8(1)(e)(i) and (ii)** allows exemption of a proposed statutory rule to be made under section 4(1)(a) or (b) of the Act, which prescribes instruments as falling within or outside the definition of statutory rule or the operation of the Act. For such statutory

rules, no consultation is required except for consultation with the relevant responsible Minister or the body responsible for the statutory rule and that required under section 4 with SARC.

107. **Section 8(1)(e)(iii)** allows for the exemption of extension regulations, which extend the life of sunsetting statutory rules under section 5A of the Act. Extension regulations can only continue an existing regulatory regime for a maximum of 12 months. Given that the purpose of the extension is to allow time for the RIS process, including consultation, to be completed, no consultation is required under section 6.

108. **Section 8(1)(e)(iv), (v) and (vi)** allows exemption of a proposed statutory rule to be made under section 4A(1)(a), (b) or (c) of the Act, which prescribes instruments as falling within or outside the definition of legislative instrument or the operation of the Act. For such statutory rules, no consultation is required except for consultation with the relevant responsible Minister or the body responsible for the legislative instrument.

109. **Section 8(1)(f)** allows exemption of a proposed statutory rule if the proposed statutory rule is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme

110. For such a statutory rule, the responsible Minister should ensure that the impact of the scheme, particularly on Victorian business, has been properly assessed and should be satisfied that there has been adequate consultation with the business community and other relevant stakeholders. This consultation may take place during the development of the national scheme and the decision as to Victoria's entry into that scheme. Under the Act, the responsible Minister should still be satisfied that the level of scrutiny and consultation required by the Act has been met. If this is the case, then the requirement for consultation under section 6(b) is satisfied. However, the responsible Minister is still required to issue a certificate of consultation under section 6(c).

111. **Section 8(1)(g)** allows exemption of a proposed statutory rule if the proposed statutory rule deals with the administration or procedures within or as between departments or declared authorities within the meaning of the *Public Administration Act 2004* or within or as between departments within the meaning of the *Parliamentary Administration Act 2005*. For such a statutory rule, consultation is required under section 6(b) with the Public Sector Standards Commissioner (and, for a statutory rule proposed under the *Parliamentary Administration Act 2005*, with relevant Parliamentary Officers), but otherwise the level and nature of the consultation required is a matter for the responsible Minister.

112. **Section 8(1)(h)** allows exemption of a proposed statutory rule if notice of the proposed statutory rule would render the statutory rule ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed statutory rule.

113. Normally, after the completion of a RIS, the Act requires that the RIS and proposed statutory rule be released for public consultation. In some cases, the release of the rule prior to its commencement may undermine the purpose for which the rule is being made. In other cases, notification may mean that particular people are subject to unfair advantage or disadvantage. In such cases, the statutory rule may be eligible for an exemption from the RIS process. Consultation under section 6 should be conducted only to the extent that the responsible Minister considers it appropriate.

114. **Section 12F(1)(a)** allows exemption of a proposed legislative instrument if the legislative instrument would not impose a significant economic or social burden on a sector of the public. Initial consultation should be undertaken under section 12C(b) for the responsible Minister to obtain sufficient evidence to form a view as to whether the proposed legislative instrument imposes a significant burden. See Part 4 of these Guidelines in relation to what constitutes a significant burden.

115. For legislative instruments imposing fees or charges, the responsible Minister issuing an exemption certificate under section 12F(1)(a) should specify in that certificate whether he or she has issued or amended any other legislative instruments in the current financial year imposing fees or charges for substantially the same purpose. See paragraph 118 for further information on what constitutes fees for substantially the same purpose.

116. **Section 12F(1)(b)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is of a fundamentally declaratory or machinery nature. For such a legislative instrument, no consultation is required under section 12C, as consultation on instruments of a minor machinery nature would be of little benefit in light of the limited nature of the matters allowed under this exemption.

117. **Section 12F(1)(c)** allows exemption of a proposed legislative instrument if the proposed legislative instrument only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget for the purposes of section 8.

118. The exemption cannot be applied if there is an increase in fees collected for substantially the same purpose multiple times within one financial year (for example, quarterly fee amendments), and the aggregate increase across the year is greater than the Treasurer's annual rate. This promotes transparency in the collecting of fees and charges, by ensuring the additional burden on those paying the fee or charge is considered in light of all other fee or charge increases in that year and allowing for fully informed scrutiny when the legislative instrument is laid before Parliament and sent to SARC for review. Fees are likely to be imposed for substantially the same purpose if they are issued under the same Act and relate to the same regulatory scheme and subject-matter.

119. If a legislative instrument sets a package of fees (a basket approach), the section 12F(1)(c) exemption does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee component is increased above the annual rate, a RIS process may need to be undertaken as the fee increase could have a significant and adverse impact on the community and business.

120. Where a proposed legislative instrument does no more than effect an increase in accordance with the Treasurer's annual rate, no additional consultation is required under section 12C of the Act. Extensive consultation is undertaken by the Treasurer and the Department of Treasury and Finance in the development of the Budget strategy, which sets out the financial plan for the State for a twelve month period. Additional consultation about an individual legislative instrument which implements part of that strategy would be of little benefit.

121. **Section 12F(1)(d)** allows exemption of a proposed legislative instrument if the proposed legislative instrument would only impose a burden on a public sector body. Initial consultation should be undertaken under section 12C(b) for the responsible Minister to obtain sufficient evidence to form a view as to whether the proposed legislative instrument imposes any burden on a sector of the public (see Part 4 of these Guidelines).

122. A determination in relation to section 12F(1)(a), that the economic or social burden imposed by the proposed legislative rule is not significant, is insufficient to show that the proposed legislative instrument imposes a burden only on a public sector body. The level and nature of the consultation required in each case is a matter for the responsible Minister.

123. **Section 12F(1)(e)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is an order made under the *Administrative Arrangements Act 1983*. The *Administrative Arrangements Act 1983* empowers the Governor in Council to make orders relating to the administration of government. These orders are machinery in nature and are unlikely to place any burden on a sector of the public. Therefore, consultation under section 12C(b) is not required.

124. **Section 12F(1)(f)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme.

125. For such a legislative instrument, the responsible Minister should ensure that the impact of the scheme, particularly on Victorian business, has been properly assessed and should be satisfied that there has been adequate consultation with the business community. This consultation may take place during the development of the national scheme and the decision as to Victoria's entry into that scheme. Under the Act, the responsible Minister should still be satisfied the level of scrutiny and consultation required by the Act has been met. If this is the case, then the requirement for consultation under section 12C(b) is satisfied. However, the responsible Minister is still required to issue a certificate of consultation under section 12C(c).

