

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.4 Conferral and exercise of powers (including by Governor-General)

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 17 of 2004 and Drafting Direction No. 3 of 2000.

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Part 1—Exercise of powers of the Governor-General

1 The question has arisen whether certain forms of statutory provision confer or impose personal discretions or obligations on the Governor-General in conflict with the expectation that he or she would exercise powers on the advice of Ministers.

2 AGS advised in 1997 (12 December 1997 Ref: OGC97076500) that none of the provisions in question has that effect, but that it would be preferable in future to draft provisions of these kinds so as to make it clear who is to form the opinion, or do the thing, that is a formal pre-condition for the exercise of a power by the Governor-General.

3 However, provisions that merely require a factual condition precedent to be satisfied, or limit the scope of a regulation-making power, and do not formally require particular steps to be taken or a particular view to be formed, do not need to be drafted differently. Examples of such provisions are the standard regulation making power and the standard termination of appointment provision (see AGS advice of 17 March 2000 Ref: 2099045898).

4 The following table sets out examples of the current forms and new forms.

Old form of provision	New form of provision
<p>(2) Before making any regulation under subsection (1), the Governor-General is to take into consideration any relevant recommendation made to the Minister by a rice industry body.</p> <p>Rice Levy Act 1991, s 8</p>	<p>(2) Before the Governor-General makes a regulation under subsection (1), the Minister must take into consideration any relevant recommendation made to the Minister by a rice industry body.</p>
<p>(5) The Governor-General shall not make a Proclamation ... except after consideration by the Executive Council of a report by the Authority ...</p> <p>Great Barrier Reef Marine Park Act 1975, s 31(5)</p>	<p>(5) Before the Governor-General makes a Proclamation, the Minister must consider a report by the Authority ...</p>
<p>(4) The Governor-General may, ..., if the Governor-General is satisfied that to do so is in the national interest, ... fix ... a percentage exceeding 15%.</p> <p>Banks (Shareholdings) Act 1972, s10</p>	<p>(4) Before the Governor-General fixes a percentage exceeding 15%, the Minister must be satisfied that it is in the national interest to do so.</p>

5 In general, you should not replace a provision expressed to require the Governor-General to consider something or form a particular opinion with a provision expressed to require the Executive Council to consider the thing or form the opinion.

Responsibility for the mental activity should be conferred on the Minister or other appropriate authority.

6 However, there may occasionally be cases where, for specific policy reasons, it is still appropriate for the Governor-General and the Executive Council to be required to engage in the mental activity themselves. You should bring any provisions of this kind to First Parliamentary Counsel's attention.

7 Drafters should use the new forms for all new provisions of the relevant kinds. Drafters should replace old forms with new forms when an Act containing an old form is being otherwise amended.

8 There will be no project to replace occurrences of the old forms with the new forms across the statute book.

9 If a provision giving a power to make a subordinate instrument is repealed and replaced, it is wise to assume that the repeal will cause the instrument to lapse. If the policy is to continue the instrument in force, you will need to include a transitional provision.

10 The following is an example of a transitional provision to continue an instrument in force in a case where the enabling provision has been repealed and replaced:

19 Transitional—section 37 of the *Widgets Act 1968*

- (1) This item applies to an instrument if:
 - (a) the instrument was made under section 37 of the *Widgets Act 1968*; and
 - (b) the instrument was in force immediately before the commencement of this item.
- (2) The instrument has effect, after the commencement of this item, as if it had been made under section 37 of the *Widgets Act 1968* as amended by this Act.

11 The Attorney-General has approved the new forms and the approach to their introduction. If an instructing Department resists changes to its legislation (for example, because it considers them unnecessary or because they may need to be negotiated or cleared with non-government bodies), please bring the matter to First Parliamentary Counsel's attention.

Part 2—Implied conferral of powers

Decision in Hong Kong Bank

12 In *Hong Kong Bank v ASC* ((1992) 108 ALR 70 at page 75) the Full Federal Court expressed the view that a provision along the lines “In this section, a reference to a prescribed person is a reference to ... any other person authorised by the Commission to make applications under this section” could not be read as conferring power on the Commission to give such authority.

13 It is possible to read the judgment as merely confirming the age-old drafting rule that substantive powers should not be conferred in definitions, but it is also possible that the decision may be interpreted more widely.

OGC advice prior to that decision

14 Prior to that decision, the Office of General Counsel gave advice on the effect of a provision that listed one of the functions of a statutory body as “When requested by the Minister, to provide information ... etc.”. There was no additional provision enabling the Minister to make the request, or obliging the body to comply with such a request.

15 The effect of the advice was that the provision gave an implied power to the Minister to make such a request.

16 The advice also said that there was some doubt whether the provision obliged the body to comply with such a request. In later correspondence, the Office of General Counsel said that a stronger word than “requested” would be desirable to put the issue beyond doubt. You should avoid this doubt by including a specific provision obliging the body to comply with the request, or if that course is inconvenient, by using the word “directed” instead of “requested”.