126. **Section 12F(1)(g)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is required to undergo, or has undergone, an analytical and consultation process which, in the opinion of the responsible Minister, is equivalent to the process for a RIS required under section 12E.

127. Initial consultation under section 12C should still be undertaken in relation to instruments to which this exemption applies, and the responsible Minister should issue a consultation certificate under section 12C(c).

128. This exemption is intended to avoid the duplication of analysis and consultation requirements in circumstances where an instrument's authorising legislation imposes requirements that are equivalent to the RIS process. Section 12H of the Act sets out a number of RIS requirements which should preferably be met by the equivalent process. However, as a minimum, the process must meet the following substantive requirements to qualify for exemption under this provision:

- the instrument must undergo an analysis of the costs and benefits, including consideration of alternative options for achieving the regulatory goal;
- the analysis must be independently assessed; and
- the instrument must undergo a public consultation process for at least 28 days.

129. **Section 12F(1)(h)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is of not more than 12 months duration and is necessary to respond to a public emergency, an urgent public health issue, an urgent public safety issue or likely or actual significant damage to the environment, resource sustainability or the economy. These instruments can be exempted to allow quick response to pressing issues and to avoid undue delay which would be caused by a RIS process. The scope of consultation required for such legislative instruments is a matter for the responsible Minister.

130. **Section 12F(1)(i)** allows exemption of a proposed legislative instrument if the proposed legislative instrument deals with the administration or procedures within or as between departments or declared authorities within the meaning of the *Public Administration Act 2004* or within or as between departments within the meaning of the *Parliamentary Administration Act 2005*. For such a legislative instrument, consultation is required under section 12C(b) with the Public Sector Standards Commissioner (and, for a legislative instrument proposed under the *Parliamentary Administration Act 2005*, with relevant Parliamentary Officers), but otherwise the level and nature of the consultation required is a matter for the responsible Minister.

131. **Section 12F(1)(j)** allows exemption of a proposed legislative instrument if notice of the proposed legislative instrument would render the proposed legislative instrument ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed legislative instrument.

132. Normally, after the completion of a RIS, the Act requires that the RIS and proposed legislative instrument be released for public consultation. In some cases, the release of the instrument prior to its commencement may undermine the purpose for which the instrument is being made. In other cases, notification may mean that particular people are subject to unfair advantage or disadvantage. In such cases, the legislative instrument may be eligible for an exemption from the RIS process. Consultation under section 12C should be conducted only to the extent that the responsible Minister considers it appropriate.

133. **Section 12F(1)(k)** allows exemption of a proposed legislative instrument if the proposed legislative instrument is made under a statutory rule and the RIS for that statutory rule has adequately considered the impact of the proposed legislative instrument.

Form and content of Ministerial exemption certificates

134. If the responsible Minister is of the opinion that an exemption ground in section 8(1) or section 12F(1) of the Act applies to a proposed statutory rule or legislative instrument, sections 8(3) (statutory rules) and 12F(3) (legislative instruments) require the responsible Minister to specify the reasons for that opinion.

135. The Act does not set out any form for the certificate that is to be issued under section 8 or section 12F. However, Appendix D to the *Victorian Guide to Regulation* provides an example form of certificate. The certificate should include:

- the name of the proposed statutory rule or legislative instrument;
- the paragraph of section 8(1) or 12F(1) under which the exemption is made;

- an outline of the nature and effect of the proposed statutory rule or legislative instrument including the proposed operative date and, if relevant, the reason for that date; and
- the reason why the proposed statutory rule or legislative instrument falls within the relevant exemption – i.e. what it is about the nature and effect of the statutory rule or legislative instrument that corresponds with the matters covered by the exemption.

136. Sections 12B (statutory rules) and 12K (legislative instruments) of the Act provide that certain individual certificates required by the Act can be incorporated into a single 'composite certificate'. A Ministerial exemption certificate may form part of a composite certificate (see also Part 5, Division 1 of these Guidelines in relation to composite certificates)

137. Section 16C of the Act requires that exemption certificates are laid before Parliament and sent to SARC. See generally Part 3, Division 5 of these Guidelines regarding other tabling requirements.

Exemption certificates under sections 9 and 12G

138. Sections 9(1) (statutory rules) and 12G(1) (legislative instruments) of the Act give the Premier the power to exempt a proposed statutory rule or legislative instrument from the RIS process. The Premier may only issue an exemption certificate where, in the special circumstances of the case, the public interest requires that the proposed statutory rule or legislative instrument be made without complying with section 7(1) (statutory rules) or section 12E (legislative instruments).

139. The purpose of the exemption is to ensure that subordinate instruments can be made without delay where the public interest requires that this occur. The Premier's power to grant exemptions is extremely limited and Premier's exemption certificates are only issued in special circumstances. For example, the Premier may decided to issue an exemption certificate where there is an emergency situation and there are overriding public interest reasons for the statutory rule or legislative instrument to be made without undergoing a RIS.

140. Premier's exemption certificates are not intended to provide an exemption merely because there is insufficient time to comply with the requirements of the Act.

141. Under sections 9(2)(a) (statutory rules) and 12G(2)(a) (legislative instruments) of the Act the Premier cannot grant an exemption certificate unless the proposed statutory rule or legislative instrument is to expire within 12 months of its commencement date. If a Premier's exemption certificate is granted, agencies will need to commence and complete a RIS process during the lifetime of the certificate. More than one certificate will rarely be granted.

142. Moreover, the duration of the certificate will be the shortest possible period necessary to enable the RIS process to be undertaken unless there are exceptional circumstances. In considering requesting a Premier's exemption certificate, the relevant Minister should be aware that in practice, a six month (rather than 12 month) exemption may be the maximum granted.

143. There are no set criteria for determining whether the public interest requires an exemption. Requests for a Premier's exemption certificate are assessed on a case by

case basis. This involves balancing the public interest in the consultation and cost-benefit assessment involved in the RIS process and the public interest in making the proposed statutory rule or legislative instrument without delay.

144. DPC should be consulted as soon as it is contemplated that the responsible Minister may request a Premier's exemption certificate. Agencies are encouraged to provide preliminary drafts of the proposed statutory rule or legislative instrument to DPC to assist in this process.

145. The responsible Minister should request in writing that the Premier issue an exemption certificate under section 9(1) (statutory rules) or 12G(1) (legislative instruments). Such requests should be made at least 14 days before the proposed date of making for the statutory rule or legislative instrument.

146. To enable the Premier to assess the public interest reasons, requests for an exemption certificate should only be made once the statutory rule or legislative instrument has been finalised. Where the certificate concerns a statutory rule, agencies will need to ensure that the rule is settled with OCPC prior to the responsible Minister's formal request to the Premier.

147. The responsible Minister's request must be accompanied by a copy of the settled statutory rule and advice provided by Chief Parliamentary Counsel under section 13 of the Act. For legislative instruments, a copy of the settled legislative instrument must be provided with the Minister's request.

148. The responsible Minister's letter to the Premier must explain why the public interest requires the exemption.

149. Where the Premier issues an exemption certificate for a statutory rule or legislative instrument, the Act requires that the agency ensures the certificate is laid before Parliament and sent to SARC (see Part 3, Division 5 of these Guidelines).

150. The agency must also forward to SARC a copy of the reasons given to the Premier when seeking a Premier's exemption certificate together with any other relevant materials.

Exemptions under the Regulations

151. The Regulations were made under section 4A, following amendments to the Act in 2010 which introduced new requirements in relation to legislative instruments.

152. Schedule 1 of the Regulations specifies certain instruments not to be legislative instruments for the purposes of the Act. If an instrument is prescribed in Schedule 1, it is not subject to any of the requirements of the Act.

153. Schedule 2 of the Regulations specifies certain instruments to be legislative instruments. Instruments prescribed in Schedule 2 are subject to the requirements of the Act. This does not preclude the Minister from issuing an exemption certificate under section 12F of the Act where appropriate, or requesting that the Premier issue an exemption certificate under section 12G.

154. Schedule 3 of the Regulations specifies certain instruments to be legislative instruments that are exempt from most requirements of the Act. These instruments are not exempt from the gazettal requirements under section 16A.

DIVISION 3 – THE RIS PROCESS

155. Sections 7 (statutory rules) and 12E (legislative instruments) of the Act state that the responsible Minister must ensure that a RIS is prepared for the proposed statutory rule or legislative instrument, unless an exemption applies.

156. The drafting and assessment requirements for the RIS are set out in sections 10 (statutory rules) and 12H (legislative instruments). The requirements relating to statutory rules and legislative instruments are very similar.

157. As outlined in the *Victorian Guide to Regulation*, the primary objectives of a RIS are to ensure:

- regulation is only implemented where there is a justified need;
- only the most efficient forms of regulation are adopted; and
- there is an adequate level of public consultation in the development of subordinate legislation.

Content of a RIS

158. RISs should be drafted in plain English to ensure they are clear and accessible to the public. They must clearly set out any new regulatory requirements to be created by the proposed statutory rule or legislative instrument.

159. Sections 10(1)(a) (statutory rules) and 12H(1)(a) (legislative instruments) of the Act require a statement of the objective of a proposed statutory rule or legislative instrument to be included in a RIS. The objectives stated in the RIS are likely to differ from those which must be included in the statutory rule (and which may be included in a legislative instrument) itself, as discussed above at Part 2, Division 4 of these Guidelines. RIS objectives should be stated in terms of the policy objectives, or outcomes, being sought to resolve the policy problem, regardless of the form the solution takes.

160. A proposed statutory rule or legislative instrument may not be the only option to address the relevant policy problem, and may not be the final option selected as a result of the RIS and public consultation processes. RISs should analyse a range of regulatory and non-regulatory options.

161. The *Victorian Guide to Regulation* provides more detail on the preparation of RISs. In particular, Appendix C includes techniques for quantifying costs and benefits, and the use of cost-effectiveness analysis where it is difficult to assign a dollar value to anticipated benefits. Further resources including RIS checklists and templates can be found on the website of the Victorian Competition and Efficiency Commission ('VCEC') (www.vcec.vic.gov.au).

162. The responsible Minister should determine at what stage he or she seeks expert advice on the development of a regulatory proposal. Contractors and consultants may be engaged to prepare RISs. If engaging consultants external to government, agencies should also consult the policies concerning engaging and managing consultants issued by the Victorian Government Purchasing Board ('VGPB'). For further information and to obtain a copy of its policies, refer to the VGPB's website (www.vgpb.vic.gov.au).

163. A detailed human rights analysis is not required as part of a RIS, as this is covered in the human rights certificate (see Part 5, Division 1 of these Guidelines). However, a RIS should consider any significant impacts on human rights contained in the *Charter*

of Human Rights and Responsibilities Act 2006 ('Charter Act') when assessing the social costs and benefits of the proposal.

Independent assessment – VCEC

164. Sections 10(3) (statutory rules) and 12H(3) (legislative instruments) of the Act require the responsible Minister to ensure that independent advice on the adequacy of a RIS is obtained and considered.

165. VCEC was established on 1 July 2004. One of VCEC's core functions is to review RISs and provide the independent advice required by sections 10(3) (statutory rules) and 12H(3) (legislative instruments) of the Act. VCEC will advise the responsible Minister as to whether the RIS adequately addresses the matters which must be included under section 10 or 12H of the Act.

166. VCEC's advice must be received before the RIS is released for public consultation (see Part 3, Division 4 of these Guidelines). If VCEC advises that it considers the RIS is inadequate, the Minister may still decide to release the RIS, but must attach the VCEC advice to the RIS.

167. Ministers are also strongly encouraged to attach VCEC's assessment letters to all RISs, even where they are assessed as being adequate. Sometimes VCEC may raise points that are relevant to stakeholders' consideration of a proposal and it is in the public interest that this advice be made available.

168. Following VCEC's assessment of the RIS, the responsible Minister must issue a certificate under section 10(4) or 12H(4) of the Act certifying that the RIS complies with the requirements of the Act and adequately addresses the likely impact of the statutory rule or legislative instrument. Where VCEC has assessed the RIS as inadequate, the certificate should explain why the Minister believes the requirements have been met, notwithstanding VCEC's assessment of inadequacy.

169. A copy of VCEC's assessment of a RIS must be sent to SARC after the statutory rule is made (regardless of whether the RIS is assessed as adequate or not). See Part 3, Division 5 of these Guidelines. This will promote a more transparent and accountable regulatory system.