Summary

17 In view of the Hong Kong Bank decision, you should not include provisions that confer substantive powers in definitions.

18 Despite the OGC advice, in view of the Hong Kong Bank decision you also need to be careful about assuming that powers can safely be conferred by implication and should consider whether an express conferral of power would be more appropriate.

Part 3—Subsection 33(3) of the *Acts Interpretation Act 1901*

19 You need to be aware that there is a narrow view and a broader view of the meaning of the word “instrument” in subsection 33(3). The narrow view is that it is limited to instruments of a legislative character (*Australian Capital Equity v Beale* (1993) 114 ALR 50). The broader view is that it includes, at least, any writing designed to carry into effect a statute (*Barton v Croner Trading Pty Ltd* (1984) 54 ALR 541). The Australian Government Solicitor has consistently taken the broader view and OPC should follow the AGS advice.

20 You also need to be aware that the mere inclusion of the words “by instrument in writing” will not necessarily enable reliance on subsection 33(3) of the *Acts Interpretation Act 1901*.

21 In January 1995 (and possibly in other cases), Robert Orr of OGC advised that the Attorney-General’s Department believed that courts “would be concerned to keep subsection 33(3) within reasonable bounds, particularly where interests of a proprietary or contractual nature are involved”. OGC appears to take the view that even where the instrument concerned does not itself grant or create proprietary or contractual rights, there may be implied limits on the power to revoke or vary the instrument where it affects such rights.

22 In summary, you should not rely on subsection 33(3) of the *Acts Interpretation Act 1901* without giving careful thought to the nature of the instrument, the nature of the power conferred, and the implications of revocation etc, and to whether those implications might

justify discovery (by OGC or a court) of an intention contrary to the application of subsection 33(3).

Part 4—Delegations—effect of changes in legislation

23 You need to be aware of the decision of the New South Wales Court of Criminal Appeal in *Australian Chemical Refiners Pty Ltd v Bradwell* (28 February 1986, unreported, although it is noted in *Administrative Law Decisions* (1986) Vol. 10 at 10 ALN N96 and *Australian Current Law Digest* [1986] ACLD 424).

24 The point of the case seems to be that a delegation (even generally expressed, eg “all my powers under the X Act”) will not be effective to delegate powers subsequently conferred on the delegator (eg by amendment of the Act). AGS also takes the view, based on this case, that where a power covered in a delegation is amended “in substance” after the delegation is made, the delegation of that power will not remain effective after the amendment. The general basis for these views is the maxim “One does not give what one does not have”.

25 If you draft an amendment of a delegable power, or an amendment to add a new delegable power to an Act, you should advise your instructors that any existing delegations should be reviewed in light of *Bradwell*’s case (ideally with the help of AGD/AGS) and, if necessary, remade.

Part 5—Ministers or Departments consulting other Ministers or Departments

26 Paragraph 6.37 of the *Legislation Handbook* provides that it is generally not appropriate to place a statutory obligation on the Minister or Department administering an Act to consult with other Ministers or Departments. Any proposal to include such a statutory obligation requires Cabinet approval or the Prime Minister’s approval.

Part 6—Exercise of powers “after report”

27 You need to be aware of the decision in *Carmody v F.C. Lovelock Pty. Ltd.* ((1971) ALR 21) in relation to the issue of whether a person, who is authorised to exercise a power “after report” or “after receiving a recommendation” of some person or authority, may exercise the power otherwise than in accordance with the report or recommendation.

28 That case concerned an Act under which a Minister had power to publish a notice if he was satisfied as to certain matters “after inquiry and report by the Tariff Board”. Barwick CJ expressed the view that the Minister’s satisfaction need not be founded exclusively on the report, but might be founded on information not derived from the report and, indeed, might be formed despite the conclusions to which the Tariff Board may have come. Similarly, Walsh J expressed the opinion that the provision does not mean that the Minister is bound to accept completely what has been reported and to act in accordance with it and with it alone. On the other hand Gibbs J expressed the view that the Minister’s satisfaction must be causally connected with the inquiry and report of the Tariff Board. In his view, in this context, the word “after” did not mean simply “following in time” but must have the meaning “subsequent to and in consequence of”, Windeyer J entirely agreed with the judgment of Gibbs J and Owen J expressly left the question open. McTiernan J and Menzies J did not deal with the point.

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29 You should bear in mind the difference of opinion in the court and should try to make as clear as possible the intended effect of provisions operating after report or recommendation. You should seek instructions as to the result to be achieved.

30 A direction that a person must not exercise a power “unless he or she has received, and considered, a report (or recommendation)” of a specified person or authority would leave the person free to act contrary to the report (or recommendation) and to take other information into account.

31 However, a power to act “**on** the recommendation” or “**on** the nomination” of a specified person or authority must be exercised in accordance with the recommendation or nomination.

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