DIVISION 4 – RELEASE OF THE RIS FOR PUBLIC CONSULTATION

170. Where the proposed statutory rule or legislative instrument requires the preparation of a RIS (see Part 3, Division 2 of these Guidelines) further public consultation requirements apply. This consultation occurs after the proposed statutory rule or legislative instrument has been drafted and a RIS prepared, as both of these documents must be released at the beginning of the consultation period. This second, more formal, phase of consultation is distinct from the initial consultation required as part of the policy development process (see Part 3, Division 1 of these Guidelines).

171. The public consultation process gives the business and wider community an opportunity to communicate to government any concerns it may have about regulations affecting its activities. One of the aims of the RIS and the public consultation process is to obtain information and comment from the widest set of possible sources. This helps identify any weaknesses in the reasoning, test assumptions and methodology, and ensure that competing interests are recognised and considered.

172. If the RIS and the public consultation process are properly undertaken, any resulting statutory rule or legislative instrument should represent the most balanced, cost effective and least intrusive solution to a problem.

Notice and publication for public consultation

173. Following initial consultation and the preparation of the RIS, the proposed statutory rule or legislative instrument and RIS must be published, along with a notice inviting comments and submissions from the public.

174. Sections 11 (statutory rules) and 12I (legislative instruments) of the Act require that the responsible Minister publish a notice inviting public comments on the proposed statutory rule or legislative instrument.

175. The notice must be published in:
- the Government Gazette;
- a daily newspaper circulating generally throughout Victoria; and
- if the responsible Minister considers it appropriate, any trade, professional or public interest publications as the responsible Minister determines.

176. The notice must set out:
- the reason for, and the objective of, the proposed statutory rule or legislative instrument;
- a summary of the results of the RIS;
- the locations (including the Government website) where a copy of the RIS and the proposed statutory rule can be obtained; and
- an invitation for public comments or submissions within a specified time not less than 28 days from the publication of the notice.

177. The RIS must be available in electronic form from a government website and in hard copy.

178. Under the Act, consultation following publication of a RIS is required for at least 28 days from public notification. However consultation for at least 60 days is best practice.

Consideration of submissions

179. Following the public consultation process, the responsible Minister must consider all submissions and comments received in relation to the draft statutory rule or legislative instrument and RIS.

180. If the Minister does not adequately address valid criticisms and suggestions made in relation to a statutory rule or legislative instrument released for public consultation, SARC may criticise the statutory rule or legislative instrument. Under section 15A of the Act, SARC must be provided with a copy of all comments and submissions received in relation to the RIS (see generally Part 3, Division 5 of these Guidelines).

Notice of decision

181. Sections 12 (statutory rules) and 12J (legislative instruments) of the Act require the responsible Minister to publish a notice of his or her decision to make, or not to make, the relevant statutory rule or legislative instrument.

182. The notice must be published in:
- the Government Gazette; and
- a daily newspaper circulating generally throughout Victoria.

183. To ensure greater transparency of decisions, the responsible Minister should provide reasons for the direction taken in a final statutory rule or legislative instrument. These should address any general issues raised in submissions.

184. A statement of reasons must also be published on a government website and available in hard copy. This will allow those who have made submissions on the RIS to see how their comments have been addressed in the final version of the statutory rule or legislative instrument.

DIVISION 5 – MAKING, TABLING AND PUBLICATION

185. Parts 3 (statutory rule) and 3A (legislative instruments) of the Act specify the requirements for making, tabling and publishing statutory rules and legislative instruments. Some of these requirements differ depending on whether a statutory rule or legislative instrument is being made, while others apply to both. These Guidelines specify some requirements in addition to those imposed by the Act.

Making statutory rules

186. Section 13 of the Act requires statutory rules made by or with the consent of the Governor in Council to be accompanied by a 'section 13 certificate' issued by the Chief Parliamentary Counsel. The section also specifies the matters which must be included in the certificate. After OCPC has settled the proposed statutory rule, a section 13 certificate must be obtained before the proposed statutory rule is submitted to the Governor in Council to be made.

187. Once the section 13 certificate has been obtained, and all other requirements outlined in these Guidelines and the Act have been complied with, the proposed statutory rule may be submitted to the Governor in Council. Section 14 of the Act specifies requirements for submitting statutory rules to the Governor in Council and the documents which must accompany the proposed statutory rule.

188. In addition to the documents outlined in section 14 of the Act, an Explanatory Memorandum must be prepared to accompany any statutory rule submitted to the Governor in Council. The Explanatory Memorandum should set out the nature and extent of any changes effected by the new statutory rule and the reason for the changes, particularly where no RIS has been prepared. The Explanatory Memorandum is especially important where the proposed statutory rule contains complex or detailed technical information.

189. The Explanatory Memorandum should be brief, and generally take the following form:
- a brief outline of the statutory rule;
- an explanation of the changes effected by each provision;
- a statement of the reasons for making the statutory rule;
- where applicable, the reasons no RIS was prepared; and
- a statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

190. A Recommendation page, signed by the responsible Minister, and an Agenda page, signed by the responsible Minister and Departmental Secretary (or authorised delegate), must also accompany a statutory rule when it is submitted to the Governor in Council.

191. Agencies should consult OCPC's *Notes for Guidance on the Preparation of Statutory Rules* (April 2011) when preparing a statutory rule.

Publishing legislative instruments

192. Section 16A(1) of the Act requires legislative instruments to be published in full in the Government Gazette.

193. In certain limited circumstances it may be impracticable to gazette a legislative instrument in full. These circumstances include where it is not possible to gazette an

instrument in full because it contains detailed maps or diagrams or is in a format that is incompatible with the format of the gazette.

194. Subsection (2) provides that where an instrument is not suitable for publication in full in the gazette, notice of the making of the legislative instrument and details of where a full copy may be obtained must be published instead.

Amendments commencing 1 January 2013

195. Section 39 of the *Subordinate Legislation Amendment Act 2010* provides for the insertion of section 16F into the Act. This section will commence on 1 January 2013.

196. The new section 16F will apply where a legislative instrument is made which amends an existing legislative instrument. In these circumstances, the instrument maker will be required to ensure that a consolidated version of the legislative instrument, as amended, is made available to the public.

197. In anticipation of the commencement of this new section, agencies should begin preparing consolidated versions of legislative instruments for which they are responsible, and make these publicly available (prior to 1 January 2013) where possible.

Laying statutory rules and legislative instruments before Parliament

198. Sections 15 (statutory rules) and 16B (legislative instruments) of the Act require statutory rules and legislative instrument to be laid before Parliament within 6 sitting days of being made. The Act also specifies documents which must accompany the new statutory rule or legislative instrument when laid before Parliament (and must also be forwarded to SARC).

199. Some of these requirements apply to both statutory rules and legislative instruments, while other documents are required only in relation to statutory rules. Requirements apply only if the documents have been prepared.

200. The following documents must accompany both a statutory rule and a legislative instrument, where they have been prepared:

- a certificate of consultation issued under section 6 or 12C (Part 3, Division 1 of these Guidelines);
- a Ministerial exemption certificate issued under section 8 or 12F (Part 3, Division 2 of these Guidelines);
- a Premier's exemption certificate issued under section 9 or 12G (Part 3, Division 2 of these Guidelines);
- a compliance certificate in relation to RIS requirements and adequacy issued under section 10(4) or 12H(4) (Part 3, Division 3 of these Guidelines); and
- a human rights certificate or human rights exemption certificate issued under section 12A or 12D (Part 5, Division 1 of these Guidelines).

201. The following additional documents must accompany a statutory rule where they have been prepared:

- an extension certificate and the Premier's certificate agreeing to the extension issued under section 5A (see Part 5, Division 5 of these Guidelines);
- an infringements offence consultation certificate issued under section 6A (see Part 5, Division 1 of these Guidelines) ;

- a section 13 certificate issued by the Chief Parliamentary Counsel (see Part 3, Division 5 of these Guidelines); and
- the responsible Minister's recommendation that the Governor in Council make the statutory rule.

Documents which must be sent to SARC

202. Sections 15A (statutory rules) and 16C (legislative instruments) of the Act require new statutory rules and legislative instruments to be sent to SARC. The Act also specifies documents which must accompany the new statutory rule or legislative instrument when sent to SARC.

203. Accompanying documents required by the Act:
- any applicable document required to be laid before Parliament (see Part 3, Division 5 of these Guidelines);
- if a Premier's exemption certificate has been issued – the reasons given by the responsible Minister to the Premier as to why the public interest requires that the proposed statutory rule or legislative instrument be made without preparing a RIS; and
- if a RIS has been prepared – the RIS and a copy of all comments and submissions received.

204. The following additional documents must also be sent to SARC:
- a copy of VCEC's assessment of any RIS (see Part 3, Division 3 of these Guidelines);
- copies of any notices published in the Government Gazette, newspapers or other publications advertising a RIS; and
- copies of any notices advising of the decision to make or not make a proposed statutory rule or legislative instrument.

205. Agencies should refer to the Act for timing requirements.

Scrutiny and disallowance of statutory rules and legislative instruments

206. Parts 5 (statutory rules) and 5A (legislative instruments) of the Act deal with the powers of SARC to report to Parliament recommending that a statutory rule or legislative instrument be disallowed or amended. SARC may only recommend disallowance or amendment where it considers that one of the criteria set out in sections 21 (statutory rules) or 25A (legislative instruments) has been breached. Agencies should consult these sections when considering the content of statutory rules or legislative instruments to minimise the likelihood of disallowance.

207. Upon SARC's recommendation, Parliament may disallow the statutory rule or legislative instrument in accordance with section 23 or 25C.

PART 4

SIGNIFICANT BURDEN

208. This Part of the Guidelines outlines circumstances in which a statutory rule or legislative instrument is considered to impose a significant burden on a sector of the public.

209. Whether a statutory rule or legislative instrument imposes a 'significant economic or social burden' is important at two stages.

210. First, sections 6(b) (statutory rules) and 12C(b) (legislative instruments) require consultation in accordance with these Guidelines with any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument. See Part 3, Division 1 of these Guidelines in relation to consultation under sections 6(b) and 12C(b).

211. Second, sections 8(1)(a) (statutory rules) and 12F(1)(a) (legislative instruments) allow a responsible Minister to issue a certificate exempting a proposed statutory rule or legislative instrument from the requirement to prepare a RIS where, in his or her opinion, the proposed statutory rule or legislative instrument would not impose a significant economic or social burden on a sector of the public. See Part 3, Division 2 of these Guidelines.

212. In considering whether a proposed statutory rule or legislative instrument imposes a significant economic or social burden on a sector of the public, the responsible Minister must consider:

- the relevant base case;
- whether the proposed statutory rule or legislative instrument imposes a burden on one or more 'sector[s] of the public'; and
- whether that burden is a 'significant economic or social burden'.

213. Each of these considerations is discussed in more detail below.

The base case

214. The relevant base case can be determined by considering what the situation would be if the statutory rule or legislative instrument were not made. This will be either the existing regulatory environment, or no regulation.

215. No regulation is the appropriate base case if:

- a statutory rule or legislative instrument is new and is not replacing an existing statutory rule or legislative instrument;
- a statutory rule is made to replace an existing statutory rule that is automatically being revoked in accordance with section 5 of the Act (i.e. 'sunsetting'); or
- a statutory rule or legislative instrument is made to replace an existing statutory rule or legislative instrument that is expiring, other than by sunsetting.

216. For a proposed statutory rule or legislative instrument that will amend an existing statutory rule or legislative instrument, the base case is the burden imposed by the existing regulatory environment.

Sector of the public

217. For a burden to be imposed on a 'sector of the public', the proposed statutory rule or legislative instrument must impose a burden on either the whole community or on one or more identifiable groups of people within the community. How many, and which, people can constitute a sector of the public is a matter of judgement in each case. It will depend on the nature of the proposed statutory rule or legislative instrument.

218. For example, a statutory rule or legislative instrument might impose a burden on a sector of the public if it:

- affects a number of businesses, community groups, or individuals;
- has a concentrated effect on a particular group, region or industry; or
- has an aggregate impact on the Victorian economy.

219. In some circumstances, a statutory rule or legislative instrument may have a significant concentrated effect on a particular group, region or industry. In such cases the burden on that group, region or industry may mean that the burden as a whole is significant, even though the majority of the population is not affected.

Significant burden

220. 'Significant burden' cannot be defined prescriptively. 'Burden' is a broad concept which may include a range of negative effects or impacts. For example, a statutory rule or legislative instrument may place a financial or another type of resource burden (e.g. time) on businesses or individuals, restrict a sector of the public's access to certain amenities or areas, or restrict an individual's ability to make choices about certain things.

221. Whether a burden is 'significant' should be determined in accordance with the ordinary English-language meaning of the word. A burden that is very minor, inconsequential or of little importance will not be a 'significant burden'.

222. Ministers should consider the burden imposed by the statutory rule or legislative instrument itself, rather than any burden imposed by the authorising legislation or statutory rule. In some cases, the burden imposed will derive from obligations set out in the authorising Act or statutory rule and the statutory rule or legislative instrument will merely be machinery. Statutory rules or legislative instruments which are machinery or declaratory in nature are unlikely to impose a significant burden.

223. Whether a significant burden may or would be imposed should initially be assessed with reference only to the costs or negative impacts on a sector of the public. That is, when assessing whether a significant burden exists, potential costs should not be offset against potential benefits. This balancing exercise is undertaken later as part of the RIS process, in analysing the overall costs and benefits of the proposed statutory rule or legislative instrument.

Assessing qualitative burdens

224. All potential costs must be assessed, regardless of how readily quantifiable those costs are. The analysis may need to include both quantitative and qualitative dimensions. Taking into account the views of stakeholders on likely or desired outcomes may help to determine whether a 'significant' burden is imposed, particularly where the costs are not easily quantified.

225. Some statutory rules or legislative instruments will impose a burden which is primarily qualitative in nature; for example those that significantly impact on rights, access to services or the ability to innovate or compete. These burdens are by nature less readily quantifiable, and will require careful assessment to ensure all potential negative impacts are identified and the relative size of each is adequately assessed. Whether a burden is significant in these cases may not ultimately be able to be based on quantitative estimates.

226. In considering whether a proposed statutory rule or legislative instrument imposes a significant burden, the responsible Minister must also consider the effect the proposed statutory rule or legislative instrument is likely to have on the rights set out in the Charter Act. See Part 5, Division 1 of these Guidelines in relation to Human Rights Certificates.

Assessing quantitative burdens

227. Where the impacts of the proposed statutory rule or legislative instrument are readily quantifiable, indicative data may be gathered to assess the likely costs of the proposal. This may involve seeking views from some of those likely to be affected.

228. In general, if the preliminary and indicative analysis suggests the measurable social and/or economic costs to any sector of the public (including costs to the Victorian community as a whole) are greater than $500,000 per year, compared with the relevant base case, then there is likely to be a significant burden. For the applicable base case, see paragraphs 214-216 above.

229. The $500,000 threshold is indicative only and should be reserved for situations where it is not otherwise clear that a significant burden may be imposed. Further, a statutory rule or legislative instrument may impose a significant burden on a sector of the public even if it imposes quantifiable costs of less than $500,000 per year - for example, if the impact is concentrated on a particular group, region or industry.

230. In determining whether a significant burden is imposed, quantifiable costs should be considered in conjunction with qualitative costs discussed above at 224-226.

Examples of where a significant burden may be imposed

231. A significant burden may be imposed on a sector of the public where the proposed statutory rule or legislative instrument has one or more of the following effects:

- imposing restrictions on entry into, or exit out of, an affected industry;
- altering the ability or incentives for business to compete in an industry;
- requiring business, community groups or individuals to spend significant additional funds or devote a significant amount of additional time to compliance activities, change current practices or seek external advice

(whether the additional resources required are significant will, to some degree, depend on the nature of the businesses or industry affected);

- creating a significant disincentive to private investment – e.g. by increasing potential delays for approvals;
- imposing significant penalties for non-compliance (either on businesses or individuals);
- imposing minimum requirements or standards on businesses or individuals, such as building requirements or environmental standards; or
- significantly affecting individual rights and liberties in some other way.

232. The above is a non-exhaustive list of examples. Each policy proposal should be assessed based on the particular impacts it will impose and the relative size of those impacts.

233. Examples of cases where a RIS has been prepared in the past include:

- Petroleum Regulations. Following the sunsetting of existing regulations, these imposed a continued requirement for petroleum firms to have development and operation plans prior to the commencement of onshore petroleum operations.
- Associations Incorporation Amendment (Fees and Other Matters) Regulations. These prescribed accounting requirements, fees to cover the costs of the incorporated associations scheme, and maximum fines which can imposed by an association on a member.
- Marine Regulations. These imposed requirements for the registration of emergency positioning devices, introduced a National Standard for Commercial Vessels and updated standards for personal floatation devices.
- Visitable and Adaptable Features in Housing. These prescribed minimum building requirements for pathways, level entries, doorway and passage widths, and accessible bathroom facilities.

234. All RISs from 2004 onwards are available on the VCEC website (www.vcec.vic.gov.au). Agencies are also encouraged to discuss any policy proposals with VCEC at an early stage of development to clarify RIS requirements.

Statutory rules and legislative instruments that impose fees or charges where section 8(1)(d) or section 12F(1)(c) does not apply

235. Where a statutory rule or legislative instrument imposes a fee or charge, the responsible Minister should consider the level of the fee, the size of any increase being made (as compared to the current fee, if one exists) and the impact it may have on an individual, community group or business. The indicative $500,000 threshold may assist with this assessment.

236. The indicative $500,000 threshold applies to the cumulative impact of the policy proposal as effected by the statutory rule or legislative instrument. It does not apply to each affected individual or business. That is, a new fee or charge which recovers $500,000 or more per year in total is likely to impose a significant burden on a sector of the public, although it may not impose a $500,000 burden on individual businesses or groups.

237. The threshold will also be met if the statutory rule or legislative instrument as a whole imposes a burden of $500,000 per year despite the fact that individual fee components may not recover more than $500,000 per year (i.e. if a basket approach is used to set multiple fees).

238. The Treasurer's annual rate does not form part of the base case. This means that a fee increase does not need to recover an additional $500,000 on top of the Treasurer's annual rate to meet the indicative significant burden threshold.

Statutory rules and legislative instruments reducing or maintaining existing fees or charges

239. Statutory rules or legislative instruments which reduce existing fees or charges payable do not usually impose a significant burden on a sector of the public.

240. However, there are exceptions, such as where a reduction in fees could cause costs to be redistributed to other sectors. This might occur where a reduction in fees lowers the level of cost-recovery and causes cost to be shifted to the general community. This may be achieved through increased base fees or charges to all those affected or additional funding being allocated from general taxation.

241. A statutory rule or legislative instrument that is remade and re-imposes an existing fee or charge at the same level can impose a significant burden, as the relevant base case will be 'no regulation' (see paragraphs 214-216 above).

PART 5

OTHER MATTERS

DIVISION 1 – CERTIFICATES

Human rights certificates

242. Sections 12A (statutory rules) and 12D (legislative instruments) require the responsible Minister to issue a human rights certificate in respect of a proposed statutory rule or legislative instrument.

243. Sections 12A(2) (statutory rules) and 12D(2) (legislative instruments) set out the matters which must be included in the human rights certificate. There are a limited number of exceptions to the requirement to produce a human rights certificate, which are set out at sections 12A(3) (statutory rules) and 12D(3) (legislative instruments).

244. Preparing a human rights certificate involves assessing the instrument's likely impact on the rights set out in the Charter Act. Conducting a human rights impact assessment as part of the policy development process will assist in the preparation of the human rights certificate that accompanies the final statutory rule or legislative instrument. This analysis is similar to the analysis undertaken through the Statement of Compatibility process when preparing primary legislation.

245. For further details on how to assess the human rights impact of proposed subordinate legislation, see Chapter 4 of the *Victorian Guide to Regulation* and the Department of Justice's *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* ('Charter Act Guidelines'). The Charter Act Guidelines include a template for completing a human rights impact assessment. This may be a useful tool for agencies when preparing human rights certificates.

246. The potential human rights impact of a proposed statutory rule or legislative instrument is relevant in considering whether it imposes a significant burden on a sector of the public. The responsible Minister must consider the effect the proposed statutory rule or legislative instrument is likely to have on the rights set out in the Charter Act when considering whether the proposed statutory rule or legislative instrument imposes a significant burden. (See Part 4 of these Guidelines).

247. A proposal is likely to create a social burden if it limits human rights. Whether the burden is significant will depend on the nature and extent of the limitation.

248. A detailed human rights analysis is not required as part of a RIS, as this is covered when preparing the human rights certificate. However, a RIS may refer to rights and liberties (including Charter Act rights) as part of the broader concept of significant social burden.

Infringements offence consultation certificates

249. If a proposed statutory rule provides for the enforcement of an offence by an infringement notice, section 6A of the Act requires the responsible Minister to issue an infringements offence consultation certificate.

250. The responsible Minister must certify that:

- the Department of Justice has been consulted about the enforcement and suitability of the offence;
- the Attorney-General's guidelines under the *Infringements Act 2006* have been taken into account; and
- the proposed infringements offence meets the requirements of those guidelines or does not meet the requirements but should be made anyway for reasons specified in the certificate.

251. Section 12B of the Act allows an infringements offence consultation certificate to be included in a composite certificate issued under that section. See Paragraphs 252-255.

Composite certificates

252. Sections 12B (statutory rules) and 12K (legislative instruments) provide that some certificates required by the Act may be issued in a single instrument, known as a composite certificate.

253. Section 12B of the Act provides that the responsible Minister may issue a composite certificate for a proposed statutory rule that incorporates:
- a Ministerial exemption certificate under section 8;
- a consultation certificate under section 6;
- an infringements offence consultation certificate under section 6A; and
- a RIS certificate under section 10(4).

254. Section 12K of the Act provides that the responsible Minister may issue a composite certificate for a proposed legislative instrument that incorporates:
- a Ministerial exemption certificate under section 12F;
- a consultation certificate under section 12C; and
- a RIS certificate under section 12H(4).

255. Agencies should note that a Ministerial exemption certificate and a RIS certificate should never be included in the same composite certificate.

Other certificates under Parts 2 and 2A

256. Other certificates which are required under Part 2 (statutory rules) and Part 2A (legislative instruments) are discussed elsewhere in these Guidelines.

- certificates of consultation – ss 6(c) and 12C(c) (see Part 3, Division 1 of these Guidelines).
- Ministerial exemption certificates – ss 8 and 12F (see Part 3, Division 2 of these Guidelines).
- Premier's exemption certificates (see Part 3, Division 2 of these Guidelines).
- RIS certificates (see Part 3, Division 3 of these Guidelines).

DIVISION 2 – INTERACTION BETWEEN THE SUBORDINATE LEGISLATION ACT AND THE AUTHORISING ACT OR STATUTORY RULE

257. When preparing a statutory rule or legislative instrument, agencies and Ministers must consider the interaction between the Act (that is, the *Subordinate Legislation Act 1994*) and the authorising Act or statutory rule (under which the proposed statutory rule or legislative instrument is made).

258. In some cases, the authorising Act or statutory rule may impose requirements, such as consultation and gazettal requirements, even though the instrument is subject to the requirements of the Act. In other cases, the authorising Act or statutory rule may apply provisions of the Act to the instrument that would not otherwise apply. This will be most common in authorising Acts or statutory rules for legislative instruments (as opposed to statutory rules).

259. In considering which requirements must be met, agencies should consider the relevant provisions of the Act and seek legal advice if necessary. In particular:

- if an instrument is prescribed to be a legislative instrument, any inconsistent or duplicating provision of the authorising Act does not apply to the instrument (section 4A(2)).
- if an authorising Act requires gazettal of a legislative instrument within a shorter time period than the Act, compliance with the authorising Act is taken to be compliance with the Act (section 16D(2)). The authorising Act should be complied with.
- if an authorising Act requires gazettal of a legislative instrument within a longer time period than the Act, the Act prevails over the authorising Act (section 16D(3)). The Act should be complied with.
- if an authorising Act requires a legislative instrument to be tabled in Parliament within a time period the same as, or shorter than, the Act, compliance with the authorising Act is taken to be compliance with the Act (section 16E(1)). The authorising Act should be complied with.
- if an authorising Act requires a legislative instrument to be tabled in Parliament within a longer time period than the Act, the Act prevails over the authorising Act (section 16E(2)). The Act should be complied with.

260. When preparing primary legislation, agencies should consider how the requirements of the Act will apply to any new statutory rule-making or legislative instrument-making powers. Except in exceptional circumstances, legislation should not contain provisions that exclude the operation of the Act.

261. Where there may be exceptional circumstances justifying an exclusion from the Act, the agency must consult with DPC during the policy development stage of the Bill. During the drafting stage, the agency must consult with OCPC as well as DPC.

DIVISION 3 – INCORPORATING OTHER MATERIAL

262. Section 32 of the *Interpretation of Legislation Act 1984* ('ILA') sets out when subordinate instruments, such as statutory rules or legislative instruments, may refer to other documents. This is known as incorporation by reference.

263. Generally, subordinate instruments may only incorporate by reference provisions of a Victorian or Commonwealth Act, a Code (as defined in the ILA), or a Victorian or Commonwealth statutory rule. Subordinate instruments may only incorporate other matters where there is explicit power to do so in the authorising Act.

264. Where matter is incorporated by reference, section 32 of the ILA sets out requirements for making material available to the public and for tabling the material in Parliament.

265. In deciding whether to incorporate material by reference, agencies should assess the drafting convenience against the effect on the accessibility of the incorporated material and the likely level of public awareness. Agencies should reserve the use of incorporated detailed and extensive technical material to subordinate legislation affecting industries familiar with the material.

266. Generally, material should only be incorporated by reference if the material clearly describes the rights and obligations being created and the people who are subject to these rights and obligations.

267. Where it is proposed that a statutory rule or legislative instrument incorporates material, all material necessary to ensure compliance should be tabled. This includes primary references as well as references to documents at a secondary or tertiary level unless such references are irrelevant to the substance of the regulation, are unnecessary or merely comprise a reference back to the primary reference material. Unless all relevant material is tabled, the statutory rule or legislative instrument does not apply, adopt or incorporate the material effectively.

DIVISION 4 – STYLE AND LANGUAGE

268. This Division outlines guidelines as to the style and language to be used in drafting statutory rules and legislative instruments.

Clear drafting of statutory rules and legislative instruments

269. Statutory rules and legislative instruments should be accurately and clearly drafted. Clear drafting will make the statutory rule or legislative instrument more accessible to the public and will reduce the risk that the instrument will be held to be in excess of the power by a court.

270. If a proposed instrument refers to any other statutory rule or legislative instrument, it must contain a footnote or end note identifying the statutory rule or legislative instrument referred to. It must also identify all other instruments which amend the statutory rule or legislative instrument referred to.

271. If a footnote or end note identifies a statutory rule or legislative instrument that has been reprinted in accordance with section 18 of the Act, the note may refer to:

- that reprint;
- the last statutory rule or legislative instrument incorporated in the reprint; and
- any statutory rule or legislative instrument which has amended the reprinted statutory rule or legislative instrument after it was reprinted.

272. All statutory rules and legislative instruments must be expressed:

- in language that is clear and unambiguous;
- in a way which ensures that its meaning is certain and there are no inconsistencies between provisions;
- in language that gives effect to its stated purpose;
- consistently with the language of the empowering Act; and
- in accordance with plain English drafting standards.

273. A statutory rule or legislative instrument should:

- not duplicate, overlap or conflict with other statutory rules, legislative instruments, or legislation; and
- always reflect the intention and promote the purpose of the authorising statute.

274. A statutory rule or legislative instrument must:

- not conflict with the letter and intent of the authorising Act;
- clearly set out as part of its text:
  - the objectives of the statutory rule or legislative instrument; and
  - the precise provision authorising the statutory rule or legislative instrument; and
- not deal with matters outside the scope of its objectives.

OCPC's role in drafting and settling statutory rules

275. Agencies must consult OCPC in drafting statutory rules.

276. OCPC plays two roles in the statutory rule making process. First, OCPC is responsible for settling the power, form and content of statutory rules and drafting statutory rules in certain circumstances (see OCPC's *Notes for Guidance on the Preparation of Statutory Rules* (April 2011)). Under section 10(1)(g) of the Act, a draft copy of the proposed statutory rule must be included with the RIS. OCPC must settle draft statutory rules before VCEC will provide its final assessment of adequacy of the RIS.

277. Second, if a proposed statutory rule is to be made by, or with the consent or approval of, the Governor in Council, section 13 of the Act requires that it be submitted to the Chief Parliamentary Counsel for the issue of a certificate by the Chief Parliamentary Counsel. Section 13 sets out certain criteria that the certificate must address (see Part 3, Division 5 of these Guidelines).

DIVISION 5 – SUNSETTING AND EXTENSION

Sunsetting of statutory rules

278. One of the aims of the Act is to ensure that outdated and unnecessary regulation is automatically repealed. Section 5 of the Act provides for the automatic revocation of statutory rules ten years after they are made.

279. Agencies must maintain accurate records of the sunset dates for all statutory rules administered by the Ministers to whom the agency reports. It is essential that an agency allow sufficient time for the review of the continuing appropriateness of all statutory rules and for the completion of the RIS process if they are to be re-made in whole, part or in a modified form.

280. OCPC notifies agencies of statutory rules that are due to sunset and works with agencies to ensure the orderly sunsetting of statutory rules. The responsible Minister should nominate an officer to notify OCPC of the Minister's intentions about remaking any statutory rule that is due to sunset. The officer should notify OCPC at least 6 months before the sunset date to allow OCPC to provide timely advice and to allow sufficient time to settle any proposed new statutory rule.

Extension of statutory rules

281. Where there are special circumstances that mean there is insufficient time to complete the RIS process before a statutory rule sunsets, section 5A of the Act allows the responsible Minister, with the agreement of the Premier, to extend the statutory rule for up to 12 months. During this time, a RIS must be completed if the statutory rule is to continue operation.

Grounds for extension

282. The Act does not define the 'special circumstances' that would justify the extension of regulations which would otherwise sunset. However, the type of circumstances envisaged may be cases where the authorising legislation has recently changed or a national scheme is being negotiated which makes it impossible for the RIS process to be completed in time.

283. In addition, the special circumstances must *cause* there to be insufficient time for a RIS to be prepared. Where there is insufficient time to prepare a RIS, extension regulations should only be made where this is due to special circumstances.

284. Administrative oversight should not be considered to be a 'special circumstance'. The scheme of the Act is to ensure that the regulatory process is undertaken and in cases where it is not, to make the reasons for not undertaking the process clear.

Process for extension

285. Only one 'extension regulation' can be made for each statutory rule. Before the responsible Minister can issue an extension certificate, section 5A(3) of the Act requires him or her to obtain a certificate from the Premier agreeing to the extension.

286. Agencies should consult OCPC and DPC as soon as they believe a statutory rule or legislative instrument may require a Premier's extension certificate. Agencies are

encouraged to provide preliminary drafts of the proposed statutory rule to DPC to assist this initial consultation.

287. The responsible Minister should request in writing that the Premier issue an extension certificate under section 5A. Such requests should be made at least 14 days before the date on which it is sought to have the proposed statutory rule made.

288. The Explanatory Memorandum submitted to the Governor in Council must also set out the special circumstances justifying the extension.

289. Extension regulations do not need to be accompanied by a RIS if the responsible Minister issues an exemption certificate under section 8(1)(e)(iii).

290. Extension certificates under section 5A(1), Premier's extension certificates under section 5A(3) or exemption certificates under section 8(1)(e)(iii) must be laid before Parliament and sent to SARC. See generally Part 3, Division 2 of these Guidelines.